



FLIGHT-WATCH



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FLYING TIGERS HONORED AT ZHI JIANG INTERNATIONAL PEACE AND CULTURE FESTIVAL

Dick Rossi, with his wife, Lydia, Bob Layher, his wife Mariam, their daughter, Linda, Peter Wright, his wife, Sinone, Jeff Greene, and his fiancé, Donna Ostroff, as a delegation of the Sino-American Aviation Heritage Foundation were guests of the China Association for Expedition and the Yunan government in Kunming on November 13 and 14, 2003. On the 14th, they were on Lake Dianchi and given a complete briefing concerning the ongoing recovery of John Blackburn's P-40 that crashed in the lake on April 28, 1942. The briefing was given by Yan Jiangzhen, the director of the China Association for Expedition. After the briefing on the recovery efforts of the P-40, the nine persons mentioned above were guests of the Hunan Provincial and Zhi Jiang County and City Governments, as participants in the China/Zhi Jiang International Peace and Culture Festival.



Dick Rossi embraces a Chinese veteran at the International Peace and Culture Festival.

defeat the Japanese during WWII. The Flying Tigers were honored by 150,000 people, 2,000 dancers, and many noted Chinese celebrities. Ambassadors from a number of countries were in attendance at these ceremonies. A Flying Tigers museum has been erected at Zhi Jiang, which was a large operational support airfield for the China Air Task Force, and later the 14th Air Force in China. As part of the festival, there was a dinner for 1,000 people in honor of

the Flying Tigers. A photograph of Dick Rossi (the President of the Flying Tigers Association) embracing a Chinese radio operator who was active during WWII accompanies this issue of Flightwatch.

The precise date on which John Blackburn's P-40 will be recovered from Lake Dianchi has not been set at the time this article is written. As we receive word on that date, it will appear in a subsequent issue of Flightwatch.

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WHERE A PILOT CHALLENGES THE FAA'S DENIAL OF HIS REQUEST FOR A MEDICAL CERTIFICATE, THE FAA CAN WITHDRAW THE DENIAL AND DELAY THE PILOT AS LONG AS IT WANTS IN HIS QUEST FOR MEDICAL CERTIFICATION

On July 14, 2003, the airman applied for a first-class medical certificate, which was issued by his aviation medical examiner ("AME"). On July 30, 2003, the manager of the Aeromedical Certification Division ("ACD") of the FAA reversed the AME's decision, citing as a basis for the denial a history and clinical diagnosis of substance abuse. In the ACD's reversal of the



The Actual Site of the watery grave of John Blackburn's P-40

Zhi Jiang was the site of Japan's official surrender in China at the close of WWII. The festival and its activities focused on the special relationship of American airmen and the Chinese people who worked hard to expel and

AME, the letter declared that it was a final agency denial of medical certification.

On September 12, 2003, the pilot filed a petition for review of the denial of his application for a medical certificate. The FAA answered on October 2, 2003, requesting that the administrator's decision be affirmed by the National Transportation Safety Board ("NTSB"). Twenty-nine days later, on October 31, 2003, the Federal Air Surgeon withdrew the ACD's declaration, relating that additional information was requested by the FAA from the airman and further relating that the FAA was "withdrawing" the denial.

On November 7, 2003, the FAA moved to dismiss the airman's petition on the grounds that the denial of his medical certificates had been "withdrawn" and there was no matter before the NTSB for determination. The FAA took the position that by "withdrawing" the



Jeff Greene Cuts the Ribbon at the Opening Ceremony of the Flying Tigers Museum

denial, the NTSB no longer had jurisdiction over the matter.

The pilot opposed the motion to dismiss on the grounds that "withdrawal" of the denial of July 30, 2003, was untimely under Rule 17 of



Two F-18's got a bit too close for comfort!!!

the NTSB's Rules Of Practice In Air Safety Proceedings [49 C.F.R. § 821.17(a)]. The pilot claimed that the FAA's withdrawal of the denial was fundamentally unfair. The administrative law judge disagreed with the airman and granted the FAA's motion to dismiss, finding that the withdrawal of the denial of his airman certificate terminated proceedings before the NTSB.

On November 21, 2003, the airman filed a request for reconsideration of the order dismissing his petition. At the time this article is written, there has been no decision rendered on that request. The airman is represented by Mark T. McDermott, Esq. and Peter J. Wiernicki, Esq. of the firm of Joseph, McDermott & Reiner, P.C. in Washington, D.C.

