

# THE PILOT IN COMMAND AND THE FARs: THE BUCK STOPS HERE (ALMOST ALWAYS)

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The Federal Aviation Regulations (FARs) make it clear—the pilot in command of an aircraft is directly responsible for, and acts as the final authority as to, the operation of that aircraft.<sup>1</sup> However, the regulations are often silent on several significant questions that frequently arise in the context of pilot in command responsibility. First, who is the pilot in command when more than one pilot occupies the cockpit? Also, is the pilot in command responsible when a qualified and capable second in command commits an error? Is the pilot in command responsible for knowing whether his aircraft is being operated with any latent defects that might impact the aircraft's airworthiness? Can more than one qualified pilot in the cockpit be held responsible for FAR violations? The purpose of this article is to explore these questions and provide guidance for those faced with the question of pilot in command responsibility under the FARs, and, specifically, in the context of Federal Aviation Administration (FAA) enforcement proceedings.

## I. WHO IS THE PILOT IN COMMAND?

In most cases it is relatively easy to determine the person responsible as pilot in command of an aircraft. The FARs generally define the term “pilot in command” as the person who (1) has final authority and responsibility for the operation and safety of the flight; (2) has been designated as the pilot in command before or during the flight; and, (3) holds the appropriate category, class, and type rating, if appropriate, for the conduct of the flight.<sup>2</sup>

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1. 14 C.F.R. § 91.3(a) (2006).
2. 14 C.F.R. § 1.1 (2006).

For commercial flight operations requiring Part 121<sup>3</sup> or Part 135<sup>4</sup> certification, the regulations require the designation of a pilot in command for the flight. For Part 135 flights, the 135 certificate holder must designate a pilot in command and “a second in command”<sup>5</sup> for flights that require two pilots.<sup>6</sup> Once designated, the pilot in command of a Part 135 flight remains the pilot in command at all times during that flight.<sup>7</sup> For Part 121 flights, the minimum pilot crew is two pilots and the Part 121 certificate holder must designate one pilot as pilot in command and the other pilot as second in command.<sup>8</sup>

For operations under Part 91<sup>9</sup> of the FARs, the question of who is pilot in command can be simple in some cases and more complex in others. In circumstances where a pilot flies without another pilot, either solo or with passengers, that pilot is obviously acting as the pilot in command.<sup>10</sup> However, the situation can become a bit murky under certain circumstances. The cases where controversy over who has pilot in command responsibility has typically arisen in the following Part 91 situations:

1. Flights where a certified flight instructor (CFI) is in the cockpit;<sup>11</sup>
2. Two pilots operating an aircraft with dual-controls when both pilots are qualified to operate the aircraft as pilot in command;<sup>12</sup>
3. Flights simulating instrument meteorological conditions<sup>13</sup> requiring a safety pilot;<sup>14</sup> and,
4. Checkrides with FAA examiners.<sup>15</sup>

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3. 14 C.F.R. §§ 121.1-121.1007 (2006).

4. *Id.* § 135.1-135.443.

5. As defined in 14 C.F.R. § 1.1 (2006).

6. 14 C.F.R. § 135.109(a) (2006).

7. *Id.* § 135.109(b).

8. *Id.* § 121.385(c). Unlike 14 C.F.R. § 135.109(b), the language in Part 121 does not indicate that once designated, the pilot in command remains as pilot in command throughout the flight. *Id.*

9. *Id.* § 91.1-91.713.

10. Fed. Aviation Decisions, Interpretation 1982-4, I-588, I-591, Letter from J.E. Murdock III, Chief Counsel to The Honorable Thomas N. Kindness (May 12, 1992) (on file with the North Dakota Law Review).

11. See discussion *infra* Part I.A.

12. See discussion *infra* Part I.B.

13. Defined in the FAA’s Aeronautical Information Manual (AIM) as meteorological conditions expressed in terms of visibility, distance from cloud, and ceiling less than the minima specified for visual meteorological conditions. Fed. Aviation Admin., U.S. Dep’t of Transp., *AIM Official Guide to Basic Night Information and ATC Procedures* (2006), available at [www.faa.gov/atpubs](http://www.faa.gov/atpubs).

14. See discussion *infra* Part I.C.

15. See discussion *infra* Part I.D.

### A. CFI IN THE COCKPIT

The certified flight instructor (CFI) carries a heavy burden when it comes to the question of who is pilot in command of an aircraft. The National Transportation Safety Board (hereinafter NTSB or the Board), in one of its earlier cases clearly states that regardless of who is manipulating the controls of an aircraft during an instructional flight, the CFI is always deemed to be the pilot in command.<sup>16</sup> The Board even goes so far to state that it makes no difference what level of proficiency a student may have attained, the flight instructor is still the pilot in command.<sup>17</sup> The Board's rationale is that a flight instructor's function on an instructional flight is to teach.<sup>18</sup> If he or she allows the flight to enter a situation that compromises safety, the CFI has breached his or her duty as pilot in command.<sup>19</sup>

Although the general rule is fairly clear-cut, there are several cases that demonstrate how difficult it can be to apply the rule in all situations. What happens when there are two instructors on board for an instructional flight and one of them expressly and unequivocally declares herself to be the pilot in command? The NTSB responded by holding that the instructor who declared herself to be the pilot in command is indeed the pilot in command.<sup>20</sup> In this case, the Board determined that "any certified pilot," let alone an experienced instructor, such as the respondent, would have constructive knowledge of the term "pilot in command" and would understand the import of taking responsibility for the flight as pilot in command.<sup>21</sup>

Another situation that raises questions is where the certified flight instructor does not hold a current medical certificate. In *Administrator v. Ridpath*<sup>22</sup> the FAA sought the revocation of Ridpath's pilot and flight instructor certificates for careless and reckless operations and for operating an aircraft while intoxicated.<sup>23</sup> The facts of the case indicate that Ridpath was instructing a rated pilot while the pilot was practicing an approach under simulated instrument conditions.<sup>24</sup> Ridpath did not hold a medical certificate.<sup>25</sup> During the practice approach, the aircraft crashed

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16. *Admin. v. Hamre*, 3 N.T.S.B. 28, 31 (1977).

