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The Traffic Cop of the Skies - FAA Enforcement Actions

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THE TRAFFIC COP OF THE SKIES — FAA ENFORCEMENT ACTIONS*

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I. FAA "ENFORCEMENT ACTIONS" IN GENERAL

LICENSED pilots are quite familiar with hundreds of rules and regulations that govern the operation of aircraft. "No person may act as a crew member of an aircraft while under the influence of intoxicating liquor,"[1] but how about those who do? "No person may operate an aircraft in acrobatic flight over any congested area of a city,"[2] but what happens to those who do? "No person may operate an aircraft below an altitude of 1,000 feet over any open air assembly of persons,"[3] but how about the "beach buzzer?" How does the FAA enforce the Federal Aviation Regulations? Generally speaking, there are two types of FAA Enforcement Actions.

A. *Certificate Action Under Section 609 Seeking Suspension Or Revocation Of Airman Certificate*

The Federal Aviation Act of 1958 provides in part:

> The Administrator may reinspect any air agency, or may reexamine any civil airman. If, as a result of such reinspection or reexamination, he determines that safety and the public interest requires, the Administrator may issue an order amending, modifying, suspending, or revoking in whole or in part, any type airman certificate or air agency certificate.[4]

This type of proceeding may be heard before an FAA hearing examiner and/or an NTSB hearing examiner. This choice lies with the airman.

B. *Civil Penalty Actions Under Section 901*

The Federal Aviation Act of 1958 provides in part:

> Any person who violates any provision of this Act shall be subject to a civil penalty of not to exceed $1,000 for each such violation.[5]

This type of proceeding is brought by the FAA in a United States district court. Section 903 provides that "such proceedings shall conform as nearly as may be to civil suits in admiralty." Either party may demand trial by jury of any issue of fact.

* Acknowledgments to Ned Zartman, Western Regional Counsel, Federal Aviation Administration; John Winder, Chief, LAX Flight Standards Division.

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[1] 14 C.F.R. § 91.11 (1967).

[2] *Id.* at § 91.71.

[3] *Id.* at § 91.79.

[4] *See also Id.* at § 13.19 (1967).

[5] *See also Id.* at § 13.15 (1967).

Thus, when a violation of a Federal Air Regulation is brought to the attention of the FAA, there are two roads which can be taken by the FAA, the road which leads to suspension or revocation of the certificate, or the road which seeks to impose a money penalty. Thus far, it has been the policy of the FAA not to pursue both kinds of enforcement procedures simultaneously, although there is no prohibition against simultaneous enforcement. On occasion, the FAA has pursued both procedures simultaneously in a particularly grievious case.[6]

II. Responsibility for Launching the FAA Enforcement Action

The Administrator's authority has been delegated first to the FAA General Counsel, and then down to each "Regional Counsel."[7] Insofar as enforcement is concerned, there are five FAA "Regions" in the contiguous United States. A typical example of this program in operation is the Western Region with headquarters in Los Angeles, California, under Ned Zartman, covering a nine state area. There are seven attorneys on the staff. These FAA attorneys "ride the circuit" from state to state as the occasion demands. The FAA area office concept, with attorneys stationed in certain major population centers, was done away with a couple of years ago, due chiefly to difficulties in regulating the case loads on an equal basis, and due to problems encountered in the area of achieving a uniform, consistent enforcement policy under the old area office framework.

Although the philosophies and personal preferences of particular Regional Counsel may, of course, differ, generally speaking, the FAA does not desire to hire an attorney-pilot to prosecute these cases, perhaps due to the experiences that the FAA attorney-pilot who has prosecuted these enforcement actions in the past has sometimes allowed his own pilot status to interfere with his objectivity, and has sympathized with the pilot involved. If this is the general rule, it is conceded that oftentimes it is to the decided advantage of the FAA to have a lawyer-pilot available to prosecute a particular enforcement action, especially in those hard-fought cases involving airline pilots or commercial operators whose livelihood may be affected by the proposed suspension or revocation, and where the lack of technical knowledge on the part of the FAA attorney would be a severe handicap. Be that as it may, only two out of seven attorneys on Ned Zartman's present Western Region staff are licensed pilots.

The FAA Regional Counsel and his associates have as their investigative arm the Flight Standards Division. In the Southern California area, the seven FAA lawyers are assisted by more than 100 field inspectors employed by the Los Angeles Flight Standards Division under John Winder. Geographically, Winder's police force is responsible for incidents brought to their attention occurring in the Southern California area from Bakersfield south to the Mexican border, and in addition to Southern California, the

[6] Discussion of FAA policy with Ned Zartman, Esq., Western Regional Counsel, FAA.
[7] 14 C.F.R. § 13.3 (1967).

entire state of Arizona. At last count, John Winder's staff of field inspectors, all of whom are high-time pilots themselves, have been regularly processing approximately 75 certificate actions or civil penalty actions per month in the general aviation category, and approximately 10 to 20 actions affecting certificates of air carriers in the airline category.

III. The Initiation of the FAA Enforcement Action by Flight Standards and/or FAA Regional Counsel—Investigative Stage

A lifeguard at Malibu, California, for example, may report that Cessna 4613L was observed buzzing the beach at extremely low altitudes on Sunday afternoon. This kind of report of potential violations may come to the FAA from varied sources—from the local police department or even from the wife of the pilot who informs the FAA that her husband has gone off flying again without a medical certificate, or perhaps under the influence of alcohol. Eventually, the report filters through to the local Flight Standards Area office where a field inspector is assigned to investigate. Each and every complaint of this kind is fully investigated by the Flight Standards field inspector. The thoroughness of the investigation varies with the seriousness of the claimed violation, the energy of the particular field investigator, and the time available to him under his current caseload.

