


# THE PILOT'S BILL OF RIGHTS



## New protections for airmen

BY JAMES E. RAMSEY AND PAUL V. HERBERS

**THE PILOT'S BILL OF RIGHTS**, sponsored by Sen. James Inhofe (Oklahoma), recently became law when it was signed by President Barack Obama on August 3, 2012. On August 7, the NTSB chief administrative law judge Alfonso J. Montañó issued an order applying it to all pending cases.

Sen. Inhofe summarized the intent of the Bill listing four things:

- First, it requires the FAA in any investigation to make sure that the pilot is fully aware of what he is being accused of before any findings of violation are issued.
- Second, it clarifies that the NTSB and its administrative law judges are not bound by the FAA's interpretation of a regulation, and no longer must merely rubber-stamp the FAA's actions. Also, there is a new appeal process allowing an airman a complete review of both the facts and the law.
- Third, the Bill of Rights improves the system of notices to airmen (NOTAMs). It requires that the FAA revamp the large volume, the searchability, and the priority of NOTAMs as well as provide a central location.

- Fourth, it addresses the medical certification process. Notably, of all the requests for assistance from airmen to AOPA each year, 28 percent have been related to the FAA's medical certification process.

Rep. Sam Graves (Missouri) introduced the companion Pilot's Bill of Rights in the House of Representatives, where Rep. Jerry Costello (Illinois) emphasized that the bill does not weaken the FAA's enforcement authority, but rather requires the FAA to make available its evidence against an airman that may result in a certificate enforcement action, as well as to modify the appeal process.

#### AIRMAN STATEMENTS DURING FAA INVESTIGATIONS

Before the Pilot's Bill of Rights, an FAA certificate action typically began with a letter of investigation (LOI) by the flight standards district office (FSDO) or FAA medical office, notifying an airman of an investigation and providing an opportunity for the airman to tell his or her side of the story, usually within 10 days. This LOI generally identified the activity being investigated without citing specific

sections or regulations, or asserting any specific potential violation. The airman was not advised whether a failure to respond would be considered negatively, or whether the FAA would use the airman's response as evidence supporting a violation of a regulation.

In practice, the information provided by an airman in response to an LOI has many times assisted the FAA in proving its case against the airman. The LOI and the airman's response will be included in the investigative file and sent to the FAA legal department by the FSDO investigator to be used as evidence if the FAA determines to seek enforcement.

The airman contesting the FAA enforcement action is entitled to present evidence in a hearing before an NTSB administrative law judge; however, the NTSB discourages the FAA from trying to obtain testimony by the airman in a hearing to bolster the FAA's *enforcement* case. At the same time, the FAA is not constrained from seeking the airman's statement or testimony during the *investigation* phase, nor from using any responses of an airman to the LOIs.

In the past, airmen without proper knowledge or advice actually helped the FAA make a case against them by responding with statements to the FAA following receipt of an LOI, since they thought they

# THE PILOT'S BILL OF RIGHTS ★

were required to do so. Some airmen believed that if they did not answer the LOI, they would be labeled as uncooperative and noncompliant. Now, under the Bill of Rights, that is clearly not the case.

There is one notable exception to this notification requirement in the Bill of Rights stating that, "The (FAA) administrator may delay timely notification ... if the administrator determines that this notification may threaten the integrity of the investigation." Again, the scope of this exception may be broadened or narrowed in future developments.

Further, with these new requirements the FAA may eventually provide more details in the LOI about the nature and scope of the investigation, although the Bill of Rights does not specifically provide for this.

It is too early to determine the full extent that the Bill of Rights will have on the aviation community. Much of that will depend on the manner in which it is implemented and the interpretive regulations that will follow. The FAA has now issued Notice N 8900.195, effective August 8, 2012, providing its inspectors guidance as to the form of notification to be provided. Any airman filing an FAA Form 8710-1 application for an airman certificate, additional rating, or renewal should expect to receive from the FAA a written notice of his rights under the Bill and a notification of investigation from the FAA of his qualifications to hold the airman certificate, rating, or inspection authorization. The FAA will also advise him that any response to an inquiry by the FAA in connection with this investigation may be used as evidence against the airman.