17. *Id.*

18. *Id.*

19. *Id.*

20. *Admin. v. Funk*, 6 N.T.S.B. 1016, 1017 (1989).

21. *Id.*

22. N.T.S.B. Order No. EA-3736 (Nov. 13, 1992).

23. *Ridpath*, N.T.S.B. Order No. EA-3736 at 2.

24. *Id.* at 3.

25. *Id.* at 5 n.4 (noting that under the FARs, a flight instructor instructing a rated pilot need not hold a medical certificate). It is noteworthy that Ridpath's lack of a medical certificate would have legally precluded him from acting as pilot in command in any circumstance. See also Fed.

approximately 75 feet short of the intended runway.<sup>26</sup> Just before the crash, Ridpath pulled back on the yoke of the aircraft in an attempt to either avert a crash or minimize its impact.<sup>27</sup> The NTSB held that the action taken by Ridpath to avoid the accident demonstrated an “involvement in the management of the aircraft that [was] sufficient to support the [careless or reckless] allegation.”<sup>28</sup> Interestingly, a separate concurrence by one Board member indicates that “[a]lthough I agree with the result in this case, I have a serious problem to the extent that the analysis suggests that respondent has violated the FARs because he manipulated the controls in an emergency attempt to reduce the severity of the accident.”<sup>29</sup> The concurrence goes on to reason that the problem was not that the flight instructor manipulated aircraft controls while under the influence, but that the flight instructor placed himself in a situation where he was responsible for manipulating the controls at a time of necessity while under the influence of alcohol.<sup>30</sup>

The question arises as to whether the Board is de facto imposing a strict liability standard on CFIs for all student errors. The answer appears to be “no.” In *Administrator v. Strobel*,<sup>31</sup> the flight instructor was asked by an experienced pilot to accompany the pilot on a “check-out” ride in an aircraft type that the pilot had never flown before.<sup>32</sup> The check-out was not legally necessary because the pilot had already been checked out in an aircraft of similar category and class.<sup>33</sup> During the flight, the pilot applied full power after a touch-and-go landing and then, inexplicably and without any warning, reduced power and jammed on the brakes of the aircraft with only 300 feet of runway remaining.<sup>34</sup> The airplane could not stop in the remaining runway, broke through a fence, and continued for another 400 feet until stopping in a corn field.<sup>35</sup> The NTSB held that the flight instructor was clearly acting as a flight instructor during this flight even though his presence was not required.<sup>36</sup> However, the Board refused to impose strict liability on the flight instructor.<sup>37</sup> The Board reasoned that although flight

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Aviation Decisions, Interpretation 1989-24, I-251 Letter from Donald P. Byrne, Acting Assistant Chief Counsel to Bruce J. Brotman (Sept. 13, 1989) (on file with the North Dakota Law Review).

26. *Ridpath*, N.T.S.B. Order No. EA-3736 at 3.

27. *Id.* at 5.

28. *Id.*

29. *Id.* at 7 (Hart, concurring).

30. *Id.*

31. N.T.S.B. Order No. EA-4384 (Jul. 18, 1995).

32. *Strobel*, N.T.S.B. Order No. EA-4384 at 3.

33. *Id.*

34. *Id.* at 4-5.

35. *Id.* at 5.

36. *Id.* at 6.

37. *Id.* at 7.

instructors are expected to do everything possible to keep a flight safe, they are not to be held strictly liable for the outcome of a flight.<sup>38</sup>

#### B. TWO QUALIFIED PILOTS AND DUAL CONTROLS

One common scenario in light general aviation aircraft are two qualified pilots in an aircraft cockpit with dual controls. This raises some interesting questions: Who is the pilot in command under these circumstances? Can a pilot who believes that he or she is on board a light general aviation aircraft as a passenger only, be held responsible for FAR violations that arise from that flight? This situation can easily arise in a variety of contexts involving light aircraft. There are many situations where a pilot (and even a non-pilot) might help with non-flying chores such as radio communications, map-reading, and changing frequencies on navigation aids.<sup>39</sup> In fact, the FAA and industry experts encourage single pilots to make use of the resources (both human and machine) available to lighten their workload.<sup>40</sup>

In a 1995 decision, *Administrator v. Thomas*,<sup>41</sup> the NTSB responded to these questions in a somewhat muddled way. But, the case still provides some valuable guidance. The *Thomas* case came about as a result of an incident involving a close shave with a barely-avoided, gear-up landing.<sup>42</sup> The aircraft involved was a Swearingen Merlin II, a twin engine turboprop airplane certificated for single-pilot operations.<sup>43</sup>

In this case, Thomas was the employer of the pilot in command who was doing the flying from the left seat of the aircraft cockpit.<sup>44</sup> On the day of the incident in question, the airplane was being flown to pick up a potential purchaser for a demonstration flight.<sup>45</sup> Thomas claimed that he took along his employee to act as pilot in command because he did not assess himself to be current in the aircraft.<sup>46</sup> Thomas and his employee took turns flying on the different legs of the flight.<sup>47</sup> At the time of the

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38. *Id.*

39. Telephone Interview with Bruce Landsberg, Executive Director of AOPA Air Safety Foundation (Aug. 12, 2007) [hereinafter interview with Bruce Landsberg].

40. *Id.*; see also NBAA Training Guidelines for Single Pilot Operations of Very Light Jets and Technically Advanced Aircraft, available at <http://web.nbaa.org/public/ops/safety/vlj/1.php>. (last visited March 19, 2008).

41. *Thomas*, N.T.S.B. Order No. EA-4309 (Dec. 14, 1994).

42. *Id.* at 3.

43. *Id.* at 3 n.4.

