

As printed in

# The National Transportation Safety Board Bar Association

Fall 2009 Newsletter

## 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.

### *LACHES. NTSB Has Surreptitiously Overruled Its Own Precedents On The Availability Of Laches As A Defense To Old FAA Enforcement Actions.*

A practical question frequently asked by clients is what time limitations are there to FAA's enforcement of alleged FAR violations. The NTSB has held that the federal statute of limitations barring penalty proceedings after 5 years does not apply to certificate revocation proceedings. (As far as we can tell, the applicability of the statute to certificate suspension proceedings has not been authoritatively decided, though we can anticipate the FAA/NTSB position.) In lieu thereof, the NTSB's 6-month stale complaint rule has functioned as a quasi-statute-of-limitations. An important question then becomes, if an FAA prosecution is not dismissible under the 6-month stale complaint rule, how long can the FAA delay the prosecution

before it is dismissible as too old? In earlier cases, the NTSB has held that the equitable doctrine of laches is available as a defense to a dilatory prosecution so long as a respondent can demonstrate actual prejudice from the delay. The NTSB has now, with a regrettable lack of candor about the existence of these precedents, quietly overruled them.

The FAA revoked, on an emergency basis (immediate grounding without prior opportunity to defend), the air transport pilot, flight instructor, flight engineer, and the first-class medical certificates of respondent for alleged falsification of several applications for his airman medical certificate. He admittedly had two Ohio "minor misdemeanor" convictions (1995 and 1997 of which the FAA became aware in 2007) for domestic violence/disorderly conduct for which he paid fines (an indication of how serious they were). He had not declared these misdemeanors on his medical applications in response to question 18w. In an appeal to the NTSB, he defended the intentional falsification charges based on the Board's stale complaint rule and the doctrine of laches, because the convictions were 11 and 13 years old by the time that the FAA got around to this action. He also defended that

he could not have known that he needed to list them on his medical application because they were characterized as "minor" under Ohio law. He believed that they need not be reported. Hence, he did not "knowingly and intentionally falsify" the applications. Despite his denial of any intent to falsify, and despite the delay in prosecution, the law judge granted FAA's motion for summary judgment. On appeal to the full Board, the judge's grant of summary judgment was affirmed.

In deciding the case, the full Board found that respondent's arguments concerning the doctrine of laches and the stale complaint rule did not present a genuine issue of material fact. "We have long held that the doctrine of laches is relevant to Board cases only in the context of the stale complaint rule [citing only the Robertson, Adcock, and Brown cases, about which we will have more to say]. Here, the stale complaint rule does not apply, because the Administrator has alleged that respondent lacks the qualifications to hold the certificates that the Administrator seeks to revoke." The lack of qualifications to hold those extensive and hard-to-earn certificates, for which he was obviously found qualified by the FAA, is because he mistakenly and unintentionally failed to list on his

medical applications the two old “minor misdemeanors,” “minor” under Ohio law and clearly unrelated to flying.

We were struck by the Board’s statement that: “We have long held that the doctrine of laches is relevant to Board cases only in the context of the stale complaint rule [citing only the Robertson, Adcock, and Brown cases].” The Board never cited nor discussed the Shrader case, 6 NTSB 1400 (1989) that contradicts this statement. In Shrader the FAA waited two and a half years before it acted. In dicta, the case quoted Administrator v. Peterson, NTSB Order EA-2989 (1989) to the effect: “The inapplicability of the stale complaint rule does not preclude an airman from otherwise attempting to demonstrate that prosecutorial delay has caused prejudice warranting dismissal” (emphasis supplied). Even more telling, Shrader goes on to say: “Although Peterson did not involve an emergency order, its implicit recognition that prejudicial delay can implicate and abridge rights not specifically addressed in our rules of practice has no less force in the emergency context.” Nor did the Board cite or discuss the Wells case, 7 NTSB 1247 (1991). In Wells, the respondent was charged with intentional falsification. The complaint was not dismissible under the stale complaint rule because it presented an issue of lack of qualifications. However, it was dismissed under the doctrine of laches due to a prejudicial delay of over 5 years between the date of the incident and the FAA’s issuance of the Notice of Proposed Certificate Action. The full Board sustained

