

WHEN IS AN AIRCRAFT AIRWORTHY?

By: Alan Armstrong, Esq.*

I.

Scope and Focus of this Article

The purpose of this article is to educate lawyers, pilots, mechanics and aircraft owners/operators with respect to when a United States – registered aircraft is “airworthy.” As we explore this subject, we will consider the statutory and regulatory underpinnings indicating when an aircraft is airworthy as well as one FAA legal interpretation which supports the position that an aircraft need not be “perfect” in order to be airworthy.¹ In its Letter of Interpretation, the FAA has conceded that determining when an aircraft is airworthy is, in many instances, a “judgment s

Our exploration of this topic will also include decisions rendered by the National Transportation Safety Board (“NTSB” or “Board”). In a number of decisions, the Board has confirmed an aircraft need not be perfect in order to be airworthy and also demonstrates that the burden of proof is on the FAA to prove the aircraft is unairworthy. Mere speculation and opinion that an aircraft might not be airworthy is insufficient. Finally, if the airman is charged with flying an unairworthy aircraft, the burden of proof is on the FAA to prove the pilot knew or should have known the aircraft was unairworthy.

II.

Airworthiness as a Legal Concept

As we begin our inquiry as to whether an aircraft is airworthy, we should consider the fact that the regulatory definition of airworthiness is not the same as the statutory definition of airworthiness. Regulatory definition is found in 14 C.F.R. § 3.5 which provides:

Airworthy means the aircraft conforms to its *type design* and is in a condition for safe operation (italics supplied).

On the other hand, 49 U.S.C. § 44704(d) provides:

The Administrator shall issue an airworthiness certificate when the Administrator finds that the aircraft conforms to its *type certificate* and, after inspection, is in condition for safe operation (italics supplied).

While the regulatory definition of airworthiness focuses on the type design, the statute authorizing the Administrator to issue an airworthiness certificate focuses on the type certificate. When litigating airworthiness, the focus will not be merely on the type design, but on the type

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¹ Letter of Interpretation from the FAA Office of Chief Counsel to the Association of Flight Attendants, March 26, 2008, regarding Request for Interpretation of 14 C.F.R. §§ 91.7(b) and 3.5(a), 2008WL 220458 (D.O.T.) [hereinafter the “Letter of Interpretation”].

certificate which includes: “the operating limitations, the certificate data sheet, the applicable regulations of this subchapter with which the Administrator records compliance and other conditions or limitations prescribed for the product in this subchapter.”² Related to the definition of airworthiness found in the regulation and the statute is 14 C.F.R. § 91.7(b) which provides:

The pilot-in-command of a civil aircraft is responsible for determining whether that aircraft is in condition for safe flight. The pilot-in-command shall discontinue the flight when unairworthy mechanical, electrical, or structural conditions occur.

In the event an airman or aircraft operator concludes that an aircraft is airworthy and the FAA disagrees, then the airman may be the subject of enforcement action and the aircraft owner/operator may be the focus of a civil penalty action on the theory there was a violation of 14 C.F.R. § 91.7(a) which provides:

No person may operate a civil aircraft unless it is an airworthy condition.

Furthermore, the FAA may assert a derivative claim that the operation of the “unairworthy” aircraft was a careless or reckless operation prohibited by 14 C.F.R. § 91.13(a).

In addition to the foregoing statute and regulations, a number of regulations have a bearing on whether the aircraft is “airworthy.”³

III. The FAA’s Letter of Interpretation

The FAA’s Letter of Interpretation was dispatched to the Association of Flight Attendants on March 26, 2008, and it dealt with a request for an interpretation of 14 C.F.R. §§ 91.7(b) [authorizing the pilot-in-command to make a determination as to whether the aircraft is in

² 14 C.F.R. § 21.41.