44. *Id.* at 3.

45. *Id.* at 5 n.7.

46. *Id.*

47. *Id.* at 3.

incident in question, Thomas was the non-flying pilot who was working radios, calling checklists, sometimes working the flaps and propeller controls on the aircraft, and calling out altitudes.<sup>48</sup>

The near gear-up incident took place while the aircraft was executing an instrument approach.<sup>49</sup> During an initial attempt to land the aircraft, the employee who was flying the aircraft lowered the gear handle, but the gear did not deploy.<sup>50</sup> As the employee began his landing flare, Thomas noticed that the cockpit's gear-down lights were not lit.<sup>51</sup> He alerted his employee and the employee executed a go-around with resulting damage to the aircraft's propeller and antennae which both struck the runway.<sup>52</sup> The employee returned for a second landing attempt and landed without further incident.<sup>53</sup>

The FAA charged Thomas with careless and reckless operation of an aircraft<sup>54</sup> and the NTSB affirmed the FAA's charges, suspending Thomas's pilot certificate for fifteen days.<sup>55</sup> One of the many interesting aspects to this decision by the NTSB is the Board's stated understanding that Thomas was not being punished as if he were the responsible pilot in command.<sup>56</sup> Instead, the Board stated that the sanction against Thomas stemmed from his "own behavior."<sup>57</sup> The Board clarified in its decision that simply because "an aircraft requires only one pilot does not support a conclusion that a second pilot (or even a non-pilot) participating in the inflight operations is not accountable for his own actions."<sup>58</sup> The Board expressly agreed with the decision by its administrative law judge that it was not necessary to determine that Thomas was the pilot in command.<sup>59</sup>

This decision is problematic at best because it fails to clarify how a second pilot or even a non-pilot could be held liable for the careless or reckless operation of an aircraft when they are not legally responsible (or in the case of the non-pilot, not capable of legal responsibility) for the conduct of the flight. However, notwithstanding this unanswered question, the

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48. *Id.* at 5-6.

49. *Id.* at 3.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.* at 1.

55. *Id.* at 2.

56. *Id.* at 4.

57. *Id.*

58. *Id.* at 5.

59. *Id.* at 8. However, the Board thought it important to point out that the employee flying the aircraft testified as to his perception that Thomas was the pilot in command. *Id.*

Board does provide some helpful guidance when it comes to the question of determining the pilot in command when you have two qualified pilots in a cockpit with dual controls. The Board stated:

[W]e think it [is] important to point out that [the employee pilot's] perception that [Thomas], who was qualified in the aircraft, was the PIC is not an unexpected assumption and that good cockpit crew management requires that two pilots in a cockpit agree prior to the flight as to the duties of each. The need for such agreement is not limited, as [Thomas] argues to those situations where the aircraft specifications and procedures require two pilots. [Thomas], as pilot and [the other pilot's] employer, could have chosen to have no role in the aircraft's operation, could have clearly told [his employee] that he was the PIC, or could have stated his intent to perform certain functions and no others.<sup>60</sup>

While this guidance might be helpful, it may still be impractical in most cases involving light aircraft requiring only a single pilot. It may be argued that this type of ruling may even produce a chilling impact on air safety because it will make "second pilots" think twice before offering any assistance during a flight. Nonetheless, this decision does in fact focus attention on this rather murky area of the FARs and the need to be as clear as possible when determining who is responsible as pilot in command of an aircraft operation.<sup>61</sup>

### C. SAFETY PILOTS

Pilots regularly operate in simulated instrument conditions in order to train as instrument rated pilots or maintain skills as instrument pilots. While one pilot is "under the hood," the FARs require the other pilot to act as a "safety pilot."<sup>62</sup> Two questions frequently arise in this context. First, who is the pilot in command while the aircraft operates in simulated instrument conditions—the pilot "under the hood" or the safety pilot? The second question is what qualifications, if any, does the safety pilot need to possess?

FAR Section 91.109(b) does not directly respond to the question of who acts as pilot in command of the flight during simulated instrument conditions. However, FAA interpretations indicate that if a pilot who is not instrument rated is flying an aircraft under a hood and simulating

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60. *Id.*

61. *See also* Admin. v. Deville, 3 N.T.S.B. 3789 (1981); Admin. v. Fields, 4 N.T.S.B. 512 (1982).

62. 14 C.F.R. § 91.109(b) (2006).

instrument flight under instrument flight rules (even while operating in visual meteorological conditions), the safety pilot must act as pilot in command and must also hold an instrument rating appropriate to the aircraft being operated.<sup>63</sup> In such circumstances, the safety pilot is considered pilot in command and must hold a current airman medical certificate.<sup>64</sup>

Relevant FAA interpretations indicate by inference that if the pilot “under the hood” is current and instrument rated, that pilot can serve as pilot in command.<sup>65</sup> Alternatively, if instrument flight is being simulated under visual flight rules, the pilots could agree prior to the flight as to which pilot will serve as pilot in command. Further, as long as the safety pilot does not act as pilot in command, he or she is not required to comply with the currency requirements of FAR Section 61.57.<sup>66</sup>

#### D. CHECKRIDES

As discussed above, when a student pilot is undergoing training, the student’s certified flight instructor is considered the pilot in command during every dual flight.<sup>67</sup> This is most obviously the case with a student who has not yet obtained a private pilot certificate.<sup>68</sup> But what happens when a student pilot or candidate for a higher certificate or rating shows up for a checkride with an FAA inspector or designated examiner?

FAA regulations tackle this issue directly. First, the regulations state that an examiner represents the FAA for purposes of administering a flight exam to determine an applicant’s fitness to hold a certificate or rating.<sup>69</sup> Next, the regulations expressly state that the examiner is not the pilot in command of an aircraft during a checkride unless the examiner agrees to act in that capacity through prior agreement with (1) the applicant or (2) a person who would otherwise act as pilot in command of the flight or a portion of the flight.<sup>70</sup>

This raises another question—if the examiner is not pilot in command, is he or she considered to be a passenger on board the aircraft? If so, that

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63. Fed. Aviation Decisions, Interpretation 1985-12, I-63, I-64, Letter from Carol S. Rayburn, Manager, General Aviation and Commercial Division, to John J. Sheehan (June 17, 1985) (on file with the North Dakota Law Review).

