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President's Message

by Justin Green

JUSTIN GREEN joined Kreindler & Kreindler LLP in 1997 after clerking for the Honorable Alfred J. Lechner in the Federal District Court for the District of New Jersey. He became a partner in January of 2003. Justin focuses his practice on helping families of aviation disaster victims, but also litigates other complex matters. Justin learned to fly while in the United States Marine Corps and served as his squadron's aviation safety officer after graduating from the Naval Postgraduate School's aviation safety program. He was responsible for his squadron's aviation safety, and also for investigating accidents. He holds an airplane and helicopter commercial license from the Federal Aviation Administration. As an aviation lawyer, Justin has successfully represented families in dozens of major aviation cases, including most recently the families of Continental Connection Flight 3407 and Turkish Airlines Flight 1951 victims. He edits Kreindler, Aviation Accident Law published by Lexis/Nexis.

Germanwings Flight 9525 raises important aviation safety, regulatory and pilot privacy issues that are all within the unique focus of our bar association.

Almost immediately after Germanwings crashed we learned that the flight's co-pilot had locked the Captain out of the cockpit and then purposely crashed the airplane. We later learned that the co-pilot had a history of psychological issues that dated back to when he underwent flight training here in the United States. How will the world's aviation authorities and airlines act to prevent a repeat of this horrible act? Will we see required psychological screening for pilots? If so, what rights would pilots have if a doctor pulls his or her medical for a perceived mental disorder and how will the pilot's privacy rights be protected?

I raise Germanwings to make a point about our bar association. No other aviation or transportation law association includes as members government and private lawyers who tackle the challenging issues that arise out of aviation disasters. Our members include lawyers who make and enforce the rules that have contributed to aviation's remarkable safety record and lawyers who work to ensure that the rules are enforced in a fair and transparent manner. Most other aviation law groups focus almost exclusively on compensation claims and defenses.

When our bar association was founded in 1984 it was centered on the representation of pilots and aviation businesses in regulatory, certification and enforcement proceedings. Over the years our focus has grown to include all areas of aviation law. I believe that it is important, however, that we do not forget the original focus of our association. To this end, I will propose that we hold our next conference in Washington, D.C. and that the agenda focus on enforcement proceedings.

We are in the process of redesigning our website and we plan to provide each member the opportunity to provide a short biography and a link to his or her website. Any member who wants to participate in the website redesign please contact me. We aim to make the website something that will bring real value to our members.

Finally, we are looking for members who are interested in fun and rewarding leadership positions with the bar association. I can assure you that there are many professional rewards that come from your investment of time and energy. Please contact me for details.

Safe flying,
Justin T. Green
President, IATSBA

Editor's Column

by
Greg Reigel

INSIDE THIS ISSUE

Fly-in season is upon us. At least it finally is up here in the upper Great Lakes Region. Pancake breakfasts, air shows, barbeques and other events all provide a reason to get in an airplane and fly somewhere. In between events the ever enticing $100 hamburger beckons. And whether because of these reasons to fly, or perhaps since the economy is improving (depending upon who you ask), in general, it appears to me that people are flying more. And that's good for general aviation. Flight schools are training pilots, repair stations are maintaining the aircraft and FBOs are providing other services to those pilots and aircraft owners.

It's even good for aviation attorneys! More flying translates into more legal work – both transactional and litigation. Aircraft sales present the opportunity to not only assist clients through the purchase or sale process, but also to help purchasers structure their transactions to maximize the benefits of aircraft ownership while still complying with applicable tax and operational regulations. Increased flying also results in more FAA enforcement and other aviation related litigation, which is good from an aviation attorney's perspective, but not so much for his or her clients! And, of course, the ever present legislative and advocacy work must be performed to preserve and promote the industry we serve.

All told, at least from my perspective, things appear to be looking up. But don't get me wrong, challenges remain. However, those challenges will likely present opportunities for attorneys who can bring their aviation and legal expertise to bear to meet and remove those obstacles. As a result, I think it is still a great time to be an aviation attorney.

And to that end, we have another edition of the IATSBA Air & Transportation Law Reporter with articles that will help you with the work you perform for your aviation clients. In his president's message, our president, Justin Green, cites some of the issues arising from the Germanwings Flight 9525 crash and the roles our members will continue to play in ensuring fair enforcement of aviation regulations as they apply to pilots, mechanics, air carriers and other certificate holders.