³ See 14 C.F.R. §§ 91.171 [VOR equipment check for IFR operations], 91.207 [the requirement for a functioning emergency locator transmitter in the aircraft], 91.213 [providing, in limited circumstances, for flying the aircraft with inoperative instruments or equipment], 1.1 [defining aircraft maintenance], 43.13(a) [requiring persons performing maintenance use methods, techniques and practices prescribed in the current manufacturer’s maintenance manual or other methods, techniques and practices acceptable to the Administrator], 43.13(b) [the standard that requires the aircraft when returned to service conform to its original or properly altered condition], 43.3 [persons authorized to perform maintenance], 43.7 [persons authorized to return an aircraft to service after maintenance], 43.7 [persons authorized to return an aircraft to service after maintenance], 43.9 [record entries after maintenance], 43.11 [record entries after an inspection], 91.401(a) [the rules governing the maintenance of United States registered aircraft], 91.403(a) [the owner/operator is primarily responsible for maintaining the aircraft], 91.403(c) [forbidding operation of the aircraft unless mandatory replacement times and inspection intervals have been complied with], 91.403(d) [requiring the owner of the aircraft to be the holder of a supplemental type certificate if the aircraft has been altered in accordance with that STC], 91.405(a) requiring the aircraft owner to have the aircraft inspected and have discrepancies corrected between inspection intervals], 91.405(b) requiring the owner/operator to ensure that maintenance personnel made appropriate entries in the aircraft maintenance record indicating the aircraft has been approved or returned to service], 91.405(c) [requiring the owner/operator to have inoperative equipment repaired], 91.405(d) [requiring the owner/operator to ensure a placard has been installed with respect to inoperative instruments or equipment], 91.407(a)(1), (2) [forbidding the operation of an aircraft after a maintenance or preventive maintenance unless the aircraft has been returned to service and maintenance record entry has been made], 91.409(a)(1) [requiring an annual inspection of the aircraft], 91.411(a)(1) [requiring the altimeter and altitude reporting system be checked within the preceding 24 calendar months], and 91.413 [requiring that the aircraft transponder has been tested within the previous 24 calendar months].

condition for safe flight and requiring discontinuance of the flight when unairworthy mechanical, electrical, or structural conditions occur] and 3.5(a) [the regulatory definition of when an aircraft is “airworthy”]. The question before the FAA counsel in rendering the Letter of Interpretation was phrased as follows:

We interpret your request to be one that asks what type of defect would render an aircraft sufficiently unairworthy to trigger the application of § 91.7(b), such that the pilot-in-command would be required to discontinue the flight.⁴

In responding to the question, FAA Counsel cited the case of *Administrator v. Doppes*, 5 NTSB 50, 52 n.6 (1985) and, quoting from the decision in *Doppes* wrote: “In order to be airworthy, an aircraft (1) must conform to its type certificate, if and as that certificate has been modified by supplemental type certificates and by Airworthiness Directives; and (2) must be in condition for safe operation.”⁵ While noting the distinction between regulatory definition of airworthiness referencing the type design and the statutory definition referencing the type certificate, the Agency did admit that in the context of the civil penalty actions, sometimes the FAA has applied the “type design” standard as opposed to the “type certificate” standard.⁶

In responding to the question about when the pilot-in-command is required to discontinue the flight, FAA counsel declared that the response was based upon “the broader concept of airworthiness that includes compliance with the type certificate, including supplemental type certificates, and Airworthiness Directives.”⁷

In the Letter of Interpretation, the FAA counsel wrote the following about when an aircraft is airworthy:

While the statute sets forth the requirements for the issuance of an airworthiness certificate, NTSB case law has recognized the difference between a new aircraft and one that has been in service, *i.e.*, an aircraft may have accumulated a certain amount of wear and minor defects and still be considered to substantially conform to its type certificate and therefore be airworthy, if it still is in condition for safe operation. *Administrator v. Calavaero*, 5 NTSB 1099, 1101 (1986) (“However, we do not agree that every scratch, dent, ‘pinhole’ of corrosion, missing screw, or other defect, no matter how minor or where located on the aircraft, dictates the conclusion that the aircraft’s design, construction, or performance has been impaired by

⁴ Letter of Interpretation at 2.

⁵ *Id.*

⁶ *Id.*, citing In the Matter of America West Airlines, FAA Order 96-3 at 29 N. 26 and 27; In the Matter of U.S. Air, FAA Order 96-25 at 11.