The Flight Standards field inspector has authority to handle some minor violations on his own in the field by "administrative action," so that it will not become necessary to involve the offices of the FAA Regional Counsel. For example, an inspector in the field may ask to see a pilot's medical certificate, and thereby, determine if it has expired. This kind of case would be handled by "administrative action," that is, the inspector might require the pilot to obtain a current medical examination, and to deliver it to him for inspection. No penalty would be assessed, but the violation would be recorded. In the event of later violations, the certificate-holder's past record will be scrutinized. Heavier penalties and longer suspensions are sought against frequent violators. It is the policy of the FAA, on the other hand, that more serious violations (all violations "that affect safety") cannot be handled by Flight Standards fieldmen by "administrative action," but must be passed on to the offices of the FAA Regional Counsel for enforcement. Into this category would fall any attempt to revoke or suspend a certificate, or any attempt to invoke a money penalty.

Not all complaints from the public at large result in an enforcement action being brought against the pilot. FAA Regional Counsel rely upon the Flight Standards Division to investigate the complaint and to determine the need for enforcement. In addition to learning the version of the complaining witness, the Flight Standards inspector is obligated to interview the pilot concerned in an attempt to determine whether there are any mitigating circumstances. If the evidence of the violation proves to be slight, Flight Standards may decide that an enforcement action is not advisable, and the case will be dropped. Then too, there are certain cases

where Flight Standards Division transfers the file to FAA Regional Counsel for enforcement, and the result is a "turn down." The FAA attorney may feel after reviewing the file that the burden of proof cannot be met. At this point, the Regional Counsel merely closes the file without any action, with advice being given to Flight Standards of the decision. In the Western Regional office, Ned Zartman's attorneys regularly "turn down" approximately 10 percent of the enforcement actions referred by Flight Standards Division.

IV. Routine Categories of Cases in the FAA Enforcement Inventory

Theoretically, a pilot's violation of any one of the Federal Air Regulations could subject him to an enforcement action. However, experience has proven that violators seem to historically fall into certain regular and repeating categories.

A. *Low-Flying Aircraft, Including The "Beach Buzzer"*

Summertime at the beach usually produces a multitude of violations of that portion of the Federal Air Regulations devoted to minimum safe altitudes.[8] The "beach buzzer," a California phenomenon, is usually charged with flying lower than the 1,000 foot minimum safe altitude over an open air assembly of persons.[9] These show-off pilots, usually of the low-time variety, but not necessarily, are primarily turned into the FAA by ground observers. In the Southern California area, lifeguards along the Malibu-Zuma Beach area are trained to use binoculars and obtain aircraft registration numbers. The Los Angeles County Sheriff's Aero Squadron, working with helicopters, also has people on patrol primarily for this purpose, and forwards complains to the FAA for enforcement. It is the policy of the FAA to throw the book at this type of deliberate violator, and to seek lengthy suspensions and/or heavy civil penalties.

B. *Weather Violations*

Federal Air Regulations provide that no person may act as pilot-in-command under instrument flight rules or in weather conditions less than the minimum prescribed for VFR flight unless he holds an instrument rating.[10] However, pilots without instrument ratings frequently do file IFR and obtain clearances from ATC. There is no requirement to display an instrument ticket before a clearance is issued by ATC. All that is required as a practical matter is a radio call to ground control requesting an IFR clearance. Usually this type of violator has had some instrument training, but no instrument rating, and he is very difficult to catch. He is usually caught by the FAA when another conscientious pilot turns him in.

Another kind of weather violator is the VFR pilot who has not bothered

[8] *Id.* at § 91.79.
[9] *Id.* at § 91.79(b).
[10] *Id.* at § 61.3.

to check his destination weather too carefully, and winds up at his destination low on fuel and on top of a solid overcast of stratus clouds. He is forced to call Air Traffic Control for assistance and vectoring down through the overcast, and thus disrupts the entire ATC system. If he survives the experience, he faces an FAA enforcement action.

The non-IFR rated pilot who deliberately files IFR and occupies IFR airspace is often spotted over the radio by ATC personnel, and on a hunch turned in to Flight Standards. After all, at last count there were only 107,000 instrument rated pilots in the entire United States out of an overall active pilot population of 548,000.[11] Air Traffic Controllers, even in a large metropolitan area such as Los Angeles, soon get to know the voices of IFR pilots using the system on a regular basis. A new voice, a new airplane call-sign, and a certain awkwardness in communications sometimes causes a controller to be suspicious and make a phone call to Flight Standards. On a few occasions, such individuals have been stopped by Flight Standards fieldmen the moment they touched down, with no instrument rating in their wallet.

C. *Student Pilot Carrying Passengers*

A student pilot may not act as pilot in command of an aircraft that is carrying a passenger.[12] Those who do, risk the revocation of their certificate. These violators usually come to the attention of the FAA in connection with the investigation of an incident or accident. For some reason, the student pilot's wife has proved to be the source of the complaint that brings him to the attention of the FAA. This is also true with regard to the violator of the following category.

D. *Flying While Under The Influence Of Alcohol*

No person may act as crew member of a civil aircraft while under the influence of intoxicating liquor.[13] Violators are difficult to find out, and in practice, hard to convict. The FAA does not have police powers, and under the present state of the law cannot require a sobriety test. When possible, Flight Standards fieldmen try to enlist the aid of local police departments in this connection. In addition to the pilot's wife, these complaints often come to the attention of Flight Standards through FAA tower personnel who have experienced difficulty in radio communication with the inebriated pilot, and who are quite sensitive to the tone and manner of voice communication. Also, the intoxicated pilot often gets into some difficulties on the ground, either before takeoff or after landing, usually in connection with buying gasoline or arguing with line boys, and reports of these difficulties filter through to Flight Standards. The intoxicated pilot also turns up in connection with investigation of incidents or accidents. FAA Regional Counsel traditionally seek revocation under these circumstances.

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[11] Beechcraft Altimeter, July 1968, Vol. 13, No. 5, at 1.
[12] 14 C.F.R. § 61.73 (1967).
[13] *Id.* at § 91.11.

E. *Accident Cases—"Pilot" Without A License—Failure To Close Flight Plan*

Investigation of aircraft accidents by Flight Standards personnel sometimes turns up violations of various Federal Air Regulations. If the pilot has survived the accident, he is generally seriously injured, and in general, the FAA does not bring an enforcement action unless there are a great many violations involved.

Every year there are a surprising number of "pilots" flying without a license. In addition to civil penalties, in this kind of case, the FAA attorneys seek first a temporary restraining order in a United States district court and then obtain a permanent injunction against the individual involved.