64. *Id.*

65. *Id.*

66. *Id.*

67. *Admin. v. Hamre*, 3 N.T.S.B. 28 (1977); *see also* FAA Interpretation 1985-12, *supra* note 64, at I-64.

68. However, a student pilot who has soloed may be considered a pilot in command when they are operating the aircraft on solo training or cross country flights.

69. 14 C.F.R. § 61.47(a) (2006).

70. *Id.* § 61.47(b).

might make a checkride for a private pilot applicant or recreational pilot applicant illegal because a non-private pilot would not have passenger carrying privileges.<sup>71</sup> The regulations address this issue by indicating that during any checkride, the applicant and the examiner are not held subject to any other regulatory requirements or limitations related to the carriage of passengers.<sup>72</sup> This provision essentially clears the way for the checkride with a pilot in command and an examiner who has a special status by virtue of not being considered a passenger or a crewmember with responsibility for the conduct of the flight.

## II. PILOT IN COMMAND RESPONSIBILITY FOR AIRCRAFT OPERATIONS AND DEFENSES

While it is sometimes difficult to identify the pilot in command, the duty and responsibility of the pilot in command is pretty clearly spelled out in the FARs. The FARs plainly state that the pilot in command of an aircraft is directly responsible for, and is the final authority as to, the operation of that aircraft.<sup>73</sup> The rule appears to leave little room for discussion—the buck stops with the pilot in command. If anything untoward occurs during a flight or if any rules are violated, it is the pilot in command who will need to atone. Despite the sweeping language suggesting a strict liability standard, there are three widely recognized exceptions to the rule.

### A. REASONABLE RELIANCE DEFENSE

The first exception is known as the reasonable reliance defense. This defense does not have its roots in the regulations. It emanates from NTSB Board (and several earlier Civil Aeronautics Board or CAB<sup>74</sup>) decisions. Essentially, the reasonable reliance defense permits a pilot in command to avoid liability if he or she reasonably relied on a second in command who errs.

From the earliest CAB cases, it was recognized that a pilot in command of a transport aircraft is not necessarily accountable for the failure of crew members where it is shown that his reliance on those crewmembers was reasonable.<sup>75</sup> In later cases, the NTSB explained the rationale for this exception to the general rule for command pilots. In *Administrator v.*

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71. *Id.* § 61.89(a).

72. *Id.* § 61.47(c).

73. *Id.* § 91.3(a).

74. The CAB was the predecessor to the NTSB.

75. *Admin. v. Dillon*, N.T.S.B. Order No. EA-4132, at 5 n.10 (Apr. 7, 1994) (citing *Charles A. Hazen*, 26 C.A.B. 824, 829 (1958)).

*Lusk*,<sup>76</sup> the Board indicates that while the responsibility for the safe operation of an aircraft rests with the pilot in command, it must be recognized that the complexity of air travel and technology requires that duties be delegated and not individually confirmed by the pilot in command.<sup>77</sup> Therefore, an airline captain could not be required to personally verify every representation made to him by any member of ground or flight crews.<sup>78</sup>

This general approach to the reasonable reliance defense continued for many years until the NTSB articulated a far more specific rubric for applying the defense in *Administrator v. Takacs*.<sup>79</sup> In the *Takacs* case, the Board established a significantly narrower standard that is still in use today. Specifically, the Board articulated the new standard as follows:

As a general rule, the pilot-in-command is responsible for the overall safe operation of the aircraft. If however, a particular task is the responsibility of another, if the PIC has no independent obligation (e.g., based on operating procedures or manuals) or ability to ascertain the information, and if the captain has no reason to question the other's performance, then and only then will no violation be found.<sup>80</sup>

As indicated, the new test requires three ingredients in order for the Board to consider the reasonable reliance defense:

1. The task is the responsibility of another;<sup>81</sup>
2. The PIC has no independent obligation to ascertain the information; and,
3. The PIC has no reason to question the performance of the crewmember.

In subsequent cases, the *Takacs* test has made it significantly more difficult to employ the reasonable reliance defense. In *Administrator v. Doreen*,<sup>82</sup> the Board concluded that the reasonable reliance defense could not be applied because the pilot in command had an independent obligation to repeat a clearance out loud (and because the pilot in command had the ability to determine the correct clearance).<sup>83</sup> The Board also refused the

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76. 2 N.T.S.B. 480 (1973).

77. *Lusk*, 2 N.T.S.B. at 481.

78. *Id.* at 482.

79. N.T.S.B. Order No. EA-3501 (Feb. 1, 1992).

80. *Id.* at 9.

81. It is noteworthy that this test has the effect of requiring that the crewmember relied upon must be a necessary crewmember under the FARs.