#### AIRMAN'S ACCESS TO THE FAA INVESTIGATIVE FILE

The Bill of Rights requires the FAA to make available to the airman all "releasable" portions of the investigative file. Those are the items permitted by the Freedom of Information Act. Now that the airman will have an opportunity to see the same information that the FAA sees, during the investigative phase and before the FAA issues a notice of a proposed certificate action, the airman shares the same level playing field with the FAA, which eliminates

much of the uncertainty in dealing with the FAA during any pending action. Further, the airman will have access to names of witnesses to allow the airman to follow up on the FAA's investigation and secure any evidence that may prove helpful later.

Before the Bill of Rights, this information only became available after the FAA had determined to proceed with an enforcement action, and then only upon request to the FAA counsel.

It remains to be seen, however, how effective these provisions will ultimately be. It appears from the legislative history of the Bill of Rights that the intent was to provide the airman with all the evidence that could affect his case. We have found in many cases that the FAA continues to investigate the case even after the formal enforcement action has begun, and continuing up to the time of the hearing, if there is to be one.

In addition, we have been involved in cases where the FAA takes sworn testimony during the investigation, called evidentiary depositions, in which neither the airman nor the attorney is entitled to attend. We have also had instances in which we discussed with FAA counsel weaknesses in the evidence, after which the FAA made further field investigation to close those evidentiary gaps for the hearing.

IT IS TOO EARLY TO DETERMINE THE FULL EXTENT THAT THE BILL OF RIGHTS WILL HAVE ON THE AVIATION COMMUNITY.

Given the requirements of notification regarding investigations, even with an FAA investigation that continues after issuance of the LOI and during the course of an enforcement action, instances of this type may be reduced or eliminated.

#### AIRMAN'S ACCESS TO AIR TRAFFIC DATA

Another section of the Bill of Rights requires that the FAA provide the airman access to air traffic data. To overcome a gap in the

Freedom of Information Act, the Bill of Rights also provides that access to such data also includes private subcontractor air traffic data in addition to the data kept by the FAA.

The Bill does not clearly indicate whether the FAA must offer the data to the airman before it is requested, or whether the airman will be required to request the specific information that he requires. As for civilian contractors providing air traffic control services to the FAA, the FAA is tasked to arrange for access to any such information requested by the airman. The FAA has now provided an e-mail address for such requests: [airmendatarequest@faa.gov](mailto:airmendatarequest@faa.gov).

Before the Bill of Rights, the airman faced a long delay and procedural hurdles in acquiring this type of information, often making a defense to the FAA action much more difficult and costly. Now that the burden of production has shifted, these problems should be eliminated.

The Bill of Rights also provides that the FAA may not proceed against an airman until 30 days after the air traffic data is made available. This also should prove to be valuable to the airman and his attorney in further dealings with the FAA investigator or FAA counsel.

The FAA also has the power to depose witnesses, as well as the airman upon whom the

violation is alleged, if permitted by the assigned administrative law judge (ALJ) to do so.

Therefore, although it appears the intent of the law was to provide the accused with all information and evidence available, the Bill of Rights is somewhat limited in referring

only to the enforcement investigative report (EIR) as well as the air traffic data, which include the traffic control investigative reports. These additional data that must be provided may prove to be very helpful in cases involving "in flight" violations.

#### FAA INTERPRETATIONS NO LONGER BINDING

The Bill of Rights eliminated the requirement that the NTSB give "deference" to FAA legal interpretations, which had led the NTSB law judges to rubber-stamp FAA

decisions. Prior law required the NTSB judge and the full NTSB to accept a valid FAA interpretation of a statute as true in almost all cases. This is no longer the law. While the NTSB may still give some consideration to the FAA's expertise in the area, both the NTSB judges and the board are free to analyze the laws and regulations on their own.

The most famous example of this problem arose around the emergency medical certificate revocation action against former air show pilot Bob Hoover. At the time, a "Hoover Bill of Rights" was adopted to allow an airman a two-day window to contest the FAA's determination of the need for emergency revocation. Sen. Inhofe, when introducing his Pilot's Bill of Rights, addressed the futility of the Hoover Bill of Rights by noting that only one such airman's appeal was actually granted in that year, and the rest had been denied. He attributed this to the "rubber-stamping" by the NTSB of the FAA's actions, which is now eliminated.

We represented an airman several years ago who faced this very problem, and he was motivated to carry this dispute through a hearing with the law judge, up to the NTSB full board, and on to an appeal in the U.S. Court of Appeals in Washington, D.C. The airman prevailed when appellate Judge John Roberts (now chief justice of the U.S. Supreme Court) found the board's deference and the FAA's interpretation to be contrary to the actual regulations. That airman not only prevailed, but also recovered most of his legal fees from the FAA. Even so, very few airmen would be in a position to finance such a fight, and none should have to.

