FLIGHT-WATCH

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COURT OF APPEALS DECISION DEMONSTRATES THE NTSB IS CONSISTENT – IT CONSISTENTLY MISAPPLIES ITS OWN RULES

I.
VARIATION ON A COMMON THEME

Great composures will introduce a theme and then repetitively employ variations of that theme throughout the course of a musical composition. The reinforcement of a repetitive theme was used to great effect in the First Movement of Beethoven's Fifth Symphony. Just like great musical composers, the National Transportation Safety Board by and through a body of law is developing a theme as well. The theme that the NTSB is developing is that it does not understand its own rules and consistently misapplies them. Only when the airman has the economic resources to challenge the fallacies in the logic of the NTSB is this theme developed in a body law decided by the courts. One such case is *Michael George Manin v. National Transportation Safety Board and Federal Aviation Administration*, U.S. Court of Appeals for the District of Columbia, Case No. 09-1157.

II.
THE UNDERLYING FACTS IN MANIN

Michael Manin held an airline transport pilot certificate and had a 1992 conviction for making a false statement on a passport application. Following his conviction, Mr. Manin failed to disclose in response to question 18(w) on the medical form the existence of the conviction. Question 18(w) on the form requests information concerning a "[h]istory of non-traffic conviction(s) (misdemeanors or felonies)." Manin requalified as an airman following the 1994 revocation of his certificates. On December 14, 1995, Manin was convicted in the Barberton, Ohio Municipal Court of disorderly conduct. The conviction was classified as a "minor misdemeanor" under Barberton's Municipal Code.

Manin applied for a medical certificate on June 1, 1996, and gave an affirmative response to question 18(w) concerning convictions and then wrote "previously reported, no change." Apparently, this affirmative response to question 18(w) on the 1996 medical form concerned the 1992 conviction of making a false statement on a passport application. Furthermore, there is no indication that the affirmative response to question 18(w) on the form in 1996 was a disclosure of the 1995 minor misdemeanor conviction. While we are contemplating repetitive themes, on April 8, 1997, Manin was again convicted in the Barberton Municipal Court for the minor misdemeanor of disorderly conduct. On each and every one of his subsequent medical certificate applications, Manin failed to disclose either his 1995 or his 1997 conviction in the Barberton Municipal Court.

In late 2007, the FAA discovered Manin's two disorderly conduct convictions. On June 20, 2008 (more than six months after the FAA became aware of the convictions), it issued an emergency order of revocation of Manin's airman certificate and medical certificate alleging multiple falsifications on the airman medical form in violation of 14 C.F.R. § 67.403.

III.
MANIN'S TWO DEFENSES – STALE COMPLAINT AND LACHES

Manin asserted two separate and distinct defenses in responding to the charges brought against him by the FAA. The first defense was rather obvious. It was the stale complaint rule. The FAA had known about the convictions in late 2007 but waited until June 20, 2008 to take action. Under 49 C.F.R. § 821.33, the complaint is stale if it "states allegations of offenses which occurred more than six months prior to the Administrator's advising the Respondent as to reasons for the proposed action."

The other defense advanced by Manin was the doctrine of laches. Laches is an equitable defense that applies where there has been a lack of diligence on the part of the party with the burden of proof and where the responding party will suffer prejudice. Prejudice can take the form of absence of witnesses, fading memories and/or the lack of available documents to ascertain the truth. In *Manin*, there was the passage of time of twelve years from the first conviction and ten years from the second conviction that were in issue.

IV.
THE INITIAL DECISION & THE BOARD'S DECISION

As has become very commonplace, the FAA brought a motion for summary judgment before trial. Frequently, the FAA will place into the record the initial conviction and compare it to the negative response on the medical application form and argue that the airman must have known his statement was false. The problem with this approach is that it employs supposition about what the airman must have known or should have known. Since the burden of proof is on the FAA to prove there was (1) a false representation (2) in reference to a material fact (3) made with knowledge of its falsity. *Singleton v. Babbitt*, 588 F.3d 1078, 1082 (D.C. Cir. 2009), Board precedent requires

inquiry into the airman's understanding of what information the question was intended to elicit. *Administrator v. Reynolds*, NTSB Order No. EA-5135, 2005 WL1965235 at 4-5 (January 24, 2005).

While both parties in the case had filed cross-motions for summary judgment and the administrative law judge (ALJ) had denied both motions, when the case was called to trial, the FAA renewed its motion for summary judgment which the ALJ granted.

The NTSB affirmed the grant of summary judgment to the FAA stating that in doing so it had "long held that the doctrine of laches is relevant to Board cases only in the context of the stale complaint rule." *Administrator v. Manin*, NTSB Order No. EA-5430, 2008 WL5972912 at 3 (April 13, 2009). The Board, in what can only be characterized as a remarkable ignorance of its own rules, found that Manin's intent in terms of his interpretation of the medical certificate question was not "relevant" to a determination of intentional falsification. *Id* at 4.

