FLIGHT-WATCH

VOLUME 269

By: Alan Armstrong, Esq.

SEPTEMBER 2014

FAILURE TO PROVIDE AIR TRAFFIC DATA RESULTS IN DISMISSAL OF FAA'S COMPLAINT

Introduction and Overview

In this issue of FlightWatch, we will examine the Initial Decision of Judge William R. Mullins in the case of *Administrator v. Michael,* 2013 WL 6221805 (NTSB). In essence, Judge Mullins found that since the FAA had not provided the pilot with air traffic data before filing the complaint, he lacked jurisdiction to adjudicate the matter and the case was dismissed. The decision of Judge Mullins in *Michael* is an outgrowth of the provisions of the Pilots Bill of Rights ("PBR"), Pub. L. 112-153. The PBR requires the FAA to notify the airman in the letter of investigation of the airman's right to obtain air traffic data. The outcome of the case in *Michael* turned on the fact that the FAA did not timely produce air traffic data resulting in dismissal of the complaint. Before delving into the particular facts in *Michael*, some background is in order to give the reader an appreciation for the reasoning of Judge Mullins in dismissing the complaint.

The Airman's Rights to Air Traffic Data Under the PBR

The PBR was passed August 3, 2012, and §2(b) deals with access to information. Section 2(b)(2)(E) provides that the "releasable portions of the Administrator's investigative report will be available to the individual." Section 2(b)(2)(F) provides: "The individual is entitled to access or otherwise obtain air traffic data described in paragraph (4)."

The airman's right to access air traffic data is set out in §2(b)(4) of the PBR which provides:

> (A) FAA Air Traffic Data. – The Administrator shall provide an individual described in paragraph (1) with timely access to any air traffic data in the possession of the Federal Aviation Administration that would facilitate the individual's ability to productively participate in a proceeding relating to an investigation described in such paragraph.
>
> (B) AIR TRAFFIC DATA DEFINED. – As used in subparagraph (A), the term "air traffic data" includes –
>
> (i) Relevant air traffic communication tapes;
> (ii) Radar information;
> (iii) Air traffic controller statements;
> (iv) Flight Data;
> (v) Investigative reports; and
> (vi) Any other air traffic or flight data in the Federal Aviation Administration's possession that would facilitate the individual's ability to productively participate in the proceeding.

At the risk of being repetitive, we understand that §2(b)(2)(F) declares that the airman is entitled to access to the air traffic data described in paragraph 4 of the PBR. Then, paragraph 4 of the PBR says that the FAA will provide the airman with air traffic data "in the possession of the Federal Aviation Administration that would facilitate the individual's ability to productively participate in a proceeding relating to an investigation described in such paragraph." While the FAA might argue otherwise, it appears that §2(b)(2)(F) and §2(b)(4) of the PBR impose an obligation on the Administrator to preserve air traffic data. Otherwise, the declaration in §2(b)(2)(F) that "the individual is entitled to access or otherwise obtain air traffic data…" would be meaningless. To expand on the point, on can envision a situation where the FAA fails to preserve air traffic data and claims the data is no longer "in the possession of the Federal Aviation Administration" under §2(b)(4) of the PBR. But such a position would ignore §2(b)(2)(F) declaring that "the individual is entitled to access or otherwise obtain air traffic data…"

On March 11, 2013, the FAA issued an order of suspension. The airman responded on April 11, 2013 with a denial of all the allegations of the complaint other than the possession of his certificate.

Four days after passage of the PBR, Chief ALJ Montaño of the NTSB passed an order that applied to all pending cases declaring, with respect to the PBR: "That new law applies to all cases before the National Transportation Safety Board involving reviews of actions of the Administrator of the Federal Aviation Administration ('FAA') that deny airmen medical certification under 49 U.S.C. §44703, or amend, modify, suspend or revoking airmen certificates under 49 U.S.C. §44709." Judge Montaño went on to declare that the PBR "became effective immediately upon its enactment; thus, it affects all cases that are currently pending before this office." Finally, Judge Montaño cautioned that practitioners and persons before the NTSB of "the immediate impact that statutory enactment may have in their preparation for, and the conduct, of these cases." Accordingly, it appears that the provisions of the PBR took effect immediately upon enactment of the legislation. This construction of the PBR should preclude an argument by the FAA that certain cases are "grandfathered" in such a manner that compliance with the PBR is not required.

Amendments to Rule 19 of the Board's Rules of Practice

On September 19, 2013, the NTSB amended its Rules of Practice including Rule 19 that deals with discovery. Rule 19 is codified at 49 C.F.R. §821.19. For the purpose of this article, we are concerned with Rule 19(d) which provides:

> Failure to provide copy of releasable portions of enforcement investigative report (EIR).
>
> (1) Except as provided in §821.55 with respect to emergency proceedings, where the respondent requests the EIR and the Administrator fails to provide the releasable portion of the EIR to the respondent by the time it serves the complaint on the respondent, the respondent may move to dismiss the complaint or for other relief and, unless the Administrator establishes good cause for that failure, the law judge shall order such relief as he or she deems appropriate, after considering the parties' arguments.
>
> (2) The releasable portion of the EIR shall include all information in the EIR, except the following:
>
> (i) Information that is privileged;
> (ii) Information that constitutes work product or reflects internal deliberative process;
> (iii) Information that would disclose the identity of a confidential source;
> (iv) Information of which applicable law prohibits disclosure;
> (v) Information about which the law judge grants leave to withhold as not relevant to the subject matter of the proceeding or otherwise for good cause; or
> (vi) Sensitive security information, as defined at 49 U.S.C. §40119 and 49 C.F.R. §15.5.
>
> (3) Nothing in this section shall be interpreted as preventing the Administrator from releasing to the respondent information in addition to that which is contained in the releasable portion of the EIR.

