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Recent Developments in FAA Enforcement... by John S. Yodice

This column is intended as an aid to practitioners, including panel attorneys of the AOPA Legal Services Plan, to keep abreast of recent developments in the law and procedures governing FAA enforcement actions. Your comments and suggestions are welcome.

A Judge's Evidentiary Rulings Are Reviewed Only for Abuse of Discretion.

The Board Will Only Entertain Evidentiary Questions When They Amount To Prejudicial Error.

This is a significant Board opinion that is instructive to all counsel who try cases before the administrative law judges of the NTSB. It is an especially important "heads-up" to counsel who routinely practice before tribunals that observe the rules of evidence and who instinctively expect them to be observed. The opinion was rendered in an appeal from an NTSB law judge's decision, in which the full National Transportation Safety Board affirmed a 120-day suspension of a commercial pilot's certificate based on several disputed regulatory violations. Among the issues considered on appeal were a number of challenges to evidentiary rulings by the law judge. These challenges included

the judge's misinterpretation of the parol evidence rule, the lack of proper authentication of a video recording made by an adverse witness, curtailing the cross-examination of the investigating FAA inspector, and more. In the significant part of the opinion that we here note, the Board iterated a difficult standard of which practitioners need to be aware and accommodate, especially infrequent practitioners before the Board. The Board held that any judge's errors in the application of the rules of evidence, by themselves, are not sufficient to warrant reversal. An objecting party must bear the burden of establishing prejudice resulting from an erroneous ruling. "With regard to respondent's arguments concerning evidentiary rulings, we review law judges' evidentiary rulings under an abuse of discretion standard.... As such, the Board will only entertain evidentiary questions when they amount to prejudicial error. On appeal, respondent does not establish how any of the law judge's evidentiary rulings prejudiced him" (emphasis supplied). Administrator v. Lackey, NTSB Order No. EA-5389 (2008).

In another recent opinion that goes even further, the NTSB upheld a 70-day suspension of this

same pilot's commercial certificate in a different case. This is an additional "heads-up" to counsel who routinely practice before tribunals that observe the rules of evidence and who instinctively expect them to be observed. The pilot was charged with busting a presidential TFR temporarily established by NOTAM near San Francisco, California. At the hearing the FAA introduced into evidence an exhibit to which the FAA witnesses made reference in testifying to the violating encroachment. It was a plot of ATC data depicting the track of the helicopter in relation to the San Francisco Bay Bridge (that provided a geographical reference to the TFR). The pilot challenged the admission into evidence of the exhibit. The FAA witness who heralded the exhibit admitted that he did not personally prepare the radar plots on the exhibit but that he was personally familiar with the production of such plots. The Board found no problem with the lack of authentication. Whether or not the result of the case was correct, the Board's language is troublesome. "We have long held that law judges have significant discretion in overseeing administrative hearings and admitting evidence into the record [citing cases]. Moreover, we will not overturn a law judge's

evidentiary ruling unless we determine that the ruling was an abuse of discretion [citing cases]. When resolving issues involving the admission of evidence, the Board is not bound by the Federal Rules of Evidence, but considers them to be ‘non-binding guidance’ [citing cases]. In this regard, the Board is not bound by evidentiary or procedural rules that apply in other courts. Furthermore, the Board is aware of the wide latitude that the Administrative Procedure Act provides agencies concerning the admissibility of evidence at administrative hearings [citing 5 USC 556(d)]. ... We find that respondent’s argument concerning [the exhibit] is an argument concerning the weight of the exhibit, rather than its admissibility, given the Administrative Procedure Act’s provision concerning the admissibility of evidence. (emphasis supplied)” Administrator v. Lackey, NTSB Order No. EA-5419 (2008).

These two Board opinions prompt a repetition of the prior guidance in this column, that in addition to offering objections to the admissibility of evidence (that likely will not be effective), counsel should argue that in light of the inadmissibility of the evidence under the Federal Rules of Evidence, the law judge should accord the evidence little or no weight. The Federal Rules represent a learned compilation, based on judicial precedent and experience, of what evidence is reliable and probative, and what evidence should not be considered. Counsel’s argument might resonate with the judges even if it does not impress the Board and its lawyers.

FAA Waivers. *Judicial Review of an FAA Waiver Cancellation Is Very Limited.*

FAA waivers are ubiquitous. They are routinely issued by the FAA to authorize the operation of aircraft in deviation of certain rules in FAR Part 91, but only when FAA finds that the operations can be safely conducted under the terms of a waiver. The FAA issues them in a myriad of aeronautical business activities, such as banner towing, conducting air shows and aerobatics, parachute jumping, etc. Because they are essential to certain business activities, counsel will sometimes be consulted about the legal remedies available if the FAA cancels a “waiver” it has granted, effectively terminating the business. There are remedies available, but they are not as protective as those available in the revocation or suspension of airman certificates, air carrier operating certificates, air agency certificates, and the like, that we usually deal with in this column.

