

UNITED STATES DEPARTMENT OF TRANSPORTATION  
FEDERAL AVIATION ADMINISTRATION  
WASHINGTON, DC

**In the Matter of:**

**RAMON C. FENNER**

FAA Order No. 96-17

Served: May 3, 1996

Docket No. CP93SO0414

**DECISION AND ORDER**

This case involves an aircraft owner, Ramon C. Fenner, whose airplane was involved in two near mid-air collisions. In the ensuing Federal Aviation Administration (FAA) investigation, Mr. Fenner refused to identify the person who was at the controls of his airplane when the near mid-air collisions occurred.

The central issue in this case is whether Mr. Fenner can be held responsible for the unsafe actions of the pilot, who had permission to fly the airplane. Chief Administrative Law Judge John J. Mathias held that Mr. Fenner is indeed responsible for the safety violations at issue<sup>1</sup> and assessed a \$4,000 civil penalty

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<sup>1</sup> Complainant alleged, and the law judge found, violations of the following regulations:

**§ 91.13 Careless or reckless operation.**

(a) . . . No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

**§ 91.111 Operating near other aircraft.**

(a) No person may operate an aircraft so close to another aircraft as to create a collision hazard.

**§ 91.113 Right-of-way rules: except water operations.**

(b) *General.* When weather conditions permit, regardless of whether an operation is conducted under instrument flight rules or visual flight rules, vigilance shall be maintained by each person operating an aircraft so as to see and avoid other aircraft. When a rule of this section gives another aircraft

against Mr. Fenner.<sup>2</sup> Mr. Fenner has appealed. This decision denies Mr. Fenner's appeal and affirms the law judge's assessment of a \$4,000 civil penalty for the violations alleged in the complaint.

A Georgia National Guard UH1 helicopter conducting a marijuana search-and-eradication mission was flying in the vicinity of Mr. Fenner's residence one day in August 1992. Mr. Fenner's residence was not a particular object of surveillance; it was simply part of a larger search area.

Mr. Fenner and his wife have a private grass airstrip adjacent to their home. The pilot of the National Guard helicopter saw an airplane taxi down the grass strip. To avoid interfering with the airplane's takeoff, the pilot asked his co-pilot, who was at the flight controls, to move the National Guard helicopter away from the airstrip. (Tr. 16-17.)

Shortly thereafter, the co-pilot heard the crew chief yell, "Aircraft on the left." (Tr. 59.) Then a Cessna 182 airplane bearing the identification number N8531T, which was later identified as belonging to Mr. Fenner, passed closely underneath the National Guard helicopter from left rear to right front. Immediately after the Cessna passed under the National Guard helicopter, it pulled its nose up abruptly to the right, and as a result, it nearly collided with the helicopter. The Cessna was so close to the National Guard helicopter that one of the

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the right-of-way, the pilot shall give way to that aircraft and may not pass over, under, or ahead of it unless well clear . . . .

(f) *Overtaking*. Each aircraft that is being overtaken has the right-of-way and each pilot of an overtaking aircraft shall alter course to the right to pass well clear.

14 C.F.R. §§ 91.13(a), 91.111(a), 91.113(b), & 91.111(b).

<sup>2</sup> A copy of the law judge's oral initial decision is attached.

Cessna's wings took up the entire windshield of the helicopter. A Georgia state trooper aboard the National Guard helicopter testified that the Cessna was less than 150 feet away from the helicopter. (Tr. 79.)

The first reaction of the co-pilot of the National Guard helicopter, who was at the controls, was to move the helicopter to the right, but at the pilot's instruction, he quickly turned the nose up and back to the left, narrowly avoiding a collision. The co-pilot testified that if he had not turned to the left, the two aircraft would have collided. (Tr. 59.) The co-pilot further testified that if he had not slowed down the National Guard helicopter, its rotary blades would have hit the Cessna's tail as the Cessna popped up in front of the helicopter. (Tr. 60.)