the laches dismissal. “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” [citing cases including Peterson]. To the same effect, and more recently, is the Stewart case, NTSB Order No. EA-4479 (1996). Stewart, too, was an emergency revocation of all respondent’s airman certificates on the ground of intentional falsification. Concerning the stale complaint rule, the Board specifically recognized “that the Administrator should have the discretion, in the interest of air safety, to pursue even stale charges that implicate airman qualifications. We nevertheless believe that judgments concerning qualifications that certain conduct would ordinarily warrant become less and less justifiable as the interval between the conduct and the prosecution for increases.” The Board went on to hold “that the respondent’s unblemished career in more than 17 years that have elapsed since the complained of violations and his present reputation for truth and veracity tip the scales against reliance on the dated indicator of his care, judgment, and responsibility as a certificate holder that the Administrator would have us employ to endorse his insistence on revocation for charges he appears to have no excuse for not bringing many years sooner.”

I believe that it is justifiable criticism to characterize this five-member Board’s statement that

“we have long held” as disingenuous for citing the Robertson, Adcock, and Brown cases without citing and distinguishing or expressly overruling Schrader, Peterson, Wells, Stewart and that line of cases decided by earlier and different Boards. Unfortunately, the law, as it has now been pronounced by the current Board, would allow the FAA to delay indefinitely by merely alleging lack of qualifications (and we can see from this case how thin an allegation that can be). To answer the client’s question about time limitations on the FAA for the prosecution of an alleged violation of an FAR, the candid answer is that unless the 6-month stale complaint rule bars the prosecution, the FAA will likely take the position, with the anticipated connivance of the NTSB, that the FAA’s time is unlimited. Administrator v. Manin, NTSB Order No. EA-5439 (2009).

***AVIATION SAFETY REPORTING PROGRAM. Timely Filing of ASRP Report Is An Affirmative Defense That Must Be Pled In An Answer.***

The Aviation Safety Reporting Program, as spelled out in FAA Advisory Circular 00-46D, provides for a waiver of sanction in an FAA enforcement case so long as certain requirements are met and certain exceptions do not apply. Principal among the requirements is that a written report must be mailed or delivered (including via the Internet) to NASA within 10 days of the

incident that led to the enforcement. In this case the FAA ordered a 30-day suspension of a private pilot's certificate for flying into the Washington DC ADIZ without complying with the special security procedures of the relevant NOTAM. The pilot appealed the suspension to the NTSB. He filed an answer to the FAA allegations admitting the inadvertent incursion, but he failed to include in his answer as an affirmative defense that he timely filed an ASRP. The FAA filed a motion for summary judgment. The pilot filed a reply to the motion for the first time claiming that he was eligible for a waiver of sanction under the ASRP. The law judge granted the FAA's motion, ignoring the immunity claim. The pilot's appeal to the full Board was thereafter denied, specifically rejecting the immunity claim. "We have previously stated that a respondent's allegation that he or she complied with the ASRP constitutes an affirmative defense [citing cases]. Moreover, section 821.31(b) of our Rules of Practice requires respondents to include the affirmative defenses that they seek to utilize in their answer to the Administrator's complaint. Where a respondent has not included an affirmative defense in his or her answer, we have previously refused to consider such an affirmative defense in subsequent pleadings [citing case]. Here, respondent did not include any indication that he may be eligible for a waiver of sanction under the ASRP until he replied to the Administrator's motion. Therefore, the law judge's disposition of the issue of sanction via summary judgment was appropriate." The

