Air & Transportation Law Reporter

International Air & Transportation Safety Bar Association

ISSUE
NOV
2018

President's Message

by
Marc Warren

INSIDE THIS ISSUE

With all of the knowledge and experience of someone who has been your President for three months, I write to challenge our assumptions about IATSBA. We assume that the Association will assuredly continue to prosper; that new members will naturally be drawn to our excellence, civility, and camaraderie; and that our rich history dating back to the "NTSB Bar Association" will secure our vitality going forward. Those assumptions may not be accurate. At the least, they do not guarantee that IATSBA will be strong in the future.

Associations today are struggling for members and relevance. Firms that used to underwrite membership in professional associations are cutting back on that support. Younger attorneys are not "joiners" and other aviation law organizations are competing with us for their participation. In short, we have challenges.

But challenges present opportunities. We can and will grow in size and prominence, if we demonstrate value and relevance to our members and onlookers. I ask each of you to recruit at least one new member. Support our regional events, like the IATSBA Meet-Up on October 17 at the NBAA Convention in Orlando. Consider how we can stay at the leading edge of aviation and transportation law. Should we become the premier professional association for lawyers involved with autonomous vehicles? And drones? And other modes of transport like rail and pipelines - and even Hyperloop technology? Should we recruit aviation and transportation lawyers around the world? Should our membership reflect and contribute to the rich and growing diversity of people in law and transportation?

The answer is "yes!" Our name says it all: we are the International Air and Transportation Safety Bar Association. Let's make our name the reality.

MARC WARREN is a partner and co-chair of the Aviation and Aerospace practice group at Jenner & Block, LLP. Prior to joining Jenner & Block, Marc chaired the Aviation practice group at Crowell & Moring, LLP. He served as acting chief counsel, deputy chief counsel, and deputy chief counsel for operations of the Federal Aviation Administration (FAA). Before joining the FAA, he retired after 26 years of service in U.S. Army Judge Advocate General's Corps.

Editor's Column

by
Greg Reigel

GREG REIGEL is a partner with the law firm of Shackelford, Bowen, McKinley and Norton, LLP in Dallas, Texas. He has more than two decades of experience working with airlines, charter companies, fixed base operators, airports, repair stations, pilots, mechanics, and other aviation businesses in aircraft purchase and sale transactions, regulatory compliance including hazmat and drug and alcohol testing, contract negotiation, airport grant assurances, airport leasing, aircraft related agreements, wet leasing, dry leasing, FAA certificate and civil penalty actions and general aviation and business law matters. Greg also has extensive experience teaching the next generation of aviation and legal professionals including in such courses as aviation law, aviation transactions, aviation security, business law and trial advocacy. Greg holds a commercial pilot certificate (single-engine land, single-sea and multi-engine land) with an instrument rating.

I recently attended the National Business Aviation Association's annual Business Aviation Convention and Exhibition ("BACE"). BACE is an opportunity to connect with the business and general aviation communities and take the pulse of the industry, both from the legal as well as the more general perspectives. This year was no different.

The industry appears to be upbeat and optimistic. Vendors exhibited the latest and greatest, as well as the tried and true, for attendees to see and touch. Business relationships were created and solidified. However, the industry continues to face the pilot, as well as the maintenance technician, shortages, which are significant concerns, as are cybersecurity, safety and tax, regulatory and risk management. Fortunately, BACE included helpful and informative presentations on each of these issues, and more.

And as always, it was a pleasure hanging out with other IATSBA members at BACE to renew friendships, catch up, and discuss current aviation law trends and issues. Networking with other IATSBA members is certainly a professional development tool that is not to be underrated, regardless of the event. Our members are involved in and attend most, if not all, of the major aviation conferences and events. IATSBA members have not shortage of opportunities to be involved and engage with other members and the aviation industry. IATSBA certainly "represents" in the aviation industry.

But the big irony for me at BACE this year, and which really wasn't a surprise, was that even though my business aviation clients knew I was attending BACE, their deals did not wait. And so, I spent a little more time than I would have liked in my room working, rather than attending presentations and meetings, walking the show floor and networking. Oh well. Better than the alternative I guess.

Now that I am back in the office and have had a chance to catch up, it is time to deliver another issue of the International Air & Transportation Safety Bar Association's Reporter. To start, Marc Warren, our current president, identifies some of the challenges facing our organization and rallies our members to rise up and overcome these challenges. Mercadie Moore, a summer intern with the National Transportation Safety Board provides us with a compilation of some of the Board's recent emergency opinions and orders.

Our immediate past-president, Jim Waldon, warns of the risks an airman faces when he or she makes false logbook entries and the FAA finds out. Joe Vacek discusses the risks posed by unmanned aircraft systems ("UAS") and the legal implications for responding to the threats posed by UAS. Finally, I have included an article explaining the truth-in-leasing

Editor's Column

...continued

compliance issues imposed upon leasing of large civil aircraft.

I want to thank our contributors, both present and past, who provide our members with interesting and informative articles. Please keep the articles coming! But if you have never contributed, now is the time. If you recently gave a presentation or wrote a brief on a legal issue that may be of interest to our members, consider converting it into an article for publication in the Reporter. Not only will our members appreciate it, but it certainly doesn't hurt from marketing/ professional development perspective.

As always, I hope you enjoy this edition of the Reporter.

NTSB Update

compiled by
Mersadie Moore

Between April and July 2018, the NTSB issued four emergency Opinions and Orders. Certainly, within recent history, this is a record number of emergency cases in such a short time span. Two of the cases presented unique questions of law regarding narcotics and omissions in intentional falsification. The other emergency orders provided the Board an opportunity to reiterate some of its longstanding holdings.

In Acting Administrator v. Siegel, respondent and the Acting Administrator cross-appealed the law judge's initial decision in an emergency order of a 90-day pilot certificate suspension for operating a civil aircraft with knowledge that THC was carried in the aircraft. (THC is an abbreviation for tetrahydrocannabinol, the primary psychoactive chemical in marijuana.) Respondent's briefcase that was found on his aircraft contained three chocolate bars, and the labels on the bars indicated that they were infused with 100 mg of THC. Respondent argued that THC is not marijuana and that he did not knowingly carry the bars on his aircraft. The Board found that THC is a derivative of marijuana and is considered the same as marijuana under the Controlled Substance Act, 21 USC § 802(16). The Board also found that the explanation the respondent provided to the police when first questioned about the edibles was more credible that the changed responses offered at the hearing.