John Yodice explains the United States Supreme Court's recent Perez decision and how it may benefit

Editor's Column

continued

respondents in FAA enforcement actions. He also discusses two recent decisions by the NTSB involving an allegation of careless and reckless operation in one case, and whether fees are "incurred" for purposes of the Equal Access to Justice Act in the other. Similarly, Katie Inman provides us with a summary of two recent decisions in which the Board addressed the issues of judicial deference and the doctrine of laches.

On a topic which has been making headlines of late, Talbot Martin discusses some of the highlights of the FAA's UAS Notice of Proposed Rulemaking, which received some 4,000 public comments that are now under review at the FAA. And Christopher Jacob informs us of new revenue rules in the state of Washington that may have adverse consequences for aircraft owners involved in certain aircraft leasing transactions. Finally, I have included an article examining the risks associated with improper replacement or installation of an aircraft data-plate.

I hope you enjoy this edition of the Air & Transportation Law Reporter. As always, I welcome your submissions, comments and feedback.

Fly safe.

GREG REIGEL is an aviation attorney and holds a commercial pilot certificate (single engine land and sea and multi-engine land) with instrument rating. His practice concentrates on aviation transactional and litigation matters. Greg is also an Adjunct Professor at William Mitchell College of Law teaching the Advocacy and Advanced Advocacy courses, and he is an Adjunct Professor at Minnesota State University - Mankato teaching the Aviation Law and Aviation Transactions courses.

FAA Update

by
John Yodice

This column is intended as an aid to practitioners, including panel attorneys of the AOPA Legal Services Plan, to keep abreast of recent developments in the law and procedures governing FAA enforcement actions. Your comments and suggestions are welcome.

ADMINISTRATIVE LAW: INTERPRETIVE RULES DO NOT HAVE THE FORCE AND EFFECT OF LAW.

In what may well be a landmark opinion in administrative law, the United States Supreme Court has ruled that "interpretive rules 'do not have the force and effect of law and are not accorded that weight in the adjudicatory process.'" Interpretive rules are rules exempt from the rulemaking procedures of the Administrative Procedure Act such as the APA "notice-and-comment" rulemaking normally employed by the FAA. While this case involved an interpretation of the United States Department of Labor, it could have significant effect in FAA enforcement matters that typically involve FAA interpretations.

Prior to the enactment of the Pilots Bill of Rights, 49 USC Section 44709(d)(3) required that "the Board [the NTSB in FAA enforcement cases] … is bound by all validly adopted interpretations of laws and regulations the [FAA] Administrator carries out and of written agency policy guidance available to the public related to sanctions to be imposed under this section unless the Board finds an interpretation is arbitrary, capricious, or otherwise not according to law." Under that statutory provision, the FAA had argued that the NTSB was bound by the FAA's Sanction Guidance Tables and the FAA's interpretation of the General Operating and Flight Rules of FAR Part 91. That provision was repealed by the enactment of the Pilots Bill of Rights. Notwithstanding this repeal, the FAA has continued to argue that the NTSB is required to defer to FAA's interpretations under traditional administrative law principles of deference.

However, this new Supreme Court opinion may well have changed that, downgrading administrative interpretations to "not having the force and effect of law." A concurring opinion expressly states that "an agency may not use interpretive rules to bind the public by making law, because it remains the responsibility of the court to decide whether the law means what the agency says it means." Respondents counsel in enforcement cases may now well argue that the NTSB is not required to consider itself bound by, or to give deference to, FAA interpretations even under general administrative law, and specifically that the NTSB is now free to determine what are appropriate sanctions in individual cases regardless of the FAA Sanction Guidance Tables, and that the NTSB is free to interpret more reasonably the FAA's General Operating and Flight Rules where the FAA is acting both as the prosecutor and interpreter. (However in both situations the FAA may argue otherwise, and the FAA continues to be able to petition a United States Court of Appeals in cases where the FAA determines that an NTSB ruling will have a significant adverse impact on FAA's enforcement responsibilities). We will continue to monitor and report legal developments under this new Supreme Court opinion. Perez v. Mortgage Bankers Assn., decided by the United States Supreme Court, March 9, 2015.

