

**CHAPTER SIX
FEDERAL REGULATION**

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Assignment

The following story has been around for at least 30 years. I first saw it in Flying magazine in the “I learned about flying from that” section. Try identifying each violation of FAR part 61 and 91 that occurred in this story, listing each FAR section, subsection etc, with a short description of what was done wrong as compared to what was required.

Letter to the FAA
Federal Aviation Agency, Washington 25, D.C.
Gentlemen:

I was asked to make a written statement concerning certain events that occurred yesterday. First of all, I would like to thank that very nice FAA man who took my student pilot's license and told me I wouldn't need it any more. I guess that means that you're giving me my full_fledged pilot's license. You should watch that fellow though, after I told him all of this he seemed quite nervous and his hand was shaking. Anyway, here is what happened.

The weather had been kind of bad since last week, when I soloed. But on the day in question I was not about to let low ceilings and visibility, and a slight freezing drizzle, deter me from another exciting experience at the controls of an airplane. I was pretty proud of my accomplishment, and I had invited my neighbor to go with me since I planned to fly to a town about two hundred miles away where I knew of an excellent restaurant that served absolutely wonderful charcoaled steaks and the greatest martinis.

On the way to the airport my neighbor was a little concerned about the weather but I assured him once again about the steaks and martinis that we would soon be enjoying and he seemed much happier.

When we arrived at the airport the freezing drizzle had stopped, as I already knew from

my ground school meteorology it would. There were only a few snow flakes. I checked the weather and I was assured that it was solid IFR. I was delighted. But when I talked to the local operator I found out that my regular airplane, a Piper J_4 Cub, was down for repairs. You could imagine my disappointment. Just then a friendly, intelligent line boy suggested that I take another airplane, which I immediately saw was very sleek and looked much easier to fly. I think that he called it a Aztec C, also made by Piper. I didn't have a tail wheel, but I didn't say anything because I was in a hurry. Oh yes, it had a spare engine for some reason.

We climbed in and I began looking for an ignition switch. Now, I don't want to get anyone in trouble, but it shouldn't be necessary to get the airplane manual just to find out how to start an airplane. That's ridiculous. I never saw so many dials and needles and knobs, handles and switches. As we both know, confidentially, they have simplified this in the J_4 Cub. I forgot to mention that I did file a flight plan, and those people were so nice. When I told them I was flying an Aztec they said it was all right to go direct via Victor_435, a local superhighway, all the way. These fellows deserve a lot credit. They told me a lot of other things too, but everybody has problems with red tape.

The take_off was one of my best and I carefully left the pattern just the way the book style says it should be done. The tower operator told me to contact Department Control Radar but that seemed kind of silly since I knew where I was going. There must have been some kind of emergency because, all of a sudden, a lot of airline pilots began yelling at the same time and made such a racket that I just turned off the radio. You'd think that those professionals would be better trained. Anyway, I climbed up into a few little flat clouds, cumulus type, at three hundred feet, but Highway 435 was right under me and, since I knew it was straight east to the town where we were going to have drinks and dinner, I just went on up into the solid overcast. After all, it was snowing so hard by now that it was a waste of time to watch the ground. This was a bad thing to do, I realized. My neighbor undoubtedly wanted to see the scenery, especially the mountains all around us, but everybody has to be disappointed sometime and we pilots have to make the best of it, don't we?

It was pretty smooth flying and, except for the ice that seemed to be forming here and there, especially on the windshield, there wasn't much to see. I will say that I handled the controls quite easily for a pilot with only six hours. My computer and pencils fell out of my shirt pocket once in a while but these phenomenon sometime occur I am told. I don't expect you to believe this, but my pocket watch was standing straight up on its chain. That was pretty funny and asked my neighbor to look but he just kept staring ahead with sort of a glassy look in his eyes and I figured that he was afraid of height like all non_pilots are. By the way, something was wrong with the altimeter, it kept winding and unwinding all the time.

Finally, I decided we had flown about long enough to be where we were going, since I had worked it out on the computer. I am a whiz at that computer, but something must have gone wrong with it since when I came down to look for the airport there wasn't anything there except mountains. These weather people sure had been wrong, too. It was real marginal conditions with a ceiling of about one hundred feet. You just can't trust anybody in this business except yourself, right? Why, there were even thunderstorms going on with occasional bolt of lightning. I decided that my neighbor should see how beautiful it was and the way it seemed to turn that fog all yellow, but I guess he was asleep, having gotten over his fear of height, and I didn't want to wake him up. Anyway, just then an emergency occurred because the engine quit. It really didn't worry me since I had just read the manual and I knew right where the other ignition switch was. I just fired up the other engine and we kept right on going. This business of having two engines is really a safety factor. If one quits the other is right there ready to go. Maybe all airplanes should have two engines. You might look into this.

As pilot in command, I take my responsibilities very seriously. It was apparent that I would have to go down lower and keep a sharp eye in such bad weather. I was glad my neighbor was asleep because it was pretty dark under the clouds and if it hadn't been for the lightning flashes it would have been hard to navigate. Also, it was hard to read road signs through the ice on the windshield. Several cars ran off the road when we passed and you can sure see what they mean about flying being a lot safer than driving.

To make a long story short, I finally spotted an airport that I knew right away was pretty close to town and, since we were already late for cocktails and dinner, I decided to land there. It was an Air Force Base so I knew it had plenty of runway and I could already see a lot of colored lights flashing in the control tower so I knew that we were welcome. Somebody had told me that you could always talk to these military people on the international emergency frequency so I tried it but you wouldn't believe the language that I heard. These people ought to be straightened out by somebody and I would like to complain, as a taxpayer. Evidently there were expecting somebody to come in and land because they kept talking about some god damn stupid son_of_a_***** up in that fog. I wanted to be helpful so I landed on the ramp to be out of the way in case that other fellow needed the runway. A lot of people came running out waving at us. It was pretty evident that they had never seen an Aztec C before. One fellow, some General with a pretty nasty temper, was real mad about something. I tried to explain to him in a reasonable manner that I didn't think the tower operator should be swearing at that guy up there, but his face was so red that I think he must have a drinking problem.

Well, that's about all. I caught a bus back home because the weather really got bad, but my neighbor stayed at the hospital there. He can't make a statement yet because he's still not awake. Poor fellow, he must have the flu, or something.

Let me know if you need anything else, and please send my new license airmail, special delivery.

Very, truly yours,
Pilot

Now that you know what violations occurred, what happens next with the FAA. Read on.

Regulation Enforcement

After the (Airline Deregulation Act) ADA of 1978, the FAA has made enforcement of regulations as its top priority. Under the FAAct of 1958, the FAA has the power to amend, revoke or suspend the certificate of any individual or company violating, or not in compliance with, FAR's.

Constitutional requirement for Due Process requires the FAA to offer the violator a fair and impartial hearing. The procedural requirements of the Administrative Procedures Act (APA) apply to FAA enforcement actions. The burden of proof is upon the FAA to show that a violation has occurred and the culprit charged is the one who committed the violation. Unlike a criminal proceeding, burden is only of proof by a preponderance of the evidence and not beyond a reasonable doubt. That means that the FAA needs only to persuade the administrative law judge (ALJ) that its version of the facts is more likely than those opposed.

