REPORT OF THE OFFICE OF THE CHAIRMAN IN SUPPORT OF RECOMMENDATION NO. 13

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I. Scope and Background

Under Title VI of the Federal Aviation Act of 1958,[1] the Administrator of the Federal Aviation Agency may issue and "amend, modify, suspend, or revoke" a variety of air safety certificates. This report deals with the procedure in formal de-certification cases, i.e., actions to amend, modify, suspend, or revoke outstanding certificates. As discussed more fully in Part II below, this procedure is of particular interest because it permits a single case to be tried *twice* at the administrative level.

The certificates subject to this de-certification, or "certificate action," process fall into seven statutory categories.[2] Certificate of the first two categories known as "type" and "production" certificates respectively, evidence the Administrator's satisfaction that the interests of safety have been adequately protected in the development and production of aircraft and aircraft components. "Airworthiness certificates," a self-explanatory term, are the third category of certificates; these are issued to registered owners of aircraft. "Air carrier operating certificates," the fourth category, should not be confused with certificates of air carrier route authority issued by the Civil Aeronautics Board; the FAA certificates relate only to the safety aspects of an air carrier's enterprise. The fifth category, "airman certificates," is, for reasons stated below, the most important category so far as this study is concerned. These certificates license the activities of pilots and other flight crew members, flight instructors, aircraft mechanics, dispatchers, control-tower operators, and even parachute riggers. The sixth category of certificates attests to

[1] 49 U.S.C. §§ 1421–30 (1964).
[2] See 14 U.S.C. §§ 1422–24 and 1426–27 (1964).

the suitability of "air navigation facilities." Finally, the seventh category, "air agency certificates," involves judgments as to the adequacy of training schools, repair stations, and so forth.

Although the process under examination applies to all of the foregoing certificates, the practical significance of the process is much more limited. The respondent in a formal certificate action proceeding is almost always an airman, and usually a pilot. The experience of the FAA's hearing officers during fiscal years 1967 and 1968 illustrates the pattern just described. Out of 227 new cases received by the hearing officers in that 24-month period, 226 involved airman certificates; and of those 226 cases, 203 involved pilots' licenses. The balance of 23 was distributed among mechanics (20), flight engineers (2), and flight navigators (1).[3] For the sake of convenience, and in recognition of the predominant impact of the formal certificate action process, this report occasionally refers to the respondent in a certificate action case as "the pilot."

Although certificate action cases have been characterized as "remedial," they are generally punitive in the sense that a sanction is sought to be imposed because of alleged improper conduct. The typical case involves a pilot who is accused of violating one of the FAA's flight regulations. Similarly, mechanics usually become involved in the process upon being accused of not meeting applicable Agency standards in the performance of specified repair, maintenance or inspection work.

The Federal Aviation Agency closes well over 1,000 certificate action cases each year. In most of these cases the respondent ultimately surrenders his certificate without receiving a formal hearing. The cases which are closed after formal adjudicatory proceedings account for only 10 to 20% of the total.[4]

Certificate action is only one of two sanctions available to the Administrator in the conduct of his air safety enforcement program. The other sanction is the monetary fine, or "civil penalty." [5] Although the Administrator's civil penalty power is used extensively, the applicable procedure is entirely different from that in certificate action cases and is, therefore, excluded from the scope of this report. Civil penalty cases are either compromised informally or referred by the FAA to the Department of Justice for collection in court.[6]

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[3] Source: FAA docket sheets.
[4] See note 19 *infra*.
[5] 49 U.S.C. § 1471(a)(1) (1964).
[6] 49 U.S.C. §§ 1471(a)(2), 1474(b)(1) (1964).

II. The Problem

A pilot who is confronted with proposed certificate action enjoys a procedural option which fairly invites inquiry. In brief, the pilot may elect to go to trial upon the decidedly favorable principle, "Heads I win, tails we flip again." To take advantage of this opportunity, the pilot must request the "formal hearing" proffered by the Administrator's Notice of Proposed Certificate Action. This hearing will be conducted before an FAA "hearing officer" under procedural rules which provide for the essential trappings of a trial.[7] Accordingly, the burden of proof will be on the Administrator rather than the pilot.[8]

If the airman prevails at the FAA trial, the action is terminated. His adversary, the agency enforcement staff, has no recourse, because the Administrator has granted the hearing officers the power to decide certificate action cases in his name and stead.[9] But the pilot, on the other hand, is in no respect bound by an adverse decision of the FAA hearing officer. He may "appeal" his case to the National Transportation Safety Board and there receive a trial *de novo* before one of the Board's APA hearing examiners.[10] As before, the FAA staff will carry the burden of proof.[11]

The second trial in a certificate action case is usually a trial *de novo* in the literal sense of that term. That is, the findings of the FAA hearing officer and the record compiled before him are simply ignored in the second proceeding. In a few cases, the respondent has entered into a stipulation permitting all or part of the FAA record to be introduced into evidence before the NTSB examiner, but such action is not at all common. Thus, from the perspective of parties who are retrying a certificate case before a Board examiner, the FAA trial was a trial in name only; in retrospect, it was more a combination dress rehearsal and deposition session.