The Board also found that the small quantity of marijuana, presumably for personal use and not distribution, is irrelevant as a purported mitigating factor. Thus, the law judge's reliance upon that fact in determining the sanction was arbitrary and capricious. The Board granted the Acting Administrator's appeal and reinstated the sanction of revocation.

In Acting Administrator v. Kornitzky Group, LLC the Board expanded its medical certificate falsification "willful disregard" standard to mechanic intentional falsification cases. It found that omissions of material facts on mechanic logs is intentional falsification. "When a repair shop does maintenance work, under the Board's jurisprudence, it must be scrupulously accurate in its records. This respondent, by admittingly picking and choosing what to include in its records and leaving it up to the FAA and end user to guess as to whether the records contained the full and complete record of maintenance done on the aircraft, exhibited a willful disregard for the FARs which were established to promote aviation safety." Respondent had the responsibility to record full and complete maintenance records, and the Board found no evidence to suggest the omissions were by mistake. Further, the respondent's motive for omission was irrelevant, only the knowledge of falsification was at question. The Board affirmed the Acting Administrator's revocation of respondent's repair certificate.

Acting Administrator v. Muriuki is a recent example of the Board's adherence to a strict standard of timeliness on appeals. The law judge found that respondent failed to

MERSADIE R. MOORE, a summer intern with the NTSB, Office of General Counsel, compiled the information for this article. Ms. Moore is beginning her second year of law school at the University of Florida Levin College of Law in Gainesville. She received a Bachelor of Science in Business Management, Marketing, magna cum laude, from Northwest Missouri State University. She supported a variety of OGC's tasks, including its work on enforcement cases.

demonstrate good cause for his late submission. Therefore, there was no basis to accept respondent's appeal of the Acting Administrator's emergency revocation of his airman medical certificates.

Muriuki, argued that he was away from home for an extended period serving his reservist duty and beginning a new job. Although he instituted a procedure for checking his mail while he traveled, that procedure broke down during this trip. The Acting Administrator argued that respondent not only needed to ensure that his mail review procedures were effective, but he received information that should have prompted more timely action. Specifically, he received notice of a Federal Aviation Administration (FAA) investigation in December 2017, and when he visited an Aviation Medical Examiner (AME), he was told that his certificate could not be issued, and the AME suggested respondent should contact the FAA. Therefore, the Board held that respondent had an obligation to be aware of what he received in the mail and failed to provide good cause why he did not meet that obligation. The Board denied respondent's appeal of the law judge's written order not accepting his late-filed appeal.

In Acting Administrator v. Greene, the Board denied respondent's appeal of the law judge's emergency order of revocation of respondent's airman pilot certificate. Respondent operated an aircraft in a reckless manner endangering the life of another by failing to become familiar with all available weather information concerning that flight, operating an aircraft so close to another to create a collision hazard, and for flying under visual flight rules (VFR) when conditions did not support it.

Respondent argued that he consulted the appropriate weather information prior to the flight, and he confirmed with the company's dispatcher that he could fly under instrument flight rules (IFR). He testified that the could see the other traffic and did not create a collision hazard with another aircraft. However, the Board upheld the law judge's finding that respondent is "less than fully credible" because during the hearing he listed numerous weather resources he utilized to plan his flight but listed only two weather resources when initially questioned by the Air Safety Investigator. The Board agrees with the law judge that a preponderance of the evidence shows that respondent failed to become familiar with all available weather information prior to flight and that he created a collision hazard by flying too close to another aircraft.

Respondent argued that revocation was not the appropriate sanction in this case and cites mitigating factors the law judge should have considered. The Board affirmed the sanction of revocation because it found that respondent's actions were deliberate and reckless. "Revocation is the appropriate sanction for actions that show disregard for safety of others and safety in the air."

Falsification of Logs

by
Jim Waldon

PILOTS WHO LOG FLIGHT TIME THEY DID NOT FLY MAY BE ENDING THEIR AVIATION CAREERS

Many of us know, logging hours you did not fly is considered falsification of records by the FAA and is penalized with a revocation of all held certificates for up to one year. What isn't as widely known is, such a pilot may be permanently banned from ever holding an Airline Transport Pilot Certificate.

For aspiring commercial pilots, the time between receiving a commercial pilot's certificate (a minimum of 250 hours) and the time when a pilot builds sufficient flight hours to be hired as a pilot making much more than minimum wage, (about 1000 - 2000 hours) can be a difficult time. It generally takes such pilots years to build this time. During this time, these pilots are generally building time as a flight instructor or flying introductory or scenic flights – generally low paying jobs. The desire to build time quickly is understandable.

It is a common story - a young, aspiring, impatient pilot at some point gets the urge to add a few hours to their log book. It might be after eight, one-hour segments of take-offs and landings as a flight instructor, or it might be two years into trying to build time. Or it might be both. At some point some aspiring pilots are tempted to add a flight or two to their logbook. Then, a month or two later, when building time is going frustratingly slow, a few more. And on and on.

If the FAA discovers these false logbook entries they will pursue a certificate action against the pilot for falsifying these hours. 14 CFR 61.59 states:

§ 61.59 Falsification, reproduction, or alteration of applications, certificates, logbooks, reports, or records.
(a) No person may make or cause to be made:
(1) Any fraudulent or intentionally false statement on any application for a certificate, rating, authorization, or duplicate thereof, issued under this part;
(2) Any fraudulent or intentionally false entry in any logbook, record, or report that is required to be kept, made, or used to show compliance with any requirement for the issuance or exercise of the privileges of any certificate, rating, or authorization under this part;
(3) Any reproduction for fraudulent purpose of any certificate, rating, or authorization, under this part; or
(4) Any alteration of any certificate, rating, or authorization under this part.

JIM WALDON is a national aviation attorney. His practice focuses on aircraft transactions and regulatory matters. He is currently the managing partner at Paramount Law Group, an aviation law firm based in Seattle, Washington. Prior to founding Paramount, Jim worked as an aviation attorney at Lane Powell, Mokulele Airlines, Alaska Airlines and at TWA.

