FLIGHT-WATCH

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Alan Armstrong standing in front of the replica Japanese "Kate" bomber owned by Japanese Bomber, LLC, in which Alan is member. Photograph courtesy of Charles Burcher.

OVERCOMING THE ADMINISTRATOR'S "EMERGENCY" CHARACTERIZATION IN AVIATION ENFORCEMENT PROCEEDINGS

By: Alan Armstrong*

I.

INTRODUCTION

The ability of the Federal Aviation Administration ("FAA" or "agency") to declare an "emergency" exists has a profound impact on the airman's ability to mount a meaningful defense in aviation enforcement litigation. It is not uncommon for the legal practitioner undertaking the defense of an airman to view the "emergency" characterization with suspicion. If the agency has been aware of the airman's alleged conduct for some time and has allowed him to continue flying, and if the agency completed its investigation months before taking certificate action, why does an emergency suddenly exist?

Almost without exception, the agency has an information advantage over the airman. This dynamic is multiplied in its effect on the airman and his counsel in "emergency" proceedings. Cynics may argue the agency acts with stealth and cunning to enjoy the element of surprise. With respect to surprise as a weapon, the following has been written:

> Surprise, therefore, becomes the means to gain superiority, but because of its psychological effect, it should also be considered as an independent element. Whenever it is achieved on a grand scale, it confuses the enemy and lowers his morale…
>
> (Carl Von Clausewitz, *On War*, Princeton: Princeton University Press, 1976, p. 198.)

This paper will briefly review the present status of National Transportation Safety Board ("NTSB") decisions in those cases where the airman was successful in challenging the agency's "emergency" characterization in proceedings revoking the airman's certificates.

II.

THE STATUTORY AND REGULATORY CONTEXT

A. STATUTORY AUTHORITY

The agency is authorized to initiate action suspending or modifying an airman's certificate. 49 U.S.C. § 44709(b)(A). If the proceedings brought against the airman are not characterized by the agency as being an emergency, then the filing of an appeal by the airman with the NTSB stays the effectiveness of the order either suspending or revoking the airman's certificate. 49 U.S.C. § 44709(e)(1). However, if the Administrator characterizes the enforcement action as involving an emergency, then the action revoking the airman's certificate takes effect immediately. 49 U.S.C. § 44709(e)(2). The NTSB is charged with making the final disposition of an emergency case within sixty days after the airman appeals. 49 U.S.C. § 44709(e)(4).

On April 5, 2000, Section 716 of the Aviation Investment Reform Act for the 21st Century was enacted into law. That statute conferred upon the NTSB the authority to review the agency's emergency determinations in certificate action cases. An airman who would challenge the agency's contention that an emergency exists must file an emergency challenge petition with the NTSB within 48 hours after the emergency order is received. 49 U.S.C. § 44709(e)(3). "If the Board finds that an emergency does not exist that requires the immediate application of the order in the interest of safety in air commerce or air transportation, the order shall be stayed…" *Id.* By statute, the NTSB must dispose of an emergency challenge petition within five days after it is filed. *Id.*

B. NTSB PROCEDURES

While an appeal from an FAA emergency order must generally be filed within ten days (49 C.F.R. § 821.53(a)), a petition challenging the emergency designation made by the Administrator must be filed with the Board "within two days after the date of receipt of an emergency…order…" 49 C.F.R. § 821.54(a). The filing of a petition challenging the emergency designation made by the agency will also be deemed as the filing of an appeal. *Id.* When filing a petition challenging the agency's designation of an emergency, the airman must attach a copy of the emergency order to his petition. 49 C.F.R. § 821.54(b). Although it is not necessary, an airman challenging the emergency characterization of the agency "may also enumerate the respondent's reasons for believing that the Administrator's emergency determination is not warranted in the interest of aviation safety." *Id.* The petition must be filed by overnight delivery service or via facsimile transmission and be simultaneously served upon the agency by the same means. *Id.* The agency has two days to serve a reply to the airman's emergency challenge petition. 49 C.F.R. § 821.54(c). Unless the case has been assigned to a law judge, the chief law judge of the NTSB will render a decision on the emergency challenge petition within five days after receipt. 49 C.F.R. § 821.54(e). In rendering a decision, the Chief Law Judge must determine whether the Administrator's emergency determination was appropriate under the circumstances, in that it supports a finding that aviation safety would likely be compromised by a stay of the effectiveness of the order during the pendency of the respondent's appeal. 49 C.F.R. § 821.54(e).