The FAA's four enforcement options are set forth in FAR 13 (the Table of Contents of FAR 13 is found at the end of this Chapter). 1. The FAA may treat a violation as an Administrative action, which results is either a Warning Letter of a Letter of Correction. Both seek immediate compliance with the regulations, and both remain in the permanent files

maintained in Oklahoma City. Any continued violations can result in stiffer enforcement proceedings. 2. The FAA may seek civil penalties from the violators. This sanction is usually employed for technical violations (as opposed to operational) of corporate certificate holders (airlines, FBO's). Fines of up to \$1,000 per day per violation may be levied against individuals; \$10,000 against companies; and up to \$50,000 for hazardous material violations. The FAA can also seize your aircraft to ensure payment of the fines. 3. Certificate actions whereby the FAA seeks to revoke, suspend or amend your certificate. 4. Reexamination can be required before a person may continue to use all, or some portion, of a certificate. Typically this occurs when there has been an accident which shows lack of competence as opposed to FAR violation. However, both reexamination and certificate action can both be maintained in a proper case.

Any criminal conduct can result in charges filed by the U.S. Attorney. Typically, a false logbook, certificate application, or medical disclosure can result in such action. The maximum penalty is 5 years in prison and \$250,000 fine. Unlike a custodial interrogation in a criminal case, a certificate action requires no "Miranda" warnings, even though anything you say can be used against you.

Complaint and Investigation

Anyone may lodge a complaint against a suspected violator. Once a complaint is received, the local FAA inspector will begin an investigation to see if a violation occurred and if the identity of violator can be determined. In most cases, an identification of the aircraft leads to the inspector contacting the owner/operator to determine who was using the aircraft on the date and time complained. Most pilots usually incriminate themselves during these telephone or personal interviews.

Enforcement Procedure

Your first official notice will be a certified letter containing a "Notice of Proposed Certificate Action, such as shown below, which contains the FAA's attorneys' statement of the set of facts pertaining to the violation, and the list of FARs alleged to be violated by you. It will also contain the sanction that the FAA seeks against you. You will be offered several courses of actions, including surrendering your certificate immediately; submitting your written reply and version of the facts; requesting an informal conference with the FAA; or to request a formal hearing.

The informal conference is conducted somewhat as a combination discovery proceeding (learning about each other's case) and a settlement conference. Because the FAA will have their attorney there, it is appropriate for you to appear with and be represented by legal counsel. Often times your lawyer can convince the FAA that there are substantial defenses to the charge, and get the FAA to reduce the sanctions, or change over to civil penalties instead of certificate action.

If there is no settlement, the FAA will proceed ahead with their proposed action against you. At this point, you must timely request a formal hearing before an ALJ or lose your certificate.

The hearing (trial) will be held in the region where the violation occurred. The ALJ will hear, consider and weigh the evidence and make her decision orally at the conclusion, or within ten days in writing. Both sides can call, subpoena, and cross-examine witnesses. Because it is an administrative proceeding, strict rules of evidence do not apply, and hearsay is permitted if it is the kind that reasonable people might rely upon.

If either side is unhappy with the ALJ's decision, an appeal may be taken to the full board of the NTSB. No new evidence is allowed, and the appeal is all done in written briefs and in

reference to the evidence submitted at the hearing. The FAA is normally without any further appeal rights if it is unhappy with the NTSB appeal decision. However, you can appeal it to the US Circuit Court of Appeals. Theoretically, you could thereafter appeal to the US Supreme Court.

Please review the case of FAA v. Uppstrom (1986) EA-2389, as a somewhat amazing example of the enforcement process, which appears at pages 7 - 11.

Civil Penalty Procedure

The procedures for the FAA to obtain monetary sanctions differ in some respects. There is no administrative hearing (trial). The trial is actually a real trial, before a jury if requested, before a real federal judge or magistrate. Strict rules of procedure and evidence apply. Thereafter, an appeal is before the Circuit Court of Appeals.

ASRP

NASA (at Ames Research at Moffett Field) maintains an aviation safety/hazards information gathering program in conjunction with the FAA which can provide immunity from enforcement sanctions (not from prosecution) provided the ASRP form 277 is completed and mailed within 10 days of the incident of possible violation. In the case of a flight crew of air carrier, the entire flight crew and the company should each file their own form 277's. This program will not relieve you sanction where there has been an accident, criminal conduct, or intentional violations.

Here is the written FAA policy:

9. ENFORCEMENT POLICY.

The Administrator of the FAA will perform his/her responsibility under Title 49, United States Code, Subtitle VII, and enforce the statute and the FAR in a manner that will reduce or eliminate the possibility of, or recurrence of, aircraft accidents. The FAA enforcement procedures are set forth in Part 13 of the FAR (14 CFR Part 13) and FAA enforcement handbooks.

In determining the type and extent of the enforcement action to be taken in a particular case, the following factors are considered:

- nature of the violation;
- whether the violation was inadvertent or deliberate;
- the certificate holder's level of experience and responsibility;
- attitude of the violator;
- the hazard to safety of others which should have been foreseen;
- action taken by employer or other government authority;
- length of time which has elapsed since violation;
- the certificate holder's use of the certificate;
- the need for special deterrent action in a particular regulatory area, or segment of the aviation community;
- and presence of any factors involving national interest, such as the use of aircraft for criminal purposes.

The filing of a report with NASA concerning an incident or occurrence involving a violation of 49 U.S.C. Subtitle VII, or the FAR is considered by FAA to be indicative of a constructive attitude. Such an attitude will tend to prevent future violations. Accordingly, although a finding of violation may be made, neither a civil penalty nor certificate suspension will be imposed if:

- the violation was inadvertent and not deliberate;
- the violation did not involve a criminal offense, or accident, or action under 49 U.S.C. Section 44709 which discloses a lack of qualification or competency, which is wholly excluded from this policy;
- the person has not been found in any prior FAA enforcement action to have committed

a violation of 49 U.S.C. Subtitle VII, or any regulation promulgated there for a period of 5 years prior to the date of occurrence; and

the person proves that, within 10 days after the violation, he or she completed and delivered or mailed a written report of the incident or occurrence to NASA under A SRS. See paragraphs 5c and 7b.

See the case of Ferguson v. FAA (at the end of this chapter) for a precedent decision as to the scope and limitations of the NASA program. A copy of the reporting form is shown at the end of the chapter.

When In Doubt

Because the decisions of the NTSB are published, as well as the legal opinions of the courts and of the FAA's own attorneys, there is ample material available to research whether particular conduct is outside of the regulations or law. If you are still unsure of whether your proposed flight is legal or not, seek a legal opinion from the FAA's regional counsel. In order to give you such an interpretation, the attorney will need to know the complete set of facts surrounding your proposed operation. Never accept an oral opinion that you will be in compliance; get it in writing. If things go awry, at least you will be able to demonstrate that you had the right attitude by trying to stay in compliance.

Examples of FAA interpretations are provided below .

Equal Access to Justice

Because the full weight of the government is behind the FAA, it is important that a remedy exists to correct injustice or unlawful conduct by the government agencies. In 1981 the Equal Access to Justice Act was enacted (49 CFR Part 826) which provides such a remedy. In 1982, in the case of Sottile v. FAA the FAA was ordered to pay Mr. Sottile \$7,000 for his attorneys' fees incurred in defending himself from an improper prosecution brought by the FAA. In order to prevail under the Act, you must 1) win the case initially brought by the FAA, 2) show that the FAA acted without probable cause and justification. The FAA has the burden to show what was the justification.

Drug Testing

The Omnibus Transportation Employee Testing Act of 1991 amended the FAA Act of 1958 to require pre-employment, reasonable suspicion, random, post-accident, and periodic recurring testing for air carrier and FAA employees holding safety sensitive positions. In Bluestein v. Skinner, (1990 9th Cir) 908 F2d 451, infringement upon 4th Amendment rights were allowed as being serving "special government needs" (safety?) other than law enforcement, so as to justify a warrantless intrusion upon a person's privacy.

