



Reviewing nTSB appeals

in 2002 by Bill Hayes

Perhaps there are some people who have spent more time reviewing NTSB decisions over this past winter than I have. To those individuals I have some advice: Get a life! Go out to the airport. Talk to your wife. Play catch with your kids. Me, I live in northwest Ohio, which is not exactly a garden spot for aviation during the winter.

Since flying was not really an option last winter, I reviewed all the decisions (orders) of the NTSB regarding appeals of decisions made by Administrative Law Judges in 2002. I wanted to see how well the FAA does on appeal, as opposed to the respondent. Who appeals more often? If you are considering an appeal, what are the betting odds? Mostly I wanted to see if my impressions of the NTSB were correct. I learned a lot and would like to share it with you.

Ground Rules

I considered all the orders from Jan. 1, 2002, to Dec. 31, 2002. This would cover -- in part -- decisions made by Administrative Law Judges during 2001. (The ALJ is the judge who actually hears the evidence and makes a decision -- the FAA or the respondent can then appeal the decision to the NTSB.) I would factor out administrative orders such as cases sent back to the ALJs for more information and simple housekeeping orders like the change of the administrator's name. Warning! The totals do not perfectly add up. Math does not lend itself to NTSB opinions. I made judgment calls -- if the FAA appeals and then dismisses, is that a win for the respondent? My decision was sometimes yes.

Overall Results



During 2002 the FAA appealed 16 decisions. They won four, lost six, and dismissed six on their own. This gave them about a 25% win record. When you factor out cases the FAA dismissed, they won four out of 10, or about 40%. Respondents (airmen, mechanics, etc.) appealed 61 decisions of the ALJs, and won 15 of these appeals. This also was close to a 25% win rate. Respondents dismissed three appeals, so their net win rate was about 26%.

This was a surprise for me. I had anticipated the FAA winning most of the time, when they appealed unfavorable decisions. It turns out they do about as well as the respondents. Put into context, the typical win rate for defendants on appeal in criminal cases runs about 7 percent. A win rate of 25% in front of the NTSB looks pretty good to me. This also tells me that the Administrative Law Judges are doing a good job on their rulings at the hearing level. Remember -- most rulings are not appealed.

It is less informative to review total numbers. During 2002 the board issued a total of 83 orders dealing with aviation cases. Of these cases, I considered four orders to be administrative, leaving 79 orders and decisions to review. The FAA won 63 times and respondents won 15 times. No, the numbers don't -- and will never -- add up.

These numbers simply reflect that the respondents lose more often at the hearing level, and therefore appeal more often than the FAA does. Remember that the FAA, in general, gets to decide which cases go to a hearing and

which ones to settle. For this reason the FAA will naturally win more cases at the hearing than the respondents. It would be a sad commentary if the FAA didn't win most of its cases at the hearing level.

Procedural Errors

The numbers that surprised me the most were the decisions by the NTSB that were decided entirely on procedural grounds: things like the answer to the complaint had not been submitted on time, orders of the board regarding discovery were not complied with, or briefs were not filed in time. Of the 79 cases decided by the NTSB, *nine* were dismissed by the board on procedural grounds. Over 10% of the cases appealed to the board were never even heard -- respondents lost these cases because they, their representatives, or their attorneys didn't follow NTSB procedures.

The NTSB rules of practice are available [online](#), and I believe the board still sends copies to everyone who files an appeal. The board is now strictly applying its rules. Cases take money to process. Government time and money can be saved by dismissing appeals that are not in compliance with the rules. If you go back 10 or 15 years, the FAA almost never moved to dismiss on procedural grounds. They wanted to try the cases on the merits. Now there is not enough money in the FAA budget to do everything they want. One place to save money is in the legal department, and one way the legal department can save money is to dispose of cases more quickly. The NTSB rules do apply equally to the FAA and respondents, but the FAA does a better job complying with the rules because they have lots of experience before the NTSB.

The lesson here is that if you are in trouble with the FAA, hire someone familiar with the NTSB rules. Consider further that in 2002 there were only 79 real cases before the NTSB. This means that there are not that many attorneys in the United States with NTSB experience. A good place to start looking for one is [AOPA](#).

I doubt that the respondents would have prevailed in all nine of these cases, but if the trends shown by the numbers in 2002 were applied, they should have won a couple of them.

When the FAA Wins



There are some cases that the FAA tends to win all the time. In ATC violations the FAA won eight out of eight. Failure to report DUI convictions, the FAA was two for two. The FAA won three out of three cases where airmen had been convicted of felony drug charges and the FAA had revoked their certificates. (You do sort-of wonder why they appealed.) In motions to reconsider prior decisions, the FAA won four out of four. The same was true for appeals under the Equal Access to Justice Act.

The odds also favor the FAA in cases dealing with Careless and Reckless Operation. Out of 12 cases, the FAA won 10, respondents won one and one was sent back for more facts.

There were four appeals in medical certification cases, all by petitioners -- only one was successful. (In medical cases the airman is usually called the petitioner.) The FAA did not appeal any adverse decisions made by the ALJs in medical cases.

Surprisingly, in the area of drug testing (random drug tests required of pilots and mechanics), there were five cases, and the respondents won two of the five. The issue in these cases was always the propriety of the drug-testing procedures. I didn't expect them to win any.

Summary of the Odds

At the beginning of this column I mentions betting odds. The NTSB really did not seem to favor either side in 2002. While the petitioners won more cases, they also appealed more cases. If you exclude the cases the FAA appealed and then dismissed, the FAA may have a better percentage of wins.

All in all, pilots and mechanics do pretty well appealing to the NTSB. Your odds of saving your certificate are about one in four. Those are pretty good odds.

I have read and thought enough about the NTSB. I am going out to the airport to watch airplanes.

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