So from reading Rule 19(d) we understand that the FAA must produce the releasable portion of the EIR by the time it serves the complaint, but certain things are off limits, such as information that is privileged or information that constitutes work product. Clearly, if the FAA is going to make a case involving an alleged airspace incursion, the Administrator must rely if the case is to be proven upon "air traffic data" as that term is defined in the PBR. And this provides us a segue into the facts in *Michael*.

The *Michael* Case

The *Michael* case involved a claim by the Administrator that on July 10, 2012, the respondent had operated an aircraft in the Class C Airspace of Omaha, Nebraska without first establishing radio communications with air traffic control. Following the alleged event of July 10, 2012, a letter of investigation (LOI) was sent to the airman on August 28, 2012, along with the warnings required by the PBR. On November 15, 2012, the Agency issued a Notice of Proposed Certificate Action. On December 10, 2012, the airman requested information that the FAA was required to provide him under the PBR.

On March 11, 2013, the FAA issued an order of suspension. The airman responded on April 11, 2013 with a denial of all the allegations of the complaint other than the possession of his certificate.

The trial before Judge Mullins was scheduled for August 15, 2013. On August 6, 2013, nine days before the trial was sent to begin, the FAA finally provided to the airman the air traffic data he had requested approximately eight months earlier.

The airman moved to dismiss the proceedings as being in violation of the PBR. The airman argued that the provision of the releasable portions of the EIR was jurisdictional in nature meaning that the NTSB could not proceed with the case if the FAA had not provided the data required by the PBR. Judge Mullins agreed with the airman and made the following declaration on the record:

> And since this public law and it was passed August 3, 2012, I think that that requirement is jurisdictional in nature, and that the Administrator could not proceed until a period of time of thirty days after this material and data has been provided to the respondent after that request.
>
> And I think the failure to provide that material has provided a jurisdictional defect for the Safety Board to proceed in this case, and, therefore, I'm going to find for the respondent in this case because of this jurisdictional defect and the failure of the Administrator to provide this data until some eight months after the request was made, December 10 of 2012 to August 6 of 2013. And during that period of time, the Administrator did proceed contrary to the Bill of Rights. So the order will be for the respondent.
>
> ORDER
>
> IT IS THEREFORE ORDERED that safety in air commerce and safety in air transportation does not require an affirmation of the Administrator's Order of Suspension as issued.
>
> And specifically I find that because the Pilots Bill of Rights, as to the issuance of the air traffic data requested has not been provided that they are under that provision, paragraph (5) in the Pilots Bill of Rights, there is not jurisdiction for the Safety Board to proceed and, therefore, the order will be in favor of the respondent.

To the extent that Judge Mullins made reference to paragraph (5) of the PBR, it appears his comments were directed toward §2(b)(4)(B)(v) which requires the provision of "investigative reports." The decision of Judge Mullins is not clear with respect to precisely what was provided by the Administrator nine days before trial. We do know that on December 10, 2012, the airman had requested all data required to be provided him by the PBR. And the decision indicates on: "August 6, 2013 the data was provided, a week before trial or nine days before trial…" Since this was a case involving an alleged Class C Airspace incursion, it is reasonable to conclude that "the data" referenced in the initial decision of Judge Mullins included and embraced air traffic data under the PBR. However, to be clear, Judge Mullins did reference subparagraph (v) of §2(b)(4)(B) of the PBR suggesting that the EIR was not produced until nine days before trial.

Whether "the data" that was produced nine days before trial was the entire EIR or merely the "air traffic data" contained in that report, the fact remains, nevertheless, that the Administrator had failed to produce "the releasable portion of the EIR to the respondent by the time [the FAA served] the complaint" in violation of Rule 19(d)(1) of the Board's Rules of Practice. [49 C.F.R. §821.19(d)(1)].

Conclusion

Because the decision of Judge Mullins is an initial decision of a trial judge and not an opinion of the five members of the NTSB, it has no precedential value. In other words, it is not binding on other judges. It is merely suggestive of a proper outcome in light of the logic of a trial judge applying the provisions of the PBR and Rule 19 of the NTSB's Rules of Practice. Having said that, it does afford airmen an argument for dismissal of the complaint in the event the Administrator has not provided the airman with the releasable portions of the EIR by the time the complaint is filed. This is specifically required by Rule 19(d) of the Board's Rules of Practice. Perhaps in time, this issue will make its way before the five members of the Board so that binding precedent on this issue can be established.

CONTACT INFO:
Phone: 770-451-0313
Fax: 770-451-0317
Email: alan@alanarmstronglaw.com

Please contact us at aaparalegal@comcast.net to be removed from the FlightWatch Email List

[Photograph Copyright John Slemp]