In rendering his decision, the chief judge shall assume the truth of the factual allegations made by the Administrator. *Id.* If the law judge grants the airman's petition, the effectiveness of the Administrator's order is stayed until the final disposition of the respondent's appeal. 49. C.F.R. § 821.54(f). The law judge's ruling on the emergency challenge petition is final and is not appealable to the Board. *Id.* In the event of an appeal to the Board on the merits of the FAA's order, the Board may note its views with reference to the judge's ruling on the emergency challenge petition, and the expression of these views shall serve as binding precedent. *Id.*

Because emergency enforcement proceedings must be fully adjudicated within sixty days from the date the airman files his appeal, there is an accelerated adjudication schedule, and no motions to dismiss or motions for more definite statement are allowed. 49 C.F.R. § 821.55(a),(b),(c),(d). A notice of hearing will be issued within three days of the Board's receipt of the agency's complaint. 49 C.F.R. § 821.56(a). A party dissatisfied with the initial decision of the law judge must file its appeal within two days of the date of the initial decision and must perfect the appeal by filing a brief in support of the appeal within five days thereafter. 49 C.F.R. § 821.57(a),(b). All briefs to the Board in emergency enforcement cases must be served by overnight delivery service or via facsimile transmission confirmed by first class mail delivery. 49 C.F.R. § 821.57(b).

Petitions for rehearing are not allowed in emergency enforcement cases unless new matters are presented in any such petition. 49 C.F.R. § 821.57(d)(1),(2), (3).

III.

A REVIEW OF SEVEN NTSB RULINGS BY THE CHIEF JUDGE

A. FOUR REASONS FOR OVERTURNING THE EMERGENCY DESIGNATION

There are seven decisions rendered by William E. Fowler, Jr., Chief NTSB Law Judge, granting emergency challenge petitions. In essence, there have been four reasons given by Judge Fowler for sustaining emergency challenge petitions, to wit: (1) the agency's delay in pursuing the action is inconsistent with its characterization of the case as involving an emergency; (2) the agency's sanction of revocation is excessive in the circumstances; (3) the conduct complained of by the airman must have a reasonable relationship to his certificate; and (4) just because a falsification issue is presented does not mean the agency's characterization of the case as involving an emergency will be sustained.

B. THE ADMINISTRATOR'S DELAY BELIES THE EMERGENCY CHARACTERIZATION

Administrator v. Bishop (NTSB Docket Number SE-16400, Order Granting Respondent's Petition Challenging Administrator's Emergency Determination (September 14, 2001)), involved contentions that a pilot flew a De Havilland DHC-3 aircraft over its gross operational weight with twenty parachutists aboard, with modifications to the interior of the aircraft that had not been approved by the Administrator, and claims that the aircraft's maintenance records did not reflect these modifications. *Id*. The agency also claimed that the aircraft had not been approved for a return to service, that the airman failed to familiarize himself with all available information, such as weight and balance considerations, before flying the aircraft, and that the flight of the aircraft terminated in an off-airport landing, causing substantial damage to the aircraft and injury to several occupants. *Id.* It was further alleged that the airman refused to present his certificates to law enforcement personnel, that that aircraft was not airworthy, and that the airman had operated the aircraft in a careless or reckless manner. *Id*. While the date of the accident was March 31, 2001, and the agency had completed its investigation by June 15, 2001, the agency did not serve its emergency order of revocation until September 6, 2001 (eighty-three days after the completion of the investigation).

Chief Judge Fowler granted the emergency challenge petition and declared:

> Such a delay of 83 days between the completion of the Administrator's investigation and the initiation of a certificate action against respondent here – for which the Administrator provides no adequate explanation – during which time respondent was (presumably with the knowledge of FAA officials) still performing a considerable number of sky-diving flights, belies the existence of an emergency. The Administrator has not shown that there is an on-going threat to public safety which must be ameliorated by grounding respondent during the pendency of his appeal, and it does not, from the allegations of her order, appear that she cannot rely upon him to be truthful to respect to any safety-sensitive matters to which he may be required to attest while his appeal is pending if the effectiveness of her Order is stayed. (*Id.*, at 4).

Arguably, there was more involved in Chief Judge Fowler's decision than the agency's delay. The violations, although serious, reflected an honest mistake or act of negligence. Chief Judge Fowler apparently surmised that the sanction sought was disproportionate to the alleged charges, and there was no imminent threat to air safety.