Medical Certificates

Unlike a pilot certificate that has already been in the use and possession of the pilot, a medical certificate needs to be issued periodically depending on the type of flight and license that is being undertaken. While a pilot certificate is a form of property, and hence cannot be taken away without due process, a person seeking to obtain a new certificate must show that they meet or exceed the minimum requirements for that certificate. If the certificate is denied, then the burden of proof, and of going forward with the case, is upon the applicant for that certificate. In medical cases, this means that you must obtain expert (and expensive) medical witnesses and reports to establish that you are qualified to be issued that certificates.

PART 13 (ToC only)

Title 14 __Aeronautics and Space

CHAPTER I __FEDERAL AVIATION ADMINISTRATION, DEPARTMENT OF TRANSPORTATION

SUBCHAPTER B __PROCEDURAL RULES

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Sec. 13.11 Administrative disposition of certain violations.

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Sec. 13.13 Consent orders.

Sec. 13.15 Civil penalties: Federal Aviation Act of 1958 involving an amount in controversy in excess of \$50,000; an in rem action; seizure of aircraft; or injunctive relief.

Sec. 13.16 Civil penalties: Federal Aviation Act of 1958, involving an amount in controversy not exceeding \$50,000;

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Sec. 13.20 Orders of compliance, cease and desist orders, orders of denial, and other orders.

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 - Sec. 13.115 Public proceedings.
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 - Sec. 13.232 Initial decision.
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 - Sec. 13.235 Judicial review of a final decision and order.

Special Federal Aviation Regulation No. 72 Civil Penalties: Streamlined Enforcement Test and Evaluation Program.

Special Federal Aviation Regulation No. 72

Civil Penalties: Streamlined Enforcement Test and Evaluation Program.

This SFAR may be used, at the agency's discretion, in enforcement actions involving individuals presenting dangerous or deadly weapons for screening at airports or in checked baggage where the amount of the proposed civil penalty is less than \$5,000. In these cases, Secs. 13.16(a), 13.16(c), and 13.16(f) through (l) of this chapter are used, as well as sections (A) through (D) below:

(A) Delegation of authority. The authority of the Administrator, under section 901 of the Federal Aviation Act of

1958, as amended, to initiate the assessment of civil penalties for a violation of the Act, or a rule, regulation, or order issued thereunder, is delegated to the regional Office of Civil Aviation Security Division Manager and the regional Office of Civil Aviation Security Deputy Division Manager for the purpose of issuing notices of violation in cases involving violations of the Federal Aviation Act and the FAA's regulations by individuals presenting dangerous or deadly weapons for screening at airport checkpoints or in checked baggage. This authority may not be delegated below the level of the Office of Civil Aviation Security Deputy Division Manager.

(B) Notice of violation. A civil penalty action is initiated by sending a notice of violation to the person charged with the violation. The notice of violation contains a statement of the charges and the amount of the proposed civil penalty or a

compromise order shall be issued in that amount;

(2) Submit to the regional Office of the Assistant Chief Counsel any of the following:

(i) Written information, including documents and witness statements, demonstrating that a violation of the regulations did not occur or that a penalty or the penalty amount is not warranted by the circumstances; (ii) A written request to reduce the proposed civil penalty, the amount of reduction, and the reasons and any documents supporting a reduction of the proposed civil penalty, including records indicating a financial inability to pay or records showing that payment of the proposed civil penalty would prevent the person from continuing in business; or

(iii) A written request for an informal conference to discuss the matter with an agency attorney and submit relevant information or documents; or (3) Request a hearing in which case a complaint shall be filed with the hearing docket clerk.

(C) Final notice of violation and civil penalty assessment order. A final notice of violation and civil penalty assessment order ("final notice and order") may be issued after participation in any informal proceedings as provided in paragraph (B)(2) of this section, or after failure of the respondent to respond in a timely manner to a notice of violation. A final notice and order will be sent to the individual charged with a violation. The final notice and order will contain a statement of the charges and the amount of the proposed civil penalty and, as a result of information submitted to the agency attorney during any informal procedures, may modify an allegation or a proposed civil penalty contained in the notice of violation. A final notice and order may be issued__

(1) If the person charged with a violation fails to respond to the notice of violation within 30 days after receipt of that notice; or (2) If the parties participated in any informal procedures under paragraph (B)(2) of this section and the parties have not agreed to compromise the action or the agency attorney has not agreed to withdraw the notice of violation.

(D) Order assessing civil penalty. An order assessing civil penalty may be issued after notice and opportunity for a hearing. A person charged with a violation may be subject to an order assessing civil penalty in the following circumstances:

(1) An order assessing civil penalty may be issued if a person charged with a violation submits, or agrees to submit, the amount of civil penalty proposed in the notice of violation.

(2) An order assessing civil penalty may be issued if a person charged with a violation submits, or agrees to submit, an agreed-upon amount of civil penalty that is not reflected in either the notice of violation or the final notice and order.

(3) The final notice and order becomes (and contains a statement so indicating) an order assessing a civil penalty when the person charged with a violation submits the amount of the proposed civil penalty that is reflected in the final notice and order.

(4) The final notice and order becomes (and contains a statement so indicating) an order assessing a civil penalty 16 days after receipt of the final notice and order, unless not later than 15 days after receipt of the final notice and order, the person charged with a violation does one of the following__

(i) Submits an agreed-upon amount of civil penalty that is not reflected in the final notice and order, in which case an order assessing civil penalty or a compromise order shall be issued if an alleged violation occurred and determines that a civil penalty, in an amount found to be appropriate by the administrative law judge, is warranted.

(6) Unless a petition for review is filed with a U.S. Court of Appeals in a timely manner, a final decision and order of the Administrator shall be considered an order assessing civil penalty if the FAA decision maker finds that an alleged violation occurred and a civil penalty is warranted.

[Dkt. No. 27873, Amdt. 13_25, 59 FR 44269, Aug. 26, 1994]

NTSB PART 821 (ToC only)

PART 821__RULES OF PRACTICE IN AIR SAFETY PROCEEDINGS

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WAGNER v FAA

9th Circuit Court of Appeals

OPINION

KLEINFELD, Circuit Judge:

Mr. Wagner petitions for review of a National Transportation Safety Board (NTSB) decision suspending his pilot's certificate for ninety days. The main issue is whether a flight can be a "demonstration flight" under Part 91 of the FAA regulations, when a person flying the airplane is considering the purchase, but the paying customer does not know that it is a demonstration flight on which it does not enjoy all the protections of Part 135. We agree with the NTSB that the answer is no.

FACTS

Sun World International regularly used Desert Airlines to fly its executives from one place to another. Mr. Wagner regularly acted as pilot, usually flying a type of airplane called a Beechcraft King Air. The evening before one such flight, the King Air had mechanical problems. A man named Frost was interested in selling a Learjet, and offered it to Desert Airlines for a free demonstration flight. Mr. Wagner had formerly been certified to fly Learjets, but had let his certification lapse because he was not flying them regularly. He had some interest in buying a Learjet. Mr. Frost, Desert, and Mr. Wagner arranged that the Learjet would be used as a substitute for the King Air, and that this would be a free demonstration flight. Mr. Wagner would fly as copilot.

