

ZUCKERT SCOUTT & RASENBERGER, L.L.P.

ATTORNEYS AT LAW

888 Seventeenth Street, NW, Washington, DC 20006-3309

Telephone [202] 298-8660 Fax [202] 342-0683

AMERICAN BAR ASSOCIATION FORUM ON AIR & SPACE LAW

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SOME THOUGHTS ABOUT FAA SAFETY ENFORCEMENT

By Frank J. Costello

The FAA's safety enforcement role is unique in American jurisprudence. No other agency of the federal government is accorded as much latitude to engage in activities which, in any other context, would be considered gross deprivations of basic constitutional rights. As Judge Wald of the D.C. Circuit observed in her concurring and dissenting opinion in the most recent appeal from the FAA's "Age 60" rule, the deference accorded to an agency "is most acute in regard to safety determinations, given the potential catastrophic effects of inadequate safety regulations, and it is difficult to imagine an agency decision which judges would be more disposed to accept than one that implicates aviation safety." Professional Pilots Federation v. Federal Aviation Administration, 118 F.3d 758, 776 (1997).

The premise underlying this latitude is that absent the direct intervention of the federal bureaucracy, FAA certificate holders would not adhere to a high level of safety and security. It is an interesting intellectual exercise to challenge the validity of that premise, but it is not very practical or political to do so. Participants in aviation just have to accept the fact that each certificate issued by the FAA carries with it the threat of martial law. But that also places a special responsibility on the FAA and its congressional overseers to act responsibly.

This paper briefly discusses three areas of FAA safety enforcement: selective air carrier certificate actions; the right to be heard in certificate actions; and the role, or non-role, of the DOT's Office of the Inspector General ("OIG") in safety enforcement. It is difficult to differentiate between lessons learned and sour grapes. It is enough to say that for lawyers weaned on civil liberties and the rights of the accused, an FAA safety practice can be a difficult experience.

Selective Enforcement

There is no one in the FAA who does not try to do his or her job with the utmost professionalism and with the interests of the public at heart. But they are working in a system, which not only gives broad authority to the regional offices, but also places a fair amount of

political responsibility on those offices, particularly since the Valujet accident. The result is an enforcement policy that is tilted against the smaller regional and specialized carriers.

Some history will bring this into perspective. In May 1979, an American Airlines DC-10 crashed on departure from Chicago. There never had been an aviation disaster of that magnitude in the U.S. The FAA took the extraordinary measure of grounding all DC-10 aircraft for 38-days, not just sitting the 138 DC-10's operated by U.S. carriers but also prohibiting DC-10 operations in U.S. airspace by non-U.S. carriers. It wrecked havoc on an industry in the earliest stages of deregulation. With the benefit of hindsight, the grounding was unnecessary, but a lesson was learned: the importance of the national air transportation system urges caution when taking enforcement activity that would impinge that system.

In 1988, at the urging of the unions, the DOT and the FAA undertook massive investigations of Eastern and Continental. Although numerous safety violations were found, the airlines were permitted to continue to operate. Indeed, the FAA established a special certificate management unit with twenty-one inspectors and supervisors to monitor Eastern. The next year, a United DC-10 crashed at Sioux City. Although there were public demands that all DC-10's be grounded again, the FAA did not take such action, nor would it do so later with other major disasters. Once more, there was a recognition that concerns about safety could be addressed with measures short of closing down or substantially limiting operations.

The Valujet accident in 1996 changed that unstated policy by focusing on regional enforcement and the role of smaller carriers. The basic policy call with respect to Valujet was that it could be shut down without substantially impairing the national system, and that such decisions belonged at the regional level. Since that time, a number of regional or specialized air carrier certificates have been suspended and/or revoked, including Rich International, Great American, AvAtlantic, Millon, Amerijet and Great Lakes. In the same period, major and national airlines have been subjected to substantial fines for alleged violations but no revocations or suspensions.

It is obvious that there is at least a de facto policy of selective enforcement in effect. It cannot be justified on rational grounds. The same assumptions that urge against major or national carrier certificate action apply to the smaller carriers. The economic impact of shutting down a smaller carrier may be more geographically limited but it is no less severe. Careers are damaged, consumers are disadvantaged and communities lose an important part of their economic base. Smaller carriers are subject to the same (and in many cases, a higher) level of safety monitoring as their larger brethren. Additionally, smaller carriers typically are the leading edge of competition in an increasingly concentrated industry.

There is no easy answer to this issue, but one suggestion is to clearly place all decisions with respect to air carrier certificate action at the national level. This would reduce the internal and external political pressure on the regions. It also would help to assure that the policy with respect to such actions, whether de jure or de facto, was at least coordinated, with all of the consequences carefully thought through.

Right to be Heard

The present statutory scheme for certificate action has no more than the slight aroma of due process and is one of the few instances in federal law where a person is guilty until proven innocent.

Pursuant to 49 U.S.C. § 44709, if the FAA believes that “safety in air commerce and the public interest” so require, it may amend, modify, suspend or revoke a certificate by order. The certificate holder has the right to appeal the order to the NTSB, with the order automatically stayed. However, if the FAA also finds that “an emergency exists and safety in air commerce or air transportation requires the order to be effective immediately,” the automatic stay is lifted and the order becomes effective. While the NTSB has sixty days to decide an emergency appeal, it might as well be sixty years. Few carriers can survive the cessation of operations for even a few days.

A good argument can be made that the “emergency” authority of the FAA should be eliminated, perhaps replaced by an emergency certificate action procedure which provided expedition while permitting the affected carrier to remain in operation pendente lite.