"When a flight plan has been filed, the pilot in command, upon completing the flight under the flight plan, shall notify the nearest FAA Flight Service Station or ATC facility."[14] VFR flight plans must be closed (cancelled), or an arrival report filed, within one-half hour (15 minutes for jets) after the estimated time of arrival. If a report is not received within this time, a comunications search will be conducted by FAA facilities. If this search fails to locate the aircraft, a search and rescue center will be advised and an extensive, costly physical search for the aircraft will be initiated.[15] Los Angeles Flight Standards reports 15 to 20 violations of this section of the Federal Air Regulations weekly originating from Van Nuys Airport alone. These complaints originate with ATC facilities. FAA personnel indicate that IFR flight plans are almost always closed by the instrument rated pilots. The VFR pilots are the chief violators.

F. *Violations By Flight Schools*

Various Federal Air Regulations apply to the approved flight schools.[16] The regulations purport to specify the quality of instruction, that is, the instruction shall be of such quality that 80 percent of the graduates pass the check ride. The regulations further provide that certain written tests will be given students, that the school's curriculum be approved by the FAA, that the school shall keep current, accurate records of each student on an individual basis, and that the school allow the FAA to inspect the records upon reasonable request. A panorama of the typical flight school type of violation processed by Flight Standards includes falsification of student records, short cutting of ground school curriculum, FAA designee (pilot examiner at the school), passing students before they are ready, and improper logging of student flight time. One flight school regularly charged students for all the time spent with an instructor from the time he left the flight desk until he returned there. These kinds of violations are usually uncovered by complaints from disgruntled students, or from competitors on the airport. Surveillance and routine checks of the flight school's records, accomplished openly, also turn up some of these violations. Al-

[14] *Id.* at § 91.83.

[15] AIRMAN'S INFORMATION MANUAL, Federal Aviation Administration, August 1968, Part I, at 53.

[16] *See* 14 C.F.R. Part 141 (1967).

though individual instructors, possessing their own certificates are involved, the FAA usually directs the enforcement action against the flight school's certificate and looks to the principal. With the renewal of the G.I. Bill, the FAA expects many fast operators to enter the field, and anticipates more and more violations of this category in the future.

G. *Violations By Repair Stations*

Various Federal Air Regulations apply to repair stations.[17] The regulations require the certificated repair station to permit the FAA to inspect its facilities and records at any time. The repair station has the duty to inspect the aircraft parts used, and to see that they are free from apparent defects or malfunctions. Only materials that conform to approved specifications may be utilized. Records of all work done, naming the mechanic who performed the work, must be maintained for at least two years.

Investigation of aircraft accidents by Flight Standards personnel sometimes discloses violation of Federal Air Regulations by repair stations. Sometimes the failure to use approved methods and the taking of shortcuts have tragic results.

Normal surveillance (routine inspections of facilities and records) turns up some violations, but most complaints reach the FAA through the disgruntled customer. Flight Standards fieldmen insist that a repair station that consistently has trouble collecting the bill from the customer is generally also the unscrupulous-type repair station that is not only overcharging, but is probably using bogus parts and cutting other corners. Flight Standards personnel investigate all cases where the aircraft owner complains of overcharging. The aircraft repair business is a small community, and the FAA soon gets to know all of the marginal operators. Although the Federal Air Regulations do not give the FAA power to arbitrate disputes as to the amount of the bill, when complaints of overcharging are made, inspections of the parts used and the records kept, often turn up violations which can and do result in a suspension or revocation of the repair station's certificate.

H. *Airline Violations*

The great bulk of enforcement actions are brought in connection with general aviation. However, Flight Standards does regularly process violations by air carriers and by airline pilots. Examples of violations currently being processed in the LAX area include overgrossed aircraft, violations of IFR flight plans, flying at the wrong altitude IFR, misuse of fuel scheduling, and violations of duty times by airline pilots. This latter type of violation has proven to be a consistent repeater. Airline pilots are limited to flying 100 hours per month, and to 1,000 hours per year. A particular airline pilot may put in his 1,000 hours yearly with a major airline, but also may have a sideline involving commercial flying, usually flight instruction of some kind. This type of violator is usually turned

[17] *Id.* at Part 145.

into the FAA by other instructors on the airport who are losing their customers to the airline pilot involved.

I. *Control and Abatement Of Aircraft Noise*

An amendment to the Federal Aviation Act, effective 21 July 1968, will undoubtedly add another category to popular violations of the Federal Air Regulations and lead to future enforcement actions. The FAA now has been given authority to prescribe standards for aircraft noise, and to establish regulations for control and abatement, and to apply these standards in enforcement actions with respect to certificate.[18]

J. *Who May Report A Violation And Medical Certification*

Any person who knows of a violation of the Federal Aviation Act of 1958, or of any regulation issued under it, may report it to the FAA. Each report made is investigated by FAA personnel. The results of that investigation are the basis for determining the enforcement action that the FAA will take.[19]

FAA attorneys have also been processing numerous cases involving the denial of medical certificates to pilots. These medical certificate cases will receive separate treatment herein, for the reason that they are not technically enforcement actions.

V. Notice to the Airman of Investigation of Violation and Attempted Compromise at an Informal Conference

Assuming that a legitimate complaint has been made, that the Flight Standards fieldman's initial investigation indicates a violation of one or more Federal Air Regulations "involving safety," the file is then forwarded for enforcement to the office of the FAA Regional Counsel. Flight Standards also forwards at the same time recommendations as to whether enforcement should take the form of a suspension or revocation (a certificate action under section 609 or a civil penalty action under section 901). The recommendation includes the suggested length of suspension and/or the amount of the suggested fine. In the event of a disagreement between Flight Standards personnel and the associate FAA Regional Counsel, as to the suggested sanctions, informal conferences are held to obtain agreement. Usually before the file is forwarded to the FAA's legal representative for enforcement action, the investigating officer at Flight Standards has notified the airman by informal letter that a report has been made, and that investigation is underway to determine whether there has been a violation of a regulation. The airman is invited to respond either orally or by letter to explain his version of the events, and to contribute to the investigation by offering any explanation of mitigating circumstances that may exist. Does the accused airman need an attorney at this point? Is there any service that a competent lawyer, versed in the ramifications of

[18] Federal Aviation Act of 1958, § 611, 82 Stat. 395, 1 CCH Av. L. Rep. ¶ 1387 at 1920-21 (this section was added by Pub. L. No. 90-411, 21 July 1968).

