The Pilot in Command and the FARs: The Buck Stops Here (Almost Always)\(^1\)

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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.\(^4\) 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.\(^5\)

For commercial flight operations requiring Part 121\(^6\) or Part 135\(^7\) 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"\(^8\) for flights that require two pilots.\(^9\)

Once designated, the pilot in command of a Part 135 flight remains the pilot in command at all times during that flight.\(^10\) 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.\(^11\)

For operations under Part 91\(^12\) 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.\(^13\) 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;\(^14\)
2. Two pilots operating an aircraft with dual-controls when both pilots are qualified to operate the aircraft as pilot in command;\(^15\)
3. Flights simulating instrument meteorological conditions\(^16\) requiring a safety pilot;\(^17\) and,
4. Checkrides with FAA examiners.\(^18\)

A. CFI in the Cockpit

The certified flight instructor (CFI) carries a heavy burden when it comes to the ques-
"Read Back"

By: Harry Lee Coe IV
S.V. (Steve) Dedmon

Our June meeting was held at the Boca Club and Resort in Boca Raton in conjunction with the bar’s annual meeting. As in years past it is that time when the bar welcomes its new leadership and acknowledges the efforts of those who gave so earnestly the past year. Our committee was no different as we gave a heartfelt “Thanks” to Elisabeth Kozlow for her dedication and leadership. Unless you have “been there-done that” you cannot get a sense of what it takes to fulfill the responsibilities in positions of authority in a committee such as ours. For those of you who have, and those of you who will take leadership positions, I am sure you can or will, appreciate Elisabeth’s efforts. In that vein, the committee welcomed Harry Coe as Chair and Steve Dedmon as Vice Chair. Unfortunately, I was unable to attend due to a medical emergency that sidelined me for a couple days. I sat out to fly myself down on Friday, but the drive to the plane was too uncomfortable, so the thought of sitting in a confined area without the possibility to “pull over” did not bode well for the trip. Besides, had something happened I would have probably violated some FAR! However, I am happy to report all is well. Before I leave the leadership issue, should you have any ideas or suggestions for upcoming meeting topics, speakers, or anything of a general nature, do not hesitate to speak with Harry or I. Consider your help solicited and encouraged. Also, a special “Thank You” to Harry for taking the time to take notes and giving us an overview of the presenters and their topics.

As a general reminder, as there are a couple items we need to keep in mind. First, as a committee you have probably seen e-mails regarding contributing to the Eilon Krugman-Kadi Scholarship fund set up through Embry-Riddle Aeronautical University. If you have not contributed it is a way to celebrate Eilon’s life and legacy while helping a student realize their aviation aspirations. Also, remember VECTORS always has a page or two or three for memorializing your legal and aviation related knowledge or experience and who better to share it with than your fellow committee members and the world for that matter as it is available on the Florida Bar website. Otherwise, see you in Tampa on September 12, 2008.

The meeting’s first presentation was a joint-presentation from Wendy McDowell, Esq., & Joseph I. Goldstein, Esq., who are both in-house counsel for: “BBA Shared Services, Inc.” (which is in-house counsel for: Signature FBOs), entitled: “Taking Your Practice In-House: A Candid Look at In-House Lawyering.” Wendy discussed the differences, both professionally and personally between being in-house counsel, as she is know and has been for the past three (3) years, and being with a private firm, which she did for several years, prior to joining Signature. Wendy made the point that there exists a mythical stereotype that in-house counsel are “Cush Jobs,” as there is no productivity measurements, time pressures, or long hours. To the contrary, she still works long days and hours and also takes work home with her, and even has to work some weekends. Of course being in-house, she is a “regular” employee who receives a salary and benefits. She also focuses on an area that she enjoys: “Aviation”- as it is not something a lawyer in private practice can typically do exclusively. Wendy also related that while she is primarily an “Aviation” attorney, she, as in-house counsel also has to deal with employment law issues, hiring & firing, contract negotiations, and other related legal issues. Finally, she intimated that while generally satisfied with her choice, her lifestyle is perhaps only a notch better than it would be, if she was a partner with a private firm, and noted the trappings of her job as in-house counsel were not the typically fancy, “silk-stocking” law firm trappings of plush carpets, brass fixtures, and fresh mahogany office furniture.

Mr. Goldstein (hold holds the Title of Secretary, Vice-President, and General Counsel of Signature) then spoke of the “Do’s & Don’ts” of contract counsel, and their typical interplay with the referring entity and in-house staff (Signature “farms out” a lot of their actual litigation cases to referral/contract counsel for handling). Mr. Goldstein discussed acceptable versus objectionable billing practices of referral counsel. For example some of the “pet peeves” which Mr. Goldstein commonly encounters from contract counsel is failing to keep him informed of the status and posture of the on-going case, and in some instances the frustration associated with expending vast resources in defense of a particular case, or a given legal position, only to be informed at a later time, deep into the on-going litigation, that the aforementioned position was not sustainable, or justified. Mr. Goldstein, also indicated that all major decisions, including the decision to settle cases, should be directed and approved by him, as General Counsel, prior to being entered into by the contract counsel, as he is “The Client,” who expects to control the litigation and ultimately will be looking to pay the settlement and the contract attorney’s fees. Finally as to billing practices by contract counsel, Mr. Goldstein indicated that bills for “review file” and “joint attorney conferences,” all from lawyers of the same firm, looked bad, and are typically not reimbursed. He also indicated that pre-approval for long or arduous legal research projects, and for large court cost expenditures should first be presented and approved by the General Counsel, prior to being undertaken, or incurred. Mr. Goldstein said the badge of distinction for contract counsel is if, after concluding a particular matter to the satisfaction of the client (i.e.- himself, as General Counsel for Signature),