V.
MANIN CHALLENGES THE BOARD'S DECISION AS ARBITRARY AND CAPRICIOUS

Following the decision of the NTSB that Manin's intent was not relevant, he filed an appeal with the United States Court of Appeals for the District of Columbia arguing that the decision of the NTSB was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law" under 5 U.S.C. § 706(2)(A). The D.C. Circuit Court of Appeals alertly noted that there was a distinction between the stale complaint rule and the doctrine of laches. In fact, the FAA even acknowledged that the Board's statement of the law in disposing of Manin's case was wrong as illustrated by the following language in the Court's decision:

> As the FAA now acknowledges, the Board's statement describing the "long held" limitation on the applicability of the doctrine of laches was simply not accurate. Board case law establishes that the laches defense may be available even when the stale complaint rule is inapplicable. "The Board has indicated on several occasions that, notwithstanding the fact that a complaint may survive dismissal under the stale complaint rule, it might still be subject to attack if an airman could establish actual prejudice in his defense which is attributable to the Administrator's delay." *Adm'r v. Wells*, 7 NTSB 1247, 1249 (1991); *see* also *Adm'r v. Peterson*, 6 NTSB 1306, 2307 n. 8 (1989). In stating the contrary and failing to offer any explanation for its departure from its own precedent, the NTSB acted arbitrarily and capriciously. *See Ramaprakash v. FAA*, 346 F.3d 1121, 1124 (D.C. Cir. 2003). ("Agencies are free to change course as their expertise may suggest or require, but when they do so they must provide a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored" (internal quotation marks omitted)).

The FAA tried to prevail on the appeal by arguing that the Board's misconduct was harmless error, but the Court of Appeals refused to take the bait noting: "but, with limited exception, the law does not allow us to affirm an agency decision on a ground other than that relied upon by the agency." In other words, the NTSB incorrectly found that the doctrine of laches was only applicable in the context of a stale complaint rule challenge, and the D.C. Circuit Court of Appeals refused to ratify an incorrect statement of the law noting:

> Because the NTSB incorrectly construed its own case law as allowing consideration of a laches defense only in the context of the stale complaint rule and rejected Manin's assertion of laches on that basis, we remand to the agency for reconsideration of Manin's defense. We reiterate that we are not suggesting that the Board could not have properly reached the same conclusion on a different basis, only that we cannot accept that basis as a *post hoc* justification when the reason offered by the Board does not withstand review.

Manin also defended the case of the merits maintaining he lacked the requisite knowledge of falsity. As noted earlier, there are three elements to a false statement charge, to wit: (1) a false representation (2) in reference to a material fact (3) made with knowledge of its falsity. Manin maintained that it was his belief that the two convictions were minor summary offenses he was not required to disclose in response to question 18(w). Both the ALJ and the NTSB rejected that defense. In fact, the NTSB declared that it had "previously rejected a Respondent's own interpretation of the requirements of a medical certificate." *Manin*, 2008 WL 5972912, at 4.

In discussing several related cases, the District of Columbia Court of Appeals noted the absurdity of the Board's position:

> After the Board issued its opinion, we decided two cases emphasizing that, under Board law, "a pilot's understanding of a question is not irrelevant to whether he offered an intentionally false answer under § 67.403(a)(1)." *Singleton*, 588 F.3d at 1082; *see also Dillmon* v. *NTSB,* 588 F.3d 1085, 1093-94 (D.C. Cir. 2009). In *Dillmon* and *Singleton* decided the same day, we stressed that the FAA is required to prove not only that an airman knew that he had been convicted of an offense in the past, but also that he knew that he was required to report that offense in his response to question 18(w). *See Dillmon*, 588 F.3d at 1093-94; *Singleton*, 588 F.3d at 1082. In other words, the FAA must "prove the airman subjectively understood what the question meant." *Dillmon*, 588 F.3d at 1094. Our analysis in these cases drew on the Board's own interpretation of the intent element of intentional falsification. *See Id.* As we noted, the Board declared in *Adm'r v. Reynolds*, that a that a determination of whether the intent element had been met "necessarily hinged on Respondent's understanding of what information the question was intended to elicit." *Id.* (quoting *Adm'r v. Reynolds*, NTSB Order No. EA-5135, 2005 WL 1967535, at 4-6 (Jan. 24, 2005)).

> "Having announced this interpretation of the intent element in *Reynolds*, the Board was obligated to apply it consistently." *Id*. It did not do so in Manin's case, instead treating Manin's subjective understanding of the requirements of question 18(w) as irrelevant.

VI.
CONCLUSION

The NTSB made two separate and distinct mistakes in deciding the appeal of *Manin*. First, it confused the doctrine of laches with a stale complaint defense. Secondly, it maintained that the subjective intent of an airman was not relevant in a case where the FAA had the burden of proving that the airman gave an intentionally false statement in responding to a question on the medical application form.

The Board, having misapplied the law in *Ramaprakash, Dillmon* and *Singleton* and now in *Manin* is continuing to voice a common theme, and the theme is that the NTSB does not understand and cannot properly apply its own body of law. Kathleen Yodice, Esq. of Washington, D.C. represented Manin.