[19] 14 C.F.R. § 13.1 (1967).

the field of enforcement actions, can offer to the airman at this stage? The answer to these questions depends upon what value the pilot places upon his certificate. Certainly the adage is still true, to the effect that the man who represents himself in court has a fool for a client. Perhaps a short review of some recent CAB and NTSB cases can effectively illustrate the consequences of violations of Federal Air Regulations and the end results of successfully prosecuted enforcement actions.

In *Halaby v. Harvey*,[20] the holder of an ATR certificate operated a Stinson aircraft over several Nebraska cities below minimum altitudes, did acrobatics without a parachute, and while under the influence of intoxicants, ran out of fuel and made a forced landing in a corn field which resulted in no injuries. FAA attorneys sought revocation, but the examiner concluded that the airline pilot's certificate should be suspended for six months. Likewise, in *Halaby v. Somlo*[21] (involving a pilot flying a multi-engined aircraft without proper rating) and in *Halaby v. Wright*[22] (where pilot flew in IFR weather without an instrument rating), suspension of certificate was the only sanction imposed. As the seriousness of the violation increases, penalties imposed simultaneously become more severe. In *Halaby v. Slaughter*,[23] for example, a student pilot's certificate was revoked for illegally carrying passengers, flying below minimum altitudes, performing acrobatics, and eventually crashing. Similarly, a licensed mechanic who held an inspection authorization suffered revocation of his authorization in *Halaby v. Proud*[24] for certifying as airworthy a Beechcraft which had only three of twenty-five hinge segments properly attached. Thus, one can readily glean that the examiner does not hesitate to *suspend* licenses or certificates for minor offenses such as failing to observe IFR minimum visibility standards,[25] failing to remain clear of clouds if a VFR pilot,[26] failing to monitor fuel consumption,[27] or taking compensation from passengers when not authorized to hire-out.[28] Nor does the examiner hesitate to *revoke* a license, either permanently or temporarily, for serious violations, *e.g.*, falsifying actual hours flown in a log book,[29] unlawfully carrying passengers,[30] flying below minimum altitudes with passengers,[31] or flying in an intoxicated state with intoxicated passengers.[32] As illustrated in *McKee v. Coleman*,[33] however, a serious violation may terminate only in suspension if there is a rebutted question of fact.

Also to be taken into account by the accused pilot to assist in his de-

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[20] 2 CCH Av. L. Rep. ¶ 21,549 at 14,105 (C.A.B. 1965).
[21] 2 CCH Av. L. Rep. ¶ 21,555 at 14,126 (C.A.B. 1965).
[22] 2 CCH Av. L. Rep. ¶ 21,556 at 14,127 (C.A.B. 1965).
[23] 2 CCH Av. L. Rep. ¶ 21,557 at 14,128 (C.A.B. 1965).
[24] Halaby v. Proud, 2 CCH Av. L. Rep. ¶ 21,559 at 14,132 (C.A.B. 1965).
[25] Halaby v. White, 2 CCH Av. L. Rep. ¶ 21,581 at 14,174 (C.A.B. 1965).
[26] McKee v. Brusnahan, 2 CCH Av. L. Rep. ¶ 21,587 at 14,183 (C.A.B. 1965).
[27] McKee v. Taylor, 2 CCH Av. L. Rep. ¶ 21,617 at 14,246 (C.A.B. 1966).
[28] McKee v. Bradway, 2 CCH Av. L. Rep. ¶ 21,627 at 14,261 (C.A.B. 1966).
[29] McKee v. Eisenberg, 2 CCH Av. L. Rep. ¶ 21,662 at 14,311 (C.A.B. 1966).
[30] McKee v. Connor, 2 CCH Av. L. Rep. ¶ 21,767 at 14,531 (N.T.S.B. 1967).
[31] McKee v. Bradway, 2 CCH Av. L. Rep. ¶ 21,771 at 14,538 (N.T.S.B. 1967).
[32] McKee v. Buck, 2 CCH Av. L. Rep. ¶ 21,771 at 14,538 (N.T.S.B. 1968).
[33] 2 CCH Av. L. Rep. ¶ 21,801 at 14,596 (N.T.S.B. 1968).

cision as to whether or not to retain an attorney is the fact that while it may be true that "they'll let me off easy the first time," this will not be true on the second occasion. A past record of violations will continue to haunt the pilot in any subsequent FAA enforcement action. In *McKee v. Lagein*,[34] the board commented: "the record discloses Respondent has previously demonstrated disposition for non-compliance of safety regulations." In *McKee v. French*,[35] the board "took cognizance of the fact that Respondent has a record of a 3-month suspension and a reprimand as well, for violations of the same regulations." By the same token, a pilot's unblemished record will also be taken into account. In *Halaby v. Harvey*,[36] the board noted that defendant "has been a military and commercial pilot for 18 years, and his record up to now is unmarred by any accident or violation." In *McKee v. Taylor*,[37] the board considered that "there is nothing to indicate that the pilot, who has been flying since 1955 (for 11 years), has previously violated any safety regulation." In *McKee v. Guthrie*,[38] the defendant's "exemplary record as a pilot" was given great weight. Given these factors, would it not be wise for the pilot charged with a first violation, even though of a minor nature, to nevertheless take it seriously in light of the fact that when he may be charged with a future, perhaps more serious violation, his past record might cost him his certificate? Certainly, competent counsel have many tools and methods to assist the airman charged with a violation in the first instance. Undoubtedly, the sooner the attorney is called in, the better he will like it, and the more assistance he will be able to render. Preferably, the attorney should be called in as soon as the airman is notified that the investigation is taking place, and before the airman commits himself and responds to the FAA with his own idea of what mitigating circumstances might get the FAA off his back. Sooner or later, he will learn that the FAA attorneys do not back off easily. Hopefully, he will learn sooner rather than later.