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CARELESS OR RECKLESS OPERATION: ANY PROVEN OPERATIONAL VIOLATION AUTOMATICALLY ESTABLISHES A FINDING OF VIOLATION OF FAR 91.13(a)

The FAA Administrator charged a respondent-pilot with violations of FAR 91.7(a) ("civil aircraft airworthiness") and 91.13(a) ("careless or reckless operation") because he operated a Bombardier CL 600 aircraft while it had damage to the louvered vents under the number 1 engine of the aircraft. The respondent-pilot appealed the FAA charges to the National Transportation Safety Board. At an NTSB appeal hearing before an administrative law judge, the judge affirmed the Administrator's un-airworthiness charge of violation of FAR 91.7(a), but did not affirm the FAR 91.13(a) "careless or reckless" charge because of the minor nature of the damage and the uneventful subsequent flight. The judge reduced the period of the ATP certificate suspension from 45-days to 30-days. Both the respondent and the Administrator appealed to the full Board. The Board denied respondent's appeal and granted the Administrator's appeal. The Board reiterated it's often criticized precedents. "Under our jurisprudence, when the Administrator has proven an operational violation of the Federal Aviation Regulations, the Administrator has also established a violation of Section 91.13(a), because the action of violating an operational violation is unequivocally careless or reckless." The Board re-instated the 45-day suspension. Administrator v. Baker, NTSB Order No. EA-5721 (2014).

EQUAL ACCESS TO JUSTICE ACT

"Quantum Meruit" Can Satisfy The "Incurred" Requirement. The FAA issued an order suspending a mechanic's certificate for 120 days alleging he returned an aircraft to service when it was not in airworthy condition. The mechanic appealed the FAA order to the NTSB. In proceedings on appeal before the NTSB, the NTSB ultimately reversed the order and vacated the suspension on the ground that the FAA failed to present sufficient evidence to support the order. The mechanic then sought an award from the NTSB under Equal Access To Justice Act claiming $66,693.27 in fees and expenses of the attorneys who represented him (although the mechanic initially appeared pro se, the mechanic was represented by counsel in most of the proceedings).

Though he had prevailed, the NTSB denied the mechanic's EAJA petition on the ground that the mechanic failed to show that he had "incurred" the fees associated with his legal defense, as required by EAJA. What confused the situation was the fact that the mechanic's attorneys also represented the mechanic's employer and some of the billings were mixed up. However, the attorneys attested that despite any mix-up, the mechanic was "legally obligated to pay for the fees and expenses associated with this case" and had "agreed to pay any fee award" to the law firm. The FAA argued that the absence of a written agreement is dispositive in determining whether fees had been incurred (we have recommended in earlier digests that there be a written agreement contemporaneous with the legal retention, to obviate this FAA argument).

The mechanic petitioned the United States Court of Appeals for the District of Columbia for review of the NTSB's denial. On this petition, the NTSB's denial of an award was vacated and the case was remanded to the NTSB to determine the appropriate amount of fees and expenses to award. The Court held that "Alabama law of quantum meruit entitles an attorney to the reasonable value of services rendered to the client" and that "it was arbitrary and capricious for the NTSB to reject the possibility that a claim in quantum meruit creates a liability for the reasonable value of services rendered notwithstanding that lack of any valid contract." As a result, fees owing under quantum meruit are "incurred" for purposes of the Equal Access To Justice Act. Roberts v. NTSB, decided by the United States Court of Appeals for the District of Columbia Circuit, January 23, 2015.

NTSB General Counsel

by: Katie Inman

KATIE PLEMMONS INMAN joined the Office of General Counsel in 2005. Ms. Inman handles cases on the Board's enforcement docket,and serves as the attorney overseeing rulemaking under the Administrative Procedure Act. Ms. Inman has also served as the attorney overseeing compliance with and litigation regarding various statutes involving the availability of information, such as the Freedom of Information and Privacy Acts. Prior to joining the Board, Ms. Inman served as a law clerk to a Federal judge in the Eastern District of Texas, where she assisted in research and drafted opinions on a variety of issues. Ms. Inman has also authored and published articles in scholarly journals concerning the legislative process and Federal programs.

Since the passage of the Pilot's Bill of Rights, parties appealing FAA certificate enforcement actions increasingly have requested clarification from the Board concerning deference.

In Administrator v. McGuire, NTSB Order No. EA-5736 (Dec. 22, 2014), the Board affirmed the Administrator's suspension of an airman's airline transport pilot (ATP) certificate for operating a Hawker HS 125 before the aircraft had been returned to service after having undergone maintenance. The Board's Opinion and Order analyzed the facts and found a reduction in sanction was appropriate, because the facts in the record established the existence of mitigating factors.

The two mechanics who worked on the aircraft had not completed the maintenance work or final inspection. Respondent did not wait to see the paperwork associated with the repair and inspection before taking off, but he presumed all paperwork had been completed, based on the conduct of the mechanics and the fact that he had waited over an hour following the inspections and the indication from the mechanic that they would have respondent on his way soon.