Falsification of Logs

...continued

The penalty for such violation is almost always a full revocation of all airman certificates for up to one year. When determining what penalty is appropriate the FAA refers to its own sanction guidance table.[1] The FAA sanction guidance table calls for certificate revocation in falsification and fraud matters. The FAA will occasionally agree to a lesser length of the airman certificate revocation period (i.e. 6 - 9 months) but they will rarely if ever negotiate to a suspension rather than a revocation. The difference between an airman certificate suspension and a certificate revocation is, after an airman serves the certificate suspension period, a pilot's certificates are returned to the pilot. A pilot whose license has been revoked keeps their legitimate hours but are required to requalify for all ratings after the revocation period.

Practically speaking, the penalty then, for such violations is 1) loss of ability to fly, 2) loss of ability to receive income, 3) loss of the benefit of the tens of thousands of dollars spent on training, and 4) potential loss of credibility/reputation. But wait, there's more.

If the FAA states in the final order of revocation the pilot lacks good moral character as a result of the falsification, that pilot will likely be banned from holding an ATP (Airline Transport Pilot) Certificate for life. 14 CFR 61.159 states, [t]o be eligible for an airline transport pilot certificate a person must . . . be of good moral character[2]. Often, but not always, the FAA will include the good moral character language in a final order.

As a pilot myself I have in the past argued that this punishment does not fit this crime. When I have discussed this with fellow pilots they agree. When I discuss it with non-pilots their response is different. The reason for the rule is clear - we as a society want to know that the pilots who are flying us and our families are qualified to do so. As a result, The FAA has no sympathy for pilots who lie about their experience. So, if you are a pilot, pay your dues - you will get there soon enough.

1 The FAA Sanction Guidance Table is contained in FAA Order 2150.3B - FAA Compliance and Enforcement Program.

2 14 CFR 61.153(c)

Threatening Drones

by
joseph V. Vacek

HOW TO ANSWER WHEN YOUR CLIENT ASKS: "CAN I SHOOT DOWN THAT DRONE?"

JOSEPH J. VACEK, J.D. is a 2006 graduate of the University of North Dakota School of Law. He teaches and researches in the discipline of aerospace law at UND. His research includes Counter UAS law and technology, UAS policy and regulation, remote sensing, UAS insurance, and constitutional and privacy issues related to law enforcement and private drone use. Over the years, he has presented his UAS research to the United States Federal Courts System; the Ninth Circuit Court of Appeals; the Eighth Circuit Court of Appeals; the Knowledge Foundation; the International Aviation and Transportation Safety Board Bar Association; and the American Bar Association.

There are now more than three times as many drones operating legally in the US as manned aircraft. Clearly, the drone industry has succeeded in entering the US airspace and is poised to continue to grow. With that explosive growth comes a particular problem: some uses of drones are nuisances, intrusions onto other legal rights, or even criminal acts. Currently, federal law under 18 USC 32 categorically prohibits destruction or interference with any aircraft, which includes a drone.[3]

SOME DRONE OPERATIONS HAVE EVOLVED INTO A THREAT

From delivery of contraband to corporate espionage, drones have been found to be useful tools in wrongdoing and crime. Even international terrorist groups such as ISIS have used drones to facilitate their activities. The threats posed by misanthropic or criminal use of drones can be categorized into physical hazards and cyber hazards.

Small drones may pose a small but potentially significant threat to passenger carrying aircraft,[4] and their mass (up to 55 lbs) combined with velocity (up to 100 mph) results in potentially lethal force in the event of a direct collision with a human, or at least significant injury from the impact or cuts from rotating blades. Even though the probability of a catastrophic collision between a drone and an occupied aircraft is thought to be quite low,[5] the consequences of such a low probability event would be severe, potentially resulting in hundreds of deaths, both of passengers and people on the ground. Much more probable than a small drone collision with a jet is a small drone creating a safety hazard to those near or below it when it is operated recklessly at a low altitude. The author of this paper recalls being out for a walk through a public park when a highly modified racing drone "buzzed" him at less than 10 feet. The author observed the operator to be using First Person View goggles to control it, without an additional visual observer, and in a congested area below trees where several people were exposed to the threat.

Less immediately threatening but much more generally risky to the population as a whole are cyber intrusions facilitated by drone. An easily

1 The original long form heavily cited academic version of this article is published and copyrighted by the North Dakota Law Review, Issue 93:3. Available: https://law.und.edu/law-review. This article omits lengthy discussion of a proposed autonomous counter UAS system, for which the author has a patent pending.

2

3 *Huerta v. Pirker*, NTSB Order No. EA-5730 (2014).

4 UAS Airborne Collision Severity Evaluation 2017 ASSURE http://www.assureuas.org/projects/deliverables/sUASAirborneCollisionReport.php

5 UAS Airborne Collision Severity Evaluation 2017 ASSURE http://www.assureuas.org/projects/deliverables/sUASAirborneCollisionReport.php

Threatening Drones

...continued

grasped example of such a risk was the demonstration of a drone-enabled hack of a printer on the 30th floor of an office building. Researchers in Singapore in 2015 coupled a smartphone to a drone, tasked the phone with impersonating a wi-fi connection, flew the drone up to the 30th floor where the printer was located, and intercepted confidential documents being sent to the printer.[6] Such use of drones as mobile electronic espionage units are alarmingly common, to such an extent that an entire cottage industry has developed detection and alerting systems to combat such espionage.

The incredibly accurate and detailed imagery and other remotely sensed data obtainable by small drones[7] poses an additional risk to critical infrastructure. The unique perspective offered by a drone operating at up to several hundred feet coupled with very high resolution stabilized cameras allows anyone--knowingly or unknowingly--to obtain detailed data for critical infrastructure, such as dams, electrical transmission systems, power generation facilities, airports, public safety agencies and assets, and military hardware locations.[8]

Clearly, the capability to easily obtain the tools that allow bad actors to gain access to or information about critical infrastructure or private data is potentially devastating. The risks posed to air traffic and people below from recklessly operated drones is also significant. People also generally dislike the idea of drones compromising their privacy.[9] Together, threatening drone operations have raised the question of countering those threats, and at least one case of note responding to a perceived threat from a drone by use of force has already occurred.[10]

COUNTER UAS IS PROHIBITED UNDER 18 USC 32.