This procedure was described above as an *option* of the pilot. The characterization is appropriate because the pilot *need not* exhaust any FAA remedy before taking his case to the NTSB. He may simply avoid any dealings with the FAA, allow the proposed certificate action to ripen into final action, and then file his appeal with the NTSB. He may also file an appeal after

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[7] 14 C.F.R. §§ 13.31–67.

[8] 14 C.F.R. § 13.59(b).

[9] 14 C.F.R. § 13.67(a). However, the hearing officer may not impose a sanction more severe than that specified in the notice of proposed certificate action.

[10] See 14 C.F.R. §§ 421.21–.50.

[11] 14 C.F.R. § 421.22.

taking advantage of the FAA's informal remedial procedures. Under FAA rules, each recipient of a Notice of Proposed Certificate Action is to be offered an opportunity to answer the charges in writing or to be heard in informal conference with FAA counsel.

Approximately 100 cases per year are appealed to the NTSB without passing through the FAA formal hearing process.[12] This number does, however, include so-called "emergency appeals." Emergency cases are those in which the Administrator has chosen to exercise his statutory power to make his order effective *pendente lite*. Such cases are not subject to the FAA formal hearing procedures; if contested, they go directly to the NTSB. An idea of the frequency of emergency appeals can be obtained from the fact that the Board disposed of 23 such cases during fiscal 1969. It is thus clear that airmen do not invariably take advantage of the two-trial process when it is available. Apparently, a significant number sacrifice this additional protection for the more expeditious direct appeal to the Board.

A study of cases docketed by FAA hearing officers during the 24-month period ending on June 30, 1968, disclosed that hearing officer decisions are appealed with some degree of regularity. The flow of cases between FAA hearing officers and NTSB examiners is not patently alarming, but neither is it *de minimis*. To illustrate, the FAA hearing officers received 227 cases during the subject period, and ultimately issued appealable orders (i.e., imposed certificate action) in 131 of them. A total of 51 were subsequently re-tried before the NTSB. In terms of an absolute number, this suggests an average of 25 cases moving each year to the NTSB for a second trial. In terms of percentages, it suggests that about 22% (51/227) of all new cases, and about 39% (51/131) of all appealable cases, are in fact tried twice.

These figures demonstrate that a respectable amount of governmental energy is dissipated by reason of the two-trial feature of the certificate action process. The question, of course, is whether it is not avoidable. It is certainly a basic assumption of our legal system that a defendant can be accorded "justice" in an adjudicatory system based on but one trial. Fortunately, the certificate action process does not force us to re-examine this assumption. The history of that system, as set forth in parts III and IV below, shows that the two-trial feature exists more through sufferance than design.

[12] According to statistics supplied by the FAA for fiscal years 1966, 1967 and 1968.

III. Certificate Action: The Statutory Framework

Section 609 of the 1958 Act[13] prescribes certain procedures for certificate action cases. Except in "emergency" cases, the Administrator is required by Section 609 to initiate a certificate action case by advising the certificate holder of the *proposed* action and the basis therefor. The Administrator must then afford the holder "an opportunity to answer any charges and be heard as to why [his] certificate should not be amended, modified, suspended, or revoked." Thereafter, if the Administrator determines that "safety in air commerce or air transportation and the public interest" so requires, he may put his proposed action into effect.

Section 609 also provides that any certificate action order may be appealed to the National Transportation Safety Board, which, "after notice and hearing", may "amend, modify or reverse the Administrator's order." The Board, in the conduct of its hearing, is not "bound by the findings of fact of the Administrator." The Board's decisional touchstone is, like the Administrator's, phrased in terms of the requirements of "safety in air commerce or air transportation and the public interest.

Emergency cases, as heretofore noted, are cases in which the Administrator determines that his order should be effective immediately. In all others the filing of an appeal with the Board stays the effective date of the Administrator's order. The Administrator may also determine that an emergency exists after an appeal has been filed. In such a case, the statutory stay is superseded by the Administrator's determination. Under Section 609, the Board must dispose of an emergency appeal within sixty days after it is advised by the Administrator that an emergency exists.