Bishop was decided before the Board adopted its Final Rule dealing with the NTSB's function in determining whether the FAA's emergency characterization is authorized. (See 68 Fed. Reg. 22623 (April 29, 2003), where the Final Rule is published.) In adopting its Final Rule, the Board

noted that examining the FAA's determination in the context of an abuse of discretion standard (as was prescribed in the Board's Interim Rule) "is more deferential to the Administrator's emergency determination judgment than is warranted under our new authority…" (*Id.* At 22624.) However, in adopting its Final Rule, the Board noted:

> …[W]e will entrust to the sound judgment and discretion of the law judge the task, and somber responsibility, of determining in each specific case whether the Administrator's emergency determination was appropriate under the circumstances. *Id.*

It appears that the holding in *Bishop* has not been compromised by the Board's adoption of the Final Rule, with the caveat that the initial decision of the Board's administrative law judge is not binding precedent. On the other hand, the practitioner should be mindful of the following language found in the preamble of the Board's Final Rule governing emergency determinations:

> …[A]n arguably dilatory prosecution does not vitiate an otherwise proper judgment as to the necessity, in the interest of aviation safety, for the immediate effectiveness of an action against a certificate before the certificate holder's appeal is adjudicated. (*Id*. at 22624, 22625.)

C. REVOCATION AS AN EXCESSIVE SANCTION

Two cases suggest that if the sanction of revocation sought by the Administrator is inconsistent with NTSB precedent, the airman may well succeed in his emergency challenge petition. The first case is *Administrator v. McCarty* (NTSB Docket Number, SE-16839, Order Granting Respondent's Petition Challenging Administrator's Emergency Determination (March 26, 2003)). *McCarty* involved a mechanic who had overhauled an aircraft engine on July 3, 1995, and nothing untoward was noticed about the engine until nearly seven years later, on June 28, 2002. According to the agency's order, the engine evidenced very serious problems and had been assembled using the wrong connecting rods. It was also alleged that the engine had not been disassembled during this seven-year period. Allegations concerning the allegedly improperly assembled engine were stated in count one of the agency's emergency order of revocation. Count two dealt with the installation of an auxiliary fuel tank in a Piper PA44-180, where the agency claimed aircraft grade fuel hoses were not employed, no FAA Form 337 had been completed, and no entry had been made in the aircraft's logbooks.

The airman maintained that the allegations made in count one were seven years old, and the appropriate sanction should be a remedial suspension order, rather than a punitive revocation order. With regard to count two, the airman maintained there had been a five-and-a-half month delay after discovery of issues with the auxiliary fuel tank system, and this delay belied the FAA's characterization of the case as involving an emergency.

The agency claimed the totality of the circumstances, coupled with airman's previous violation history (no specifics were given) justified the emergency designation. Judge Fowler granted the airman's emergency challenge petition. While he rejected the airman's argument that a five-and-a-half-month delay with regard to count two of the emergency order of revocation belied the emergency contention, he nevertheless sustained the petition, declaring:

> Nevertheless, it does not seem to the undersigned that the acts and omissions alleged by the Administrator in her order represent such an immediate or ongoing threat to public safety as to warrant the deprivation of Respondent's use of his mechanic's certificate during the pendency of his appeal of that order. The order alleges that respondent performed substandard mechanical work on two separate aircraft, more than seven years apart. Without more, this does not present an imminent or ongoing public safety hazard. There are no allegations that cast doubt on respondent's trustworthiness, and while the Administrator has duly noted that the

> totality of the acts and omissions alleged in her two counts may well – if they are all proven at the hearing in this matter – justify the revocation of respondent's mechanic's certificate, she has admitted in her reply that none of the violations alleged is so egregious as to independently support a revocation. The Administrator's bald reference to an enforcement violation history on respondent's part does not mention the nature of any past violation (s) he was found to have committed or indicate how recently such violation(s) occurred. Absent such information, the undersigned is unable to conclude that respondent's violation history, in combination with violations alleged herein, shows that he represents an immediate or ongoing threat to air safety which must be ameliorated by depriving him of his certificate privileges while the merits of the Administrator's charges are litigated. (*Id*., at 5-6.)

Administrator v. Cameron (NTSB Docket Number: SE-17073, Order Granting Respondent's Petition Challenging Administrator's Emergency Determination (April 7, 2004)), involved an airman who had three driving under the influence convictions, one of which had apparently been reported (and two of which apparently had not been reported) to the FAA Civil Aviation Security Division. The allegations against the airman were that he had failed to report two of his driving under the influence convictions to the Civil Aviation Security Division as required by 14 C.F.R. § 61.15(e), and he had more than one motor vehicle accident occurring within a period of three years, contrary to 14 C.F.R. § 61.15 (d).

