



Cold Shoulder

By Kent S. Jackson

NTSB Decisions on Ice and Fees Chill Pilots' Rights

Two recent unrelated cases have resulted in a record number of emails requesting coverage in this column.

The first focuses on the distinction between an AIRMET and a SIGMET, and a pilot's reliance on that distinction. SIGMETs "advise of nonconvective weather that is potentially hazardous to all aircraft" and are issued when certain weather phenomena, including severe icing, occur or are expected to occur. AIRMETS are "advisories of significant weather phenomena but describe conditions at intensities lower than those which trigger SIGMETs." This includes moderate icing.

In *Administrator v. Watkins*, a pilot preparing for a part 135 flight in an airplane equipped for light to moderate icing, but not severe icing. The forecast for his flight included an AIRMET for isolated severe mixed icing below 6,000 feet in light freezing drizzle, light freezing rain. After being told by the weather briefer that the AIRMET included a forecast of severe icing, the pilot specifically asked whether any SIGMETs had been issued. None had.

The pilot then checked to see if there were any pilot reports (iPIREPs) for severe icing. There were none. The pilot made the flight without incident, but a competing part 135 operator reported the flight to the FAA.

The NTSB simply found the distinction between an AIRMET and a SIGMET irrelevant: "While he may have been confused over the AIRMET/SIGMET issue, the warnings of severe icing were clear and the regulatory prohibition against operating an aircraft without certain ice protection provisions into an area of forecast severe icing is also clear.

The pilot also argued that even if the AIRMET calling for isolated severe icing was to be believed, it was supplemented with subsequent information which, under FAR section 135.227(f), allowed him to take off.

Under FAR section 135.227(f), a pilot may rely on weather reports and briefing information that update earlier forecasts of severe icing. The pilot argued that he was

permitted to rely on pilot reports (PIREPs) that he received from the Wichita control tower and weather reports from Great Bend and other locations along his route to assess whether the forecast of severe icing was incorrect. Because none of the reports was for severe icing, he maintained that the original forecast and weather briefing were superceded.

Unfortunately, according to the NTSB, the absence of PIREPs indicating severe icing is not sufficient to negate an official forecast of severe icing.

However, because the pilot's confusion over the severe icing forecast in an AIRMET, the NTSB did not consider the flight to be an intentional violation. Therefore, he was allowed to avoid a suspension because he had turned in a NASA form, although he will still have a record of violation for five years.

The second case that has caused a stir among the pilot defense community is a recent NTSB interpretation of the Equal Access to Justice Act which punishes an employer who pays or advances the money to defend one of its pilots from the FAA.

In *Application Of Livingston*, the NTSB overturned the decision of one of its Administrative Law Judges to award a pilot \$29,994.33 in attorney's fees under the Equal Access to Justice Act ('EAJA').

EAJA was designed to help citizens defend themselves from unjustified governmental actions. In the context of a fight with the FAA, a pilot who seeks to recover attorneys fees will only be paid if he or she (1) prevailed in the underlying proceeding, (2) meets certain net worth requirements, and (3) incurred the sought fees and expenses in connection with the underlying proceeding; if all those criteria are met, then the NTSB is to make an award, unless the position of the FAA is found to have been substantially justified or other factors would make an award unjust. The italicized words are elements of the Act which have been extensively litigated.

The issue in *Livingston* was whether a pilot could be reimbursed for attorney's fees

in a case where the FAA had not been substantially justified in bringing an enforcement action, but the pilot's employer had paid for the pilot's attorney's fees.

The Administrative Law Judge saw no problem in awarding fees to the pilot under these circumstances. The Judge found it reasonable that an employer would pay the legal costs of an employee in defending an action which arose from actions within the scope of his employment. He also believed that it is not reasonable that an employer, under such conditions, would pay its employee's legal fees and expenses, on the one hand, and not expect that the employee reimburse it for the expenses it paid on the employee's behalf, at least to the extent that the employee recovers attorney fees and expenses from the Government in an EAJA action.

The NTSB reversed the Judge and ruled that the pilot could not seek fees that he had not incurred, and the employer could not be reimbursed because it was not a 'party' to the action. The Board stated: A policy intended to encourage attorneys to represent persons in otherwise "unprofitable" cases therefore is not undermined by a disapproval of fees here.

How many employers would spend \$30,000 to defend a pilot? The FAA wields enormous power and resources, and when it is clear that they have done so in an unjustified manner against a pilot, there should be no squabbling about how the pilot cobbled together money for a defense. Keep in mind the fact that EAJA does not reimburse a pilot for lost income or defamation.

AOPA spotted the danger that this case presents to insurance programs that pay for enforcement defense and filed a brief in the case. Clearly insurers will have to raise rates if they cannot count on any reimbursement under EAJA. The Board stated that their decision speaks to some of the general arguments AOPA raises in its brief, but does not decide the ultimate issues inherent in legal services insurance plans.