Executives from Sun World had plans to travel on Desert Airlines the evening that Frost, Desert, and Mr. Wagner made the arrangements for the demonstration flight. Neither Sun World president Mr. Rinella nor the Sun World employee responsible for booking the flight knew anything about these arrangements. They thought they were chartering a commercial air taxi flight as usual. When Mr. Rinella got to the airport and saw the Learjet, he expressed surprise, and said he did not need a jet for the short flight. Mr. Yskamp, the head of Desert Airlines, and Mr. Wagner were there, but did not tell Mr. Rinella that this was a free demonstration flight to look over the Learjet. Instead, Mr. Rinella was told that he would be charged the same rate he usually paid for the King Air, because the King Air was not available:

Well, I heard at that time that the King Air was not available, this plane was being substituted but that the__not to be alarmed because the rate on the airplane would be identical to that for the King Air and that Desert Air was absorbing the difference. . . . I had no knowledge of the demonstration flight.

Subsequently, Desert Airlines sent Sun World an invoice for the flight. Mr. Rinella initially refused to pay it, because it did not have a date, and it listed the King Air aircraft instead of the Learjet. After Desert satisfied him that the amount was the same as he would have paid for the King Air, he authorized payment on the invoice to Desert Airlines. A

copy of the invoice was not furnished to Mr. Wagner's counsel until the day before his hearing, although he had been advised that there was such an invoice. The evidence established without contradiction that neither Mr. Wagner nor Mr. Frost, the owner of the Learjet, charged or was paid for the flight. There is no explanation in the record of whether the FAA disciplined Desert Airlines, which arranged the flight with the passengers and billed them for it, or just Mr. Wagner, the unpaid copilot.

All of the facts cited above were supported by substantial evidence on the record as a whole, and none of them was contradicted. Thus, as far as the prospective seller of the Learjet was concerned, this was a demonstration flight at no charge so that Mr. Wagner could evaluate the plane for possible purchase, and determine whether his frequent customers would like it. But as far as Mr. Rinella and the Sun World employee who booked the flight knew, this was a commercial flight for which they would be billed. They knew nothing about its being a free test flight to demonstrate the airplane. Desert Airlines seems to have been of two minds, operating a free test flight so far as Mr. Frost, the Learjet's owner, and Mr. Wagner, the copilot and prospective purchaser, were concerned, but an ordinary commercial flight for hire with respect to its customer, Sun World International.

ANALYSIS

This is an Administrative Procedure Act review of a petition, so we "shall hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. S 706(2)(A); *Howard v. FAA*, 17 F.3d 1213 (9th Cir. 1994). Purely legal questions are reviewed de novo. *Howard*, 17 F.3d at 1215.

I. The FAA's Discovery Violation.

The Administrative Law Judge had required exchange of all exhibits fifteen days before trial. The attorney for the FAA did not obtain Desert Airlines' invoice to Sun World until a week before trial, Monday, March 16. A week earlier, she had told Mr. Wagner's lawyer that among the exhibits would be a copy of the invoice, but he did not fully understand what she was talking about, because he did not realize that Desert Airlines had sent an invoice. She told him that she would send it to him immediately as soon as she received it. She had the attorney's fax number.

The FAA's lawyer got the invoice in the late afternoon on Monday, March 16. She did not send it to Mr. Wagner's lawyer that afternoon. She was out of the office and did not have it sent Tuesday or Wednesday. She was back in the office Thursday, but did not cause the invoice to go out that day either. Instead, she sent it ordinary mail (not fax) on Friday, March 20. It got to Mr. Wagner's lawyer Monday, the day before the Tuesday hearing. Mr. Wagner objected to its admission as evidence, but the Administrative Law Judge let it in anyway. Mr. Wagner, however, did not seek a continuance to rebut the evidence. Mr. Wagner argues that admitting the invoice was arbitrary and capricious.

There appears to have been no good reason why the FAA's attorney could not have subpoenaed the invoice in plenty of time to produce it as required by the deadline in the prehearing order. Nor was there any apparent excuse for not faxing it to Mr. Wagner's lawyer during the week before the hearing, when she had it and he did not. As the case would look to the attorneys the week before the hearing, the invoice would likely be important, because it would prove that the flight had been for a charge, not for free.

But as the evidence came out at the hearing, and as the FAA decided the case, the invoice did not matter. We therefore need not decide whether the invoice was wrongly admitted. As we explain below, the outcome was controlled by the customers' ignorance of whether this was a demonstration flight, and its expectation that it would be charged, regardless of whether a charge was actually made. Error in admission of the invoice could not, as this case ultimately was decided, have prejudiced Mr. Wagner, so we need not decide whether there was error. See *Janka v. Department of Transportation*, 925 F.2d 1147, 1152 (9th Cir. 1991).

II. Part 91.

Part 135 of the FAA regulations generally provide regulatory safeguards for air taxi passengers. 14 C.F.R.S 135.1. Part 91 provides more liberal operating rules for various kinds of flights, such as ferry or training flights, aerial survey work, free demonstrations of airplanes to prospective customers, and use by a company of its own airplane. 14 C.F.R.S 91.501. Mr. Wagner was certified to fly the Learjet under Part 91, but not under Part 135. The applicable subsection upon which he relies is for demonstration flights:

Flights for the demonstration of an airplane to prospective customers when no charge is made except for those specified in paragraph (d) of this section

14 C.F.R. S 91.501(b)(3). Subsection (d) is an exception for certain passed on expenses, e.g., fuel and landing fees, 14 C.F.R. S 901(d), and no party claims that it applies to this case.

Mr. Wagner argues that the quoted exception applies, because he worked with Desert Airlines as an independent contractor, and the Sun World passengers were his regular customers and not just Desert Airlines'. The owner of the Learjet did not charge and neither did he.

We agree with the NTSB that the regulation must be applied based upon what the customers knew when its executives boarded the plane, not upon arrangements unknown to it between the owner and prospective purchaser of the airplane. The regulatory scheme is designed to assure the safety of air taxi passengers. A secondary purpose is to facilitate air commerce, by encouraging people to fly on airplanes secure in the knowledge that air commerce is heavily regulated to protect their safety. If a customer's executives are flying on a free demonstration flight to look over an aircraft for possible purchase, without all the Part 135 safeguards in place, the customer is entitled to know it.

The critical fact in the case at bar is that neither Sun World president Mr. Rinella nor the employee who booked the flight knew they were involved in a demonstration flight.

Unless all customers making travel arrangements on a flight know that they are dealing with a demonstration of an airplane for which no charge will be made to some prospective purchaser of the aircraft, this Part 91 exception to Part 135 cannot apply. 1

We need not decide whether Mr. Wagner could have avoided discipline, had the evidence demonstrated that he reasonably believed that Sun World knew that this was a free demonstration flight. No evidence contradicted Mr. Rinella's testimony that when he asked about the Learjet, with Mr. Wagner standing there and talking to him, he "heard at that time that the King Air was not available, this plane was being substituted but that the__ not to be alarmed because the rate on the airplane would be identical to that for the King Air and that Desert Air was absorbing the difference." Mr. Wagner testified, but did not deny that this discussion had taken place or that he had said or heard the remark.

So far as Sun World knew, this was an ordinary commercial flight, of the type regulated by Part 135. Mr. Rinella and the employee who booked the flight might never have heard of Part 135, but they could assume that the usual regulatory scheme for commercial airplane flights was in place and protecting the passengers' safety. The company was to be charged, and it paid for the flight. Section 91.501(b)(3) requires that no charge be made for a demonstration flight. It is not a "no charge" flight if the customer is to pay for their carriage, whether or not the airline is to pay the aircraft's owner. Indeed when Mr. Rinella raised the question of why they were flying on a Learjet, he was told that his company would be charged the same rate as for a King Air.

Looking to the customers' reasonable expectation to determine the nature of the flight is consistent with NTSB precedent. See *Administrator v. Southeast Air, Inc.*, 4 NTSB 517, 519 (1982); *Administrator v. Cunningham*, 5 NTSB 516, 519 (1985). It makes obvious sense.