82. N.T.S.B. Order No. EA-4778 (June 30, 1999).

83. *Doreen*, N.T.S.B. Order No. EA-4778 at 2-4.

reasonable reliance defense to a pilot in command when the Board determined that a reasonably prudent pilot would not assume that his second in command would correctly enter an altitude.<sup>84</sup> Another example of the narrowing of this defense comes in the case of *Administrator v. Buboltz*,<sup>85</sup> where the Board found that a pilot in command failed to meet the requirements of the *Takacs* test due to the fact that he had reason to question his first officer's characterization of a clearance, and the opportunity to ascertain whether his flight was cleared.<sup>86</sup> The most recent rejection of a reasonable reliance defense is found in *Administrator v. Jolly*.<sup>87</sup> In this case, the Board was not persuaded that the reasonable reliance defense applied because the respondent did not establish that he did not have the ability to determine whether his co-pilot had complied with an airspace NOTAM (notice to airmen).<sup>88</sup>

Some safety questions arise as a result of the Board's tighter requirements for utilizing the reasonable reliance defense. One prominent point of concern is whether the Board's legal policy is congruous with FAA's efforts to encourage the use of crew resource management (CRM), which refers to the effective use of all available resources during a flight: "human resources, hardware, and information."<sup>89</sup> FAA's push for greater crew coordination and delegation of duties stems from its observations that many incidents and accidents are caused by "poor group decisionmaking, ineffective communication, inadequate leadership, and poor task or resource management."<sup>90</sup> Safety experts point out that narrowing the use of the reasonable reliance defense could be counterproductive to safety due to the possibility of regression to the 1970s and 1980s cockpit environment when a first officer merely served as a back-up and the captain was always assumed to be correct.<sup>91</sup>

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84. *Admin. v. Nutsch*, N.T.S.B. Order No. EA-4148 at 6 (Apr. 13, 1994), *aff'd*, 55 F.3d 684 (D.C. Cir. 1995).

85. N.T.S.B. Order No. EA-3907 (June 7, 1993).

86. *Buboltz*, N.T.S.B. Order No. EA-3907 at 2.

87. N.T.S.B. Order No. EA-5307 (August 9, 2007).

88. *Jolly*, N.T.S.B. Order No. EA-5307 at 10-12.

89. FED. AVIATION ADMIN., U.S. DEP'T OF TRANSP., ADVISORY CIRCULAR No. 120-51E, CREW RESOURCE MANAGEMENT TRAINING 2 (Jan. 22, 2004).

90. *Id.* at 4.

91. Interview with Professor Jim Higgins, Dep't of Aviation, John D. Odegard Sch. of Aerospace Science, Univ. of N.D. (May 9, 2007); *see also* Interview with Bruce Landsberg, *supra* note 40.

## B. EMERGENCY AUTHORITY OF PILOT IN COMMAND

The second exception is applicable in the case of an inflight emergency. The FARs permit a pilot in command, when facing an inflight emergency requiring immediate action, to deviate from the rules to the extent required to meet the emergency.<sup>92</sup>

The first issue that arises in the use of a pilot's emergency authority is clarifying what is meant by the term "emergency" as it is used in the regulations. FAA interpretations indicate that an emergency will generally be recognized in "unexpected [or] unforeseen serious occurrence[s] or situation[s] that require[] prompt, urgent action."<sup>93</sup> However, the Board has, in certain circumstances, rejected arguments by the FAA that there can only be an emergency when "immediate" action is required.<sup>94</sup> The Board has also been willing to permit the invocation of emergency authority when, in hindsight, no abrupt action by the pilot in command was necessary.<sup>95</sup>

Another issue that frequently arises in cases where a pilot in command invokes emergency authority is the need to declare an emergency. The NTSB Board has clearly ruled on this issue—the fact that a pilot does not formally declare an emergency on his radio does not preclude reliance on FAR Section 91.3(b) as exculpatory.<sup>96</sup> However, a review of NTSB Board decisions makes it clear that the declaration of an emergency will be treated as circumstantial evidence that an emergency situation truly existed.<sup>97</sup> It is also important to note that the Board will not recognize the exercise of a pilot's emergency authority when the emergency is one of the pilot's own making.<sup>98</sup>

The FARs also provide for some administrative burdens on pilots who find it necessary to deviate from the rules due to an emergency. As a general operating rule, a pilot who invokes FAR Section 91.3(b) must, upon

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92. 14 C.F.R. § 91.3(b) (2006).

93. Fed. Aviation Decisions, Interpretation 1993-10, I-26, I-28, Letter from Donald B. Byrne, Assistant Chief Counsel, Regulations Division to Mr. George K. Schaefer (Apr. 16, 1993) (on file with the North Dakota Law Review). The FAA has also issued guidance on particular types of emergencies. *See also* Fed. Aviation Decisions, Interpretation 1990-39, I-356, I-357, Letter from Donald B. Byrne, Assistant Chief Counsel, Regulations and Enforcement Division to Gerald L. Naekel (Nov. 23, 1990) (on file with the North Dakota Law Review) (discussing major fires and natural disasters); Fed. Aviation Decisions, Interpretation 1979-38, I-373, I-374, Letter from Johnathan Howe, Deputy Chief Counsel to Joseph M. Schwind (July 9, 1979) (on file with the North Dakota Law Review) (pertaining to fuel supply, weather conditions, and icing conditions).

94. *E.g.*, Admin. v. Scott, N.T.S.B. Order No. EA-4003 at 4 (Oct. 27, 1993).

95. Admin. v. Owen, 3 N.T.S.B. 854, 856-57 (1977).

96. Admin. v. Clark, 2 N.T.S.B. 2015, 2017 n.8 (1976).

97. *Scott*, N.T.S.B. Order No. EA-4003 at 4-5.

98. *See* Admin. v. Teti, N.T.S.B. Order No. EA-3969 (Aug. 12, 1993) at 8; Admin. v. Worth, N.T.S.B. Order No. EA-3595 (June 2, 1992) at 7 n.15.

the request of the FAA, file a written report of the deviation to the FAA.<sup>99</sup> A pilot operating under Part 121 of the FARs must abide by more detailed requirements requiring that:

Whenever a pilot in command or dispatcher exercises emergency authority, he shall keep the appropriate ATC facility and dispatch centers fully informed of the progress of the flight. The person declaring the emergency shall send a written report of any deviation through the certificate holder's operations manager, to the Administrator. A dispatcher shall send his report within 10 days after the date of the emergency, and a pilot in command shall send his report within 10 days after returning to his home base.<sup>100</sup>

Pilots operating under Part 135 of the FARs have a somewhat similar requirement mandating that anyone deviating from a rule in Part 135 due to an emergency must:

[W]ithin 10 days, excluding Saturdays, Sundays, and Federal holidays, after the deviation, send to the FAA Flight Standards District Office charged with the overall inspection of the certificate holder a complete report of the aircraft operation involved, including a description of the deviation and reasons for it.<sup>101</sup>

In the end analysis, a deviation from the regulations due to an emergency may be excused. However, the emergency must be genuine and not of the pilot's own making. Additionally, the pilot invoking emergency authority must be prepared to properly document the circumstances surrounding the emergency and subsequent deviation.