What do the FAA people themselves think about whether or not an attorney can be of any help to the airman who learns that an investigation is being carried out, and that a case is being built against him? In gathering materials and information for this article, the writer put this question directly to one Flight Standards field representative in the LAX area, who replied defensively: "I don't think I should have to answer that question." It is not obvious that this particular FAA representative would just as soon have the accused pilot off-balance, and uninformed as to any rights and defenses that he may be entitled to? If one wanted to win, would not he rather play against a one-armed goalie?

John Winder, Chief of LAX Flight Standards, furnished a pragmatic answer to this question, to the effect that it often depends upon the financial situation, and the seriousness of the offense. If the pilot is cited for

[34] 2 CCH Av. L. Rep. ¶ 21,717 at 14,439 (N.T.S.B. 1967).
[35] 2 CCH Av. L. Rep. ¶ 21,629 at 14,264 (C.A.B. 1967).
[36] 2 CCH Av. L. Rep. ¶ 21,549 at 14,105 (C.A.B. 1967).
[37] 2 CCH Av. L. Rep. ¶ 21,616 at 14,246 (C.A.B. 1966).
[38] 2 CCH Av. L. Rep. ¶ 21,676 at 14,343 (C.A.B. 1966).

failure to close a VFR flight plan, and inquiry satisfies him that there will probably be a $25 fine imposed, there may be no need to retain counsel. Beyond this kind of case, however, Winder feels that competent counsel can often assist the defendant immeasurably, assuming that the stakes are high enough. As a practical matter, Ned Zartman, LAX Regional Counsel, advises that most pilots do not fight back; they do not think it is worth hiring an attorney. In perhaps only 10 per cent of the cases is an attorney brought in. It is suggested that the fact that 90 per cent of the accused airmen represent themselves in *propria persona*, accounts for the high degree of success that is currently being achieved by government lawyers who handle FAA enforcement actions.

Returning once again to the next step wherein Flight Standards invites the airman to respond to the charges, and to state both his version and any mitigating circumstances, generally speaking it is good advice to the airman to reply, but it should be a thoughtfully worded response, and counsel should assist in preparing the reply. The Federal Air Regulations provide that this statement of the defendant may be used in any later hearing for impeachment purposes. That is, if the airman's version of the events as given at any hearing are in any way inconsistent with his statement, then the latter may be used by FAA counsel at the hearing in order to impeach his veracity as a witness.[39] In a contested case, the next phase is when the airman learns from FAA Regional Counsel that it is their intention to issue a suspension or revocation. If the pilot, at this step, has not had the foresight to retain counsel, there is indeed little hope of his avoiding a suspension, revocation or fine. Counsel for the airman should be at this point take advantage of the Federal Air Regulations and request an informal conference with the FAA attorney.[40] There is nothing like facing your adversary prior to the trial in a contested case. This informal conference can be used by counsel for the airman as an informal and inexpensive discovery device. Generally the FAA counsel will disclose the nature of his evidence and identify his witnesses. It is at this conference that the airman can sometimes effectively present his side of the case in person to the FAA counsel who will be prosecuting him, and in some selected instances, FAA Regional Counsel have closed their file after the informal conference, upon being convinced that he did not have a very strong case. In the LAX area, each associate Regional Counsel under Ned Zartman holds 30 to 40 informal conferences monthly. Zartman's office has found the informal conference an invaluable tool in disposing of pending cases. It is at this stage of the case that some effective bargaining can take place. The strengths and weaknesses of each side of the case come to the surface and are put in perspective. There is plenty of room to negotiate with the FAA attorney in an effort to have the technical charges reduced conditioned upon an admission of guilt by the airman to some lesser charge, to have a threatened revocation reduced to a temporary suspension, or to

[39] 14 C.F.R. § 13.59 (1967).
[40] *Id.* at § 13.19.

agree upon the reduction of the proposed fine, depending, of course, on the relative strengths and weaknesses of each particular case. Mr. Zartman furnishes his associate LAX counsel with complete authority to negotiate and bargain themselves with the airman at this stage of the case.[41]

VI. The Beginning of Formal Legal Proceedings

As indicated previously, when the file first comes over to FAA Regional Counsel from Flight Standards, it contains a recommendation as to which form the enforcement action should take, whether it be the normal certificate action under section 609 seeking suspension or revocation, or the civil penalty action under section 901 seeking a fine. The FAA counsel has the choice of remedy. As a practical matter, he must make the choice, for each type has a different forum. Civil Penalty Actions are heard in a United States district court. Cases involving certificate action are heard before either a hearing examiner of the FAA and/or NTSB, this latter choice being with the airman. There is nothing to prevent the FAA from choosing to proceed with both a certificate action and penalty action. However, this means that the FAA attorney has two legal cases to process in separate forums, and besides being clumsy, is a duplication of effort. Therefore, as a matter of policy, the FAA Counsel generally pursue only one kind of enforcement action. On occasion, however, FAA Counsel have pursued both a certificate action and a penalty action simultaneously. These cases are generally reserved to particularly grevious violations where perhaps an airman has not only deliberately violated regulations, but has also profited handsomely thereby. One example would be the flight school that has charged students for (and written up as flight time) every minute spent with a student by an instructor, even if part of such time was devoted to details concerning the scheduling of the airplane, walking out to the flight line, and inspection of the aircraft prior to takeoff. In this kind of case, the FAA might choose to both revoke the flight school's certificate under section 609 and also file a civil penalty action under section 901 in an effort to penalize the flight school and disgorge illegal profits accumulated as a result of the violation.

On occasion, an enforcement action has started out as a certificate action under section 609, has been dismissed, and the case has continued on as a civil penalty action under section 901, at the specific request of the pilot. One example of this kind of procedure took place in Los Angeles recently when the employer of the commercial pilot involved learned of the pending action under section 609 and indicated that either suspension or revocation would cost the individual both his job and his livelihood. Having mercy, FAA Regional Counsel dismissed the certificate action and instead sought the imposition of a civil penalty under section 901 in the United States district court.