The granting of waivers is discretionary with the FAA. Nevertheless, the FAA action is subject to judicial review pursuant to 49 USC 46110(c). In this illustrative case, a corporate operator had been conducting a banner towing business for some years pursuant to a waiver that had been periodically renewed. In an investigation, the FAA found that in a two year period, the operation experienced two plane crashes, two pilots made landings hard enough to damage the planes, one pilot ran out of fuel and had to undertake an emergency landing, and found four paperwork violations. As a result, the FAA ordered cancellation of

the waiver. The cancellation ended the banner towing business. The operator sought judicial review of the FAA order in a United States Court of Appeals. The operator contended that the cancellation of the waiver was arbitrary and capricious, an abuse of discretion, and unsupported by substantial evidence, in violation of the Administrative Procedure Act, 5 USC 706. The Court of Appeals denied the petition for review. The Court held that the standard of judicial review is deferential to the FAA. “We will overturn the FAA’s factual findings only if unsupported by substantial evidence in the administrative record [citing cases]. We will uphold the agency’s decision unless it is arbitrary and capricious, an abuse of discretion, or otherwise contrary to law [citing cases]. In other words, when reviewing agency action under the APA, we do not substitute our own judgment for the agency’s about what action is warranted in the circumstances. Rather, we will set aside the FAA’s order on substantive grounds only if the agency relied on improper factors, failed to consider important relevant factors, or committed a clear error of judgment that lacks a rational connection between the fact found and the choice made [citing cases]. An agency may also act arbitrarily and capriciously by failing to follow its own regulations and procedures.” On review, applying these standards, the Court held that the administrative record supports the FAA’s decision. This case illustrates the narrowness of the scope of judicial review in the case of a waiver cancellation. Aerial

Banners v. Federal Aviation Administration, United States Court of Appeals for the Eleventh Circuit, August 26, 2008 (unpublished opinion).

Credibility. A Federal Court Of Appeals Holds That The NTSB Owes Deference To A Law Judge's Credibility Finding Unless It Is "Arbitrary, Capricious, An Abuse Of Discretion, Or Otherwise Not In Accordance With Law."

The United States Court of Appeals for the Ninth Circuit once again admonishes the NTSB to give due deference to the credibility determinations of the NTSB judges (see our report of the Wedding case in this column in the Fall 2004 issue of the NTSB Bar News). In this case, the FAA revoked, on an emergency basis, a commercial pilot's license on the ground that she had performed aerobatic maneuvers too close to the ground. On appeal to the NTSB, a law judge, believing the pilot's eyewitnesses and expert witnesses that the maneuvers were not aerobatic, reversed the FAA order of revocation. The law judge considered the FAA witnesses, but concluded, "I'm not saying that the [FAA's] witnesses didn't see what they say, but perhaps they misunderstood what they saw." The FAA appealed the law judge's decision to the full Board, and the full Board reversed the decision of the law judge. The pilot then petitioned for review by the Ninth Circuit, and the Court remanded the case to the NTSB again admonishing the NTSB: "We will set aside the NTSB's decision if we find it to be 'arbitrary,

capricious, an abuse of discretion, or otherwise not in accordance with law [cite]. An agency's decision is arbitrary and capricious if the agency fails to follow its own precedent or fails to give a sufficient explanation for failing to do so [citing cases]. Where an ALJ chooses to credit one set of witnesses' version of events over another, he has made an implicit credibility determination to which the NTSB must defer' in the absence of any arbitrariness, capriciousness, or other compelling reasons' [cite]. The NTSB must leave undisturbed an ALJ's credibility finding 'unless there is a compelling reason or the finding was clearly erroneous' [cite]." The case was remanded to the NTSB to determine whether there was a compelling reason for the NTSB to reverse the judge or whether the finding was clearly erroneous. *Andrzejewski v. FAA*, United States Court of Appeals for the Ninth Circuit, December 3, 2008.

Credibility. The NTSB Will Not Disturb A Law Judge's Credibility Finding Unless It Is Arbitrary, Capricious, Or Clearly Erroneous.

Perhaps anticipating the Court's admonition in the *Andrzejewski* case reported above, the NTSB upheld a judge's credibility finding against an FAA challenge. Respondent, a commercial pilot, was the operator of banner towing business under an FAA certificate of waiver. The FAA revoked respondent's pilot certificate on an emergency basis charging that he had made a fraudulent or intentionally false entry on the

FAA waiver certificate. According to the FAA, he had handwritten on the certificate the name of a pilot who had not actually been authorized to fly for the towing operation. On respondent's appeal to the NTSB, at a hearing before an administrative law judge, the respondent and his witnesses testified that the FAA had verbally authorized the handwritten insertion. The FAA witnesses testified to the contrary. On weighing the testimony, the judge determined that the FAA had not met its burden of proving that respondent had intentionally falsified the certificate. The judge called it a "communication misunderstanding." The FAA appealed the judge's finding to the full Board. In affirming the law judge, the Board articulated its long-standing holdings that while a law judge's credibility findings are not dispositive and may be reviewed by the Board de novo, "the Board will not disturb a law judge's credibility finding unless it is arbitrary, capricious, or clearly erroneous." *Administrator v. Hiott*, NTSB Order No. EA-5417 (2008).