The law judge affirmed the Administrator's order, finding respondent was not eligible for a waiver of sanction under the Aviation Safety Reporting Program (ASRP) and the affirmative defense of reasonable reliance could not excuse his conduct.

The Board agreed with the law judge, but reduced the sanction from a 150-day suspension to a 60-day suspension period. The Board found probative the testimony of respondent and both mechanics who worked on the Hawker, all of whom recalled completing tests and engine run-ups, after which the supervisory mechanic informed respondent he could be on his way soon. Respondent waited at least one hour before departing, and presumed, based upon his conversation with the supervisory mechanic, the work was completed and the necessary paperwork was finished. The Board noted the Administrator did not dispute respondent's state of mind in believing the paperwork would be complete in time for his departure. Another mechanic who worked on the Hawker testified he picked up debris near the aircraft just before the Hawker began rolling. The Board stated this type of activity could give the impression the mechanics expected respondent to depart, and he was not obligated to wait any longer.

The Board also stated the Administrator's attorney did not dispute the respondent's synopsis of the facts. In addition, the Board noted the Administrator's attorney stated the FAA did not consider one of the alleged violations when "setting the sanction in this case."

In recognizing certain facts in the record as mitigating and in considering their effect on the choice of sanction, the Board also commented on the degree of deference to apply to the Administrator's choice of sanction following the legislative changes that resulted from the Pilot's Bill of Rights; the statute struck from 49 U.S.C. § 44709(d)(3) the statement that the Board is "bound by all validly adopted interpretations of laws and regulations the Administrator carries out and of written agency policy guidance available to the public related to sanctions to be imposed under this section unless the Board finds an interpretation is arbitrary, capricious, or otherwise not according to law." Pub. L. 112-153 § 2(c)(2), 126 Stat. 1159, 1161 (2012).

The Board noted since the enactment of the Pilot's Bill of Rights, it has found instructive Martin v. Occupational Safety and Health Review Commission, 499 U.S. 144, 111 S.Ct. 1171 (1991). The Board stated, "we will defer to the Administrator when the regulation or choice of sanction is unclear and the Administrator offers an interpretation that is *reasonable*." The Board stated this reading was consistent with Martin. The Board cited Administrator v. Jones, NTSB Order No. EA-5647 at 19-21 (2013), in recalling the appropriate extent of deference with which the Board should view the Administrator's interpretation of the Federal Aviation Regulations and the Administrator's choice of sanction. The Board specifically stated the removal of the heightened deference previously codified in § 44709(d)(3) "does not mean the Board, or NTSB administrative law judges, should decline to apply any deference."

In addition, in disposing of a recent emergency appeal, the Board revisited the equitable doctrine of laches. In Administrator v. Zaia, NTSB Order No. EA-5739 (Feb. 10, 2015), the Administrator's emergency order alleged respondent violated 14 C.F.R. § 67.403(a)(1) by intentionally falsifying a medical certificate application on May 15, 2009. The Administrator waited over 5 years to initiate action against the respondent. The law judge held a hearing, at the conclusion of which he dismissed the Administrator's emergency order, holding the doctrine of laches precluded the Administrator from taking action against the respondent. He expressly found the Administrator failed to explain the delay in bringing the action. Based upon the testimony at the hearing, the law judge concluded this delay caused actual prejudice to respondent, as respondent could no longer find a percipient witness who helped him fill out the application.

The Administrator appealed the law judge's decision, arguing he should not have dismissed the case under the doctrine of laches. The Board cited Manin v. Nat'l Transp. Safety Bd., 627 F.3d 1239, 1241 (D.C. Cir. 2011), in which the United States

Court of Appeals for the District of Columbia Circuit defined the doctrine as "an equitable defense that applies where there is (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense."

The Administrator argued even assuming the witness's testimony would have corroborated the respondent's testimony, no actual prejudice occurred, as the testimony simply would have supported a finding of respondent's willful disregard of the truth of the answers on his medical certificate application.

In reviewing the record, the Board found the Administrator's responses to interrogatories in discovery showed the FAA knew of respondent's conviction in April 2010 but took no action even to request a certified copy of respondent's airman medical file until February 2012. At the hearing, the Administrator's counsel conceded the Administrator had no justification to excuse the delay.

As to the issue of actual prejudice, the Board noted the law judge specifically and repeatedly determined respondent suffered actual prejudice from the loss of this percipient witness. Hearing and observing the missing witness's testimony would have been critical to the law judge's assessment of whether respondent's testimony was credible, which is an essential determination in an intentional falsification case.