In two other cases the U.S. Court of Appeals reversed the NTSB findings, which had been bound by FAA precedent incorrectly finding fraud for falsification of medical applications. The new Bill of Rights may very well have resulted in the same ultimate resolution at a much earlier stage, without the necessity of the airman's resort to the U.S. Court of Appeals. Again, those successes came only after protracted delay and expense.

#### RULES OF EVIDENCE

The Bill of Rights directs the NTSB judges to apply the rules of the U.S. courts, both as to procedures before the hearing and as to evidence admitted during the hearing. The most important aspect of this change is likely to be elimination of hearsay evidence. Hearsay is a statement made outside of the hearing.

For example, if a witness tells an FAA investigator what he or she saw, and the investigator writes down his notes, the statements from that witness are hearsay. They are considered to be unreliable unless that witness is present at the hearing to explain exactly what he meant, both because the witness may have been unclear and because the investigator may have written it down wrong.

## THE BILL OF RIGHTS EXPANDED THE AIRMAN'S OPTIONS FOR APPEAL.

In a court, this type of hearsay cannot be used in evidence. In administrative proceedings such as a hearing before the NTSB judge, now under the Bill of Rights, this hearsay should not be admissible.

#### COMPLETE REVIEW ON APPEAL

The Bill of Rights expanded the airman's options for appeal. If an airman believes that the NTSB administrative law judge was in error, and the full NTSB does not correct that error, the airman may now appeal the case to a U.S. District Court, which is the trial-level federal court. Previously, any appeal could only be made to the U.S. Court of Appeals, which is limited to reconsideration of points of law. Now, the federal trial-level court can reconsider all the evidence as well as the law without being bound to any erroneous findings of the NTSB judge or the board. This provides the airman one more level of assurance that a truly neutral judge will consider the case in its entirety. This should be of particular benefit in emergency revocation matters, not only in terms of a full fair review, but also in terms of time delay and expense.

#### NOTAMS

Another section of the Bill of Rights calls for improvement of the NOTAM system. The goal of this improvement includes provision of pertinent and timely information regarding the national airspace system and decrease in the volume of NOTAMS, and to make the NOTAMS more specific and relevant to an airman's realm and in a format that is more usable.

The need for such a change is obvious by a quick glance at Section 5-1-3, Notice to Airmen System, July 26, 2012, edition of the

*Aeronautical Information Manual*. As aviation attorneys over the years we have seen a number of cases in which an airman is being violated for failure to follow a NOTAM of one sort or another, especially temporary and periodic airspace restrictions. The potential for confusion or oversight in the current system has now been addressed.

The FAA has been tasked to develop a system by which NOTAMs are to be more easily searchable and filtered so that pilots can determine the priority of all available flight safety information.

#### MEDICAL APPLICATION

Finally, Section 4 of the Bill of Rights requires an FAA review and assessment of the medical certification process. This review is intended to provide greater clarity and guidance to applicants and to promote the public understanding of the medical requirements. It should also rewrite questions on the medical application form that are appropriate without being overly broad and are subject to a minimum amount of misinterpretation and mistaken responses to allow for consistent treatment and responses to the medical application process, reducing unfair inferences that an individual has intentionally falsified answers on the form.

This section is of utmost importance. The FAA has been very unforgiving of airmen for misreading or misunderstanding a question, or forgetfulness of long-past events. Cases of DUI charges dismissed immediately after arrest have resulted in questionable FAA actions. Expunged records have been the subject of such "misunderstandings." The airman does not know whether or not the expungement of the record by the civil authorities means that he still has to report it on the application.

#### CONCLUSION

In summary, the Bill of Rights is a most welcome development for airmen. It will obviously provide some relief and assistance to airmen, although the full benefit of the law will depend upon FAA rulemaking and future rulings by the courts and the NTSB. We can hope that the spirit and intent of the legislators who introduced the Bill of Rights will be followed by the administration and the courts. *EA*

---

**James E. Ramsey** and **Paul V. Herbers** are aviation attorneys at Cooling & Herbers P.C. in Kansas City, Missouri. Paul Herbers and James Cooling serve as members of EAA Legal Advisory Committee.