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referral of additional files/cases to the contract attorney and as such constitutes a tacit approval of their overall performance and pricing. Conversely, failure to obtain additional referrals is, in some instances, a surreptitious disapproval of the contract counsel’s performance and/or billing practices.

The next group of speakers were from the Nation Air Traffic Controllers Association (NATCA) Local Union Post, and were of course, active FAA air traffic controllers based at Miami’s International Airport (KMIA). The group included Mitch Herrick & Jim Marinitti, President of the Local NATCA) based at KMIA and Eric Stein and Veronica Stein from Palm Beach International Airport (KPBI) which is located approximately 55 nautical miles due north of KMIA. Members of the group spoke about the FAA’s pending consolidation and merger of the current Traffic Approach Control (TraCon) currently based at and serving KPB, into a larger, more expansive facility located at the KMIA, as part of an on-going FAA cost saving, realignment, and consolidation effort. The group unanimously opposed this merger proposal based upon several factors including: elimination of redundancy (there is currently only two (2) TraCons serving all southeast Florida’s dozens of airports and three (3) major, international airports KPBI, KMIA, and Ft. Lauderdale/Hollywood International (KFLL). If one of the two TraCons should “go-down” or be knocked off line by a major storm, or other disaster such as when Hurricane Andrew struck South Florida, the other TraCon could step in to keep the flow of traffic moving which is exactly what happened in that event in 1992. Under the current FAA’s proposal, they would expect Jacksonville Center, located over 200 nautical miles to the north, to step in and start vectoring and spacing traffic into Miami, Ft. Lauderdale, and Palm Beach. Given the physical constraints of land-lines, line-of-sight radio and radar obstructions, this could prove to be a near futile task, as what Jax could do would be done “blindly,” without the benefit of a true, real-time picture of what was occurring in the skies. Palm Beach’s facility however, is and can be linked to the existing landlines and does have the benefit of the applicable radar facilities governing South Florida, since it is much more proximately located. Additionally, there are limited cost savings, as the FAA itself in its own study, indicates a modest cost-savings through this consolidation effort of around $1M per year. Relatively speaking this is peanuts in the scheme of the FAA’s billion-dollar budgets. In an earlier FAA study obtained by NACTA through the Freedom of Information Act, FAA staff after careful and systematic study over a period of years rejected the proposal they now champion. There is legislative interest also as several local congressmen and women are now working with the NATCA to oppose this plan. NATCA members also intend to approach Florida senators Martinez and Nelson, in an effort to enlist their support in opposition to this short-sighted plan. The group contends much of the cost pressures, consolidation, and privatization efforts of the FAA, including the Lockheed-Martin flight service debacle, are political ploys, implemented from-the-top-down by the appointees of the current Neo-Conservative Republican administration, bent on blindly adhering to the privatization-at-all-costs mantra, notwithstanding the disasters which have predictably been occasioned when large private, for-profit companies are handed billions of dollars and thus inherit a virtual monopoly on traditional governmental functions. The group cites, in addition to the flight service program, the Florida school voucher program and the issues surrounding Halliburton supplied services in Iraq as examples of a program they hope to avoid regarding air traffic control services in southern Florida.

Get in on the “action!"
FAA Proposal on Registration of Aircraft

By J. Christopher Robbins, Esq.¹

In an effort to keep our clients and other interested parties in the aviation industry informed of regulatory developments that may affect us all, we think you should be aware of the FAA’s notice of proposed rulemaking issued to amend the requirements for the registration of aircraft.

Basically, all aircraft owners that desire to maintain their registration will have to re-register their aircraft within a specified time period. The FAA is proposing to terminate all certificates for currently registered aircraft and then to reissue certificates for those aircraft that are eligible for registration. The new certificates will be issued with staggered expiration dates, and, once those terms expire, renewals will be granted for successive three-year terms. Upon sale of an aircraft, the purchaser will have a limited time to complete the registration process and reserve the N-number before the certificate is canceled. Upon expiration of a Dealer’s Certificate, the N-numbers of aircraft registered on that certificate will be cancelled if application for registration has not been made.