The Cessna was close enough so that the crew of the National Guard helicopter could see that the pilot of the Cessna was a male between the age of 35 and 40. They could also see that the Cessna's pilot had short brown hair, and that he was wearing a short-sleeved shirt and sunglasses. (Tr. 60, 83.)

A few minutes later, the crew chief yelled, "Oh my God, he is coming back again." The National Guard helicopter stayed straight and level, avoiding any abrupt movements that might create more danger. (Tr. 84.) Again the Cessna passed underneath the National Guard helicopter, though a little further away this time, and again the Cessna pulled up and to the right after passing underneath the National Guard helicopter. (Tr. 18.) The Georgia state trooper took a photograph of the Cessna as it passed underneath the National Guard helicopter. (Tr. 19). This photograph was later admitted into evidence at the hearing. (Complainant's Exhibit 1.) The trooper estimated that the Cessna was approximately 250 feet away from the helicopter at the time he took the photograph. (Tr. 82.)

The crew of the National Guard helicopter then saw the Cessna coming back a third time. (Tr. 81.) At this point, the pilot of the National Guard helicopter decided to take his helicopter and crew out of the situation as quickly as he could. (Tr. 19.) He took over the controls and flew the helicopter to a nearby pasture area, where he descended to a hover below treetop level so that the airplane could not pass under his helicopter or otherwise disturb it again. (*Id.*) The Cessna then left the area. Later, the crew of the National Guard helicopter wondered if the Cessna had tried to "scare them off" because marijuana was in the area. (Tr. 43.)

When the FAA investigated the incident, the Cessna turned out to be owned by Mr. Fenner, although Mr. Fenner was in Fort Lauderdale, Florida at the time of the incident. (Tr. 99; Complainant's Exhibit 5.) Accordingly, the FAA inspector determined that Mr. Fenner was not the pilot of the aircraft. Both Mr. Fenner and his wife, who was the sole witness for Mr. Fenner at the hearing, knew the pilot's identity, but refused to disclose it. (Tr. 99, 136.) When asked about her reasons for declining to disclose the pilot's identity, Mrs. Fenner said that she did not want someone else to go through what she and Mr. Fenner had been through since the time of the incident. (Tr. 136.) Mrs. Fenner testified that the individual piloting the airplane had permission to do so. (Tr. 145-146.)

FAA inspector David Dees testified that if the agency had known the identity of the pilot of the airplane, the agency would have sought to suspend his pilot certificate, rather than seeking to impose a civil penalty on Mr. Fenner. (Tr. 100-

101.) The pilot of Mr. Fenner's aircraft has never come forward to identify himself or to explain his actions.<sup>3</sup>

Mr. Fenner filed an appeal brief in which he states that he does not take issue with the law judge's findings concerning whether the alleged near mid-air collision took place. (Appeal Brief at 4.) Instead, Mr. Fenner challenges the law judge's holding that he, Mr. Fenner, is legally responsible for the "suicidal" actions of an unidentified person in an airplane simply because he owned the airplane on the date in question. (*Id.*) According to Mr. Fenner, the law judge's holding violated his right to due process of law under the Fifth Amendment to the U.S. Constitution. Mr. Fenner also argues that the law judge erred, both in stating that the pilot was an employee of Mr. Fenner, and also in determining that Mr. Fenner was liable under agency theory.

It is true, as Mr. Fenner asserts on appeal, that the record does not support the law judge's statement that the pilot of Mr. Fenner's aircraft was in Mr. Fenner's employ.<sup>4</sup> However, it makes no difference. Regardless of whether the pilot was employed by Mr. Fenner or whether agency principles permit a finding of liability, the statutory definition of the term "operate" indicates that Mr. Fenner "operated" the aircraft, because the pilot had permission to use the aircraft. The Federal Aviation Act, as amended, defines "operate aircraft" as follows:

"operate aircraft" and "operation of aircraft" mean using aircraft for the purpose of air navigation, including--  
(A) the navigation of aircraft; and

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<sup>3</sup> This decision does not review the facts relating to the dispute between the parties over whether the National Guard helicopter returned to the Fenner residence after the incident. As the law judge correctly determined, whether the helicopter returned to the Fenner residence is irrelevant.