Petition of Lester P. Martin, III, NTSB Docket No. SM-4589

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SUBPART K TOOK EFFECT NOVEMBER 17, 2003 – CAUTION URGED IN FLIGHT DEPARTMENTS OPERATING MULTIPLE AIRCRAFT WHERE TIME IN ONE AIRCRAFT IS SWAPPED FOR TIME IN ANOTHER

FAR § 91.501 deals with permissible operations of large and turbine-powered multi-engine airplanes under Part 91 of the FARs. For example, a corporate jet may be flown to



AVG Veterans Dick Rossi, Peter Wright and Bob Layher surrounding a bust of General

provide

transportation to company officials or guests of the company. FAR § 91.501(b)(6). Flights may be conducted for ferrying or training operations. Under Section 91.501(b)(1), the aircraft may be demonstrated to prospective customers under § 91.501(b)(3) if no charges are made other than those permitted in FAR § 91.501(d)(1) through (10). Typically, these reimbursable expenses include: (1) fuel, oil and lubricants; (2) travel expenses of the flight crew; (3) hangar and tie-down expenses away from the aircraft's base of operation; (4) insurance obtained for the specific flight; (5) landing fees; (6) customs and foreign permit fees; (7) in-flight food and beverages; (8) passenger ground transportation; (9) flight planning and weather contract services; and (10) a charge equal to 100% of the expenses of fuel, oil, lubricants and other additives.

In addition to multi-engine jet aircraft being operated as outlined above, the aircraft may be operated under a time-sharing agreement where the owner makes the aircraft available with flight crew under FAR § 91.501(c)(1) provided the owner is only reimbursed for those expenses allowed by FAR § 91.501(d)(1) through (10).

In addition to time-sharing agreements, it is possible to swap time on airplanes. This is technically called an interchange agreement and is allowed by FAR § 91.501(c)(2). When time on a King Air is interchanged for time on an Learjet, the difference in the operating costs of the aircraft is recognized, and a

charge may be made recognizing the difference in operational costs that does "not... exceed the difference between the costs of owning, operating, and maintaining the two airplanes." FAR § 91.501(c)(2).

Another possibility is to have joint ownership of an aircraft. Under a joint ownership agreement, one of the registered joint owners makes the airplane available with flight crew to one of the other registered joint owners which "pays a share of the charge specified in the agreement." FAR § 91.501(c)(3). It is important to note that under a joint ownership agreement, the registered joint owner paying money to the other registered joint owner which provides the flight crew is not restricted to paying the ten items listed under FAR § 91.501(d). Accordingly, a joint ownership agreement affords greater economic flexibility than a time-sharing agreement.

Even though an airplane may not be a large airplane weighing more than 12,500 lbs, it is still possible to operate small aircraft under the safe harbor provisions set forth in FAR § 91.501 if the aircraft owner joins the National Business Aircraft Association and avails itself of NBAA Exemption Number 1637M. In other words, Cessna Citations and Beech King Airs may be operated under § 91.501 even though the aircraft do not weigh an ex-



Another historic moment – the last flight of the Concorde

cess of 12,500 pounds When aircraft leases of this nature are employed, they are subject to the truth-in-leasing requirements set forth in

FAR § 91.23. The FAA is concerned about the lessee of an aircraft having a clear understanding with the lessor in terms of who or what is exercising **operational control** over the aircraft. This term is defined in FAR § 1.1 as follows:

Operational control, with respect to a flight, means the exercise of authority over initiating, conducting, or terminating a flight.

Although it was not intended to do so, FAR § 91.501 enabled creative individuals to fashion fractional ownership arrangements. Essentially, a fractional ownership arrangement is a composite of joint ownership and interchange agreements where multiple owners own multiple airplanes. If one owner's airplane is unavailable, he may avail himself of flight time in the airplane of another owner on an interchange basis. These kinds of operations are frequently provided by corporate flight departments today. However, a problem arises in the implementation of Subpart K to the Federal Aviation Regulations with an effective date of November 17, 2003. Persons and organizations commenting on the implementation of Subpart K noted that it may be difficult to distinguish a traditional joint ownership agreement with an **occasional** interchange operation from a **fractional ownership program**. The response of the FAA was that these issues will be decided on a "case-by-case basis." As pilots, we know what that means. A case is not a good thing. A case-by-case basis means that there are going to be situations where airplanes which have historically been operated lawfully will now, arguably, require satisfaction of the regulatory requirements of Subpart K. Flight departments and operators which employ multiple aircraft and multiple flight crews where aircraft are **interchanged** are alerted by this article to the fact that one can anticipate violations being brought by the FAA if it believes

Bob Layher with Chinese Generals



the owner/operator is engaged in a "fractional ownership program" without having met the requirements of Subpart K of the FARs.