While the agency maintained that the conduct of the airman presented a threat to air safety, Judge Fowler, after conducting a rather extensive analysis of NTSB precedent concluded that a revocation of the airman's certificates for these violations was excessive. He therefore declared:

> It does not, therefore, appear to be the norm in cases of this nature for either the Administrator or the Board to impose the sanction of revocation on an airman for either an initial failure to report an alcohol or drug-related motor vehicle accident, or the existence of two or three such motor vehicle accidents within a three-year period, or both, absent an additional aggravating factor, such as a prior Section 61.15(e) violation history. (*Id.*, at 4.)

D. THE CONDUCT COMPLAINED OF MUST HAVE A REASONABLE RELATION TO A CERTIFICATE AGAINST WHICH EMERGENCY ACTION IS TAKEN

Two decisions rendered by Chief Judge Fowler illustrate that the agency may, on occasion, take emergency action against a certificate when the conduct of the certificate holder does not present an emergency threat to air safety insofar as that certificate is concerned. The first case, *Administrator v. Surrell* (NTSB Docket Number: SE-17214, Order Granting Respondent's Petition Challenging Administrator's Emergency Determination Insofar As It Relates To His Mechanic Certificate (October 22, 2004)), involved an airman who had allegedly operated an aircraft under the influence of alcohol. The airman was also a licensed aircraft mechanic. The agency took emergency action against (1) his private pilot certificate, (2) his medical certificate, and (3) his aircraft and power plant certificate. The airman did not challenge the emergency action in relation either to his private pilot certificate or his medical certificate. He contended:

> The Administrator has wholly failed to demonstrate any basis for her conclusion that Respondent's continued exercise of his mechanic's privileges (sic) will compromise aviation safety in any manner. (*Id.*, at 3.)

All Chief Judge Fowler had before him was a single instance of alleged flying under the influence of alcohol. There was no allegation made by the FAA that the airman habitually abused drugs or alcohol or ever worked as an aircraft mechanic while intoxicated. Chief Judge Fowler granted the emergency challenge petition insofar as the airman's aircraft and power plant certificate was concerned, reasoning that the allegation that he had operated an aircraft under the influence was not reasonably related to his compe-

tence or potential threat to air safety as an aircraft mechanic. *Id.*, at 4.

Administrator v. D'Onofrio (NTSB Docket Number: SE-17349, Order Granting Respondent's Petition Challenging Administrator's Emergency Determination Insofar As It Relates To His Ground Instructor Certificate (March 31, 2005)) involved an airman who had allegedly undergone psychiatric treatment for hallucinations and visual distortions, and he was on medication for bipolar disorder. The Administrator brought an emergency order of revocation with respect to his commercial pilot, flight instructor, airman medical, and ground instructor certificates. The airman challenged the emergency designation with respect to his ground instructor certificate. Chief Judge Fowler sustained the emergency challenge petition, noting:

> However, insofar as Respondent's ground instructor certificate is concerned here, it must be noted that there is no requirement in the FARs that the holder of a ground instructor certificate also hold a medical certificate… (*Id.*, at 4.)

E. AN ALLEGATION OF FALSIFICATION IS NOT AUTOMATICALLY AN EMERGENCY

The agency typically justifies employing emergency authority relying upon Appendix 4 to FAA Order 2150.3A, the Sanction Guidance Table, which states that falsification of documents results in revocation of the airman's certificate. However, not every falsification presents an emergency to air safety.

In *Administrator v. Kyle (*NTSB Docket Number: SE-117410, Order Granting Respondent's Petition Challenging Administrator's Emergency Determination (June 9, 2005)), the airman had accomplished an inspection on an aircraft. However, documentation concerning this inspection was, allegedly, altered to make it appear that the inspection was accomplished 5.6 flying hours earlier than the time at which the inspection was actually accomplished. The FAA maintained that the airman had falsified aircraft records and sought an emergency revocation of his aircraft and power plant certificate. Chief Judge Fowler granted the emergency challenge petition and made the following observations:

> While the wisdom of respondent's actions in purportedly falsifying a maintenance logbook entry to reflect the timely performance of the required maintenance may well be subject to serious question, it is, nevertheless, the case that the falsification at issue is not alleged to have been made in an attempt to either document work that was never accomplished or to cover up substandard work; that respondent allegedly understated the TAT (total aircraft time) of the performance of the subject maintenance by only 5.6 hours, and only exceeded the maximum TAT for accomplishing such maintenance by one hour; and that the alleged falsification did not go to the integrity of the certification process. The undersigned does not, therefore, believe that the falsification with which respondent has been charged is of a type that represents an immediate threat to the public interest and air safety. (*Id.*, at 3.)