⁷ *Id.* at 2.

the design defect to a degree that the aircraft no longer conforms to its type certificate.”). Important in the NTSB’s reasoning was that the FAA had not shown that “the alleged defects or discrepancies had had an adverse impact on the level of safety that an aircraft’s conformity with its type certificate is intended to insure, or to counter the substantial evidence adduced by respondent that they had not had such an impact.” *Id.* at 1101; *Administrator v. Calavaero*, 5 NTSB 1105 (1986) (quoting in part *Id.* 1101). See also *Administrator v. Frost*, NTSB Order No. EA-4680 (1998).⁸

In the Letter of Interpretation, FAA Counsel further declared that if an aircraft is operated with equipment inoperative included on an approved minimum equipment list, and then the aircraft would still conform to its type certificate.⁹ With regard to operations of air carriers, FAA counsel noted that the pilot-in-command shall insure that all mechanical irregularities occurring during a flight are entered into the maintenance log of the aircraft at the end of the flight and further, before each flight, the pilot-in-command shall ascertain the status of each irregularity entered in the log at the end of the preceding flight.¹⁰ FAA counsel further confirmed that pilots operating under Parts 21 and 135 may not allow a flight to continue toward an airport of intended landing unless the flight can be completed safely.¹¹ FAA counsel, after discussing the obligation of air carrier and air taxi pilots not to continue toward the destination airport if the flight cannot be safely completed then wrote as follows:

An airplane that has been in service for a number of years clearly is not in exactly the same condition as when it left the factory. Nevertheless, if the airplane has properly been inspected and maintained in accordance with 14 C.F.R. Parts 91 and 43, it should substantially conform to its type certificate to the extent that it will provide a level of safety that conformity with its type certificate is intended to insure. The determination of when a mechanical, electrical or structural discrepancy is sufficiently serious to render an aircraft unairworthy is, in many cases, a judgment call . . .¹²

⁸ *Id.* at 2-3.

⁹ *Id.* at 2.

¹⁰ *Id.* at 3 citing 14 C.F.R. § 121.563 and also noting a similar requirement applied to air taxi operations citing 14 C.F.R. § 135.65(b).

¹¹ *Id.* at 3 citing 14 C.F.R. §§ 121.627(a)(d), 121.557, 135.69(b), 135.19.

¹² *Id.* at 3.

IV. A Review of NTSB Precedent Concerning When an Aircraft is Airworthy

A. The FAA Must Prove the Aircraft is Unairworthy

The law is clear that the burden of proof is on the FAA in aviation enforcement proceedings.¹³ The failure of the FAA to carry its burden of proof in a case alleging an aircraft was unairworthy is illustrated in *Administrator v. Van der Horst*.¹⁴ In *Van der Horst*, the FAA brought an action to suspend the airman's certificate for 180-days contending violations of 14 CFR §§ 91.7(a) [operating an aircraft in an unairworthy condition] and 91.13(a) [operating an aircraft in a careless or reckless manner].¹⁵ The balloon had suffered a burn hole extending vertically 102 inches from the throat and was 129 inches wide. There was no damage above the first four meters of the balloon envelope.¹⁶

Two FAA inspectors testified that the respondent could not have adequately inspected the condition of the load tapes prior to his flight since the distance at which respondent viewed the balloon (20 feet) from the balloon basket was too great for an effective inspection.¹⁷ On the other hand, respondent testified that he had held a commercial certificate with a balloon rating since 1974 and had accumulated 3,700 hours of flight time in balloons.¹⁸

The respondent testified that after the burn, he determined there was no damage to the load tapes.¹⁹ Further, the respondent presented the testimony of Brent Stockwell, an experienced balloon pilot and FAA designated examiner; and Mr. Stockwell, in reviewing photographs of the balloon, declared that the balloon was airworthy and that respondent could have adequately assessed the condition of the load tapes in the balloon basket twenty feet below the envelope.²⁰

The law judge found the FAA had failed to prove a violation of § 91.7(a) because no one had inspected the load tapes.²¹ Nevertheless, the law judge did find a violation of § 91.13(a).²² On appeal, the airman argued that the Administrator had not put him on notice that the FAA was pursuing an independent charge under § 91.13(a) in asserting his preflight inspection of the burn damage was insufficient.²³ Reversing the decision of the law judge and granting the respondent's appeal, the Board declared:

A fair reading of the Administrator's complaint indicates that both the § 91.7(a) and § 91.13(a) charges were premised upon a case theory that respondent's balloon was damaged to such an

¹³ 49 CFR § 821.32

¹⁴ *Administrator v. Van der Horst*, NTSB Order EA-5179, 2005 WL 2477523 (N.T.S.B.)

¹⁵ *Id.* at 1.

¹⁶ *Id.* at 2.