The Board found its jurisprudence addressing the willful disregard standard is readily distinguishable from the case at hand. In this case, the Board determined the witness's testimony was percipient to a determination on the issue of intentional falsification. Based upon his testimony at the hearing, the respondent was attempting to read and understand the application, using his then-assistant to assist him. However, without her testimony, it is impossible for the law judge or the Board, on a de novo review, to know how much of the application respondent heard and understood, or whether he exhibited a willful disregard for what the application said.

On the rulemaking front, the NTSB published a Notice of Proposed Rulemaking to update 49 C.F.R. part 845 (Rules of Practice in Transportation: Investigative Hearings; Meetings; Reports; and Petitions for Reconsideration) on March 19, 2015. Comments in response to the NPRM are due May 18, 2015. You may review the NPRM and submit comments online at www.regulations.gov (Docket NTSB-GC-2012-0002).

Emerging Leaders

by:
Talbot Martin

ANOTHER STEP IN UAS REGULATIONS

While the path to a well balanced Unmanned Aerial System (UAS, or drone) regulatory scheme is proving to be a bumpy one, the FAA appears poised to issue a detailed proposed rule. This is a welcome step in a process that has proven to many to be more frustrating than productive. Unfortunately, the administration of the National Aerospace System moves much slower than modern industry, especially the modern technology industry, and this proposal is likely much more restrictive than the UAS industry, manufacturers and potential operators, would like.

UAS's have long been with us, but they have been relegated to a hobbyist market, with little real oversight. As the potential commercial applications of UAS's have exploded alongside the development and miniaturization of modern technologies, the various industries seeking to exploit this potential have been frustrated with the progress made by the Federal Aviation Administration. Up to now, the general rule is that commercial operations are prohibited. Currently, the FAA is regulating the limited commercial use of the technology through a patchwork system of exemptions, authorizations and other non-comprehensive mechanisms that serve to add uncertainty in this developing marketplace. Every operation is currently performed as an explicit exception to the prohibition of the commercial use of these technologies, or is simply conducted without complying with Federal regulation.

Amazon and other members of the Small UAV Coalition are concerned that over regulation of the industry will stifle a high tech industry in the U.S., leaving other countries to pave the way. Further, they are critical that the time the process is taking to develop comprehensive regulations is also encouraging the technology to develop outside of the U.S.

The FAA has proposed a scheme that would allow commercial operation of certain small unmanned aircraft and seems poised to implement it upon adoption of the final rule. The scheme focuses on three distinct areas: the imposition of operational limitations, the certification of operators and the imposition of certain responsibilities upon them, and the aircraft itself. Several themes that appear in the proposed regulations will be quite familiar to the aviation community, such as "see and avoid" which plays a big role in the FAA's proposed rules. Other unique concerns that the FAA is attempting to address are the loss of positive control of the aircraft and increasing privacy concerns that seem to pervade many aspects of the technology industry.

This proposal now allows interested parties to offer their insights to the Federal Aviation Administration, and the FAA will consider the knowledge that enterprises have to offer and adjust the regulations accordingly – so long as the agency feels that the safety of the public is not unduly impacted.

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With respect to Operators, the FAA's proposal includes a certification process with recurrent training obligations, and basic operating rules contingent upon the operator and/or an observer maintaining line of sight of the aircraft. By certificating the operator, the FAA is in familiar oversight territory, as pilots of manned aircraft are trained and certified according to regulatory standards and can face legal enforcement actions against their certificates by the FAA if they do not comply with their regulatory requirements. Initially, this will not likely be a problematic burden so long as the FAA's training and certification requirements are appropriate with respect to scope and cost – after all, these aircraft are orders of magnitude smaller and lighter than manned aircraft, and variations of many UAS aircraft are flown by children as toys. However, as the systems gain higher level of automation, the requirement to have an operator may become a regulatory burden that the UAS industry will find prohibitive with respect to operation in the U.S. The requirement for the operator to maintain visual line of sight contact with the unmanned aircraft could prove to be very stifling on the industry.

The FAA is proposing extensive operational limitations on the systems. The proposal includes requirements that the aircraft weigh less than 55lbs, be operated within the range of visual line of sight of the operator, not be operated over persons (except those associated with the operation), flown only during daylight, yield right of way to all other aircraft, be operated at less than 100mph, below 500ft, outside of controlled airspace (unless with ATC permission), one aircraft per operator, and several other restrictions. The bright spot in the proposal is that a category of microUAS's will potentially be allowed to operate with fewer restrictions, as their small weight imposes significantly less risk of harm than larger systems.