Further, referencing the Board's Preamble to the Final Rule governing its review of the FAA's emergency determinations, Judge Fowler wrote:

> …[T]he Board indicated that not all alleged falsifications demand the immediate imposition of a sanction before the charges against an accused certificate holder have been fully adjudicated…(*Id.* Judge Fowler referenced 68 Fed. Reg. at 22624.)

Administrator v. Fahning (NTSB Docket Number: SE-16982, Order Granting Respondent's Petition Challenging Administrator's Emergency Determination (October 24, 2003)) contains logic similar to that expressed by Chief Judge Fowler in *Kyle*. In *Fahning*, it was alleged that the airman had falsified maintenance records and had flown an aircraft that was out-of-annual. The airman, in his appeal and emergency challenge petition, maintained that the inspections in issue had been accomplished and that he merely back-dated the certification to the date on which the inspections had been achieved, because the

aircraft's records had been misplaced. Chief Judge Fowler granted the airman's emergency challenge petition, observing:

> In light of this, the undersigned does not believe that Respondent's alleged falsification actions represent an immediate threat to the public interest in air safety. (*Id.* at 5.)

IV.

STATISTICAL DATA

One might wonder about the number of emergency challenge petitions which have been filed with the NTSB, as well as the disposition by the Chief Judge with respect to those challenge petitions. The data may be categorized for three periods: (1) decisions rendered after the effective date of the legislation giving the Board authority to review the FAA's emergency determinations, but before its adoption of the Interim Rule (April 5, 2000, through July 10, 2000); (2) decisions rendered under the Interim Rule (July 11, 2000, through June 29, 2003); and (3) decisions rendered since the adoption of the Final Rule (June 30, 2003, through September 30, 2005. The cutoff date of September 30, 2005, is an arbitrary date selected for the purposes of this article.)

During the pre-Rule period, there were no grants of emergency challenge petitions, six denials, and one was dismissed. During the period of the Interim Rule, there were two grants of emergency challenge petitions, ninety denials, and sixty were dismissed. Also during this period, there were two orders terminating proceedings prior to decision. For example, an order terminating proceeding prior to decision might be appropriate in the event the case settled, or the petition or appeal was withdrawn. Following the adoption of the Final Rule, there have been five grants of emergency challenge petitions, forty-seven denials, thirteen dismissals, and four orders terminating proceedings prior to decision.

While it may appear that the number of dismissals was substantially higher during the period of the Interim Rule as compared to that after the adoption of the Final Rule, several comments are in order. The duration of the period of the Interim Rule is longer than the duration of time from the adoption of the Final Rule to September 30, 2005, the arbitrary cutoff date selected for purposes of this article. Secondly, the Interim Rule required that the person filing an emergency challenge petition provide the reason(s) for the challenge to the FAA's determination of an emergency. The Final Rule does not impose such a burden on the respondent. Because of this, and because the Final Rule only gives the FAA the opportunity to reply to the petition where the petition gives the reasons for the challenge, the FAA began, as a matter of course, to inform the airmen of the reason(s) for its emergency determination in its emergency order. Articulating a reason for the "emergency" may have resulted in respondents filing fewer emergency challenge petitions, since they may understand or appreciate the nature of the emergency advanced by the agency.

V.

CONCLUSION

The Board's authority to make a determination with respect to whether or not the agency has abused its discretion in claiming an airman represents a threat to air safety necessitating that the case be handled as an emergency is of recent origin. The seven cases discussed in this paper are the only ones known to the author to have resulted in a successful challenge to all or a portion of the agency's emergency determinations. As the agency continues to initiate emergency certificate actions against airmen, and as emergency challenge petitions are filed, more decisions may be rendered by the Board's Chief Administrative Law Judge which could illustrate the circumstances in which the agency has gone too far in claiming an airman represents a threat to air safety in any particular instance.

In looking toward the future, some predictions and suggestions may be in order. First, the grant of an emergency challenge petition will continue to be the exception, not the rule. Secondly, while the FAA may, on occasion, exhibit an inordinate delay in pursuing certificate action as an emergency, the delay, alone, may not be enough to overcome an emergency designation without additional factors, such as a mere negligent omission by the airman or certificate-holder and/or a realization that the sanction of revocation sought by the FAA is excessive in the circumstances. Third, there must be a reasonable nexus between the conduct in issue and the certificate held by the airman or respondent. Finally, any facts or circumstances

which may indicate that the actions of the airman or certificate-holder are more innocent than those portrayed by the agency may persuade the chief law judge of the NTSB to overturn the emergency characterization.

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