As reported on the AOPA web site:

Currently, the one-time aircraft registration fee is $5. While the re-registration proposal applies the $5 fee to its initial registration and re-registration and subsequent renewals, the agency also makes it clear that it wants to increase the fees.² According to the proposal, “one of the FAA’s goals for its pending reauthorization is to match FAA funding more closely with the costs of providing services.” The President’s proposal for FAA reauthorization included language that would provide for a charge of $130 for initial registration and re-registration of aircraft and a $45 renewal fee every three years after that.³

The rationale for this change is an increase in the number of aircraft on the Registry whose owners cannot be positively and accurately identified in a timely manner. Removing the N-numbers of the unqualified aircraft is expected to eliminate a large pool of questionable N-numbers. The FAA estimates that about one-third of the 343,000 aircraft currently registered are no longer eligible for registration. The FAA also pointed to increasing user needs for accurate and current aircraft information and concerns of homeland security.

We disagree that this is the best method of achieving these objectives. If the FAA is interested in purging the rolls of obsolete N-numbers, a simple letter to owners, which requires a response by return mail, would be preferable. By contrast, the FAA’s proposal will be costly and time-consuming. The continuing commitment to register and re-register periodically could be a paperwork nightmare and one borne by both aircraft owners and the FAA.

Moreover, historically, aircraft registration has enjoyed permanence and convenience, unlike registration of vessels and automobiles. It seems imprudent to upset this established practice. Finally, we are concerned that the FAA’s proposal, aside from being inconvenient, will open the door to a host of new fees associated with their proposed required, periodic re-registration.

To voice your opposition to this FAA proposal, contact your Congressman and Senators. Email and phone numbers can be obtained at: [http://clerk.house.gov/member_info/index.html](http://clerk.house.gov/member_info/index.html)

(Endnotes)

1. Chris Robbins is senior counsel and director of Robbins Equitas. He is a former federal judicial law clerk to the Honorable Tu M. Pham, United States Magistrate Judge. Robbins is a cum laude graduate of the University of Miami School of Law, where he was a member of the University of Miami Business Law Review. Robbins currently serves on both the admiralty and aviation law committees of The Florida Bar. Robbins is a writer, an instrument rated airplane pilot, and a public speaker. He recently prepared a lecture series for Chinese university students on subjects including law, American democracy, and entrepreneurship. Robbins’ articles have been published widely in the U.S. and international press. His work has appeared in the New York Times, Miami Herald, Hong Kong Apple Daily, Tampa Tribune, and other periodicals. He can be contacted at Robbins Equitas 2639 Dr. MLK Street North, St. Petersburg FL. 886/862-6878 or e-mail at [www.aviation-law.org](http://www.aviation-law.org).


3. Id.
Airport “Through the Fence” operations and Residential Airparks at Publicly Funded Airports

By Bill Dunn

Over the past several years, members have contacted the Association with questions regarding Through-the-fence operations at public use airports. However, since the General Accounting Office (GAO) released a report critical of the Federal Aviation Administration’s (FAA) failure to adequately oversee airport land use, the FAA has implemented an active program of conducting land use inspections at obligated airports. With these increased inspections, the FAA has identified (and continues to discover additional) airports that are not following federal guidance on land use. The Association is currently experiencing an increase in the frequency of issues surrounding land use and through the fence activity at publicly funded airports that are grant obligated to the FAA.

Association members are squarely on both sides of this issue. Some favor through the fence access to the airport (most of those are members who own off-airport property) while members who are located on the airport paying the airport’s rates and charges, do not necessarily favor off-airport access to the airport since they believe the through the fence operator is not adequately funding the airport; especially in cases with the TTF access is legally deeded with little or no access fee paid to the airport.

There can be some positives for the airport and all members with a properly structured and FAA approved access agreement that provides financial support to the airport. However, the FAA has historically “discouraged” through the fence access to a publicly funded airport for a number of reasons.

What is a Through the Fence Operation?

Generally speaking, a Through the Fence (TTF) operation is defined by the Federal Aviation Administration (FAA) as any activity or use of real property of an aeronautical or non-aeronautical nature that is located outside (or off) of airport property but has access to the airport’s runway and/or taxiway system. Airport property is property owned by the airport sponsor and shown on an FAA approved Airport Layout Plan (ALP). Through the Fence operations occur from property that is immediately adjacent to the airport but which is owned by corporations, businesses or private parties. These properties are not under control in any manner by the airport sponsor. The FAA officially defines Through the Fence as: “Through-the-fence operations are those activities permitted by an airport sponsor through an agreement that permits access to the public landing area by independent entities or operations offering an aeronautical activity or to owners of aircraft based on land adjacent to, but not part of, the airport property. The obligation to make an airport available for the use and benefit of the public does not impose any requirement for the airport sponsor to permit ground access by aircraft from adjacent property.” [emphasis added]

Through the Fence applies to PROPERTY and not INDIVIDUALS. Individual activities such as independent aircraft mechanics and flight instructors are addressed very specifically in the FAA Advisory Circular on Minimum Standards for Commercial Activities.

Types of Through the Fence Arrangements

There are several different types of through the fence operations. The first is an airpark environment where private parties construct a residence with aircraft hangar and are provided access to the airport infrastructure. The second is a private party or company that owns land next to the airport with access to the airport infrastructure and constructs facilities with the intent of providing commercial aeronautical services to the public. And the third is a business that owns property adjacent to the airport with access to the airport infrastructure but which does not provide any commercial services to the public and whose aircraft use of the airport is incidental to such business.