Federal law currently prohibits any counter UAS (CUAS) activity beyond detection, tracking, and notification of the intrusion. The 3 relevant sections of 18 USC 32 to CUAS state that "Whoever willfully sets fire to, damages, destroys, disables, or wrecks any aircraft in the special aircraft jurisdiction of the United States or any civil aircraft used, operated, or employed in interstate, overseas, or foreign air commerce[11]...interferes with or disables, with intent to endanger the safety of any person or with a reckless disregard for the safety of human life[12],....communicates information, knowing the information to be false and under circumstances in which

6 Wired https://www.wired.com/2015/10/drones-robot-vacuums-can-spy-office-printer/

7 See Vacek, *Remote Sensing of Private Data By Drones Is Mostly Unregulated: Reasonable Expectations of Privacy Are At Risk Absent Comprehensive Federal Legislation*. 90:3 NDLR 463 (2014).

8 https://www.techspot.com/news/72136-drone-manufacturer-dji-accused-spying-us-critical-infrastructure.html

9 https://www.marketwatch.com/story/surprising-drone-study-shows-how-people-really-feel-about-drones-2015-11-11

10 *Boggs v. Meredith* https://regmedia.co.uk/2017/03/24/drone.pdf

11 18 USC 32(a)(1)

12 18 USC 32(a)(5)

such information may reasonably be believed, thereby endangering the safety of any such aircraft in flight[13]... shall be fined under this title or imprisoned not more than twenty years or both.[14]

As a preliminary matter, the question of whether a UAS is actually an aircraft subject to 18 USC 32 and other federal laws and regulations governing the use, operation, and responsibility for the operation of aircraft, as well as federal jurisdiction over such aircraft, has been answered in the affirmative.[15] Since *Pirker*, regulations as to the operating rules for small UAS have been promulgated[16] and a registration scheme has been attempted. With the definitional status of UAS, specifically small UAS (less than 55 lbs) settled, enforcement of regulation and policing and enforcement of rulebreakers becomes pressing, especially so considering the rapid growth of small UAS operations. The relevant question is what defenses are available to property owners or people against UAS intruders when UAS operators violate their property rights or threaten their physical safety. At first glance, 18 USC 32 appears to prevent any such self-help measures, but at least three potential exceptions exist due to the special nature of UAS operations.

While the relevant language of 18 USC 32 appears to categorically prohibit destruction or interference with an aircraft, the specific prohibitions were drafted to apply to manned aircraft and arguably leave open the possibility of some exceptions for CUAS as currently written, as long as the CUAS process and actions are reasonable. The possible exceptions for CUAS are related to actions that are simply impossible to execute upon manned aircraft. They are (1) partial temporary disablement by electronic means; (2) interference or disablement unrelated to safety of human lives; and (3) communicating false information to a UAS that does not endanger the safety of the aircraft.

Partial temporary disablement by electronic means

18 USC 32(a)(1) criminalizes a number of actions directed towards aircraft; the list includes fire, damage, destruction, disablement, or wrecking. Words are known by the company they keep,[17] and all of the listed statutory actions result in significant harm to an aircraft and would put it to some degree in a state of emergency or at least urgency. An intruding drone subject to a CUAS system that triggers the drone's "return to base" function, for example, has indeed been disabled as to its original planned flight, but is not damaged, destroyed, or even disabled. Such a command is similar to an air traffic control clearance to an airliner that directs the pilots to a different destination (to avoid bad weather, for example) and is not equivalent to the category of harm intended by the statute. The intruder drone simply

13 18 USC 32(a)(7)
14 18 USC 32(a)(8)
15 Huerta v. Pirker https://www.ntsb.gov/legal/alj/OnODocuments/Aviation/5730.pdf
16 14 CFR 107 et seq
17 "noscitur a sociis"

follows the new command and returns to its base, which it would also do automatically if it lost its communication link with its operator or the operator could command if the operator lost awareness of the drone's location. But a CUAS system's interference by commanding a return to base function is still an interference, which implicates 18 USC 32(a)(5).

Interference or disablement unrelated to safety of human lives

18 USC 32(a)(5) prohibits interference or disablement of an aircraft with intent to endanger the safety of any person or with a reckless disregard for the safety of human life. The disablement issue has been treated above, and a CUAS system command to return to base is clearly interference. However, as long as the safety of any person on the ground (since UAS are not piloted and carry no passengers) is not endangered or recklessly disregarded, it appears that interference such as that described would not be proscribed by the statute. What CUAS actions do not endanger safety or recklessly disregard human lives is a question of fact and of reasonableness.

Communicating false information to a UAS that does not endanger the safety of the aircraft.

18 USC 32(a)(7) prohibits "communicating false information to an aircraft knowing the information to be false and under circumstances in which such information may reasonably be believed, thereby endangering the safety of any such aircraft in flight."[18] A return to base command given by a CUAS system is an intrusion into the communication channels between the drone and the operator, and would be a false command under the statute, because the operator did not give the command. Since the drone obeyed the CUAS "false" command and returned to base, such an action violates the first part of 18 USC 32(a)(7). Similar to the analysis above, however, endangerment is also a required element. Here, endangerment is tied to the aircraft's safety rather than human safety. As long as the CUAS command does not override the drone's normal safety-compliance software,[19] if installed, or cause an accident, this part of the statute is probably not violated, either.

DEFENSIVE MEASURES ARE AVAILABLE

CUAS includes a range of technological defenses, either passive or active. Passive detection and tracking of intruding drones, as well as alerting the property owner or the police, do not violate 18 USC 32 as such actions fall outside the scope of the statute. Active countermeasures may implicate 18 USC 32 but fall into a defensible exception from the statute as discussed above or may clearly violate the statute. Should an active CUAS action such as an electromagnetic pulse, frequency jam,

18 18 USC 32(a)(7)

19 such as geofenced areas or optical detection and avoidance of obstacles

or physical incapacitation or destruction of the drone occur, it more than likely violates 18 USC 32, as well as FCC regulations. However, the justifications of defense of property, self-defense, or necessity may cover such CUAS action if the actions were objectively reasonable.