### C. CONTROLLER ERROR DEFENSE

The third widely recognized exception is where a pilot reasonably relied on an air traffic controller who makes an error. Much like the reasonable reliance defense, the controller error defense does not have its roots in the regulations. It is largely based on NTSB Board decisions and interpretations.

Long standing Board precedent makes it clear that a pilot's violation (typically of an air traffic control clearance) may be excused if ATC is the initiating or principal cause of the deviation.<sup>102</sup> This precedent was

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99. 14 C.F.R. § 91.3(c).

100. 14 C.F.R. § 121.557(c).

101. *Id.* § 135.19(c).

102. *E.g.*, Admin. v. Snead, 2 N.T.S.B. 262 (1973); Admin. v. Nelson and Keegan, 2 N.T.S.B. 1900 (1975); Admin. v. Dunkel, 2 N.T.S.B. 2250 (1976); Admin. v. Smith, 3 N.T.S.B.

amplified (and to some extent clarified) in *Administrator v. Fromuth and Dworak*<sup>103</sup> when the Board explained that even if a deviation from a clearance is initiated by a pilot's inadvertent mistake, the mistake may be excused if after the mistake, the pilot takes action that, but for ATC, would have exposed the error, thus allowing ATC to correct the error.<sup>104</sup> As long as there is no evidence that a pilot misheard a clearance or instruction due to carelessness or lack of professionalism, a full readback of the misunderstood clearance to ATC that goes uncorrected by ATC will exonerate the pilot(s) involved.<sup>105</sup> The Board plainly indicates that it views the readback as an intention to ensure that compliance with ATC instructions or clearances is based on an accurate understanding of the clearance or instruction.<sup>106</sup>

All of this is somewhat muddled with a significant United States Court of Appeals decision in *Garvey v. NTSB*.<sup>107</sup> In *Garvey*, the pilot in command of a Northwest Airlines flight mistakenly thought that an instruction to an American Airlines aircraft was intended for his flight.<sup>108</sup> The Northwest pilot made a full readback of the clearance to ATC; however, his transmission was entirely blocked or "stepped on" because it was made at the same time the American Airlines pilot was making his readback.<sup>109</sup> Due to the fact that ATC never received the readback from the Northwest pilot, it could not correct his mistake and he went on to deviate from his clearance which triggered a violation.<sup>110</sup>

The NTSB was persuaded that the Northwest pilot had done everything he could to ensure a correct understanding of the clearance he was given. Therefore, the Board dismissed the FAA enforcement action against the pilot.<sup>111</sup> In doing so, the Board rejected the FAA's interpretation of its regulations that "[i]nattention, carelessness, or an unexplained

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85 (1977); *Admin. v. Rolund*, N.T.S.B. Order No. EA-3991 (Sept. 27, 1993), *reconsideration denied* Order EA-4123 (Mar. 17, 1994), *aff'd*, 57 F.3d 1144 (D.C. Cir. 1995).

103. N.T.S.B. Order No. EA-3816 (Mar. 5, 1993).

104. *Fromuth & Dworak*, N.T.S.B. Order No. EA-3816 at 6-7.

105. *See Admin. v. Atkins & Richards*, EA-4078 (Feb. 16, 1994).

106. *Admin. v. Fromuth & Dworak*, EA-3816 (Mar. 5, 1993); *see also* FAA Order 7110.65, Air Traffic Control, Section 2-4-3 (Feb. 16, 2006). "If altitude, heading, or other items are read back by the pilot, ensure the read back is correct. If incorrect or incomplete, make corrections as appropriate." FED. AVIATION ADMIN., AIR TRAFFIC CONTROL 2-72 (1993).

107. 190 F.3d 571 (D.C. Cir. 1999).

108. *Id.* at 574.

109. *Id.*

110. *Id.*

111. *Id.* at 575.

misunderstanding . . . [does] not excuse a deviation of a clearly transmitted clearance or instruction.”<sup>112</sup>

On appeal, the FAA argued that the NTSB had a statutory obligation to defer to its interpretation (developed as a litigation position during the proceedings).<sup>113</sup> The Court of Appeals agreed with the FAA and reversed the NTSB’s decision to exonerate the pilot.<sup>114</sup> It is uncertain if the impact of this case is limited to its unusual facts, i.e. that the pilot’s readback was totally blocked. However, it is worthy to note its holding and the more overarching ruling regarding deference to FAA interpretations (even those developed during litigation).<sup>115</sup>

### III. PILOT IN COMMAND RESPONSIBILITY FOR AIRCRAFT AIRWORTHINESS

The FARs clearly state that no person may operate an unairworthy aircraft<sup>116</sup> and that “a pilot in command of a civil aircraft is responsible for determining whether that aircraft” he or she is operating is in airworthy condition.<sup>117</sup> Further, the pilot in command is required to discontinue a “flight when unairworthy mechanical, electrical, or structural conditions occur.”<sup>118</sup>

While this regulation appears straightforward, it does raise some practical questions regarding application. A pilot may be responsible for determining aircraft airworthiness, but is that liability absolute? Can a pilot reasonably rely on the maintenance logbook entries prepared by FAA certified maintenance personnel? What if an aircraft begins a flight in airworthy condition and an unairworthy condition develops that the pilot does not notice? Just how far does the pilot in command’s responsibility extend when it comes to aircraft maintenance and airworthiness?