Board overstated its prior precedents that only held that it is "preferable" to raise the issue in the answer "or at a minimum to advise the Administrator of the issue." See, Administrator v. Laroux, NTSB Order No. EA-4957 (2002). In the instant case, neither the FAA nor the NTSB was in doubt that the respondent timely filed and was timely claiming ASRP immunity. Where was the "prejudice" to the FAA or NTSB if respondent had been allowed to litigate that issue? We have seen in prior decisions, reported here, where the respondent is denied a procedural or evidentiary claim because respondent failed to prove prejudice to the respondent. If respondents must prove prejudice to take advantage of a procedural or evidentiary claim, why shouldn't the FAA have the same burden? Lack of mutuality? As this new precedent stands, the specific message to the Bar in this case is to be sure to formally include any ASRP claim in an answer. The more general message to the Bar is to be aware of the persistent NTSB bias in favor of the FAA and against respondents in procedural claims. Administrator v. Corrao, NTSB Order No. EA-5448 (2009).

***EQUAL ACCESS TO JUSTICE ACT. FAA's Withdrawal Of A Case Prior To A Hearing Does Not Justify An EAJA Award.***

Under the Equal Access To Justice Act, the NTSB, as an agency that conducts "an adversary adjudication," may award attorneys fees and other litigation expenses to a "prevailing party" unless the position of the FAA in

pursuing the matter was "substantially justified." In this case the FAA suspended the air transport pilot certificates of two pilots for allegedly operating a Learjet aircraft while it was not in airworthy condition. The pilots, denying the charges, appealed the suspensions to the NTSB. The cases were consolidated and scheduled for hearing when the FAA filed a notice of withdrawal of the case. As a result, the NTSB law judge issued an order terminating both cases. The pilots then filed an application for an EAJA award arguing that they had prevailed in the matter. The law judge agreed and granted an award in the amount of \$12,475. The FAA appealed the judge's award to the full Board. The full Board, relying on the United States Supreme Court decision in Buckhannon Bd. And Care Home, Inc. v. West Virginia Dept. of Health, 532 U.S. 598 (2001), reversed and denied the award. The Board cited Buckhannon as holding that under EAJA a prevailing party must be one who received an enforceable judgment on the merits of a case, or who obtained a court ordered consent decree that resulted in a change in the legal relationship between the parties, neither of which applied in this case. Essentially the Board held that the pilots were not prevailing parties because an adversarial adjudication had not occurred since there had not been a hearing on the merits. FAA's withdrawal does not constitute the pilots "prevailing parties." Member Robert L. Sumwalt filed a stinging dissent to the majority opinion, accusing the majority of rejecting the obvious

Congressional intent behind the EAJA, as well as the express language of the Board's own rules. Rule 826.24(c) states that a "voluntary dismissal" constitutes the "final resolution of a proceeding" upon which a prevailing party may initiate an EAJA claim. Applications of Turner and Coonan, NTSB Order No. EA-5467 (2009).

award of fees under EAJA is inappropriate when credibility is a primary component of a law judge's decision based on the factual record." Application of Beauchamp, NTSB Order No. EA-5422 (2008).

***EQUAL ACCESS TO JUSTICE ACT. FAA Substantially Justified In Prosecuting Where Witness Credibility Is In Issue.***

Here is another case in which the NTSB reversed its own judge who made an award under the Equal Access To Justice Act, establishing a precedent further evidencing the Board's disfavor of such awards. As we have already observed, an award may not be made to a prevailing party if the FAA is shown to have been substantially justified in pursuing its complaint in the first instance. In this case the FAA revoked all of a pilot/mechanic's FAA certificates for allegedly falsifying an aircraft logbook entry concerning the installation of an engine and the annual inspection of the aircraft. After a hearing on the mechanic's appeal, an NTSB law judge chose to believe the mechanic and his witnesses over the FAA witnesses. The judge dismissed the FAA complaint. The judge subsequently granted the mechanic's application for an EAJA award, finding that the FAA was not substantially justified in pursuing the charges. The FAA appealed the award to the full Board. The full Board reversed the award. "We have long held that an