The justification defenses of Defense of Property, Self Defense, and Necessity are justifications of conduct that, while violative of law on their own, are allowable because the wrongfulness of the original act outweighs the wrongfulness of the defensive act. Justification of Defense of Property exists when a person uses "reasonable force to protect his property from trespass or theft, when he reasonably believes that his property is in immediate danger of such an unlawful interference and that the use of such force is necessary to avoid that danger."[20] The amount of force used to defend property must be reasonable, i.e. "It is not reasonable to use any force at all if the threatened danger to property can be avoided by a request to the other to desist from interfering with the property."[21] The Model Penal Code requires a person to make a request to desist before using force, unless that would be useless or dangerous.[22]

Justification of Self Defense exists when a person who is not an aggressor uses "a reasonable amount of force against his adversary when he reasonably believes (a) that he is in immediate danger of unlawful bodily harm from his adversary and (b) that the use of such force is necessary to avoid this danger."[23] While there is much nuance in the law regarding the duty to retreat,[24] imminence of attack,[25] or injuries to 3rd persons,[26] those considerations apply to other persons, not to objects like drones. While defending oneself against a drone might conceivably result in injury to a 3rd person, this analysis is focused solely on the question of the applicability of justification defenses to CUAS under 18 USC 32.

Justification of Necessity exists when "the defendant chooses the lesser of two evils and thus, by bringing about the lesser harm, avoids the greater harm."[27] A balancing of the harm avoided with the harm done must be performed[28] and the defendant must intend to avoid harm.[29] Objectively, the value of the harm avoided must be greater than the harm done,[30] there must be no reasonable alternatives[31] and the defendant must not have brought about the situation.[32] Depending on the circumstances of

20 2 LaFave Substantive Criminal Law 2d, Sec. 10.6 (2003).
21 Id. at 10.6(a) citing State v. Cessna, 153 N.W. 194 (1915), State v. Woodward, 50 N.H. 527 (1871).
22 3.06(3)(a)
23 2 LaFave Substantive Criminal Law 2d, Sec. 10.4 (2017).
24 Id at 10.4(f)
25 Id at 10.4(d)
26 Id at 10.4(g)
27 Id at 10.1(d)
28 Id at 10.1(d)1-(d)2.
29 Id at 10.1(d)3
30 Id at 10.1(d)4
31 Id at 10.1(d)5
32 Id at 10.1(d)6

an intruding drone, any one of the enumerated justifications may apply.

ADVICE FOR YOUR CLIENTS

Any of the above justifications may apply in a given context, and the nexus of a client's question and an analysis of which justification is defensible is purely academic without a plan of action. From earlier in this article, the three exceptions identified in 18 USC 32 are (1) partial temporary disablement by electronic means; (2) interference or disablement unrelated to safety of human lives; and (3) communicating false information to a UAS that does not endanger the safety of the aircraft. Currently, FCC regulations prohibit the use of electronic frequency jamming.[33] Some electronic CUAS technology manufacturers distinguish their products from prohibited broadband jammers by employing "software defined radio," the operation of which, arguably, does not violate FCC jamming rules because of its specific function.[34]

The best plan of action for your client would be to first advise them to deploy some kind of passive drone sensor system to determine the extent of the problem. Once they have data, their next step would be to decide whether to incorporate some kind of CUAS system on top of the sensor system. Depending on your clients' choice of system, use the above analysis to advise them whether their plan would be defensible under 18 USC 32 and whether it runs afoul of FCC's jamming rules. Finally, advise them to keep meticulous records, and archive any data from the sensor or CUAS system in case the need to raise one of the affirmative defenses discussed above arises.

CONCLUSION

Explosive growth of UAS use by companies small and large and general consumers brings problems of nuisances, intrusions onto legal rights, or even criminal acts. While 18 USC 32 prohibits destruction or interference with any aircraft, including drones, this article provides explanation of how countermeasures may be justified using the defenses of defense of property, self-defense, or necessity. Any such counter UAS actions must be reasonable in response to the threat level for a justification to be reasonably defensible, and a client's particular choice of CUAS system may implicate FCC jamming regulations, depending on how it operates.

33 https://www.fcc.gov/general/jammer-enforcement

34 https://www.defensenews.com/digital-show-dailies/navy-league/2018/04/10/this-gun-shoots-drones-out-of-the-sky/

Truth in Leasing

by
Greg Reigel

UNDERSTANDING AND COMPLYING WITH AIRCRAFT TRUTH IN LEASING REQUIREMENTS

If you lease an aircraft that is a "large civil aircraft", as defined in 14 C.F.R. § 1.1 (12,500 pounds, maximum certificated takeoff weight), you should be aware of the truth-in-leasing ("***TIL***") requirements of 14 C.F.R. § 91.23. Section 91.23(e) defines a lease as "any agreement by a person to furnish an aircraft to another person for compensation or hire, whether with or without flight crewmembers." Assuming your arrangement for use of the large civil aircraft falls within this definition, then you must also comply with the following TIL requirements:

- The lease agreement must be in writing;

- The lease must include a written TIL clause that is in bold print, at the end of the lease, and immediately preceding the space for the parties' signatures, which includes:
  1. Identification of the Federal Aviation Regulations ("***FAR***") under which the aircraft has been maintained and inspected during the 12 months preceding the execution of the lease and certification by the parties that the aircraft is in compliance with applicable maintenance and inspection requirements for the operations contemplated by the lease (e.g. typically Part 91 since TIL requirements don't apply to Part 121 or 135 air carrier lessees);
  2. The name, address and signature of the person responsible for operational control of the aircraft under the lease, and certification that each person understands that person's responsibilities for compliance with applicable FAR;
  3. A statement that an explanation of factors bearing on operational control and pertinent FAR can be obtained from the responsible Flight Standards District Office ("***FSDO***");

- A copy of the lease must be carried in the aircraft during all operations under the lease;

- A copy of the lease must be sent to the Aircraft Registration Branch, Attn: Technical Section, P.O. Box 25724, Oklahoma City, OK 73125, within 24 hours of execution; and

- At least 48 hours before takeoff of the first flight under the lease the lessee must inform the responsible Flight Standards office by telephone or in-person of:
  1. The location of the airport of departure;
  2. The departure time; and
  3. The registration number of the aircraft involved.