As for the aircraft, they must be less than 55lbs, or 4.4lbs to be considered a microUAS, and marked in such a way that they can be uniquely identified.

This proposal appears to be a limited attempt to bring some small UAS operation into the already mature system of regulations that apply to manned aircraft. While familiar for regulators and the manned aircraft industry, this scheme is quite limited and limiting in many respects, and as such, the requests for exemptions could continue unabated. Furthermore, current leading edge technologies have already surpassed these proposed regulations.

To be fair, the FAA has a tough job to do, and the FAA makes clear in the proposal this is only a first step in a rapidly developing industry. With this in mind, it is critical that interested parties provide meaningful comments to the proposed rule, as the FAA appears to indicate that it does want to accommodate the development of the UAS industry and application in the U.S., but only so long as the United States National Airspace System remains one of the safest in the world.

Tax Avoidance Rules

by:
Christopher C. Jacob

NEW "TAX AVOIDANCE" RULES SIGNIFICANTLY AFFECT AIRCRAFT OWNERS

On April 2, 2015 the Washington Department of Revenue issued its final "tax avoidance" rules explaining the implications of RCW 82.32.655, a statute enacted in 2010. Collectively, the rules (WAC 458-20-280, WAC 458-20-28001, WAC 458-20-28002, and WAC 458-20-28003) address whether, in the Department of Revenue's view, a transaction or arrangement is designed to unfairly avoid taxes contrary to RCW 82.32.655.

BACKGROUND

Many Washington aircraft owners over the years have acquired aircraft in a stand-alone company, typically a limited liability company formed for the specific purpose of owning the aircraft, which then leased the aircraft to another party, typically the owner of the limited liability company, to use for business or personal flights. This leasing structure for aircraft ownership was often necessary to comply with the Federal Aviation Regulations and additionally permitted aircraft owners to avail themselves of a "sale-for-resale" exemption to either sales tax due on the purchase price of an aircraft at the time of its acquisition in Washington or use tax due upon the aircraft's first use in the state. Instead, the aircraft owner was permitted to collect from the lessee sales tax on fair market value lease payments throughout the lease term, which were then remitted to the State.

In the midst of a 2010 budget deficit the Washington State Legislature passed a tax bill targeting, among other things, certain "sale-for-resale" aircraft lease arrangements constituting "unfair tax avoidance." "Unfair tax avoidance" was deemed to include any transaction or arrangement by which a taxpayer vested legal title or ownership of tangible personal property in another entity controlled by the taxpayer in order to avoid Washington sales or use tax.

IMPLICATIONS OF NEW TAX RULES

As construed by the Department of Revenue in the new rules, the 2010 statute potentially exposes aircraft owners to up to 9.5% sales or use tax on the purchase price of their aircraft together with "tax avoidance" penalties of 35% of the unpaid tax, plus any other generally applicable penalties and interest, for engaging in unfair tax avoidance.

Not all sale-for-resale leasing structures will be deemed invalid under the Department of Revenue's new rules. Significantly, the rules include a "safe harbor" in WAC 458-20-28003(2)(i) applicable when "substantially all use" (95%) of the aircraft is under a lease (i) for a reasonable rental value, (ii) by a substantive operating business, (iii) for bona fide business purposes.

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The Data Plate Dance

by:
Greg Reigel

As many of you may know, in order to be airworthy a type-certificated aircraft must have an identification or "data" plate issued by the aircraft's manufacturer secured to the aircraft. Ordinarily, that requirement isn't an issue for an aircraft owner. But what happens when an aircraft is missing its data plate? Perhaps the aircraft was wrecked, or the owner purchased the aircraft as salvage. This can leave an aircraft owner in a tough spot: The aircraft may be in a condition safe for flight, but it isn't flying anywhere without a data plate.

So, what can an aircraft owner, and the maintenance provider who may be assisting the aircraft owner, do? Well, one option is to contact the aircraft manufacturer and request a replacement data plate. Unfortunately, since product liability exposure is always a concern for manufacturers, they are reluctant to issue a new data plate and expose themselves to potential liability for an aircraft whose condition they have been unable to verify. As a result, that option is seldom successful.

Another option that may tempt an aircraft owner or maintenance provider in this situation would be to simply purchase another wrecked or salvage aircraft that is the same make and model and then use that aircraft's data plate on the other aircraft missing its data plate. After all, this seems like a logical and reasonable option to get an aircraft that may be in perfectly safe, flyable condition back in the air. Right? Unfortunately, the FAA doesn't agree and a recent decision by the NTSB affirmed the FAA's position that this option is contrary to the regulations.