<sup>4</sup> The record does not contain any evidence concerning this issue.

(B) causing or *authorizing the operation of* aircraft with or without the right of legal control of the aircraft.

49 U.S.C. § 40102(a)(32) (emphasis added.) In addition, the Federal Aviation Regulations provide that:

*Operate*, with respect to aircraft, means use, cause to use, or *authorize to use* aircraft, for the purpose (except as provided in § 91.13 of this chapter) of air navigation including the piloting of aircraft with or without the right of legal control (as owner, lessee, or otherwise).

14 C.F.R. § 1.1 (emphasis added.)

Neither the statutory nor the regulatory definition of the term “operate” contains any language indicating that in order to have “operated” an aircraft, a person must have authorized the pilot’s *particular use* or *manner of use* of the aircraft. Granting Mr. Fenner’s appeal would require reading into the statutory and regulatory definitions language that is simply not there.

Mr. Fenner’s unsworn assertions, made for the first time on appeal, that the record contains no evidence that he authorized or approved the pilot to fly his airplane, are without merit. Contrary to Mr. Fenner’s argument, a preponderance of the reliable, probative, and substantial evidence indicates that the pilot had permission to use the airplane. Complainant is correct that the presumption is that the owner authorized use of the aircraft, absent some evidence to the contrary.<sup>5</sup>

Here, Mrs. Fenner testified that the pilot had permission to use the aircraft.

Moreover, Mr. Fenner did not take the stand to testify that he had not authorized

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<sup>5</sup> An aircraft owner’s claim that the pilot who committed the safety violations did not have permission to fly the airplane constitutes an affirmative defense. A party who has asserted an affirmative defense has the burden of proving it. 14 C.F.R. § 13.224(c). Also, affirmative defenses must be raised in the answer to the complaint. 14 C.F.R. § 13.210(d).

use of the aircraft, though he was present at the hearing and had the opportunity to do so.

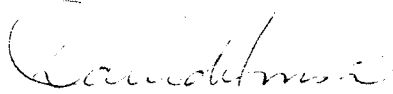
Although Mr. Fenner argues that “it cannot be seriously argued that owners are liable for all infractions committed in their aircraft, a doctrine equivalent to strict liability” (Appeal Brief at 13), that is not what this case is about. While aircraft owners may not be liable for *all* infractions committed in their aircraft, they can be held liable for infractions committed by a pilot who had permission to use their aircraft. The FAA has a statutory duty to protect the public from dangerous actions.<sup>6</sup> Moreover, holding aircraft owners responsible in cases like this may help ensure that aircraft owners grant permission to use their aircraft only to persons they know to be responsible.

Mr. Fenner’s argument that his right to due process was violated also lacks merit. Although Mr. Fenner asserts that “the adjudicator should not be allowed to make up the rules as the case unfolds,” that did not occur here. The statutory and regulatory definitions of the term “operate” are not new. Indeed, the definition of “operate” was part of the Federal Aviation Act when it was first enacted in 1958.

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<sup>6</sup> 49 U.S.C. § 44701.

For the foregoing reasons, the law judge's decision, finding that Mr. Fenner violated the regulations alleged in the complaint and imposing a \$4,000 civil penalty, is affirmed.<sup>7</sup>



DAVID R. HINSON, ADMINISTRATOR  
Federal Aviation Administration

Issued this 3rd day of May, 1996.

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<sup>7</sup> Unless Respondent files a petition for review with a Court of Appeals of the United States within 60 days of service of this decision (under 49 U.S.C. § 46110), this decision shall be considered an order assessing civil penalty. See 14 C.F.R. §§ 13.16(b)(4) and 13.233(j)(2) (1994).