That Congress, in passing Section 609, foresaw only one formal hearing in a certificate action case is hardly open to debate. This is to say there is significance in the fact that the section characterizes the requisite Board procedure as a "hearing" and the FAA procedure as only "an opportunity to be heard as to why," etc. The House committee report described Section 609 procedure as follows:

> When the Administrator revokes, modifies, or suspends a certificate under section 609, an appeal to the Board is provided.
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> In order to expedite the safety enforcement process, section 609 of the legislation changes the present law by permitting the Administrator to amend, modify, suspend, or revoke safety certificates prior to formal pro-

[13] 14 U.S.C. 1429 (1964).

> ceedings before the Civil Aeronautics Board. However, in order to protect the holders of certificates from arbitrary action, the Administrator is required, except in cases of emergency, before taking any action to advise the holder of the certificate of the nature of the charges against him and to give the holder an opportunity to present informally his defenses to the Administrator. If, after this informal presentation, the Administrator is still of the opinion that the certificate should be amended, modified, suspended, or revoked, the Administrator may take such action. Thereafter, if the holder of the certificate disagrees with the action of the Administrator, he may appeal to the Civil Aeronautics Board where he will be given a full hearing complying in all respects with the requirements of the Administrative Procedure Act. In this hearing before the Board, the Administrator will have the normal burden of proof to establish facts, justifying the amendment, modification, suspension or revocation of the certificate.[14]

To summarize the two salient points in this passage, the FAA procedure was seen as an informal conference, while the Board procedure was to be a formal adjudicatory hearing.

From 1958, when the FAA was created, until 1962, the procedure in certificate action cases conformed to the expectations of the framers of Section 609. The Administrator offered only an informal conference to the recipient of a Notice of Proposed Certificate Action.[15]

IV. "Project Tightrope" and the Introduction of the FAA Trial

The present two-trial system dates from 1962, when the FAA trial was introduced through an exercise of the Administrator's rulemaking authority. This action was taken, quite clearly, to implement the recommendation of an independent advisory group which is usually referred to by its code name, "Project Tightrope."

Project Tightrope was set in motion by Najeeb Halaby shortly after he became Administrator in 1961. Administrator Halaby appointed a panel of six prominent lawyers and commissioned them to study possible improvements in the Agency's rulemaking and enforcement procedures. This was done against a background of sometimes recriminatory relations between Mr. Halaby's predecessor and the FAA's "public." The prior Administrator had also made the enforcement process particularly visible to the

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[14] House Report No. 2360, 85th Congress, 2nd Session (1958), p. 8. The Senate report contains similar language. See S. Rep. No. 1811, 85th Cong., 2nd Sess. (1958), p. 11.

[15] Report on Rulemaking and Enforcement Procedures: Project Tightrope (October, 1961), p. 12. A copy of this report is available in the library of the FAA.

aviation public by maintaining an "enforcement crackdown" between March 1959 and November 1960.[16]

Project Tightrope submitted its final report to Administrator Halaby in October 1961.[17] In addition to a number of recommendations concerning rulemaking and investigative procedures which are not pertinent to the present discussion, the report contained what amounts to a condemnation of the enforcement scheme authorized by Section 609. The power to punish summarily, with justification to be made—if at all—at a subsequent trial, reminded the panel of the Queen of Hearts' edict: "Sentence first—verdict afterwards." It was, they said, simply "too much power for the Administrator to want or to wield." In support of this conclusion the report offers the following concisely stated arguments:

> The present right of a disciplined airman to secure a de novo review from the CAB is, in our judgment, not equal to nor a proper substitute for a trial type hearing in advance of punishment. It puts the burden of moving forward on the wrong person. Anyone familiar with the problem of a citizen confronted by his Federal Government will appreciate that the whereabouts of the burden of moving forward is not an idle philosophical inquiry.
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> Furthermore we are convinced—without being able to supply proof—that enforcement officials who know, as FAA officials know, that in only about 10 percent of their certificate cases will they have to present formal proof, and that the painstaking accumulation of relevant, reliable, probative and admissible evidence need be begun only when the accused appeals to the CAB, cannot have the same attitude, and the same scrupulous care in accumulating all the facts, which we always hope to find in those prosecutors who must be prepared to prove every charge before an independent tribunal.
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> Finally, apart from its effect on substantive justice in particular cases, we believe that a procedure open to characterization as "punishment first, trial later" destroys the appearance of fairness that is so vital to public acceptance of any governmental regulation and enforcement system.

As a substitute for summary punishment, Project Tightrope recommended that the Administrator establish a corps of independent hearing examiners to hear and decide certificate action cases. The Administrator's Section 609 powers, with the exception of his emergency suspension power, were to be delegated to the presiding examiner "subject to [the Administrator's] personal review in cases where a severe punishment—such as revocation of a certificate—has been imposed." Cases were to be initiated, as in the past, by the Administrator's Notice of Pro-

[16] Report, Project Tightrope, *supra* note 15, p. 13.
[17] Report, Project Tightrope, *supra* note 15. See, in particular, pp. 18–21.

posed Certificate Action, except that the Tightrope-designed notice would advise the respondent of his right to an FAA trial. A failure to accept the "proffered hearing" within a specified period would operate as a default and the Administrator would then take the proposed action.