¹⁷ *Id.* at 3.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

extent that it was unairworthy, but the Administrator did not prove this key fact. The complaint did not provide respondent with adequate notice that he must defend against an independent charge of carelessness based upon an inadequate preflight

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 . . .

The Board's decision in *Van der Horst* underscores the fact that when the FAA charges an airman with operating an unairworthy aircraft, the burden proof is on the Agency. Moreover, if the Administrator charges the airman with careless or reckless conduct on the theory the aircraft was unairworthy, if the underlying premise is not proven (that the aircraft was unairworthy), then the derivative violation of careless or reckless misconduct must fail as well unless the Complaint clearly states and independent charge against the airman for conducting an inadequate preflight inspection.²⁵

B. Opinion Testimony that an Aircraft is Potentially Unsafe Does Not Equate to Unairworthiness

Nicolai v. Administrator,²⁶ involved an airman who was observed taxiing an aircraft by an FAA inspector with bird nesting material in the rudder.²⁷ The case was tried, and the FAA prevailed at the hearing on charges alleging that the airman had operated the aircraft in an unairworthy condition and had operated the aircraft in a careless or reckless manner.²⁸ The airman appealed, and then the FAA withdrew the complaint.²⁹ Because the case did not reach the NTSB, there was no decision on the merits with respect to the conclusions of the law judge, and the finding of the law judge had no precedential effect.

The airman then filed an application for attorney's fees under the Equal Access to Justice Act arguing that the FAA was not substantially justified in pursuing the action and further arguing that the airman was the prevailing party.³⁰ The airman's application for litigation expenses was denied, and he appealed to the NTSB.³¹ In evaluating the airman's appeal from the denial of his EAJA application, the Board noted the definition of when an aircraft is airworthy, *i.e.*, conforms to its *type certificate* and is in condition for safe flight.³² The Board then compared and contrasted that legal standard with the testimony of the FAA inspector (who was not a maintenance inspector) who had opined that the airworthiness of the aircraft "unknown" and the aircraft was "potentially unsafe."³³ In contrast to the inconclusive testimony of the FAA inspector, the airman offered the expert testimony of a Mr. Howell who reviewed the maintenance manual for the aircraft that confirmed a 2 ounce weight can be added to the rudder within a range of 16 inches from the hinge center line with no adverse effect on the aircraft's

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Nicolai v. Administrator*, NTSB Docket No. 108-EAJA-SE-10353 (1993).

²⁷ *Id.* at 2.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* at 2, 3.

³¹ *Id.* at 1.

³² *Id.* at 4.

³³ *Id.* at 5.

balance.³⁴ A study presented for consideration by the court on the bird nest showed its minimal (less than 2 ounce) weight.³⁵ The Administrator offered no evidence regarding the weight of the nesting material nor its exact position with the result that the airman took the position that the Administrator did not have substantial justification for asserting that the bird nesting material put the rudder out of balance and rendered the aircraft unairworthy.³⁶

The Board reversed the decision of the law judge denying the airman's application for fees noting: "the record reflects a less than thorough investigation and a willingness to prosecute based only on assumptions based on incomplete information."³⁷ As a variation on a common theme (i.e., that the burden of proof is on the Administrator to prove the aircraft is unairworthy), the Board, in reversing the law judge and finding in favor of the airman on his Equal Access to Justice Act Application declared:

. . . The Administrator did not at any point in his investigation adequately study the rudder balance issues relevant to this aircraft, nor did he make any effort to determine the weight or position of the nesting material . . .

The Administrator's later attempt to correct for these lapses - - by arguing that an unknown condition is equivalent to an unairworthy condition and that the aircraft was potentially unsafe - was directly contrary to established case law requiring that the Administrator prove that the operation of the aircraft was actually unsafe. Under these circumstances, the Administrator was not reasonable in pursuing a charge of operating an unairworthy aircraft.³⁸

To the extent the Administrator also brought charges of careless or reckless operation of an aircraft, since there was no proof the aircraft was unairworthy, the allegation of careless or reckless conduct was not substantially justified as well.³⁹ *Nicolai*, like *Van der Horst* confirms not only that the burden of proof is on the Administrator to actually prove the aircraft is unairworthy, but when the Administrator goes forward with a case that has not been properly or adequately investigated, the actions of the Administrator are not substantially justified giving rise to exposure to pay legal fees and expenses under the Equal Access to Justice Act.

³⁴ *Id.* at 6.