In the past, the regulation required that the 48-hour notification be provided to the "Flight Standards district office nearest the airport where the flight will originate." However, when the FAA recently updated Section 91.23, it replaced this language with the a less specific reference to "the responsible Flight Standards office." And, unfortunately, this change in language has now created some confusion as to which FSDO the notice must be given: the FSDO where the first flight will originate, or the FSDO responsible for the lessee's home base?

However, based upon a review of the Final Rule that made the language change, as well as AC 91-37B, Truth in Leasing, I think the notice must still be provided to the FSDO with jurisdiction over the airport from which the first flight will originate consistent with past practice. Here's why:

The Final Rule states "[t]his rule does not change any existing processes. Processes for public interaction with AIR and AFS (such as application processes, reporting processes, and oversight processes) are documented in orders, notices, advisory circulars (ACs), and policy statements. Where general references to "the FAA" are introduced in specific sections, existing advisory material for the affected section specifies the AIR and AFS offices responsible for the function identified in that Section."

And then going back to AC 91-37B, Paragraph 10 states that the 48 hour notification must be made "to the FAA", with further clarification in Paragraph 10.1 that the "notification must be made to the FSDO nearest the airport where the lease or contract flight will originate." So, I don't think the Final Rule's language changes past practice – which was to provide notification to the FSDO with jurisdiction over the airport where the first flight under the lease originates.

However, I do think that it would make more sense for the notification to be made to the FSDO nearest the operator's home base (and the language in AC 91-37B "where the lease or contract flight will originate" could support this position since it could be read to require notification to either the FSDO where the lease originates (home base) or where the first flight originates). And since one of the policy factors underlying the TIL requirement is FAA oversight lessees/operators, it would certainly make sense for the notification to be provided to the FSDO with jurisdiction over the lessee/operator rather than a FSDO with no connection to the lessee/operator and within whose jurisdiction the first flight under the lease only happens to originate.

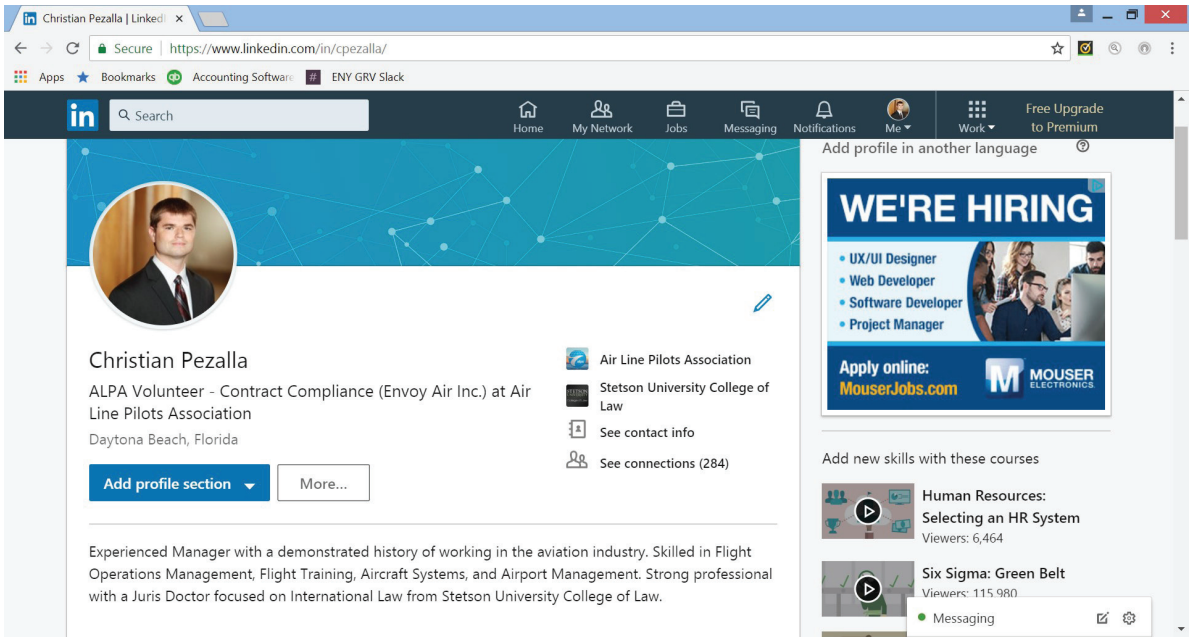
But for now, the conservative approach is to provide notice to the FSDO with jurisdiction over the airport where the first flight under the lease originates. And rather than providing the notice via telephone, the notice may also be provided via facsimile which then provides the lessee with proof of delivery of the notice in the event that a dispute ever arises as to whether the notice was given to the FAA.