The Tightrope report acknowledged and dismissed two objections to this proposal: (1) that the 1958 act did not provide for formal hearings before the FAA; and (2) that some cases might be tried twice, since "those who demand a separate evidentiary hearing before the CAB may be legally entitled to it under the present statute." As to the first point, the group assured the Administrator that "since the provision of a hearing within the FAA increases rather than decreases the rights of the accused and appears to be well within the powers of the Administrator, it could hardly be subject to legal attack."

With regard to the second anticipated objection, the group indicated its disapproval of a two-trial system and suggested that it would be desirable to convert the Board trial into an appellate-type proceeding. In fact, the report recommended an amendment to Section 609 which would give the Board "discretionary power to decide whether the taking of more evidence is required." The recommendation was stated rather weakly, however, since the group was unwilling to say that the same result could not be achieved under the existing statute by unilateral action of the Board. Also tending to weaken the recommendation was an expressed willingness to accept a two-trial system, if necessary, as the price of an urgently needed reform. The group thought it probable that the twice-tried case would be an "infrequent" phenomenon in any event.

Early in 1962 the FAA implemented the essential features of the Tightrope recommendation. Apparently, however, the Agency never proposed an amendment to Section 609 along the lines suggested in the report.

V. Eliminating the Two-Trial Problem

The best way to eliminate the two-trial problem in the certificate action process is to eliminate the FAA trial. The Administrator could do so simply by amending the agency's rules of procedure. There would be no need to seek enabling legislation, for Section 609 does not require the Administrator to provide anything more elaborate than an informal conference. On the other hand, it would be necessary to amend Section 609 in order to solve the two-trial problem by making Board procedure basic-

ally appellate in character. The language of that Section, supplemented by unambiguous statements in the pertinent Congressional committee reports, leaves little room to doubt that the NTSB hearing must be a trial.

Of course, mere ease of implementation would be a poor substitute for a sound result. But eliminating the FAA trial has, in addition, an important substantive advantage over changing the present Board procedure. The NTSB has an attractive degree of independence from the FAA even though both agencies are administrative units of the Department of Transportation. This fact should enure to the benefit of the Board's examiners presiding in certificate action cases, adding strength to their claim of neutrality as between certificate holders and the FAA staff. Moreover, because Board examiners are already experienced in certificate action cases this neutrality does not have to be bought at the price of competence.

"Punishment first, trial later" need not be the result of doing away with the FAA trial. Under Section 609 the filing of an appeal with the NTSB (which may be accomplished by a simple letter under Board rules)[18] stays the FAA certificate action order during the pendency of the appeal. Thus, actual punishment is possible only in the period between the entry of the Administrator's order and the filing of the certificate holder's appeal. But even this gap can be avoided by postponing the effective date of the Administrator's order for a period of time sufficient to permit the appeal to be filed. In fact, the FAA does provide for such a postponement as a matter of standard procedure. If this practice were to be continued after the elimination of the FAA trial, it would be quite inaccurate to characterize the certificate action process as "punishment first, trial later."

However, the report of Project Tightrope correctly pointed out that *appearance* of fairness is important in winning public acceptance of an enforcement system. It is therefore undesirable, as the report again makes clear, for such a system to be *open to characterization* as "punishment first, trial later." It would seem, though, that the appearance of fairness problem would be slight in this particular instance if the Agency properly informs its regulated public. It is a question of telling respondents, and also certificate holders in general, how the system actually works.

A final matter of interest is the apparent expectation of the Tightrope group that the implementation of its recommendations

[18] 14 C.F.R. § 421.21(a).

would encourage many more certificate holders to insist on formal hearings. This is certainly implicit in the group's argument, quoted *supra*, to the effect that the enforcement officials of that time lacked a strong incentive to investigate thoroughly, knowing, as they did, that they would be put to proof in only 10% of their cases. If the group did in fact expect to see a marked change in the ratio of hearing to nonhearing cases, the expectation has not materialized.[19] Discontinuing the FAA trial should not, therefore, have any great effect on that ratio either.

[19] For example, in fiscal year 1966 the FAA entered 1,471 certificate action orders, 82 of which were entered after an FAA hearing. (1966 FAA Annual Report, p. 16). An additional 118 cases were appealed directly to the Civil Aeronautics Board. (Figure supplied informally by FAA). Even assuming that all appealed cases were subsequently tried, the Agency was put to proof in only 14% of the 1,471 cases.