

## WHAT DO I DO IF I HAVE BUSTED MY ALTITUDE?

If you think you busted your altitude and this was detected by ATC, this would be a good time to consider filing an Aviation Safety Report with NASA. The NASA Report will not keep you from having a violation on your record, but it will very likely result in a waiver of sanction, even if you are found to be guilty of an FAR infraction.

The second thing to consider is getting all data that pertains to the incident. All data means the radar plots; the NTAP data; the voicetapes of radiotelephone communications between ATC, your aircraft, and all other aircraft at the time of the alleged deviation; the preliminary pilot deviation report /operational error report; and the final pilot deviation report /operational error report. It is important at this point in the discussion to note that if there has been a loss of separation between aircraft, it will either be categorized as a pilot deviation (the pilot's fault) or an ATC operational error (ATC's fault). The air traffic control system generally works fairly well until there is a loss of separation. Then everyone runs for cover. My experience has been that sometimes ATC tries to blame its mistakes on the pilots. In other words, what should have been classified as an operational error is characterized as a pilot deviation to get ATC off the hook. My experience has also been that even if there is a pilot deviation, it is not uncommon to find some ATC complicity in terms of improper phraseology or the failure to correct an incorrect clearance read back by the pilot.

While the air traffic control environment is generally a cooperative community where pilots and controllers work together, if there is a loss of separation, someone has to take the blame. A loss of separation in an altitude bust case is generally detected by "snitch." Snitch is computer software that works in conjunction with the other equipment employed by the controller. If two aircraft are in the vicinity of each other [with 1,000 feet of vertical separation] and the aircraft at the lower altitude deviates upward by more than 200 feet, and there is a loss of separation of 80% or more, an alarm goes off at the controller's work station which is called a "conflict alert." When a conflict alert goes off, someone is going to take a hit. The controller is removed from his or her work station and interrogated. He or she fills out a written statement, and a preliminary pilot deviation report or operational error report is supposed to be transmitted from the facility to Washington within one hour.

According to FAA Notice N7210.251 effective February 14, 1985, ATC is supposed to give the pilot the following warning if a pilot deviation is occurred:

(AIRCRAFT IDENT.) POSSIBLE ALTITUDE (OR OTHER)  
DEVIATION AT (TIME) AT (ALTITUDE). YOU MAY  
CALL (NAME OF FACILITY) QUALITY ASSURANCE  
OFFICE (PHONE NUMBER) DURING ADMINISTRATIVE  
HOURS FOR ADDITIONAL INFORMATION.

It has further been my experience that ATC rarely gives this warning. What happens if ATC fails to give the warning? If ATC fails to give the warning, the pilot may have a defense very much like the filing of an Aviation Safety Report with NASA. In Administrator v.

Brasher, 5 NTSB 2116 (1987), the failure of ATC to give the pilot a warning resulted in the pilot having a violation, that the sanction was waived. So, if ATC did not give you the appropriate warning, you may have a defense in terms of a waiver of sanction. On the other hand, if the controller failed to give you this warning, the FAA will argue that he was too busy to do so. The Agency argues that the obligation to give this warning is only “workload permitting.”

As I mentioned earlier, the relationship between pilots and controllers is generally one of cooperation until a conflict alert goes off. When lawyers are called upon to defend pilots who are alleged to have busted their altitudes or to have deviated from their assigned clearances or instructions, one may wish to consider whether or not the instructions of the controller were ambiguous. In Administrator v. Smith, 3 NSTB 85 (1977), the controller instructed the aircraft to join V-244 which had two components. The controller did not say which component the aircraft was to join. The flightcrew by-passed the first component of V-244 and flew to the second component. Because the controller did not specify which portion of the airway the aircraft was cleared to, the FAA could not prove a violation of the FARs. By the same token, in Administrator v. O’Brien, NTSB Order No. EA-4000 (Oct. 28, 1993), the NTSB reversed the law judge who found violations of the Federal Aviation Regulations where the pilots were repeatedly told to expect one runway and then given a clearance to land on a different runway at the very last moment. These actions by ATC were found to be ATC complicity that justified exoneration of the flightcrew.

The regulations the FAA will claim were violated in a typical altitude bust case are FAR § 91.123(a) [deviating from an ATC clearance], or FAR § 91.123(b) [deviating from an ATC instruction], and FAR § 91.13(a) [careless or reckless operation of an aircraft while engaged in air navigation].

It is an unfortunate reality that this kind of litigation requires the pilot’s lawyer to focus his attention on things ATC did wrong or may have done wrong. Was the controller working two airplanes with very similar call signs? Did the controller alert these aircraft to the similar call signs before one aircraft complied with an instruction issued to the other aircraft? It is also important to note that the FAA has undertaken to overturn a substantial body of case law developed by the NTSB over the years which holds that in the event of a pilot deviation, if the air traffic controller was the last person in the chain of safety to be in a position to prevent the deviation, even if the pilot misread the clearance or read the clearance back incorrectly, the pilot should still be exonerated. In this regard, see the FAA’s Interpretive Rule entitled “Pilot Responsibility for Compliance with Air Traffic Control Clearances and Instruction,” published in 64 Fed. Reg. 15192 (April 1, 1999). A discussion dealing with the struggle over responsibility for misunderstood ATC clearances or instructions appears in Volume 105 of Flightwatch, appearing on this website.

Finally, even if it is an undefendable altitude bust with no ATC complicity, if the altitude deviation was less than 500 feet, and if the pilot has no previous violation of this nature within two years of the date of the alleged deviation and unless there are aggravating circumstances in the violation the FAA is supposed to issue the pilot a letter of non-compliance

(warning letter). See FAA Compliance/Enforcement Bulletin No. 86-1 dated December 14, 1988, which appears in Appendix 1 to FAA Order 2150.3(A) dated December 14, 1988, entitled "Compliance and Enforcement Program."