³⁵ *Id.*

³⁶ *Id.* at 6.

³⁷ *Id.*

³⁸ *Id.* at 7.

³⁹ *Id.*

C. The Administrator is Obligated to Review the Type Certificate before Concluding the Aircraft is Unairworthy.

In *Administrator v. Thibert*⁴⁰ the ALJ dismissed the Administrator's complaint which had ordered a 120-day suspension of the respondent's commercial pilot and flight instructor certificates based on alleged violations of 14 CFR §§ 91.7(a) and 91.13(a).⁴¹ The Administrator's evidence was that an Agency inspector had observed a helicopter with a broken lateral cyclic control servo mount bracket, a cork inserted in the engine oil quick drain in lieu of the approved part, and the aircraft's records stated that the "rotor tach [was] running hot," but that no maintenance records indicated any repair of the rotor tachometer.⁴² Two FAA inspectors testified they considered the aircraft unairworthy and that the aircraft did not conform to its type certificate.⁴³ The Agency inspectors opined that a qualified pilot should have known that the alleged discrepancies existed and should have insured that they were repaired.⁴⁴ On cross-examination, inspectors admitted that they did not review the aircraft's type certificate or any accompanying data regarding the aircraft's type design before determining the aircraft was unairworthy.⁴⁵ Further, they did not review the pre-flight inspection checklist the airman used prior to operating the aircraft.⁴⁶ The respondent testified that he would not normally inspect any of the alleged discrepancies and he was not aware of the discrepancies.⁴⁷ The law judge dismissed the Administrator's complaint and found that the evidence in the record did not prove that any of the alleged discrepancies would render the aircraft unairworthy and that the Administrator had not proven that the airman had operated the aircraft knowing it was unairworthy.⁴⁸

The Board, in affirming the initial decision of the law judge declared that the Administrator had the burden of proof of proving the aircraft was unairworthy by a preponderance of the evidence.⁴⁹ In affirming the conclusion of the law judge that the FAA had failed to carry its burden of proof, the Board observed:

We have also concluded, however, that when small, insignificant deviations are present, an aircraft may still substantially conform to its type design. *Administrator v. Frost*, NTSB Order No. EA-4680 (1998); *Administrator v. Calavaero, Inc.*, 5 NTSB 1099, 1101 (1996). In determining whether an aircraft is airworthy in accordance with the aforementioned standard, the Board considers whether the operator knew or should have known of any deviation of the aircraft's conformance with its type certificate. See, e.g., *Administrator v.*

⁴⁰ *Administrator v. Thibert*, N.T.S.B. Order No. EA-5306 (2007).

⁴¹ *Id.* at 1,2.

⁴² *Id.* at 2.

⁴³ *Id.* at 3.

⁴⁴ *Id.*

⁴⁵ *Id.* at 3, 4.

⁴⁶ *Id.* at 4.

⁴⁷ *Id.*

⁴⁸ *Id.* at 4, 5.

⁴⁹ *Id.* at 5.

Yialamas, NTSB Order No. EA-5111 (2004);
Administrator v. Bernstein, NTSB Order No. EA-4120 at 5 (1994).⁵⁰

D. Minor Defects in an Aircraft do not Render it Unairworthy.

In *Administrator v. Calavaero*,⁵¹ the law judge reversed an order of the Administrator suspending a respondent's air carrier operating certificate for 120-days alleging that an aircraft had been operated in an unairworthy condition.⁵² The Administrator asserted, among other things, that the aircraft had flap bearings/bushings that were excessively worn, a corrosion hole in the right aileron, a hole worn in the cowl flap, the right engine cowl was cracked in two places, that both the right and left oil coolers were covered with white paint, and the left wingtip had been damaged and repaired with bondo.⁵³ The position of the Administrator was that these defects rendered the aircraft unairworthy without demonstrating how the defects had an adverse impact on the level of safety afforded by conformity with the aircraft type certificate.⁵⁴ The Board, in giving deference to the credibility assessments of the law judge concluded the Administrator had failed to demonstrate that the observed defects had any impact on the safety of the aircraft. In affirming the judge, the Board declared:

We do not take issue with the Administrator's position that an aircraft, in addition to being in a safe condition to operate, must be in conformity with its type certificate in order to be considered airworthy. However, we do not agree that every scratch, dent, 'pinhole' of corrosion, missing screw, or other defect, no matter how minor or where located on the aircraft dictates the conclusion that the aircraft, design, construction, or performance has been impaired by the defect to a degree that the aircraft no longer conforms to its type certificate. In this case, the Administrator essentially made no effort to show that the alleged defects or discrepancies had had an adverse impact on the level of safety that an aircraft's conformity with its type certificate is intended to insure, or counter the substantial evidence adduced by respondent that they had not had such an impact . . .⁵⁵

⁵⁰ *Id.* at 6, 7.