Regulation Of Fractional Aircraft Ownership Programs And On-Demand Operations – Final Rule, 68 Federal Register 54520 (September 17, 2003).

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NTSB ORDERS FAA TO PAY PILOT'S LEGAL FEES IN EXCESS OF \$25,000 WHERE THE FAA CLAIMED THE PILOT REFUSED TO SUBMIT TO A TEST TO DETERMINE WHETHER THERE WAS ALCOHOL IN HIS SYSTEM

Dale Whittington was the pilot of a Learjet 25B, N128TJ that landed in Ft. Lauderdale on February 23, 2002. After landing, a bag belonging to Whittington's copilot showed a small amount of white powder that was suspected to be cocaine. Whittington submitted to a field sobriety test, which he failed.

Officer Phillips arrested the pilot for operating an aircraft while intoxicated. The pilot then submitted to an "intoxilyzer" breath test that resulted in a triple zero reading. This meant that there was no evidence of alcohol in the blood of the pilot. Later, the pilot refused to submit to either a blood test or a urine test. The police officer requesting the tests admitted that after the pilot blew a triple zero, he **no longer suspected** the pilot had **alcohol** in his system. The pertinent Federal Aviation Regulation required that a pilot submit "**a test**" to determine whether or not there was alcohol in his system. The pilot did submit to such a test (**note the singular**). See FAR § 61.16 ["a refusal to submit to a test to indicate the percentage by weight of alcohol in the blood, when requested by a law enforcement officer in accordance with section 91.17(c) of this chapter, or a refusal to furnish or authorize the release of the test results requested by the Administrator in accordance



with section 91.17(c) or (d) of this chapter is grounds for... (b) suspension or revocation of any certificates...”]

The airman had been charged with acting as a crewmember aboard an aircraft while his faculties were impaired in violation of section 91.17(a)(2) and operating an aircraft with illegal narcotics aboard. FAR § 91.19(a).

Just before the case was called to trial, the charges brought by the Administrator of flying while impaired and flying with narcotics aboard were dropped. This left pending before the Administrative Law Judge the two remaining charges dealing with the requirement of submitting to “a test” for “alcohol” as set forth in FAR §§ 61.16 and 91.17. The judge found that the Administrator **had proven a case** of violating the two remaining regulations. However, on appeal, the NTSB reversed the Administrative Law Judge, finding that the airman had submitted “a test” for the presence of “alcohol” and **no violation** by the FAA **was proven** by the evidence. In light of that finding by the NTSB, the airman made application for legal fees and case expenses. The judge denied the application for legal fees and case expenses under the Equal Access to Justice Act (“EAJA”). The airman appealed, and the NTSB reversed, in part, the finding of the judge. With regard to the first two charges of flying while impaired and operating an aircraft with illegal contraband aboard, even though those charges were dropped, the NTSB found that the FAA was substantially justified in pursuing the airman on those charges. The ostensible basis for dropping those charges just before trial was because the Broward County Sheriff’s Office had failed to complete the test on the substance found in the co-pilot’s bag and one witness for the hearing was not available. How-

ever, with regard to the other two charges dealing with refusing to submit to a test for alcohol, the Board again found that the FAA was incorrect in pursuing those charges and that the FAA was **not substantially authorized in law and in fact** in pursuing those charges. Accordingly, \$4,698.34 in expenses of the pilot were disallowed, but the pilot was allowed to recover from the FAA \$25,154.25.

Application of Dale L. Whittington, NTSB Order Number EA-5063 (November 10, 2003). [Mr. Whittington was represented by Mark T. McDermott, Esq. of Washington, D.C.]

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The author and his staff would like to wish each one of you a very happy holiday season, with best wishes for a happy and prosperous New Year!

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Note: All photographs of activities or persons in China are reprinted courtesy of the Sino-American Aviation Heritage Foundation. Visit its website at www.sino-am.com.

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