The Agreement

Access to the public airport is provided through two different mechanisms. One is what is referred to as “deeded access.” This means that the adjacent property owner, when purchasing the property was granted a real estate

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deed that very specifically outlined the property owner’s right to access the airport from his adjacent property. Deeded access is a legal right of passage bound by state laws in the state where the transaction occurred. In most cases, deeded access does not have any fees attached for access to the airport. It is more of a property “right.” Deeded access is also referred to as an easement.

The second mechanism is through an access agreement. This is a legal document entered into between the specific parties much like a lease. These agreements contain the terms and conditions associated with granting access to the public airport. Access agreements may or may not have an annual fee associated with granting the access. Since at least 1989, the FAA has actively discouraged through the fence agreements at publicly funded airports. The FAA Order 5190.6A, also known as the Airports Compliance Handbook states as an agency position of the subject: “As a general principle, FAA will recommend that airport owners refrain from entering into any agreement which grants access to the public landing area by aircraft normally stored and serviced on adjacent property. Exceptions can be granted on a case-by-case basis where operating restrictions ensure safety and equitable compensation for use of the airport.” The FAA’s policy has not changed. What has changed is a mandate from Congress.

As the FAA has worked to comply with this Congressional guidance and actively pursue additional airport land use inspections, the agency has identified a number of publicly funded, public use airports that they believe are in violation of certain federal grant assurances. The law also requires the FAA to submit a report to Congress annually that lists airports that are not in compliance with these federal grant obligations and the corrective actions planned to bring the airport back into compliance with federal grant obligations. This is an issue extremely important to AOPA and the health of airparks, nationwide.

Federal Grant Obligations and the Compliance Program

When the sponsor of an airport that is eligible to receive federal funding under the FAA’s Airport Improvement Program (AIP) accepts federal funding, the airport sponsor is required to execute a contract with the FAA. This contract includes thirty-nine (39) Grant Assurances – a series of performance metrics – that the airport sponsor agrees to abide by in operating the airport. Grant Assurances are codified in federal law and can be found on the FAA’s web site.

- Keeping good title of airport property
- Compatible land use
- Availability of fair and reasonable terms without unjust discrimination
- Adhering to the approved airport layout plan
- Self-sustainability
- Sale or disposal of Federally acquired property
- Preserving rights and powers
- Using acceptable accounting and record-keeping systems
- Compliance with civil rights requirements

Congress has also provided the FAA with the ability to “protect the federal investment” and to ensure that an airport sponsor abides by these assurances through penalties ranging from withholding future grants to implementing legal action against the airport sponsor both administratively and in the federal judicial system. The FAA has a statutory mandate to ensure that airport owners comply with these assurances. This is the FAA Grant Compliance Program. An overview of the FAA Compliance Program can be found on the agency’s web site.

Grant Obligations that apply regarding Through The Fence Operations

Of the 39 federal grant assurances, in most cases, the FAA typically focuses on 4 assurances when reviewing Through The Fence issues. These include:

Grant Assurance #5 – Preserving Rights and Powers

a. “It [sponsor] will not take or
permit any action which would operated to deprive it of any of the rights and powers necessary to perform any or all of the terms, conditions, and assurances in the grant agreement without the written approval of the Secretary, and will act promptly to acquire, extinguish or modify any outstanding rights or claims of right of others which would interfere with such performance by the sponsor. This shall be done in a manner acceptable to the Secretary."

It is important to note that Assurances apply only to property owned and controlled by the airport sponsor. Off-airport, Through the Fence facilities do not have the same protections as those who are located on actual airport property. As such, rules, regulations and operating requirements do not apply to TTF operators. In actuality, the airport sponsor has no control or power over those off-airport properties. Therefore, by not having the ability to control TTF operators, the airport sponsor may be viewed by the FAA as having subrogated its responsibility.

Grant Assurance #21 – Compatible Land Use

"It [sponsor] will take appropriate action, to the extent reasonable, including the adoption of zoning laws, to restrict the use of land adjacent to or in the immediate vicinity of the airport to activities and purposes compatible with normal airport operations, including the landing and takeoff of aircraft. In addition, if the project is for noise compatibility program implementation, it will not cause or permit any change in land use, within its jurisdiction, that will reduce its compatibility, with respect to the airport, of the noise compatibility program measures upon which federal funds were expended."

Since 1982, the FAA has emphasized the importance of avoiding the encroachment of residential development on public airports, and the Agency has spent more than $300 million in Airport Improvement Program (AIP) funds to address land use incompatibility issues. A substantial part of that amount was used to buy land and houses and to relocate the residents. The FAA's policy on compatible land use adjacent to a publicly funded airport was further codified legally in a Part 16 ruling13 issued January 19, 2007. This Directors Determination, at page 42, ruled: “The FAA generally discourages residential airparks adjacent to airport property because such airparks can create a compatible land use problem, especially with noise compatibility and zoning issues, in the future. Grant assurance 21, Compatible Land Use, requires airport sponsors to take appropriate action, including the adoption of zoning laws, to restrict the use of land adjacent to, or in the immediate vicinity of, the airport to activities and purposes compatible with normal airport operations, including landing and taking off of aircraft. The FAA recognizes residential development adjacent to airport property as an incompatible land use.”