⁵¹ *Administrator v. Calavero*, 5 NTSB 1099, NTSB Order No. EA-2321, 1986 WL 82413 (N.T.S.B.)

⁵² *Id.* at 1.

⁵³ *Id.* at 3.

⁵⁴ *Id.* at 2.

⁵⁵ *Id.* at 2.

E. The Board Does Not Apply a Standard of Strict Liability in Airworthiness Violations for Pilots

In *Administrator v. Frost*,⁵⁶ the FAA asserted four defects with respect to a helicopter: (1) that the flight manual did not contain a permanent revision control page,⁵⁷ (2) that the turbine outlet temperature gage did not have a red line,⁵⁸ (3) that the tachometer did not have a yellow caution range marking,⁵⁹ and (4) a placard was missing from the instrument panel.⁶⁰ The law judge found violations of 14 C.F.R. §§ 91.7(a) and 91.13(a) but reduced the suspension from ninety to fifty days.⁶¹ The airman appealed, and the Board reversed finding (1) that there was no proof the revision page to the flight manual was a required part of the manual,⁶² (2) that the absence of a red line on the turbine outlet temperature gauge was normal wear and tear which, if not adversely affecting flight safety, is not considered an airworthiness violation,⁶³ (3) that insofar as the tachometer did not have a yellow caution range marking, the standard for pilots in charges of operating an unairworthy aircraft is not one of strict liability and there is no evidence the respondent knew or should have known that the colored yellow arch was required,⁶⁴ (4) that to the extent a placard was missing from the cockpit, the Administrator did not establish the respondent knew or should have known the placard was required.⁶⁵ The decision of the Board in *Frost* is important when an airman is the target of the action because the Board applies a reasonableness standard and the Administrator must show the pilot knew or should have known of the alleged defect in the aircraft.⁶⁶

F. The Scuderi Decision – A Departure from NTSB Precedent

The Board's decision in *Administrator v. Scuderi*⁶⁷ may be argued to be inconsistent with the Board precedent previously discussed in this article. In *Scuderi*, the airman appealed a 180-day suspension of his certificate for violations, including, flying an aircraft in an unairworthy condition and careless or reckless operation of an aircraft.⁶⁸ The law judge found that Scuderi, while operating his Cessna 182, struck the wingtip of Beechcraft King Air causing damage to both aircraft.⁶⁹ The judge found Scuderi departed in his aircraft without first taking corrective action in terms of having his aircraft inspected or repaired.⁷⁰ At the time of the incident, Scuderi did not have a current medical certificate, and he failed to present his pilot's certificate, medical certificate, and other items upon the request of a local law enforcement officer.⁷¹ New York State trooper, Robert Krepplein, who was the chief pilot for the aviation unit of the New York

⁵⁶ *Administrator v. Frost*, NTSB Order No. EA-4680, 1998 WL 400002 (N.T.S.B.)

⁵⁷ *Id.* at 1.

⁵⁸ *Id.* at 2.

⁵⁹ *Id.*

⁶⁰ *Id.* at 3.

⁶¹ *Id.* at 1.

⁶² *Id.* at 1, 2.

⁶³ *Id.* at 2.

⁶⁴ *Id.*

⁶⁵ *Id.* at 3.

⁶⁶ See *Frost supra* at 2 citing *Administrator v. Parker*, 3 NTSB 2997, 2998 (1980).

⁶⁷ *Administrator v. Scuderi*, NTSB Order No. EA-5321, 2007 WL 2846495 (N.T.S.B.).