In Administrator v. Tre Aviation Corporation and Robert E. Mace, NTSB Order No. EA-5722 (2014), Tre Aviation Corporation ("TAC") purchased a Bell 206B (serial number 3570) helicopter which was missing a data plate. Although Mr. Mace tried on behalf of TAC to obtain a data plate for the aircraft from Bell, not surprisingly that was unsuccessful. So Mr. Mace decided that TAC would use the helicopter for its parts. Later, Mr. Mace, again on behalf of TAC, purchased another Bell 206B (serial number 3282), which was missing an engine and many other parts, but which did include a data plate. Although TAC purchased 3282 with the intention of repairing it, inspection of the aircraft disclosed that 3282's fuselage was corroded beyond repair and required replacement.

Later, in what would otherwise appear to be a reasonable way of making the best of the situation, TAC replaced the corroded fuselage and tailboom on 3282 with the fuselage and tailboom from 3570. It also painted the registration number for 3282, on the tailboom of 3570. During the replacement, TAC used only the upper right and left engine cowlings and the particle separator, as well as other "small" parts from 3282. TAC then applied for and received a standard airworthiness certificate for the aircraft from a Federal Aviation Administration (FAA) designated airworthiness representative (DAR). With that in hand, Mr. Mace, an A&P mechanic with

inspection authorization, approved the aircraft for return to service.

Unfortunately, when Mr. Mace was talking with several FAA inspectors during the course of an inspection he told several inspectors what he had done. Shortly thereafter the FAA issued an order revoking the aircraft's airworthiness certificate. TAC appealed the FAA's order and, after a hearing, an NTSB administrative law judge ("ALJ") affirmed the FAA's order. The ALJ found that TAC's apparent removal of the data plate from 3282 and installation on 3570 resulted in the aircraft being improperly identified and thus lacking qualification to hold a standard airworthiness certificate. TAC then appealed the ALJ's decision to the full NTSB.

On appeal, TAC argued, among other things, that it had simply repaired the aircraft and that replacement of the 3282 fuselage was simply replacement of a component rather than switching the aircraft. In response, the Board initially cited 14 C.F.R. § 45.13(e) which states, "[n]o person may install an identification plate removed in accordance with paragraph (d)(2) of this section on any aircraft, aircraft engine, propeller, propeller blade, or propeller hub other than the one from which it was removed." Consistent with this regulation, it also noted the importance of having an accurate data plate in light of airframe times and airworthiness directive compliance.

Turning to the specific facts of the case, the Board rejected TAC's argument that it had simply "repaired" the 3282 aircraft. Rather, the Board determined the resulting aircraft was really the 3570 aircraft with the addition of a few parts, the registration number and data plate from the 3282 aircraft. As a result, the Board found that Section 45.13(e) specifically prohibited the replacement of the data plate in that situation.

The Board also rejected TAC's argument that the "fuselage" was merely a component, rather than the "aircraft" itself. It observed that "[a] fuselage is a substantial aspect of any rotorcraft" and under the language of Section 45.13(e) "the absence of the terms 'fuselage' and 'airframe' indicates a data plate's installation on an airframe or fuselage or any other component designed to exist permanently on an aircraft is the same as the data plate's installation on an aircraft."

The Board then confirmed that Section 45.13(e) precludes replacing virtually all parts and components of a wrecked aircraft and then attaching that aircraft's data plate to the assembled replacement parts and components. And based upon the record, the Board determined that is what TAC had done and it affirmed the ALJ's finding that TAC had violated Section 45.13(e).

This is a tough situation for an aircraft owner to be in. It can also be difficult for the maintenance provider assisting the aircraft owner and trying to get the aircraft back in the air. As with most cases, whether an aircraft

The Data Plate Dance

continued

is simply being repaired, or whether it is being completely rebuilt with replacement parts and components, will be decided based upon the unique facts of each particular situation. If an aircraft owner in that situation suggests or requests a remedy that involves removal or installation of a data plate, maintenance providers should be wary.

In this case, the FAA was only taking action to revoke the aircraft's airworthiness certificate. However, oftentimes the FAA will also pursue action against the mechanic who worked on the aircraft or returned it to service as well. If you are asked to advise an aircraft owner or maintenance provider regarding replacement or installation of an aircraft data plate, make sure you understand the regulations and the risks before you advise your client to participate in the data plate dance.