While the FAA has the choice of the forum and the kind of enforcement action to pursue, the airman can have the choice of which hearing

[41] *Id.* at § 13.15 gives the FAA Administrator the authority to compromise.

examiner (FAA or NTSB) will hear the matter, in the event that the government lawyers choose to utilize section 609 (certificate action). It is suggested there is a decided and definite advantage to the airman if he chooses to have the matter heard by an FFA Examiner. The choice of the airman to first have the matter heard before the FAA Hearing Examiner in effect gives the airman "two bites at the apple." That is, should the airman lose the case before the FAA Hearing Examiner, he can immediately turn around and request that the matter be tried again and be heard this (second) time by a Hearing Examiner of the NTSB. This request of the airman automatically results in a trial de novo (new trial). The results of the first trial must be ignored by the NTSB Hearing Examiner in the second trial under current rules of practice and procedure. In effect, government attorneys again have the burden of producing effective evidence against the pilot. Time lags may result in the unavailability of witnesses at the second hearing. Both the pilot and his attorney may by this time be better prepared to try the same case again, in the light of the knowledge acquired by the experience of the first trial. In summation, the initial choice of the airman, whether to request the hearing before the FAA Hearing Examiner or the NTSB Hearing Examiner, is a crucial one, for if the airman's choice is the NTSB Examiner, there is only one trial, and only one small bite at the apple. After an adverse result affecting the airman, the only legal remedy left is the appeal, where rules are constructed in such a way to affirm the trial result in all but the most unusual cases. The FAA attorneys would rather have the airman choose the NTSB route, because they would not be exposed to the possibility that they would have to try the case twice.

In the event that the FAA Regional Counsel chooses to utilize section 901, the forum is the United States district court seeking to impose a civil penalty of not more than $1,000. Therefore, the action is begun by filing suit in the federal court, and service is effected upon defendant by personal service of the summons and complaint in the usual manner. In connection with a civil penalty action, a form of attachment is authorized to guarantee payment after judgment. An FAA safety inspector obtains an order of seizure issued by the Regional Director of the FAA, and may summarily seize an aircraft that is involved in a violation for which a civil penalty may be imposed on its owner or operator.[42]

In the event the FAA Regional Counsel chooses to utilize section 609, a quite different procedure to begin the legal action is used. Regional Counsel advises the certificate holder by letter of the charges upon which the FAA Administrator bases the proposed certificate action, and allows the certificate holder to answer the charges and to be heard as to why the certificate should not be suspended or revoked. This is a form letter called "Notice of Proposed Certificate Action."[43] The notice of proposed certificate action constitutes the complaint or statement of the facts upon which

[42] *Id.* at § 13.17.
[43] *Id.* at § 13.19.

the action is proposed.[44] Next, answer of the certificate holder must be returned by mail with a postmark of not later than 15 days after the date he received the notice.[45] The certificate holder's answer must be responsive to the allegations set out in the Notice of Proposed Certificate Action. Any allegation that is not denied is considered to be admitted.[46]

At this time, the certificate holder may also request a formal hearing in writing with a postmark of not later than 10 days after the close of the informal conference with the FAA Counsel.[47] Each pleading thereafter filed with the Hearing Examiner by either party must also be served upon the other party, in the case of the certificate holder, by mailing a copy to him at his last address filed with FAA, and if he is represented by an attorney, the service shall be made upon the attorney.[48]

In the event that FAA Regional Counsel has chosen to utilize section 901 (civil penalty action), pre-trial motions are governed by the normal Federal Rules of Civil Procedures.

In connection with section 609 (certificate action), several motions are provided for in the Federal Air Regulations. The airman may file a motion to dismiss for failure of the allegations to state a violation of the act.[49] This motion is similar to a general demurrer. If the notice of proposed certificate action alleges the violation occurred more than six months before the date of mailing, this motion can be made. This motion puts the burden on FAA Counsel to show that good cause existed for the delay of more than six months, and that in spite of the delay, sanctions are warranted in the public interest.[50] Also, the certificate holder may file a motion that the allegations in the notice be made more specific, definite and certain,[51] a motion for judgment on the pleadings,[52] a motion to strike,[53] or a motion for production of documents. Either party, upon motion showing good cause may request the Hearing Examiner to order any party to produce any designated document, paper, book, account, letter, photograph, object, or other tangible thing, that is not privileged, that constitutes or contains evidence relevant to the subject of the hearing and that is in the party's possession, custody or control.[54] In connection with a civil penalty action under section 901, discovery is governed by the normal Federal Rules of Civil Procedure. In a certificate action under section 609, either party may take pre-trial testimony by deposition.[55] The Hearing Examiner may issue subponeas, requiring the attendance of witnesses for the purposes of taking depositions.[56] Ned Zartman advises that in the Los

[44] *Id.* at § 13.41.
[45] *Id.* at § 13.19.
[46] *Id.* at § 13.41.
[47] *Id.* at § 13.19.
[48] *Id.* at § 13.43.
[49] *Id.* at § 13.49(a).
[50] *Id.* at § 13.49(b).
[51] *Id.* at § 13.49(c).
[52] *Id.* at § 13.49(d).
[53] *Id.* at § 13.49(e).
[54] *Id.* at § 13.49(f).
[55] *Id.* at § 13.53.
[56] *Id.* at § 13.57.

Angeles area, where only 10 per cent of the accused airmen are represented by counsel, even where an attorney is involved, depositions are rarely taken as a practical matter.

VII. TRIAL

Trials in connection with a civil penalty action under section 901 are held in a United States district court, where trial procedures are governed by the normal Federal Rules of Civil Procedure. The airman is entitled to a trial by jury. Ned Zartman advises that during his seven year tenure as Los Angeles Regional Counsel, there have been no jury trials in the Los Angeles area. In connection with a certificate action under section 609, procedures at the hearing are governed by Part 13 of the Federal Air Regulations, which set forth in Subpart D, the Rules of Practice for Hearings in FAA Certificate Proceedings.