A variation of this was proposed last year in the form of the “Hoover” bill, proposed legislation named after Bob Hoover, the legendary aerobatics performer who had his airman certificate revoked by the FAA on an emergency basis. As introduced in the last Congress, the Hoover bill (S. 842 and H.R. 1846) would amend section 44709 to provide that if an emergency order issued, the certificate holder could demand an NTSB hearing on whether or not an “emergency” existed within 48 hours of its appeal. The NTSB then would have not more than 48 hours to decide whether an emergency existed, with the burden on the FAA to establish that proposition. This, at least in theory, would provide a modicum of due process, although more so for airmen than for air carriers.

The Role of the Office of the Inspector General

The thought that the DOT has an armed, plainclothes police force roaming the nation is more than a little alarming. Even more alarming is the fact that certificate action can be accompanied by armed searches and seizures conducted by the Office of the Inspector General. Non-programmatic enforcement activities by Inspectors General of other federal agencies have been successfully challenged. If such a challenge were made to DOT/OIG action, it would be along the following lines.

The Inspector General Act of 1986, 5 U.S.C. App. 3, was enacted "to consolidate existing auditing and investigative resources to more effectively combat fraud, waste and mismanagement in the programs and operations of [various executive] departments and agencies." Burlington Northern Railroad Co. v. Office of Inspector General, Railroad Retirement Board, 983 F.2d 631, 634 (5th Cir. 1993) (citing legislative history). The OIG at any federal agency has the authority to monitor the agency's activities. Third parties fall within the

OIG's investigatory authority only to the extent that they are involved in an agency's programs, e.g., as recipients of federal funds. While the OIG's investigatory powers within the agency sphere are broad, they are not unlimited. An OIG's investigatory authority does not extend to matters, which do not concern fraud, inefficiency or waste within a federal agency. Burlington Northern, supra., 983 F.2d at 641-42 (citations omitted).^{1/}

The court in Burlington Northern put a fine point on the latter principle by holding that an OIG lacks the statutory authority to investigate the regulatory compliance of third parties:

"When a regulatory statute makes a federal agency responsible for ensuring compliance with its provisions, the Inspector General of that agency will lack the authority to make investigations or conduct audits which are designed to carry out that function directly."

Id. at 642.^{2/}

The pertinent DOT and FAA regulations reflect this distinction. The OIG's authority is focused on the "programs and operations of the Department" and its responsibilities consist of conducting audits, investigations, reviewing existing and proposed legislation and making recommendations to the Secretary and Congress "for the purpose of promoting economy and efficiency in program administration, or preventing and detecting fraud and abuse" in connection with DOT programs. 49 C.F.R. §§ 1.23 (i) and 1.24 (d). Specifically, the OIG has delegated to it the authority to conduct aviation economic audits, to make an annual report to Congress and to participate in the program fraud civil remedy procedures. 49 C.F.R. §§ 1.60, 20.605 and 31.1 et seq. The FAA, on the other hand, has the delegated authority to investigate all violations of the

^{1/} See, Winters Ranch Partnership v. Viadero, 901 F. Supp. 237 (W.D. Tex. 1995) where the court stated that "the scope of the Inspector General's duties and powers is severely limited and there was no intent by Congress to transfer 'responsibility for audits and investigations constituting an integral part of the programs involved. In such cases, the Inspector General [has] oversight rather than direct responsibility.'" Id. at 240 (quoting H.R. Rep. No. 584, 95th Cong., 1st Sess., at 12-13 (1977)). Also see, United States v. Montgomery County Crisis Center, 676 F. Supp. 98 (D. Md. 1987), where the court noted that the statute's legislative history "makes clear that in granting [the OIG] subpoena power Congress was focusing upon obtaining records necessary to audit and investigate the expenditure of federal funds." Id. (quoting S. Rep. No. 1071, 95th Cong., 2nd Sess.).

^{2/} The court specifically held that the Railroad Retirement Board OIG could not conduct a tax audit of a railroad since that was the responsibility of the Board. The distinction is between "the oversight of compliance by an agency with an act's regulatory provisions" and "oversight by an agency with the internal policies of the agency." United States v. Hunton & Williams, 952 F.Supp. 843, 851, n. 15 (D.D.C. 1997). The former is the responsibility of the regulators. The latter is the responsibility of the OIG.

Federal Aviation Act or the FAR's. 14 C.F.R. § 13.3. If FAA investigators suspect a criminal violation, they have the responsibility for directing it to the Office of the Chief Counsel or, in some cases, the FBI. 14 C.F.R. § 13.23. The OIG simply is not in the loop when non-programmatic criminal violations are suspected.

The farthest the OIG has come to pushing its jurisdictional envelope is to use other federal law enforcement agencies to front for it. For example, in Wag-Aero, Inc. v. United States, 837 F.Supp. 1479 (E.D.Wis. 1993), aff'd. without opinion, 1994 U.S. App. LEXIS 27856 (7th Cir. 1994), search warrants were obtained in an OIG investigation of "bogus parts," i.e., parts not in compliance with the FAR's, through U.S. Customs investigators who alleged that the parts in question were imported into the U.S. unlawfully. The warrants were upheld, but solely to the extent that the allegations supported the Customs violations, not any violations of the FAR's.

These may be fine distinctions, but they are important enough to be embodied both in acts of Congress and federal regulations. The underlying policy is this: criminal investigations of third parties for violations of regulatory compliance activities should be left to fair-minded professionals with the experience and training in the particular area of compliance.