Some guidance on these issues is provided by NTSB decisions. The first set of cases address the issue of whether a pilot can rely on maintenance entries prepared by FAA certificated maintenance personnel in determining whether an aircraft is airworthy. The second set of cases

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112. *Id.*

113. *See* 49 U.S.C. § 44709(d)(3) (stating that the Board is “bound by all validly adopted interpretations of laws and regulations the Administrator carries out . . . unless the Board finds an interpretation is arbitrary, capricious, or otherwise not according to law”).

114. *Garvey v. Nat’l Transp. Safety Bd.*, 190 F.3d 571, 586 (D.C. Cir. 1999).

115. *See* *Martin v. Occupational Safety & Health Review Comm’n*, 499 U.S. 144, 152-53 (1991) (holding that courts must defer to interpretations of the Secretary of Labor rather than those of the OSHRC in split enforcement regime under the Occupational Safety & Health Act).

116. 14 C.F.R. § 91.7(a) (2006).

117. *Id.* § 91.7(b).

118. *Id.*

discusses a pilot's responsibility to detect and properly respond to an unairworthy condition that occurs during a flight.

#### A. REASONABLE RELIANCE ON MAINTENANCE PERSONNEL

As indicated above, before every flight, the pilot in command must make an assessment of whether his or her aircraft meets airworthiness standards.<sup>119</sup> However, with the complexity of aircraft systems and the inability of a pilot to make that determination without assistance from qualified maintenance personnel, the question becomes whether a pilot in command can reasonably rely on qualified maintenance personnel to determine whether his or her aircraft is airworthy. Most pilots and lawyers would like to think the answer to this question is "yes."

However, the wording of the FARs is clear: "No person may operate a civil aircraft unless it is in an airworthy condition."<sup>120</sup> The words of this regulation were interpreted rather strictly in an early NTSB decision where an FAA inspector examined an aircraft approximately one month after its annual inspection, finding a number of substandard maintenance items that he believed rendered the aircraft unairworthy.<sup>121</sup> In discussing that case, the NTSB stated:

The fact that some of the discrepancies might not have been detect[ed] on a normal walk-around inspection by a pilot prior to flight, and the fact that the aircraft had passed an annual inspection . . . [a month prior], do not excuse respondent from its responsibility, as the operator, for the airworthiness of the aircraft.<sup>122</sup>

Obviously, the standard created by this case is very close to a strict liability standard—even though a pilot in command might not be able to detect a maintenance deficiency, they are still held responsible if a deficiency exists.

In later cases, the NTSB reconsidered this strict liability approach. Perhaps, the first case articulating the current standard applied is *Administrator v. Hanley*.<sup>123</sup> In *Hanley*, the pilot was flying cargo in a forty-year old Beech D18 between Miami, Florida, and Freeport, Grand Bahama.<sup>124</sup> During a routine ramp inspection in Miami, an FAA inspector cited the aircraft with several maintenance discrepancies.<sup>125</sup> The pilot

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119. *Id.*

120. *Id.* § 91.7(a).

121. *Admin. v. Golden Eagle Aviation, Inc.*, 1 N.T.S.B. 1028 (1971).

122. *Id.* at 1032.

123. 3 N.T.S.B. 1773 (1984).

124. *Id.* at 1777.

125. *Id.*

informed his employer of the deficiencies cited by the FAA inspector and his employer instructed him to taxi the aircraft to a repair station that did all the maintenance work on this aircraft.<sup>126</sup> After the pilot was notified that all necessary repairs had been made, he performed a preflight inspection, took notice that the repairs were made and noted in the maintenance logbooks, and flew a cargo mission.<sup>127</sup> Upon his return to Miami, the FAA inspector was waiting for him, and determined that the repair station had not made all the necessary repairs.<sup>128</sup> The FAA sought a sixty-day suspension of Hanley's airman certificate.<sup>129</sup> Ultimately, the Board reduced the sanction to ten days, preserving a finding of a regulatory violation against Hanley. Most importantly, the Board noted that the pilot did everything his employer requested and that he could reasonably believe, based on his employer's advice, that the repair station had properly completed its work.<sup>130</sup> The Board went on to state:

We are satisfied . . . that the [pilot] . . . could reasonably assume that the aircraft was airworthy [on the date of the flight in question] based on his employer's advice that the repair facility had completed the work on his own observations, during preflight, concerning the previously noted deficiencies. . . . In these circumstances, we think that the respondent did not act imprudently or unreasonably in relying on his employer's assurances that the work had been properly done.<sup>131</sup>

This case and subsequent cases appear to lead to the application of a standard of reasonableness when attempting to resolve a question of whether a pilot in command is responsible for an aircraft's unairworthy condition. In *Administrator v. Olsen*,<sup>132</sup> the Board specifically stated that it was not imposing a standard of strict liability when holding that a pilot in command knew or should have known about an unairworthy condition.<sup>133</sup> Determining just what a pilot should have known is often the question that hinges on the facts and circumstances of a particular case. In *Administrator v. Nielsen*,<sup>134</sup> a pilot contended that he appropriately relied on the assumption that a mechanic would have informed him if his aircraft was unsafe to

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126. *Id.*

127. *Id.* at 1777-78.

128. *Id.* at 1778.

129. *Id.* at 1774.

130. *Id.*

131. *Id.*

132. N.T.S.B. Order No. EA-3743 (Nov. 23, 1992), *aff'd*, 14 F.3d 471 (9th Cir. 1994).

133. *Id.* at 4-5.