PETITION DENIED.

Footnotes

[Footnote 1] We need not decide how the regulation should be construed in circumstances where there is a significant distinction between "customers," the term in the regulation, and passengers. If Desert Airlines had told Sun World that the flight would be a free demonstration flight, but the Sun World employees who were passengers did not know that, so the passengers thought they were boarding an ordinary commercial flight, that might or might not be a distinguishable case. Likewise, if the "prospective customers" for an aircraft were to be passive investors buying the plane for lease to an air taxi service, and the fully informed passengers for the demonstration flight were the air taxi personnel who would use the plane but would not be the seller's "prospective customers," we do not intimate unavailability of 14 C.F.R. S 91.501(b)(3). These questions are left for a case raising them.

BORREGARD v. NATIONAL TRANSP. SAFETY BD.

46 F.3d 944 (9th Cir. 1995)

Petition to Review a Decision of the National Transportation Safety Board.

Robert Borregard appeals an NTSB decision affirming an FAA Emergency Order revoking his aircraft mechanic certificate and inspection authority on the charge that Borregard altered an aircraft's maintenance logs for a fraudulent purpose in violation of 14 C.F.R. 43.12(a)(3). Borregard contends that the Board's finding that he breached 43.12(a)(3) is not supported by substantial evidence and that the revocation of his certificates was an inappropriate and unconstitutional response to the charged violation. Because the Board's decision is not arbitrary and capricious and is supported by substantial evidence, we affirm. The penalty, too, was appropriate in light of the gravity of Borregard's infraction and established Board precedent.

I. Standards of Review

Review of NTSB orders is deferential. This Court must affirm unless the NTSB's order is

"arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706(2)(A). Findings of fact are conclusive, so long as they are supported by substantial evidence in the record. Legal conclusions are generally reviewed de novo. *Olsen v. NTSB*, 14 F.3d 471, 474 (9th Cir. 1994). However, an agency's interpretation of its own organic statute and regulations are accorded deference, unless "the administrative construction is clearly contrary to the plain and sensible meaning of the regulation." *Hart v. McLucas*, 535 F.2d 516, 520 (9th Cir. 1976).

II. The Legal Standard

The Board's interpretation of 43.12(a)(3) is arguably contrary to the plain meaning of the regulation. Correctly understanding 43.12(a)(3) as an attempted fraud provision, the Board enunciated the elements of a 43.12(a)(3) violation: 1) a false representation; 2) in regard to a material fact; 3) made with knowledge of its falsity; and 4) with the intent to deceive. The language and purpose of 43.12(a)(3), however, may call for a less exacting standard. The regulation prohibits "[a]ny alteration, for fraudulent purpose." (Emphasis added). By requiring that the alteration be actually false and made with knowledge of that falsity, the Board has effectively read the word "any" out of the regulation and replaced it with an implicit "knowingly false." The elements of attempted fraud would seem to be met so long as the actor subjectively believes the alteration is false, whether or not the information is actually false.

Although we note this lurking question, we do not need to make such subtle interpretive distinctions today as *Borregard* clearly violated 43.12(a)(3) even under the more stringent standard applied by the Board.

III. Each Element of a 43.12(a)(3) Violation is Supported

Each element of a 43.12(a)(3) violation is supported by substantial evidence. The basic facts of the case are not in dispute. *Borregard* initially entered October 24 as the date of inspection in the engine log of the plane at issue and October 28 as the inspection date in the air frame log. In fact, the inspection had not been completed by October 24 or 28. Keith Mason, the director of maintenance of Squadron Two Flying Club, *Borregard's* employer, asked *Borregard* to backdate the annual inspection to September in an apparent attempt to shield a club member from any liability arising from his flying an uncertified plane. *Borregard* covered the entries of the October dates with a sticker and entered September 1 as the date he completed the annual inspection. Once *Borregard* learned that the FAA had received the false records, he attempted to cover up his misstatement. He again placed stickers over the entries, rewriting October 24 in the logs and submitting the new copies to the FAA. Later, he wrote "void" over the new October 24 entry. He finally recorded November 1 as the completion date, despite the fact that as of November 1, the annual inspection still had not been completed.

Borregard concedes that he made all the above date changes and that he knew that the inspection had not been completed even by November 1, the latest date entered.

Accordingly, there is no question that the four entries were false and that *Borregard* knew of their falsity. Entry of the exact completion date only satisfies the air safety regulations. *Administrator v. Olsen*, NTSB Order No. 3582 at 10.

Borregard argues that he had no intent to deceive the FAA. In a nutshell, he argues that he intended to defraud only those who would rely on the records of Squadron Two, not the FAA. However, the fact that *Borregard* intended to defraud certain people and not others

does not negate his bad intent. The pilots, mechanics, insurers, and anyone else who might rely on Squadron Two's safety records, even the public at large, are within the ambit of those protected by the air safety regulations requiring that maintenance records for aircraft be trustworthy. Cf. *Administrator v. Berglin*, NTSB Order No. EA_3846 at 5.

Furthermore, there is substantial evidence suggesting that Borregard intended to defraud the FAA. Borregard knowingly presented false information to the FAA, sending the FAA copies of redacted records showing an October 24 inspection date. Later, Borregard showed up at the hearing with records bearing a November 1 completion date, when, by Borregard's own testimony, the inspection was completed after November 1.

As a matter of law, Borregard's false entries in the logs are material. The test of materiality is whether the false statements had the natural tendency to influence, or were capable of influencing, the decision of the FAA inspector to whom the logbook was submitted. *Janka v. NTSB*, 925 F.2d 1147, 1150 (9th Cir. 1991). As one would expect, materiality in the context of regulations requiring logbooks has been interpreted broadly to include any logbook entry which in any way illustrates compliance with the referenced regulations. *Administrator v. Olsen*, NTSB Order No. EA_3582 at 10. Clearly, certifying that maintenance on a plane had been completed when in fact it had not is material.¹

IV. The Propriety of Revocation of Licenses as a Penalty

Borregard contends that revocation of his mechanic and inspection certificates is not an appropriate sanction for the violation charged in that 1) it violates his substantive due process rights and 2) his actions do not show a lack of qualification. Both arguments are contrary to the great weight of authority.

The "liberty" that the Constitution protects does include choice of occupation. *Board of Regents v. Roth*, 408 U.S. 564, 573, 92 S.Ct. 2701, 2707 (1972). However, the state has broad discretion to regulate professions through the police power, subject only to rational basis review. *Schwartz v. Board of Examiners*, 353 U.S. 232, 239, 77 S.Ct. 752, 756, 1 L.Ed.2d 796 (1957). Because the qualification standards requiring accurate entries in maintenance logs are rationally connected to the public interest in safe air travel, there is no constitutional violation here.

Numerous cases have upheld the revocation of licenses not only for fraudulent entries, but the lesser included offense of intentionally false entries. The law is well-settled that "[a]n Inspection Authorization holder who knowingly misrepresents a logbook entry bearing on the condition of an aircraft . . . clearly lacks the judgment a qualified certificate holder is expected and required to possess." *Administrator v. Rice*, 5 NTSB 2285 (1987). "[O]ne intentionally false log entry would be sufficient, in and of itself, to warrant revocation." *Administrator v. Olsen*, NTSB Order No. EA_3582 (1992), *aff'd Olsen v. NTSB*, 14 F.3d 471, 476 (9th Cir. 1994). See also, *Administrator v. Berglin*, NTSB Order No. EA_03846 (1993) and *Administrator v. Coomber*, NTSB Order No. EA_4283. Thus, revocation of Borregard's inspection authority was the appropriate and expected response to the fraudulent log entries.