LinkedIn for IATSBA

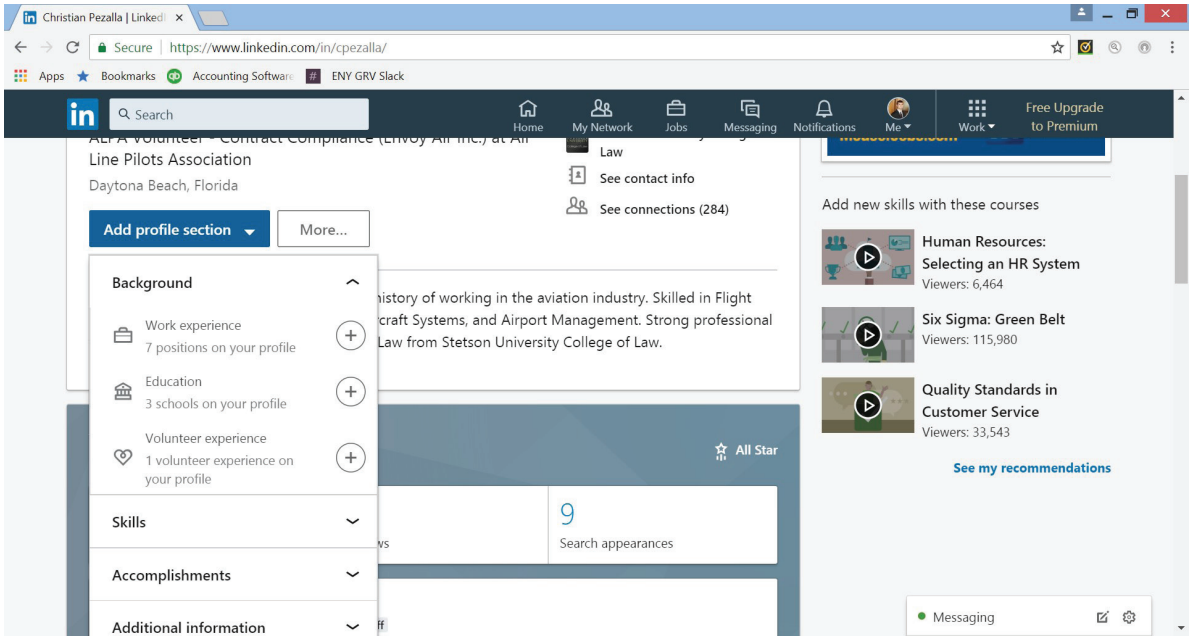
by
Chris Pezalla

IATSBA HAS A NEW AND IMPROVED COMPANY PROFILE ON LINKEDIN. TO ADD IATSBA TO THE EXPERIENCE SECTION OF YOUR LINKEDIN PROFILE, FOLLOW THE STEPS BELOW:

1) Log into LinkedIn and go to your profile page.



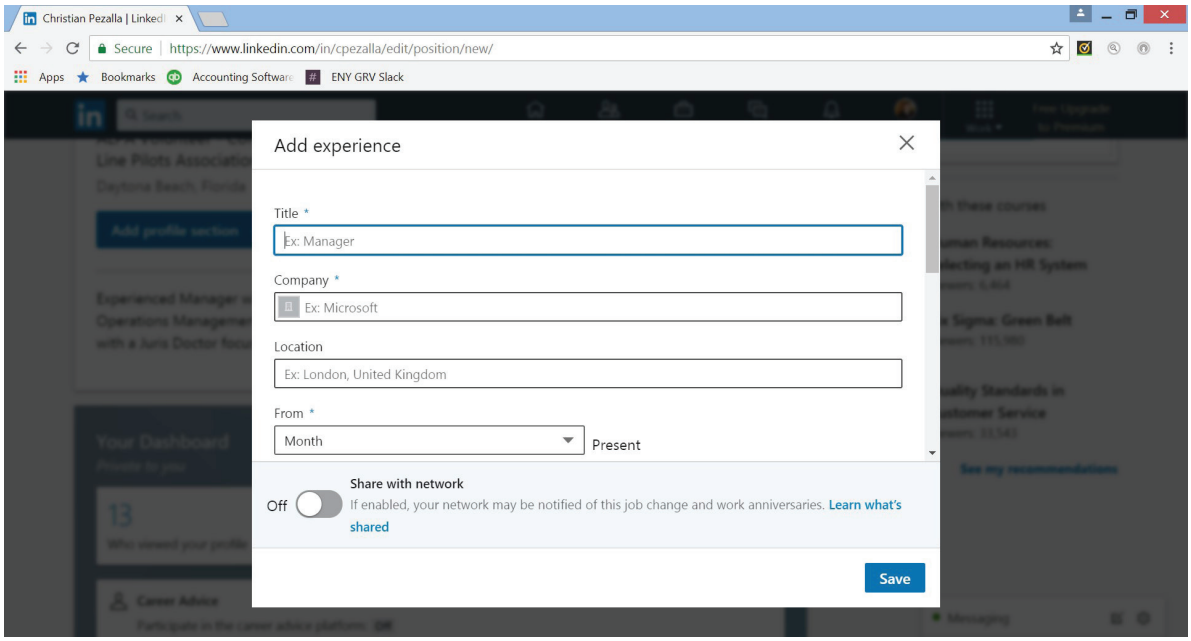
2) Click on “Add profile section” and select the plus symbol to the right of “work experience”.



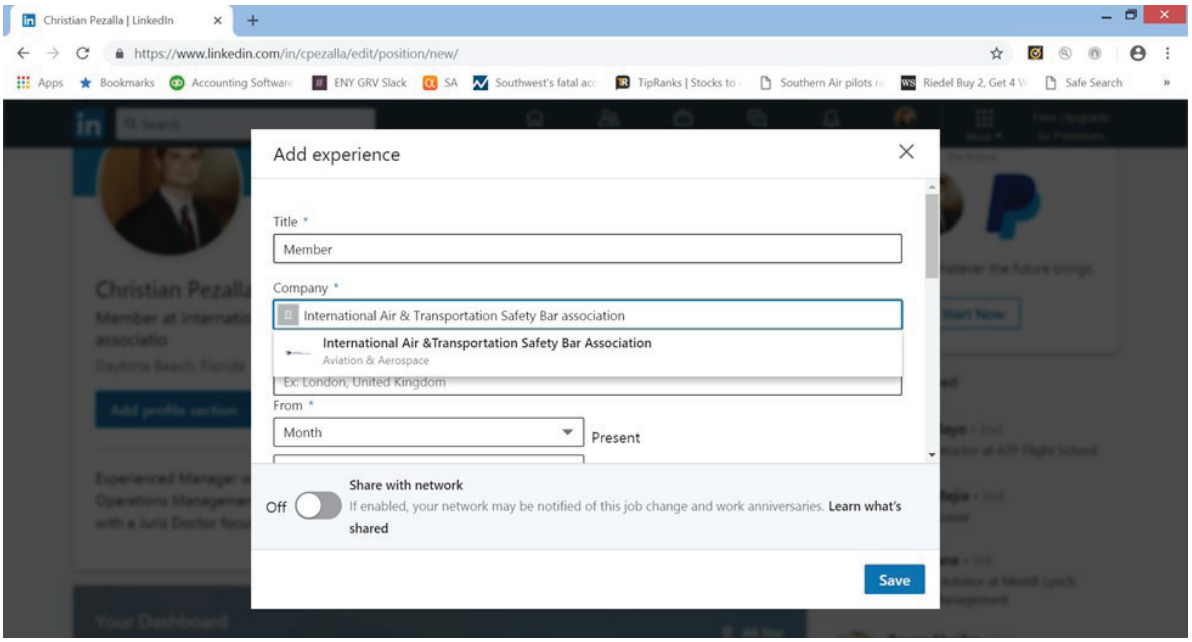
LinkedIn for IATSBA

...continued

3) Enter a title such as “Member,” “Board Member” or “President”.