134. N.T.S.B. Order No. EA-3755 (Dec. 16, 1992).

fly.<sup>135</sup> However, the Board disagreed, reiterating that it is the pilot in command's ultimate responsibility, to determine whether his aircraft is airworthy.<sup>136</sup> In this case, the Board specifically determined that even if the pilot did not know that a broken carburetor heat control cable rendered his aircraft unairworthy, he should have known that the cable was necessary to getting carburetor heat and, therefore, to the safe operation of his aircraft.<sup>137</sup>

Thus, at the end of the day, the standard that a pilot in command will be held to is whether he knew or reasonably should have known that his aircraft was unairworthy.<sup>138</sup> Further, it is important to note that FAR Sections 91.7(a) and 91.7(b) are to be treated differently when analyzing pilot in command responsibility. Section 91.7(a) lays out a pilot's responsibility to determine airworthiness before operating an aircraft. Section 91.7(b) addresses pilot responsibility once an aircraft is in flight.<sup>139</sup>

#### B. UNAIRWORTHY CONDITIONS DEVELOPING INFLIGHT

In *Administrator v. Hedayat-Zadeh*,<sup>140</sup> the FAA sought the suspension of Captain Zadeh's airline transport certificate for thirty days for operating an unairworthy aircraft.<sup>141</sup> The FAA also charged Captain Zadeh with careless or reckless operations endangering the life or property of another.<sup>142</sup>

This case involved an interesting set of facts and circumstances. Captain Zadeh was the non-flying pilot in command of a Boeing 747 passenger carrying flight from Gardermoen Airport in Oslo, Norway, to John F. Kennedy Airport in New York City.<sup>143</sup> Due to the short runway at the departure airport, Captain Zadeh decided to perform a static takeoff in which the brakes of the aircraft are not released until the engines produce full thrust.<sup>144</sup> Apparently, the high thrust of the engines caused large portions of the runway pavement behind the aircraft to break up and strike the aircraft, causing substantial damage to the tail section of the aircraft.<sup>145</sup> At least three flight attendants observed asphalt chunks of runway blow up from the ground at the rear of the aircraft and one of the flight attendants

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135. *Id.* at 6.

136. *Id.*

137. *Id.*

138. *Admin. v. Yialamas*, N.T.S.B. Order No. EA-5111 (Sept. 20, 2004), at 6-7.

139. *See Admin. v. Naypaver*, N.T.S.B. Order No. EA-4127 (Mar. 17, 1994).

140. N.T.S.B. Order No. EA-3918 (June 10, 1993).

141. *Id.*

142. *Id.* at 2; *see also* 14 C.F.R. § 91.13(a) (2006).

143. N.T.S.B. Order No. EA-3918 (June 10, 1993) at 2.

144. *Id.*

145. *Id.* at 2-3.

reported hearing “a loud bang as the asphalt hit the fuselage.”<sup>146</sup> The airport tower controller informed the cockpit crew that “you blew up the asphalt layer in the very south end of the [runway] and there was coming debris after you.”<sup>147</sup> However, the focus of the tower was on whether the aircraft tires had been damaged during the takeoff.<sup>148</sup> Unaware of the substantial damage to his aircraft, Captain Zadeh continued the flight to New York uneventfully with the aircraft showing no sign of damage.<sup>149</sup> Upon arrival in New York, however, it was apparent that the aircraft was seriously damaged.<sup>150</sup>

The FAA argued that the information provided to Captain Zadeh should have alerted him to the fact that the aircraft was possibly unairworthy.<sup>151</sup> The FAA relied on long-standing Board precedence found in *Administrator v. Dailey*<sup>152</sup> and *Administrator v. Parker*.<sup>153</sup> In both of these cases, the Board held that a pilot could be held responsible if it was determined that a reasonable and prudent pilot would have concluded from available information that the aircraft he was operating was or had become unairworthy.<sup>154</sup>

In the *Zadeh* case, both the law judge and the NTSB found that the facts did not support a finding that Captain Zadeh knew or should have known that his aircraft had sustained damage and become unairworthy. The NTSB based its finding on the lack of clarity in communications between the flight attendants and the cockpit crew and the airport tower.<sup>155</sup>

The *Zadeh* case demonstrates that while the pilot in command is ultimately responsible for discontinuing a flight if unairworthy conditions arise during the flight, the pilot in command’s liability is not absolute. It must be found that a reasonably prudent pilot either knew, or should have known, that an unairworthy condition existed.<sup>156</sup>

#### IV. CONCLUSION

One of the fundamental legal principles in aviation is that the pilot in command is ultimately responsible for the safety of the flight. This basic

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146. *Id.*

147. *Id.* at 3.

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.* at 4.

152. 3 N.T.S.B. 1319 (1978).

153. 3 N.T.S.B. 2997 (1980).

154. *Id.*; 3 N.T.S.B. 1319 (1978).

155. N.T.S.B. Order No. EA-3918 (June 10, 1993) at 6.

156. *See id.*

tenet is of primary importance whenever a pilot is faced with an enforcement action by the FAA.

However, there are occasions where it is not so easy to identify the pilot in command. While clear identification can be made in most air carrier cases where two pilots (a pilot in command and second in command) are required, the lines may start to blur when two pilots are within reach of the controls in flights governed by Part 91 of the FARs. Circumstances involving flight instruction, two qualified pilots at the controls, and safety pilots during simulated instrument flights are some of the most common situations where we need to turn to cases and FAA interpretations for guidance. In the end, it is the person who truly acts as the pilot in command, the person who actually exercises command authority, who is indeed the pilot in command. Where a person is seated in the aircraft, and even whether a person lacks qualifications, is not necessarily relevant in the determination of who is the pilot in command.

Even though a pilot is deemed to be responsible as pilot in command or second in command, there are still defenses that are recognized by regulation and NTSB case law. Most of these defenses can be characterized as “reasonable reliance” defenses. The question that often needs to be answered in this context is whether the pilot reasonably relied on other crewmembers, air traffic controllers, maintenance personnel, or his or her own observations regarding aircraft performance and airworthiness either preflight or during flight. In other cases, the pilot might be able to establish an emergency authority defense. In these cases it is important to determine if the emergency was created by the pilot’s own actions. If not, was the pilot’s action in response to the emergency prudent and reasonable? In the end, the general rule usually prevails. The buck stops with the pilot in command—almost always.