The determination went on to state, in relevant part: “In this case, the Respondent not only failed to object to establishing the residential airpark, but also is actively involved in promoting the development. The Respondent made airport property available to the developer of the airpark..... Having residential homes adjacent to the airport is an incompatible land use. The Director finds the Respondent is in violation of grant assurance 21, Compatible Land Use, by allowing and promoting the development of a residential airpark adjacent to the airport.” In some cases, the development of residential properties adjacent to the airport actually creates obstructions to the airport and associated Part 7713 surfaces, airport Runway Protection Zones (RPZ) and Obstacle Free Areas (OFA) as required by the FAA.14 Such impacts have a potential negative impact on the full utility of the airport as well as creating potential hazards to air navigation.

Grant Assurance #22 – Economic Nondiscrimination

h. “The sponsor may establish such reasonable, and not unjustly discriminatory, conditions to be met by all users of the airport as may be necessary for the safe and efficient operation of the airport.”

i. “The sponsor may prohibit or limit any given type, kind or class of aeronautical use of the airport if such action is necessary for the safe operation of the airport or necessary to serve the civil aviation needs of the public.”

In a number of TTF agreements, the off-airport operators gain access to the public use airport without paying a fee to the airport for that access. In most cases, the TTF access has been granted by a real estate easement granting the fee-less access. At the same time, aircraft operators based on the airport property are subject to the airport sponsors rates and charges. Lack of a reasonable fee structure for access to the airport can create economic discrimination against the on-airport tenants. Off-airport individuals have an economic advantage in violation of grant assurances.

Grant Assurance #24 – Fee and Rental Structure

“It will maintain a fee and rental structure for the facilities and services at the airport which will make the airport as self-sufficient as possible under the circumstances existing at the particular airport, taking into account such factors...
as the volume of traffic and economy of collection. No part of the federal share of an airport development, airport planning or noise compatibility project for which a grant made under Title 49, United States Code, the Airport and Airway Improvement Act of 1982, the Federal Airport Act of the Airport and Airway Development Act of 1970 shall be included in the rate basis in establishing fees, rates, and charges for users of that airport.”

**The Fee and Rental Structure**

assurance requirements have led to a number of lawsuits against airport sponsors when the sponsor has attempted to implement access fees for TTF access to a publicly funded airport. While the TTF operators have no right under federal assurances, they have brought suit in state courts to prevent implementation of charges for access to the airport – especially when access was granted to them by real estate deed easements. On airport tenants have often been forced to absorb the costs of these expensive legal proceedings. Portage County, OH and Addison, TX airports are examples. Additionally, in some cases, on airport tenants have brought formal complaints to the FAA under FAR Part 16 since they have had to pay fees that are not levied on TTF operators. Additional assurances may apply in some situations including Assurance# 19 – Operation and Maintenance, Assurance# 20 – Hazard Removal and Mitigation and Assurance #23 relating to Exclusive Rights.

**The Application of FAA Policy on Through the Fence Operators**

If an airport is not federally grant obligated – meaning that past obligations have expired, the airport has never accepted any FAA airport development funding; the airport is not bound by any federal surplus property Quit Claim Deed restrictions – Through The Fence operations do not fall under the jurisdiction of the FAA in any manner.

However, if the public use airport (whether publicly or privately owned) is obligated to federal grant assurances, then the FAA indeed has legal authority to become involved with the airport sponsor in working to develop a solution that is in the best interest of the airport.

**The FAA estimates** that there are approximately 50 publicly funded, grant obligated public use airport that are affected by the Agency’s policies on Through The Fence operations which covers both residential and commercial developments on property adjacent to the publicly funded airport.

In fact, the Agency has indicated on numerous occasions that they are not opposed to residential airparks at private use airports since these airports are operated for the benefit of the private owners. At the same time, the Agency has indicated that a public airport receiving Federal financial support is different because it operated for the benefit of the general public.

While not “prohibited” by the FAA, the FAA strongly discourages TTF operations because they make it difficult for an airport operator to maintain control of airport operations and allocate airport cost to all users. TTF arrangements also can complicate the control of vehicular and aircraft traffic.

In any event, the local FAA Airport District Office (ADO) with oversight responsibility for the particular airport should be consulted BEFORE any TTF agreement is approved or modified.

**Potential Resolution Strategies to the FAA Policy.**

First, it is important to understand that there is no federal law, or FAA policy that requires an obligated airport sponsor to allow TTF operations. There are a number of potential solutions which potentially be implemented to resolve or mitigate FAA concerns. It is important that the FAA play an active role in seeking any resolution regarding off-airport access to the publicly funded airport.