4) Type “International Air & Transportation Safety Bar association” into the company line. A dropdown menu will appear. Select IATSBA from the list.



For further help with IATSBA LinkedIn, please contact Chris Pezalla at 386-589-2508 or cpezalla@3pointaviation.com.

Regional Meetings

SOUTHERN REGION MEETING AT NATIONAL WWII MUSEUM IN NEW ORLEANS - APRIL 23, 2019

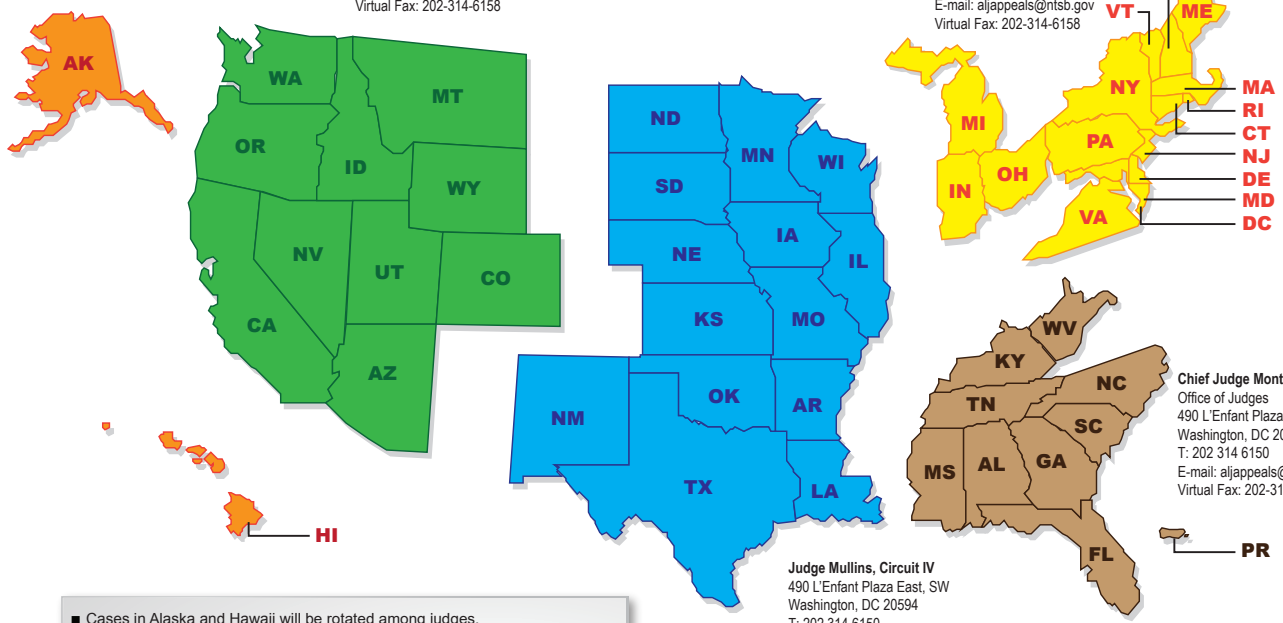
IATSBA ROUNDTABLE ON FAA'S NEW AEROMEDICAL INITIATIVES - A DISCUSS WITH THE FEDERAL AIR SURGEON DR. MIKE BERRY - LUNCHEON MEETING AT THE ARMY AND NAVY CLUB ON FARRAGUT SQUARE, WASHINGTON, DC - APRIL 4, 2019

Dinner gathering during the NBAA Convention in Orlando, FL at Charlie's Steakhouse.

IATSBA SW Regional meeting at Albuquerque Balloon Fiesta

Circuit Assignments

NTSB LAW JUDGE CIRCUIT ASSIGNMENTS



Judge Schumacher, Circuit III
4760 Oakland Street
Denver, CO 80239
T: 202-314-6150
E-mail: aljappeals@ntsb.gov
Virtual Fax: 202-314-6158

Judge Woody, Circuit I
Office of Judges
490 L'Enfant Plaza East, SW
Washington, DC 20594
T: 202 314 6150
E-mail: aljappeals@ntsb.gov
Virtual Fax: 202-314-6158

Chief Judge Montaño, Circuit II
Office of Judges
490 L'Enfant Plaza East, SW
Washington, DC 20594
T: 202 314 6150
E-mail: aljappeals@ntsb.gov
Virtual Fax: 202-314-6158

Judge Mullins, Circuit IV
490 L'Enfant Plaza East, SW
Washington, DC 20594
T: 202 314 6150
E-Mail: aljappeals@ntsb.gov
Virtual Fax: 202 314 6158

- Cases in Alaska and Hawaii will be rotated among judges.
- Emergencies will be assigned across circuits based on availability.

10.06.002

IATSBA Membership

Name: _____

Firm/Company/Affiliation: _____

Address: _____

City: _____ State: _____ Zip: _____

Work Phone: _____ Fax Number: _____

Email: _____ Website: _____

Membership Directory Listing/Area of Practice:

_____

_____

_____

PLEASE CIRCLE MEMBERSHIP TYPE

Checks are to be made payable to "IATSBA" and sent to the mailing address below.
Online application and payment by credit card at www.IATSBA.org.

Regular/Full Annual Membership: ---------- $119.00
Federal Government Annual Membership: ---------- $59.00
Recent Law School Graduate Annual Membership:
(Within two years of graduation from law school) ---------- $49.00
Law School Student Annual Membership: ---------- NO CHARGE
Associate Annual Membership
(Associate Membership is for those not eligible for a Regular/Full Membership.
Associate Membership is non-voting. There are two types of Associate Membership.)
Associate with listing: ---------- $129.00
(May list credentials in Membership Directory - use the lines provided above.)
Associate without listing: ---------- $119.00

International Air & Transportation Safety Bar Association
PO Box 3035 ● Frederick, MD ● 21705-3035 ● Tel: 757-777-8769 ● Fax: 800-886-4685