Let us assume that the airman has requested a formal hearing, and further, that he has asked that an FAA Hearing Examiner be assigned to resolve the case. If he loses here, he can then take his "second bite at the apple," and demand that an NTSB Hearing Examiner conduct a trial de novo. There is no right to a jury trial in these cases. At the present time, there are only three or four FAA Hearing Examiners in the entire United States, with offices in Washington, D.C., and who travel to the residence of the airman to hear these cases. It so happens that no present FAA Hearing Examiner is himself a pilot. There are at the present time only five or six NTSB Hearing Examiners. Their offices are also in Washington, D.C., and they also travel to hearings. A few of them formerly were pilots. Whether the hearing is being held before an FAA Hearing Examiner or an NTSB Hearing Examiner, the following procedural rules apply:

(1) The Hearing Officer shall give the parties adequate notice of the date and place of the hearing.[57] Hearings are usually held at the Regional Headquarters of the FAA.

(2) The Hearing Officer may issue subpoenas requiring attendance of witnesses or the production of documents.[58]

(3) Each party to a hearing may present his case or defense by oral or documentary evidence, and conduct such cross-examination as may be needed.[59]

(4) The burden of proof is upon the FAA Counsel.[60]

(5) The Hearing Officer shall give the parties adequate opportunity to present oral arguments.[61]

(6) At hearings conducted by the FAA Hearing Examiners, generally speaking there is no court reporter in attendance. Sometimes the FAA Hearing Examiner will use an electronic recording device. The NTSB Hearing Examiners generally have certified court reporters to transcribe

[57] *Id.* at § 13.55.
[58] *Id.* at § 13.57.
[59] *Id.* at § 13.59.
[60] *Id.* at § 13.59(b).
[61] *Id.* at § 13.61.

all proceedings.[62] In an important case, which may be appealed, counsel are advised to make arrangements for a certified shorthand reporter.

(7) If the Hearing Officer determines that safety in air transportation and the public interest so requires, he may issue an order suspending or revoking the respondent's certificate.

The Hearing Officer may also find that while the allegations of the notice have been proved, that no sanction is required, and order the notice terminated. If the Hearing Officer finds that the allegations of the notice have not been proved, he may order the notice dismissed. If the Hearing Officer finds it to be equitable and in the public interest, he may order the proceeding terminated upon payment by respondent of a civil penalty in an amount agreed upon by the parties, thus achieving as a practical matter the end result of a civil penalty action under section 901.[63]

VIII. Appeals in the Case of a Certificate Action Under Section 609

Following an adverse result before the FAA Hearing Examiner, the airman can take his case before higher tribunals in the following order:

(1) Trial de novo before NTSB Hearing Examiner as has been set forth previously.

(2) Next, to the 5-man National Transportation Safety Board.[64] Written opinions are published by Commerce Clearing House in *Aviation Law Reporter*. The 5-man board generally functions as an appellate court, and makes an effort to determine whether there was substantial evidence to support the findings of the Hearing Officer.[65] Inquiry is also made as to whether the Hearing Officer followed the policy of the NTSB, and whether or not there were any errors of law that took place at the hearing. Oral arguments and briefs are submitted in Washington, D.C.

(3) To the United States Court of Appeals.

In a civil penalty action under section 901, the maximum fine possible at the present time is $1,000 for each violation of a Federal Aviation Regulation.[66] Of course, the airman can be charged with a number of separate counts in the same action. In a certificate action under section 609, the maximum penalty is the complete revocation of the airman's certificate. Revocation can only be effective for one year under the present law.[67] After one year, the airman can apply for a new certificate, but he is starting from scratch, and must pass the usual written and practical tests the same as a beginner.

In recent years, there has been quite a bit of heavy traffic in medical certificate cases. These cases generally arise in two different ways. The first kind of medical certificate case arises when a serious medical problem of

[62] *Id.* at § 13.63.
[63] *Id.* at § 13.67.
[64] *Id.*
[65] Petition of James Dillahunt, Jr., 2 CCH Av. L. Rep. ¶ 21,729 at 14,464 (N.T.S.B. 1967)
[66] Federal Aviation Act of 1958, § 901, 72 Stat. 783, *as amended*, 76 Stat. 149, 49 U.S.C. § 1471 (1964).
[67] Federal Aviation Act of 1958, § 602, 72 Stat. 776, 49 U.S.C. § 1422 (1964).

some kind comes to light when the pilot has in his possession a medical certificate which may be valid on its face for a year or more, and FAA Regional Counsel believes it in the interest of safety to revoke the medical certificate effective immediately. In this kind of case, the plaintiff is the FAA Administrator and the procedure is as follows:

(1) The FAA Administrator issues an emergency order pursuant to section 609 and section 1005 of the Federal Aviation Act of 1958, revoking the medical certificate. These sections establish the authority of the Administrator to advise the Board that an emergency exists and safety requires immediate effectiveness of the order.[68]

(2) The Administrator then has the duty of initiating proceedings immediately, and to give preference to such proceedings over all others. The matter is assigned to a Hearing Examiner.[69]

(3) In this kind of case, the burden of proof is on the FAA Administrator, who must establish by a preponderance of reliable and probative evidence that the pilot is not medically qualified to hold a medical certificate.[70]

Current CAB decisions reflect numerous examples of this kind of case initiated by the FAA Administrator. In *McKee v. Miller*,[71] it was the burden of the Administrator to prove by the preponderance of the evidence that respondent pilot suffered from a psychotic disorder involving depression and suicidal tendencies, and that safety in air commerce and the public interest required revocation of his medical certificate which was valid on its face.

In *Mocho v. McKee*,[72] it was the FAA's burden to prove that cardiovascular hypertension disqualified the pilot from holding a medical certificate. In *McKee v. Harper*,[73] it was the FAA's burden to prove that the hearing deficiency of a pilot did not meet the hearing standards for a first or second class medical certificate, and that the pilot therefore, lacked requisite proficiency and skill to hold an airline transport or instrument rating.

The second kind of medical certificate case arises when a serious medical problem of some kind comes to light at the time the pilot is examined by an FAA-designated physician, during the course of applying for a medical certificate. The physician refuses to issue a valid certificate, and it is now the pilot who must initiate legal proceedings to question the validity of the FAA physician's opinion. In this kind of case, the plaintiff (petitioner) is the pilot, and the procedure is as follows:

(1) Any person who is denied a medical certificate by an Aviation Medical Examiner may within 30 days after the denial, apply in writing

[68] Federal Aviation Act of 1958, § 609, 72 Stat. 779, 49 U.S.C. § 1429 (1964).