1. **Discontinue airport eligibility for receiving federal AIP airport development funding**

   Probably the most effective strategy is to withdraw from the AIP development program. However, at that point, all future development projects will fall squarely on airport tenants, business and TTF operators to fund. This is the case in Oneida County, TN., where Oneida County, the airport’s sponsor, is proposing to develop a high-end residential component adjacent to the airport with access to a taxiway on the airport. The FAA has advised the county that such a development would jeopardize future federal funding. Instead, the county has chosen to withdraw from the program. However, since grant assurances normally have a 20-year obligation from the date of the last grant, the agency may not accept this option as a “final” resolution to a current TTF
situation. Even so, with the exception of the FAA Policy and assurance relative to Revenue Diversion, the agency’s enforcement ability would indeed be limited to refusing future grants.

2. Establish economic uniformity between TTF and On-airport users

All stakeholders on the airport and off airport operators should be involved with the airport sponsor in developing a rates and fee structure (including an access fee) that brings economic parity to all parties with access to the publicly funded airport. At those airports where no fee is charged for TTF access to the publicly funded airport, work with impacted parties to develop a structure acceptable to the FAA. The sponsor of the Portage County Airport attempted to establish comparable fees for TTF operators as those already imposed on on-airport tenants. The airport’s efforts were met with a series of lawsuits in State court, which upheld the TTF operators “deeded access” to the airport without financial compensation. Thereafter, in order to keep the airport open and solvent, the sponsor implemented a Airport Use Fee based on size of aircraft and number of annual operations broken into two Categories. An on airport tenant brought a formal complaint before the FAA claiming economic discrimination. The FAA upheld the validity of the fee as reasonable.

3. Modification of access agreements and/or deeded access easements

Modify any existing agreements or easements that provide access to the public airport so that TTF operators are legally bound to follow all airport procedures, rules and policies to include Minimum Standards. The application of a uniform “fee for access” to bring fiscal parity to both on-airport and TTF operators would be a part of these modifications. Additionally, residential property sales should include avigation easements recorded on property deeds named in favor of the airport.

4. Avoid any expansion of TTF access and facilities

The FAA has been willing to “accept”, although reluctantly, existing residential airport developments, as they exist in number and size on a specific date at a publicly funded airport provided that the controlling entity enters into an agreement with the FAA that will prevent any expansion of the airpark or add additional housing development from being built on the property. At the same time, the FAA will look to the airport sponsor to address any fiscal disparity with on-airport tenants and to ensure the airport has a level of control of the access.

5. Removal of obstacles

If a TTF facility has been deemed an obstacle to air navigation under the Part 77 process, it is likely that the mitigation measure has fallen to the airport in the form of higher traffic patterns, changes to traffic pattern flow or direction, or the raising of airport approach minima; sometimes to a height that may make an IFR approval no better than a VFR day. The FAA’s only “legal” recourse in mitigating the impacts of a hazard determination is to penalize the airport. Any off-airport development should comply fully with the obstruction evaluation process and not pose a safety hazard or hazard to air navigation to other aircraft operating at the airport.

6. A change in federal law covering FAA Grant Assurances

Changes to the FAA grant assurances would likely be met with some significant challenges especially relating to Assurance #21 – Compatible Land Use. If changes were made to allow residential airport development adjacent to a publicly funded airport, such change would severely hamper or even potentially eliminate the agency’s ability to object to an airport sponsor’s approval of a residential development in close proximity to a public airport that did not have airport access.

One of the biggest challenges to public use airports is an airport sponsor’s approval of residential development near an airport. In most cases, when these are constructed, the new residents complain to city and county officials about noise emanating from the airport and call for restriction or curfews at the airport. Another factor to consider is that some states already have statutes on the books that discourage or even prohibit residential development within a certain distance from the airport.

Note again that none of this applies if the public use airport, whether privately or publicly owned, has not accepted federal grant monies or does not intend to seek federal airport development funding.

(Endnotes)

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5. Advisory Circular 150/6190-7 (8-28-06) – Minimum Standards for Commercial Aeronautical Activities page 6 section 1.3 Minimum Standards Apply By Activity 1.3a and 1.3b
6. FAA Order 5190.6A, October 1, 1989 at section 6-6 paragraph d – Agency Position
7. AIR-21 (HR 1000) section 737. (Public Law 106-181) and codified as USC Title 49 § 47131
8. United States Code (USC) Title 49 § 47107 (a)
10. See 49 USC 6 § 40101, 40103(c), 40113, 40114, 46101, 46104, 46105, 46106, 46110, 47104, 47105(d), 47106(d) and 47106(e)
13. 14 CFR Part 77.25. Civil airport imaginary surfaces. These surfaces exist to provide an obstruction free environment around an airport. Penetration of these surfaces by an obstruction may adversely affect the airport by reducing usable runway length, increasing instrument approach minima, etc.
15. See FAA Docket No. 16-06-01 and Docket No. 16-06-06
16. See FAA Docket No. 16-05-14 R/T-182 v Portage County Regional Airport Authority
17. United States Code title 49 § 47107 provides the legal basis for FAA Grant Assurances
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...nationale is that a flight instructor’s function on an instructional flight is to teach.\(^{1}\)