Likewise, Board precedents have implicitly held that integrity is a prerequisite to holding a pilot or mechanic certificate. See, *Administrator v. Barron*, 5 NTSB 256 (1985); *Administrator v. Coomber*, NTSB Order No. EA_4283; and *Olsen v. NTSB*, 14 F.3d at 476. Considering that this Court in *Olsen* affirmed revocation of a mechanic certificate for an intentionally false log entry in violation of 43.12(a)(1), there can be no argument that

an attempted fraud, a more serious violation, cannot warrant such a sanction. *Hart v. McLucas*, 535 F.2d 516, 520 (9th Cir. 1976) (fraudulent entries carry a greater degree of culpability than intentionally false ones and, therefore, warrant more severe sanctions). Thus, revocation of Borregard's mechanic certificate was also an appropriate and predictable sanction.

V. Conclusion

Reflecting on his own error of acquiescing to his employer, Borregard confessed, "I'm stupid. I really, really am stupid." While Borregard, who is arguably a simple naif manipulated by others, may be entitled to pity, he is not entitled to a mechanic certificate with inspection authority. Lack of judgment is just as serious a shortcoming for an airplane mechanic entrusted with certifying the airworthiness of planes as is a lack of mechanical skills. Borregard was correctly found in violation of 43.12(a)(3), even under the stringent legal standard applied. Ninth Circuit and NTSB precedent, as well as common sense, support revocation of the certificates as an appropriate penalty. We AFFIRM.

Footnotes

[Footnote 1] Borregard raises several other irrelevant or baseless arguments that do not merit discussion.

Ferguson v. FAA (1982)

Lowell G. Ferguson appeals the decision of the National Transportation Safety Board (NTSB) to suspend his Airline Transport Pilot Certificate for 60 days for violations of the Federal Aviation Regulations. Ferguson, the pilot-in-command of Western Airlines Flight 44, landed his aircraft without clearance at Buffalo, Wyoming, rather than at the scheduled stop at Sheridan, Wyoming. The NTSB adopted as its own the decision of the Administrative Law Judge (ALJ) affirming the order of suspension issued by the Administrator of the Federal Aviation Administration (FAA).

Ferguson now requests this court to vacate and set aside the order of the ALJ and the NTSB, or, in the alternative, to remand for further proceedings. Ferguson asserts an affirmative defense under the FAA/NASA Aviation Safety Reporting Program (ASRP Advisory Circular 00-46B), contending: (1) he was entitled to a waiver of punishment because his actions were inadvertent and not deliberate;" (2) his conduct was not reckless within the meaning of Federal Aviation Regulation § 91.9(14 C.F.R. § 91.9). Jurisdiction in the United States Court of Appeals for the Ninth Circuit is predicated upon 49 U.S.C. § 1486 (Federal Aviation Act of 1958), 49 U.S.C. § 1903 (Independent Safety Board Act of 1974), and 5 U.S.C. § 701 (Administrative Procedure Act).

In our view, this appeal presents two issues: first, whether the ALJ properly interpreted the phrase "inadvertent and not deliberate" in Advisory Circular (00-46B) of the FAA Aviation Safety Reporting Program; and second, whether the NTSB was correct in affirming the ALJ's conclusion from the findings of fact that Ferguson's operation of Western Airlines Flight 44 was reckless within the meaning of Federal Aviation Regulation § 91.9.

We hold that the NTSB did not abuse its discretion in interpreting the Advisory Circular 00-46B. Neither the historical background nor the language of the circular indicates that reckless conduct can be considered "inadvertent and not deliberate" and thus, qualify for a waiver of punishment. We also conclude that the NTSB did not abuse its discretion in affirming the ALJ's conclusion that Ferguson's conduct was reckless. Although Ferguson did not knowingly land his aircraft at the wrong airport, he should have known that his conduct demonstrated a gross disregard for safety and created an actual danger to life and property. Accordingly, we affirm the decision of the NTSB.

1. FACTUAL BACKGROUND

Ferguson was pilot_in_command of Western Airlines Flight 44 from Los Angeles, California to seven locations, including Las Vegas, Nevada, Denver, Colorado, and Sheridan, Wyoming. Ferguson, with over 12,000 hours of flying experience, had never been found in violation of any Federal Aviation Regulations.

Flight 44 left Los Angeles on July 31, 1979. By the time the flight departed on the leg from Denver to Sheridan, it was 35 minutes behind schedule. The original flight plan would have taken the aircraft from the Denver Air Route Traffic Control Center to the Crazy Woman navigational facility for an instrument landing in Sheridan. Shortly before reaching Crazy Woman, however, control of flight 44 was transferred to Salt Lake Air Route Traffic Control Center (Salt Lake Center). Visibility was unrestricted, and Salt Lake Center offered flight 44 a direct clearance to Sheridan along airway victor 19, which passed directly over an airport in Buffalo, Wyoming. Flight 44 accepted the new plan in order to save time and fuel.

Ferguson handled radio communications as the flight approached Sheridan, and the first officer, James Bastiani, flew the aircraft. Neither Ferguson nor Bastiani had flown into Sheridan before, but each believed the other had. Ferguson reviewed the navigational chart, but failed to note that the Buffalo airport was directly under the aircraft's flight path.

At approximately 10:00 p. m. both Ferguson and Bastiani saw runway lights and commenced a visual approach to what they assumed was the Sheridan Airport. Ferguson did not use available radio navigation aids to make positive identification of the airport. During the approach, flight 44 maintained radio contact with the Sheridan Flight Service Station. Although the Air Traffic Controller in Sheridan informed Right 44 that another aircraft was on final approach, neither Ferguson nor Bastiani inquired further when they were unable to see the other aircraft. Although the airport at Sheridan was equipped with visual approach slope indicator (VASI) lights, Ferguson did not ask the Sheridan Flight Service Station why the runway before him was not so lighted. In spite of the fact that Ferguson was under an obligation to land the aircraft himself (Western Airlines Flight Operational Manual, §5.1.2 B), First Officer Bastiani landed the Boeing 737. It was not until the aircraft's landing gear nose wheel sank in the turnoff pad beyond the runway that Ferguson realized that flight 44 had landed in Buffalo instead of Sheridan. The error was confirmed when the jeep that drove up to meet them bore "Piper" insignia rather than the

expected Western Airlines logo.

On November 28, 1979 the Administrator of the FAA issued an order of suspension of Ferguson's Airline Transport Pilot certificate for 60 days. The order was subsequently filed as the Administrator's complaint, and charged Ferguson with violation of four sections of the Federal Aviation Regulations: (1) §91.75(a) (14 C.F.R. § 91.75, deviating from an air traffic control clearance; (2) § 121.590(a) (14 C.F.R. § 121.590), landing at an airport not certificated under part 139 of the Federal Aviation Regulations; (3) § 121.555(b) (14 C.F.R. § 121.555), landing at an airport not listed in the Western Airlines Operations Specifications; and (4) § 91.9 (14 C.F.R. § 91.9), operating an aircraft in a careless or reckless manner so as to endanger the life or property of another.

An evidentiary hearing was held before an ALJ on June 4, 1980. The ALJ concluded that the evidence in the record supported a finding that Ferguson had violated the sections of the Federal Aviation Regulations as charged. The Administrator's 60-day suspension of Ferguson's Airline Transport Pilot Certificate was affirmed by the ALJ.