[69] Federal Aviation Act of 1958, § 1005, 72 Stat. 794, *as amended*, 73 Stat. 427, 49 U.S.C. § 1485 (1964).

[70] *See* Mocho v. McKee, 2 CCH Av. L. Rep. ¶ 21,747 at 14,494 (N.T.S.B. 1967); McKee v. Harper, 2 CCH Av. L. Rep. ¶ 21,796 at 14,582 (N.T.S.B. 1968); McKee v. Miller, 2 CCH Av. L. Rep. ¶ 21,709 at 14,417 (C.A.B. 1967).

[71] 2 CCH Av. L. Rep. ¶ 21,709 at 14,417 (C.A.B. 1967).

[72] 2 CCH Av. L. Rep. ¶ 21,747 at 14,494 (N.T.S.B. 1967).

[73] 2 CCH Av. L. Rep. ¶ 21,796 at 14,582 (N.T.S.B. 1968).

and in duplicate to the Federal Air Surgeon, Aeromedical Certification Branch, FAA, P. O. Box 25082, Oklahoma City, Oklahoma, for reconsideration of the denial. If he does not apply for reconsideration during the 30-day period, he is considered to have withdrawn his application for a medical certificate. Only if the Federal Air Surgeon also denies the medical certificate can the pilot legally proceed further.[74]

(2) The Federal Aviation Act of 1958 provides that any person whose application for the issuance or renewal of an airman's certificate and medical certificate is denied may file with the NTSB a petition for review of the Administrator's action.[75]

(3) The Board shall assign such petition for hearing.[76]

(4) The Board shall not be bound by the findings of fact of the Administrator.[77]

(5) In this kind of case, the burden of proof is on the pilot (petitioner) to demonstrate that he is qualified to hold a medical certificate.[78]

Current CAB decisions also reflect numerous examples of this kind of case initiated by the pilot. In *Petition of John Doe*,[79] the pilot was unable to meet the burden of establishing by preponderance of reliable and probative evidence that he was qualified to hold a medical certificate because of a psychonuerosis. In *Petition of James Dillahunt*,[80] the Hearing Examiner found that the pilot had not met the burden of demonstrating his qualifications to hold a medical certificate because of coronary heart disease which might reasonably be expected to lead to myocardial infarction. In *Petition of Robert Warner*,[81] it was the pilot's burden to prove his medical qualification to hold a medical certificate, in spite of a history of recurring disturbances of consciousness, the cause of which was without medical explanation.

In summation, it therefore appears that in connection with these two kinds of cases involving medical certificates, under current law governing the subject matter, the crucial question of who must meet the burden of medical proof depends upon the accident of when the medical problem comes to light. If the FAA Administrator learns of the medical problem when a valid medical certificate is still in effect and he chooses to initiate the legal action, it is the FAA who has the heavy burden of proof. If the medical problem does not come up until the pilot applies for a renewal of his medical certificate and the FAA Administrator refuses to issue one at that time, it is the pilot who must initiate the legal action and who has the burden of proof. In both kinds of cases, however, the question for decision by the Hearing Examiner is the same, to wit, in the light of the medical problem presented by the evidence, what action does safety in air com-

[74] 14 C.F.R. § 67.27 (1967).
[75] Federal Aviation Act of 1958, § 602, 72 Stat. 776, 49 U.S.C. § 1422 (1964).
[76] *Id.*
[77] *Id.*
[78] Petition of James Dillahunt, Jr., 2 CCH Av. L. Rep. ¶ 21,729 at 14,464 (N.T.S.B. 1967). *See also*, Petition of John Doe, 2 CCH Av. L. Rep. ¶ 21,739 at 14,479 (N.T.S.B. 1967).
[79] 2 CCH Av. L. Rep. ¶ 21,739 at 14,479 (N.T.S.B. 1967).
[80] 2 CCH Av. L. Rep. ¶ 21,729 at 14,464 (N.T.S.B. 1967).
[81] 2 CCH Av. L. Rep. ¶ 21,749 at 14,498 (N.T.S.B. 1967).

merce and the public interest require? In order to deny the medical certificate, the medical problem must be such that it would *probably* interfere with the safe piloting of aircraft; the mere *possibility* of such interference is not sufficient.[82] It is quite obvious that in these kinds of cases involving medical certificates that the airman will quickly drown without competent legal and medical talent working diligently in his behalf.

IX. Conclusion

General aviation, together with its big brother, the scheduled airline carrier, is presently experiencing a period of remarkable growth. Expanding "learn to fly" activity throughout the United States, instigated by manufacturers of small aircraft in an effort to generate sales, in contributing greatly to the growth of general aviation. In 1967, more than 159,000 persons were issued student pilot licenses by the FAA, up from 121,000 issued during 1966. Studies by one of the largest manufacturers in the world of small airplanes, the Cessna Aircraft Company, project that 193,000 persons will be issued student licenses in 1968.[83] The latest figures available indicate there were more than 548,000 active pilots in 1966, only 21,000 of whom were employed by airlines. As of 1 January 1967, there were 107,000 total active aircraft in the United States. The FAA's forecast for 1977, is to look for 183,500 total active aircraft, including 3,500 airline configurations.[84] The nationwide facilities of the FAA charged with the responsibility of regulating air traffic control on a day-to-day basis are straining at the seams in an effort to keep pace with this growth. One takeoff or landing every 17 seconds was the record set recently between 5:00 and 6:00 p.m. on a Friday afternoon by the controllers at FAA's Chicago O'Hare Airport Tower.[85] Lawyers and pilots should take note that in the future there will be corresponding rapid developments and changes in the field of FAA Enforcement Actions in order to keep pace with the exploding developments in the field of general aviation itself.

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[82] John Doe, Airman Certificate, 13 C.A.B. 109 (1945).
[83] Cessna Pennant, Vol. 5, No. 1, June 1968, AOPA Flying Fact Card, at 1.
[84] *Supra* note 11.
[85] Aviation News, Vol. 6, No. 13 at 13 (FAA June 1968).