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.\(^{2}\)

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.\(^{3}\)

Another situation that raises questions is where the certified flight instructor does not hold a current medical certificate. In *Administrator v. Ridpath*\(^{4}\) 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.\(^{5}\) The facts of the case indicate that Ridpath was instructing a rated pilot while the pilot was practicing an approach under simulated instrument conditions.\(^{6}\) Ridpath did not hold a medical certificate.\(^{7}\) During the practice approach, the aircraft crashed approximately 75 feet short of the intended runway.\(^{8}\) 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.\(^{9}\)

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.”\(^{10}\) 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.”\(^{11}\)

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.\(^{12}\)

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*,\(^{13}\) 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.\(^{14}\) The check-out was not legally necessary because the pilot had already been checked out in an aircraft of similar category and class.\(^{15}\) 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 the brakes of the aircraft with only 300 feet of runway remaining.\(^{16}\)

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.\(^{17}\) The NTSB held that the flight instructor was clearly acting as a flight instructor during this flight even though his presence was not required.\(^{18}\) However, the Board refused to impose strict liability on the flight instructor.\(^{19}\) The Board reasoned that although flight 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.\(^{20}\)

B. Two Qualified Pilots and Dual Controls

One common scenario in light general aviation aircraft is when two qualified pilots are 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. 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.

In a 1995 decision, Administrator v. Thomas, 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. The aircraft involved was a Swearingen Merlin II, a twin engine turboprop airplane certificated for single-pilot operations.

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. On the day of the incident in question, the airplane was being flown to pick up a potential purchaser for a demonstration flight. 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. Thomas and his employee took turns flying on the different legs of the flight. At the time of the 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.

The near gear-up incident took place while the aircraft was executing an instrument approach. 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. As the employee began his landing flare, Thomas noticed that the cockpit’s gear-down lights were not lit. 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. The employee returned for a second landing attempt and landed without further incident.

The FAA charged Thomas with careless and reckless operation of an aircraft and the NTSB affirmed the FAA’s charges, suspending Thomas’s pilot certificate for fifteen days. 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. Instead, the Board stated that the sanction against Thomas stemmed from his “own behavior.” 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.” 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.

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 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.

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.

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.” 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 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. In such circumstances, the safety pilot is considered pilot in command and must hold a current airman medical certificate.
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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. 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. 

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. This is most obviously the case with a student who has not yet obtained a private pilot certificate. 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. 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.

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 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. 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. 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. 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) 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. In later cases, the NTSB explained the rationale for this exception to the general rule for command pilots. In Administrator v. Lusk, 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. Therefore, an airline captain could not be required to personally verify every representation made to him by any member of ground or flight crews.

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. 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.

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;
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, 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). The Board also refused the 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. Another example of the narrowing of this
defense comes in the case of Admin- 
istrator v. Buboltz,88 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 character- 
ization of a clearance, and the opportu-
nity to ascertain whether his flight was 
cleared.89 The most recent rejection 
of a reasonable reliance defense is found in Administrator v. Jolly.90 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).91

Some safety questions arise as a 
result of the Board’s tighter requirements 
for utilizing the reasonable reliance de-
ference. One prominent point of concern 
is whether the Board’s legal policy is con-
gruous 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.”92 FAA’s push for greater crew 
coordination and delegation of duties 
steps from its observations that many 
incidents and accidents are caused by 
“poor group decisionmaking, ineffective 
communication, inadequate leadership, 
and poor task or resource manage-
ment.”93 Safety experts point out that 
narrowing the use of the reasonable reli-
ance defense could be counterproductive 
to safety due to the possibility of regres-
sion 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.94

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.95

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 emer-
gency will generally be recognized in 
“unexpected [or] unforeseen serious 
occurrence[s] or situation[s] that require 
prompt, urgent action.”96 However, the 
Board has, in certain circumstances, 
rejected arguments by the FAA that 
there can only be an emergency when 
“immediate” action is required.97 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.98 
Another issue that frequently arises 
in cases where a pilot in command in-
vokes 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 de-
clare an emergency on his radio does 
not preclude reliance on FAR Section 
91.3(b) as exculpatory.99 However, a 
review of NTSB Board decisions makes 
it clear that the declaration of an emer-
gency will be treated as circumstantial 
evidence that an emergency situation 
truly existed.100 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.101

The FARs also provide for some ad-
ministrative burdens on pilots who find 
it necessary to deviate from the rules

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due to an emergency. As a general operating rule, a pilot who invokes FAR Section 91.3(b) must, upon the request of the FAA, file a written report of the deviation to the FAA. 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.

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:

[Within 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.]

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. This precedent was amplified (and to some extent clarified) in Administrator v. Fromuth and Dworak 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. 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. 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.

All of this is somewhat muddled with a significant United States Court of Appeals decision in Garvey v. NTSB. 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. 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. 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.

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. In doing so, the Board rejected the FAA’s interpretation of its regulations that “[i]nattention, carelessness, or an unexplained misunderstanding . . . [does] not excuse a deviation of a clearly transmitted clearance or instruction.”