⁶⁸ *Id.* at 2.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

State Police testified that he saw the King Air lurch backwards as a result of the collision.⁷² Kreppin also testified he heard the noise of the collision.⁷³ Finally, Kreppin testified he observed damage on the King Air and the Cessna 182.⁷⁴

The Administrator called FAA Inspector Shapiro who testified that given the circumstances of the collision, the airman should have arranged for an internal, complete inspection of the aircraft before operating it again.⁷⁵ Even though following the incident, Scuderi's mechanic certified the aircraft as airworthy, inspector Shapiro maintained that because the aircraft had departed in an unknown condition, it did not make Scuderi less culpable.⁷⁶

On appeal, Scuderi maintained that the damage Mr. Shapiro referenced was merely a "scuff."⁷⁷ Scuderi maintained that Mr. Kreppin testified he did not see any damage to the aircraft and Scuderi's mechanic certified the aircraft as airworthy shortly after the incident.⁷⁸ Finally, Scuderi maintained that a photograph on which the Administrator relied did not show damage that would render the aircraft unairworthy.⁷⁹ The Board, in affirming the law judge's decision declared it was "mindful of the fact that the Administrator has the burden of proving that the aircraft was unairworthy by a preponderance of the evidence."⁸⁰ Also, the Board declared that it understood that airworthiness was a two prong standard, i.e., (1) whether the aircraft conforms to its type certificate, and (2) whether the aircraft is in the condition for safe operation.⁸¹ Affirming the decision of a law judge, the Board declared: ". . . [W]hile the Administrator has not presented evidence to prove that Respondent's aircraft did not conform to its type certificate, the Administrator has nevertheless shown that the aircraft was not in a condition for safe operation when respondent operated the aircraft . . . respondent's awareness of the potentially unsafe condition leads us to conclude that his operation of the aircraft resulted in a violation of § 91.7(a)."⁸² The Board went on to find that since a violation of § 91.7(a) had been proven," . . . [W]e also conclude that respondent's operation of the aircraft subsequent to the collision was careless or reckless, in violation of § 91.13."⁸³

In both *Scuderi* and *Nicolai*, the testimony of the Agency Inspector was that the airworthiness of the aircraft was unknown."⁸⁴ In *Scuderi*, the Board did not premise the violation on the finding the aircraft did not conform to its type certificate but rather on the premise the aircraft was not in a condition for safe operation.⁸⁵ However, the Board which had disapproved of the "potentially unsafe" standard in *Nicolai*⁸⁶ but then said in *Scuderi*: "Respondent's awareness of the *potentially* unsafe condition leads us to conclude that his operation of the aircraft resulted in a violation of § 91.7(a)."⁸⁷

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* at 3.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.* at 4.

⁸³ *Id.*

⁸⁴ *Scuderi* at 2; *Nicolai* at 5.

⁸⁵ *Scuderi* at 4.

⁸⁶ *Nicolai* at 5.

⁸⁷ *Scuderi* at 4 (italics supplied).

V. Conclusion

Board precedent is clear that the burden of proof is on the Administrator to demonstrate the aircraft is unairworthy.⁸⁸ In terms of allegations that a pilot flew an unairworthy aircraft, the standard is not one of strict liability, but reasonableness, i.e., whether the pilot knew or should have known the aircraft was unairworthy.⁸⁹ The Board, in *Nicolai* declared that a declaration that the aircraft's airworthiness was unknown or was potentially unsafe did not equate to unairworthiness.⁹⁰ However, in *Scuderi*, the Board equated "unknown" airworthiness and "potentially" unairworthiness with unairworthiness.⁹¹

The Board's decision in *Scuderi* appears to be a departure from precedent to the extent it equates "unknown" airworthiness with actual unairworthiness and a "potentially" unairworthy aircraft with an aircraft that is actually unairworthy. Further, the decision in *Scuderi* substitutes the assessment of the pilot under 14 C.F.R. § 91.7(b) that an aircraft is safe for flight with the speculation of an Agency Inspector that the aircraft might not be safe for flight.

In a proper case, if the Board relies upon *Scuderi* and rejects long standing case law in this area, then the Board's reliance upon *Scuderi* may be challenged as arbitrary, capricious or otherwise not in accordance with the law.⁹² In the meantime, given the uncertainty the Board has injected in terms of when an aircraft is airworthy with the decision in *Scuderi*, determining when an aircraft is airworthy will apparently remain a "judgment call."⁹³

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⁸⁸ See *Van der Horst; Calavero; and Frost*.

⁸⁹ *Frost*

⁹⁰ *Nicolai* at 5.

⁹¹ *Scuderi* at 2, 4.

⁹² 5 U.S.C. § 706(2)(A).

⁹³ Letter of Interpretation at 3.