I

Ferguson filed a timely notice of appeal, and on December 9, 1980 the NTSB affirmed the 60-day suspension. On January 7, 1981, Ferguson filed a motion to stay the order with the NTSB. The motion was granted on January 8, 1981, and the order of submission was stayed pending the disposition of the case by this court.

II. STANDARD OF REVIEW

Our review of the NTSB decision is limited by the standards set forth in the Administrative Procedure Act, 5 USC § 706(2). Unless the decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law" 5 U.S.C. § 706(2)(A), or "unsupported by substantial evidence," 5 USC. § 706(2)(E), we must affirm. Furthermore, we must give deference to an administrative agency's interpretation of its own regulations. Udall V. Tallman,(1965); Sierra Pacific Power Co. v. EPA, (9th Cir. 1981); and also, Beliwood General Hospital V. Schweiker,(1982) (administrative interpretation of regulation by agency responsible for promulgating and administering it is controlling unless it is plainly erroneous or inconsistent with regulation.)

It is important to note that in this case Ferguson's conduct is not in dispute. Rather, it is the agency's conclusions drawn from the conduct that are at issue. Ferguson failed to: (1) familiarize himself with the navigational chart depicting the Buffalo airport; (2) land the aircraft himself, as required by Western Airlines Flight Operational Manual (15.1.2 B); (3) use navigational aids such as the VOR/DME, the Instrument Landing System (ILS); and the Monarch low frequency beacon associated with the ILS to identify the airport; and (4) note visual indications that he was landing at the wrong airport.

The NTSB, affirming the FAA's interpretation of the scope of Advisory Circular 00-46B, determined that Ferguson was not entitled to a waiver of punishment under the "inadvertent and not deliberate" provision of the circular. The NTSB also concluded from the findings of fact that Ferguson's conduct was reckless within the meaning of Federal

Aviation Regulation § 91.9(14 C.F.R. §91.9). Because both issues in this case center on agency interpretations of regulations and conclusions drawn from findings of fact, this court will review the decision of the NTSB under the abuse of discretion standard, giving deference to the agency's interpretation of its own regulation.

111. The SCOPE OF ADVISORY CIRCULAR 00-46B

We first consider Ferguson's claim that he is entitled to a waiver of punishment under the terms of Advisory Circular OO-46B, which was issued on June 15, 1979, and was in effect at the time flight 44 landed at the Buffalo Airport. Unlike the two preceding Advisory Circulars (issued on 1975 and 1976), 00-46B does not include an express exclusion of reckless conduct from the scope of immunity. It does, however, provide for a waiver of punishment if the violation was "inadvertent and not deliberate."

Ferguson contends that the removal of the express exclusion of reckless conduct from the scope of immunity evidences the intent of the FAA to waive disciplinary action in cases where conduct was reckless so long as the conduct was also "inadvertent and not deliberate." He also suggests that this court should adopt what he terms a "lay interpretation" of "inadvertent." Under Ferguson's definition, "inadvertent" is synonymous with not deliberate." Thus, violations that are not deliberate are also inadvertent.

NTSB responds that the history of the FAA Aviation Safety Reporting Program (ASRP) indicates that the intent of The FAA was to limit rather than increase the number of instances in which a waiver of punishment would be afforded. Because reckless conduct had been expressly excluded in the past, the NTSB asserts that it would not be consistent with the FAA's intent to establish a new waiver for reckless conduct. Furthermore, the NTSB maintains that the phrase "inadvertent and not deliberate" inherently excludes reckless conduct.

A. The Administrative Interpretation

In 1979 the FAA Administrator promulgated an Advisory Circular which modified the ASRP to provide for disciplinary action against violators whenever information about the violation is obtained from an independent source. 44 Fed.Reg. 18129. Waiver of punishment is granted if:

- (1) The violation was inadvertent and not deliberate;
- (2) The violation did not involve a criminal offense, or accident, or action under section 609 of The Act which discloses a lack of qualification or competency, which are wholly excluded from this policy;
- (3) The person has not been found in any prior FAA enforcement action to have committed a violation since the initiation of the ASRP of the Federal Aviation Act or of any regulation promulgated under that Act; and
- (4) The person proves that within 10 days after the violation, he or she completed and delivered or mailed a written report of the incident or occurrence to NASA under ASRS. Advisory Circular 00_46B, paragraph9c(1) - 9c(4).

Although the language of the Advisory Circular 00_46B does not expressly

exclude reckless conduct from the scope of immunity, the FAA Administrator's notice explains:

In addition, where a timely report is filed, if the FAA has not initiated its investigation within 90 days after the incident, the Administrator will waive the taking of disciplinary action against the person filing the report; *provided the incident does not involve reckless operations*, gross negligence, willful misconduct, a criminal offense, or an accident. 44 Fed.Reg. 18128_18129 (emphasis added).

Thus, the Administrator has determined that the circular, as presently formulated, excludes reckless conduct from the scope of immunity.

"The administrative interpretation of a regulation by the agency responsible for promulgating and administering it is controlling... unless it is plainly erroneous or inconsistent with the regulation." Immigration and Naturalization Service V. Stanisic, 395 U.S. 62, 72,89 S.Ct. 1519, 1526, 23 ~Ed.2d 101 (1969), quoting Bowles V. Seminole Rock Co., 325 U.S. 410, 414, 65 S.Ct. 1215, 1217, 89 L.Ed. 1700 (1945)." Illwood General Hospital at 1044. We first examine whether this interpretation is clearly erroneous. An examination of the history of the ASRP reveals that the Administrator's interpretation of the scope of the circular is correct.

The FAA Administrator, in a notice at 44 Fed.Reg. 1812~18129 (1979), indicated that the FAA established The ASRP in 1975 in order to obtain information that would aid in discovering and preventing unsafe conditions in the National Aviation System. Much of this information had remained unreported because pilots and other involved individuals feared disciplinary action. *Id.* Therefore, the first Advisory Circular 0046, promulgated in 1975, included a waiver of certain disciplinary actions in return for a timely written report. The 1975 circular, however, expressly stated that the waiver applied "except with respect to reckless operations, criminal offenses, gross negligence, willful misconduct and accidents." *Id.*

In 1976, The FAA Administrator modified the ASRP to provide for submission of reports directly to the National Aeronautics and Space Administration (NASA). Advisory Circular 00_46A (1976). The NASA system was designed to guarantee absolute confidentiality and thus, to encourage reporting. 44 Fed.Reg. 18128 (1979). An important provision of the 1976 circular stated that disciplinary action could not be taken against a violator unless the FAA approached NASA to inquire about a particular incident within 45 days of its occurrence. Advisory Circular 00_46A Para. 6a(1). Reckless conduct was expressly excepted from the provision: "Disciplinary action may be taken in such cases, however, on the basis of information obtained independently of the Aviation Safety Report." *Id.* ¶ 6a(3). It appears, therefore, that reckless conduct was expressly excluded from the scope of immunity if the incident involving reckless conduct was independently reported. In keeping with the FAA's Administrator's intent to encourage reporting, an incident involving reckless conduct could not be used for disciplinary purposes unless an independent report was received.

In our view the FAA, by promulgating Advisory Circular 00-46B, did not intend to increase the number of circumstances in which waivers of punishment would apply. Rather, the 1979 circular decreases the availability of waivers by allowing disciplinary action when incidents are independently reported. Reckless conduct was not immune from disciplinary action under the 1975 and 1976 circulars, and we agree with the NTSB that the FAA did not intend to allow a waiver of punishment for reckless conduct under the 1979 circular. Thus, we conclude that the Administrator's interpretation of the circular is not clearly erroneous.