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). The Court of Appeals agreed with the FAA and reversed the NTSB’s decision to exonerate the pilot. 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).

III. Pilot in Command Responsibility for Aircraft Airworthiness

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

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 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. 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.” 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. In discussing that case, the NTSB stated:

The fact that some of the discrepancies might not have been detected 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.

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. In Hanley, the pilot was flying cargo in a forty-year old Beech D18 between Miami, Florida, and Freeport, Grand Bahama. During a routine ramp inspection in Miami, an FAA inspector cited the aircraft with several maintenance discrepancies. The pilot 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. 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. 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. The FAA sought a sixty-day suspension of Hanley’s airman certificate.

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. The Board went on to state:

We are satisfied . . . that the . . . 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.

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, 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. 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, a pilot contended that he appropriately relied on the assumption that a mechanic would have informed him if his aircraft was unsafe to fly. However, the Board disagreed, reiterating that it is the pilot in command’s ultimate responsibility, to determine whether his aircraft is airworthy. 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.

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. 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.

B. Unairworthy Conditions Developing Inflight

In Administrator v. Hedayat-Za- deck, the FAA sought the suspension of Captain Zadeh’s airline transport certificate for thirty days for operating an unairworthy aircraft. The FAA also charged Captain Zadeh with careless or reckless operations endangering the life or property of another.

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. 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. Apparently, the high thrust of the engines caused large portions of the runway pavement behind the aircraft to break.
The FAA argued that the information provided to Captain Zadeh should have alerted him to the fact that the aircraft was possibly unairworthy. The FAA relied on long-standing Board precedents found in Administrator v. Dainley and Administrator v. Parker. 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.

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.

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.

**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 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.

**Endnotes**
1. This article is reprinted by permission of the North Dakota Law Review as copyright holder. The article can be found at 83 N.D. L. Rev. 817-36 (2007).
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3. Associate Professor of Aeronautical Science, Embry-Riddle Aeronautical University, Daytona Beach, FL.; B.S. University of South Dakota, 1997; J.D. University of South Dakota School of Law 2000. Professor Venuhuizen has been an active pilot and certified flight instructor since 1990.
5. 14 C.F.R. § 91.3(b) (2006).
10. Id. § 135.105(b).
11. 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.
12. Id. § 91.1-91.713.
14. See discussion infra Part I.A.
15. See discussion infra Part I.B.
17. See discussion infra Part I.C.
18. See discussion infra Part I.D.
20. Id.
21. Id.
22. Id.
24. Id.
27. Id. at 3.
28. 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. 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).
30. Id. at 5.
31. Id.
32. Id. at 7 (Hart, concurring).
NBAA Training Guidelines for 14 C.F.R. § 91.13(a)

81. 81.
80. Lusk, 2 N.T.S.B. at 481.
81. Id. at 482.

83. Id. at 9.
84. It is noteworthy that this test has the effect of requiring that the crewmember relied upon must be a necessary crewmember under the FARs.

85. N.T.S.B. Order No. EA-4778 (June 30, 1999).
88. N.T.S.B. Order No. EA-3907 (June 7, 1993).
90. N.T.S.B. Order No. EA-5307 (August 9, 2007).
92. FED. AVIATION ADMIN., U.S. DEP’T OF TRANSP., ADVISORY CIRCULAR No. 120-51E, ORG. RESOURCES MANAGEMENT TRAINING 2 (Jan. 22, 2004).
93. Id. at 4.
94. 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.
95. 14 C.F.R. § 91.3(b) (2006).
100. 14 C.F.R. § 91.7(a).
101. 14 C.F.R. § 121.557(c).
102. Id. § 135.19(c).
107. Admin. v. Fromuth & Dworak, EA-3816 (May 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).
108. 190 F.3d 571 (D.C. Cir. 1999).
109. Id. at 574.
110. Id.
111. Id.
112. Id.
113. Id.
114. Id. at 575.
115. Id.
116. 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”).
118. 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).
119. 14 C.F.R. § 91.7(a) (2006).
120. Id. § 91.7(b).
121. Id.
122. Id.
123. Id. § 91.7(a).
125. Id. at 1032.
127. Id. at 1777.
128. Id.
129. Id.
130. Id. at 1777-78.
131. Id. at 1778.
132. Id. at 1774.
133. Id.
134. Id.
135. N.T.S.B. Order No. EA-3743 (Nov. 23, 1992), aff’d, 14 F.3d 471 (9th Cir. 1994).
136. Id. at 4-5.
138. Id. at 6.
139. Id.
140. Id.
143. N.T.S.B. Order No. EA-3918 (June 10, 1993).
144. Id.
145. Id. at 2; see also 14 C.F.R. § 91.13(a) (2006).
146. N.T.S.B. Order No. EA-3918 (June 10, 1993) at 2.
147. Id.
148. Id. at 2-3.
149. Id.
150. Id. at 3.
151. Id.
152. Id.
153. Id.
154. Id. at 4.
156. 3 N.T.S.B. 2997 (1980).
159. See id.