Tax Avoidance Rules

continued

Even if otherwise applicable, the tax avoidance penalty may be waived by the Department of Revenue if the taxpayer discloses its participation in an affected arrangement or transaction to the Department in writing before the Department provides notice of an investigation or audit or otherwise discovers the taxpayer's participation. The new rules take effect May 3, 2015 and will be applied retroactively by the Department of Revenue through 2011, potentially ensnaring aircraft owners who entered into structures they legitimately believed were valid at the time.

While Washington is among the first states to target aircraft sale-for-resale exemptions, other states seeking to meet spending goals will likely be looking at sales and use tax exemptions applicable to aircraft as a potential revenue-generating source.

Circuit Assignments

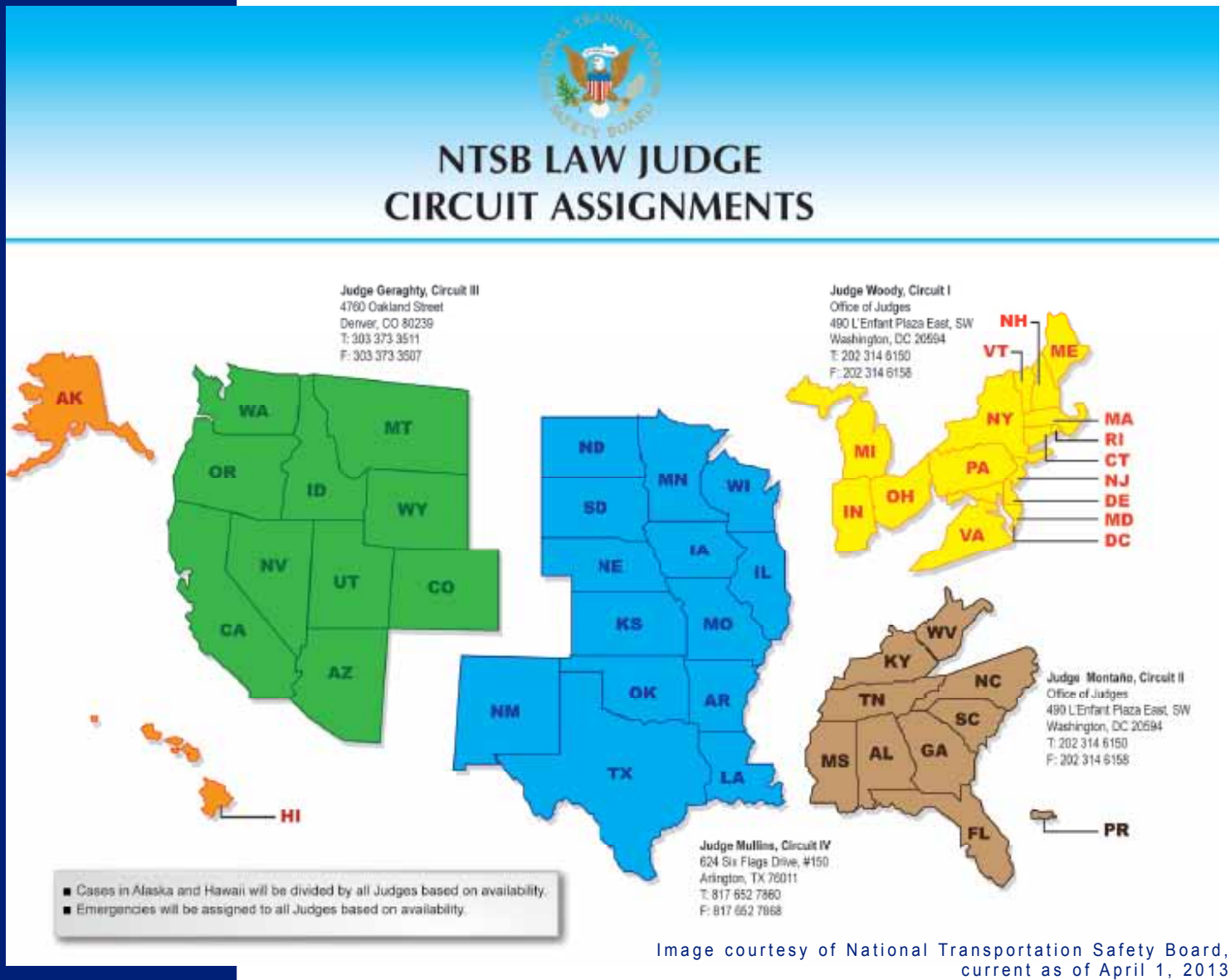

Image courtesy of National Transportation Safety Board, current as of April 1, 2013

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