We next examine the language used in the 1979 circular to determine whether the phrase "inadvertent and not deliberate" excludes reckless conduct, and is therefore consistent with the interpretation of the Administrator.

B. The Meaning of "Inadvertent and Not Deliberate"

Ferguson urges this court to conclude that the term "inadvertent" is synonymous with "not deliberate." In affirming the order of the ALJ, the NTSB defined the terms "inadvertent and not deliberate" to mean not reckless. the NTSB stated:

The terms 'inadvertent' and 'not deliberate' are used in the conjunctive (rather than disjunctive) in the Advisory Circular. Therefore, for immunity to apply, not only must a violation be not deliberate, it must also be inadvertent. While it is undisputed that the violations were not deliberate, it is also clear that, under any reasonable definition, they were not inadvertent. "Reckless" connotes a substantially greater degree of lack of care than "inadvertence", as exemplified by the difference between simple negligence and gross negligence, and approaches deliberate or intentional conduct in the sense of reflecting a wanton disregard for the safety of others. Exclusion of reckless conduct from the immunity protection of the circular is also consistent with the history and intent of the ASRP.

Thus, in the view of the NTSB the meaning of the phrase inadvertent and not deliberate is consistent with the FAA Administrator's interpretation of the circular. We agree.

The parties do not dispute that Ferguson's conduct was not deliberate. Therefore, we must determine whether his conduct was inadvertent. Ferguson, as pilot_in~command of Western Airlines Flight 44, was required by Federal Aviation Regulations and company policy to perform certain duties:

(1) to familiarize himself with all flight information. FAR § 91.5 (14 C.F.R. § 91.6); (2) to utilize available radio navigation aids to identify the airport before landing. Western Airlines Flight Operation Manual, I 5.3.3.C; and (3) to land the aircraft himself until he accumulated 100 hours as pilot_in_command of a type aircraft. Western Airlines Flight Operation Manual 15.1.2.B. It is undisputed that he failed to comply with these regulations.

In each instance, Ferguson's failure to comply with the regulation was the result of a purposeful choice. If he had thoroughly examined the navigational chart before the flight, his hasty in-flight examination of the new route (depicted on the same chart) might have revealed the presence of the Buffalo Airport in the same path as the Sheridan Airport. He chose, however, not to familiarize himself with all flight information. If he had utilized his radio navigation aids, he could have positively identified the airport. He chose, however, not to persevere in his use of navigational aids. If he had flown the aircraft himself, he might have been more alert to the visual indications that he was landing at the wrong airport. He chose, however, to allow First Officer Bastiani to land the aircraft.

Ballentine's Law Dictionary defines "inadvertence" in the following manner: "The word includes the effect of inattention, the result of carelessness, oversight, mistake, or fault of negligence and the condition or character of being inadvertent, inattentive or heedless. Gross negligence is not inadvertence in any degree."

It is evident that an inadvertent act is one that is not the result of a purposeful choice. Thus, a person who tums suddenly and spills a cup of coffee has acted inadvertently. On the other hand, a person who places a coffee cup precariously on the edge of a table has engaged in purposeful behavior. Even though the person may not deliberately intend the coffee to spill, the conduct is not inadvertent because it involves a purposeful choice between two acts: Placing the cup on the edge of the table or balancing it so that it will not spill. Likewise, a pilot acts inadvertently when he flies at an incorrect altitude because he misreads his instruments. But his actions are not inadvertent if he engages in the same conduct because he chooses not to consult his instruments to verify his altitude.

In spite of the fact that Ferguson may not have consciously intended any particular consequences to occur as a result of his choice, he nevertheless made an election to act as he did. We agree with the NTSB's decision: "While it is undisputed that Ferguson's ... violations were not deliberate, it is also clear that, under any reasonable definition, they were not inadvertent."

Ferguson suggests that we should adopt a lay interpretation of inadvertent. In our view a lay interpretation of the phrase is consistent with a legal interpretation. Webster's Dictionary defines "inadvertent" as: "Not paying strict attention; failing to notice or observe; heedless; unwary. Clearly, Ferguson's conduct cannot fall within the ambit of this definition. Although his actions did not reflect the degree of deliberateness found in intentional misconduct, neither can they be found to be inadvertent. We hold that the NTSB did not abuse its discretion by determining that the scope of the 1979 circular does not allow a waiver of punishment for reckless conduct, and that the phrase "inadvertent and not deliberate" cannot encompass reckless conduct.

IV. RECKLESS CONDUCT WITHIN §91.9

Federal Aviation Regulation §91.9 (14C.F.R. §91.9) states: "No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another." The term "reckless," as used on §91.9 has been interpreted to mean "conduct that demonstrates a gross disregard for safety when coupled with the creation of actual danger to life and property...." Administrator v. Understein, NTSB Order EA_1644 (1981). Thus, in order to find that the NTSB abused its discretion, this court would need to decide that the findings of fact do not lead to the conclusion that Ferguson's conduct demonstrated: (1) a gross disregard for safety; and (2) a danger to life and property.

A gross disregard for safety occurs when a person engages in conduct that shows a disregard for foreseeable consequences. Administrator v. Understein, NTSB Order EA_1644 (1981). Ferguson should have known that his conduct could result in harm to the safety of his passengers. the ALJ commented that Ferguson's failure to use navigational aids was "unjustified." Sound judgment should have dictated a verification of the airport. the NTSB indicated that Ferguson should have known that he was landing at the wrong air port because of the visual indications. VASI lights, which Ferguson knew were part of the Sheridan airport, were not visible. the Sheridan Flight Service Station relayed the information that another aircraft was in the traffic pattern, but Ferguson did not realize what he should have known that he was landing at the wrong airport. Because the consequences of Ferguson's conduct were clearly foreseeable, the conclusion of the NTSB that Ferguson demonstrated a gross disregard for safety is not an abuse of discretion.

There is no question that Ferguson's conduct created an actual danger to life and property. The N'TSB suggests several events that could have occurred as a result of Ferguson's conduct: (1) The hard landing and subsequent hard brake application could have caused the aircraft to swerve off the runway; (2) The landing gear could have collapsed if it had sunk into the ground near the runway; (3) a fire could have resulted if any of the fuel tanks had ruptured; and (4) The aircraft could have struck mountainous terrain because the flight was using the published elevation for Sheridan rather than Buffalo. Even though no actual injury resulted, the potential endangerment is sufficient to find reckless operation. Administrator V. Stretar, NTSB Order EA_1535(1980).

Ferguson argues that emphasis should be placed on the fact that no accident, injury, or property damage occurred. He contends that "any act of inadvertence in light of its potential catastrophic consequences would constitute gross negligence or reckless conduct under the Administrator's theory." This contention is not accurate because an act of inadvertence, even one of potential catastrophic consequences, would not be reckless unless it was coupled with the requisite gross disregard for safety.

We hold that the NTSB did not abuse its discretion in drawing the conclusion that Ferguson should have known that he was landing at the wrong airport. Because Ferguson's conduct had clearly foreseeable consequences, it demonstrated a gross disregard for safety and created an actual danger to life and property. Thus, the conduct was reckless within the meaning of §91.9.

V. CONCLUSION

In summary, we hold that the NTSB did not abuse its discretion by determining that the scope of Advisory Circular 00_46B does not allow a waiver of punishment for reckless conduct, and that the phrase "inadvertent and not deliberate" cannot encompass reckless conduct. Furthermore, we hold that the NTSB did not abuse its discretion in drawing a conclusion from the findings of fact that Ferguson's conduct was reckless within the meaning of Federal Aviation Regulations §91.9 (14 C.F.R. §91.9).

The decision of the NTSB is AFFIRMED.