

SERVED: July 7, 1993

NTSB Order No. EA-3927

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 28th day of June, 1993

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JOSEPH M. DEL BALZO,)	
Acting Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-11753
v.)	
)	
RICHARD W. RENNER,)	
)	
Respondent.)	
)	
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OPINION AND ORDER

Respondent, appearing pro se, has appealed from the oral initial decision of Administrative Law Judge Jimmy N. Coffman, issued on September 9, 1991, following an evidentiary hearing.¹ The law judge affirmed a 1991 order of the Administrator revoking, pursuant to 14 C.F.R. 61.15 and 65.12,² respondent's

¹The initial decision, an excerpt from the hearing transcript, is attached.

²§ 61.15(a)(2) provides:

pilot and mechanic certificates. We deny the appeal.³

The Administrator's order was based on respondent's conviction for various drug-related offenses. The Administrator offered evidence that respondent had been convicted: 1) in 1984, of conspiring to distribute marijuana; and 2) in 1987, of conspiring to distribute cocaine.

The Administrator introduced portions of respondent's testimony from the 1987 court proceedings to demonstrate that he and his co-conspirators had used an aircraft in narcotics smuggling. For example, respondent had testified that he purchased an aircraft, modified its fuel capacity to increase its range, and was a crewmember on a cocaine-smuggling flight to and

(..continued)

(a) A conviction for the violation of any Federal or state statute relating to the growing, processing, manufacture, sale, disposition, or importation of narcotic drugs, marihuana, or depressant or stimulant drugs or substances is grounds for--

* * * * *

(2) Suspension or revocation of any certificate or rating issued under this part.

§ 65.12 provides, as pertinent:

(a) A conviction for the violation of any Federal or state statute relating to the growing, processing, manufacture, sale, disposition, possession, transportation, or importation of narcotic drugs, marihuana, or depressant or stimulant drugs or substances is grounds for--

* * * * *

(2) Suspension or revocation of any certificate or rating issued under this part.

³The Administrator has moved to strike respondent's Response to Administrator's Reply Brief. We grant the motion, as this brief is an unauthorized reply to a reply. See 49 C.F.R. 821.48(e).

from Columbia. Exhibit A-9 at 141-145.⁴

On appeal, respondent first challenges the law judge's delaying until the hearing his ruling on respondent's motion to compel discovery. Respondent cites the Administrator's failure to respond to a question seeking the names of all pilots who were involved in drug smuggling or other illegal activities but were allowed to retain their certificates because they aided the government. He suggests that, as a result, the law judge's actions denied him due process.

We agree with the law judge's denial (Tr. at 64) of the motion to compel. Therefore, and although, as the Administrator notes (Reply at 10), we have stated our preference for pre-hearing rulings on discovery motions,⁵ we cannot find that respondent was prejudiced by the delay. As noted by the law judge, we have declined to intervene in the Administrator's enforcement policy, including his prosecution choices as between one certificate holder and another. See, e.g., Administrator v. Kaolian, 5 NTSB 2193 (1987), and Go Leasing, Inc. v. NTSB, 800 F.2d 1514 (9th Cir. 1986). Thus, evidence regarding treatment of other pilots is irrelevant in this proceeding.

Although we might wish the FAA to have been more prompt here and would urge it to be in the future, we will not review the

⁴The Administrator also introduced evidence that respondent had been convicted of aiding certain Columbians to avoid immigration controls and enter the United States. Exhibits A-1-3. Respondent objects to the admission of this evidence. See discussion, infra.

⁵Administrator v. Bowen, 2 NTSB 940, 942 (1974).

Administrator's extremely long delay in issuing his order and, therefore, must also reject respondent's arguments that are based on the Administrator's tardiness. There is no question that an issue of qualification has been raised by respondent's 1984 and 1987 convictions. Administrator v. Kolek, 5 NTSB 1437 (1986), aff'd Kolek v. Engen, 869 F.2d 1281 (9th Cir. 1989); Administrator v. Hernandez, NTSB Order EA-3821 (1993).

Respondent appears, erroneously, to believe that lack of qualification means lack of aviation ability. Administrator v. Klock, NTSB Order EA-3045 (1989) at note 7 (the issue of qualification raises questions not only of technical skills but also on the "care, judgment and responsibility required of a certificate holder"). Therefore, the order is not subject to dismissal as stale under 49 C.F.R. 821.33.

Respondent next challenges the law judge's acceptance of the Administrator's various exhibits. As noted earlier (see note 4), respondent objects to the admission of Exhibits A-1-3 because they relate to a misdemeanor charge over 10 years old. The Administrator indicates (Tr. at 21) that this evidence was introduced to show respondent's willingness to use aircraft in the commission of a crime. We can find no abuse of discretion in the law judge's allowance of this material. This evidence of a conviction regarding immigration matters is not directly relevant to the charges in the complaint, as the cited regulations relate to controlled substance convictions. Nevertheless, the law judge has considerable discretion in the conduct of the hearing and,

absent a showing of harm to respondent from the law judge's admission of this material, we see no grounds to question the law judge's exercise of that discretion here.

We have the same reaction to respondent's objections regarding the admission of the remaining exhibits. Exhibits A-4 and 5, and 7-10 are official records from the various court proceedings; Exhibit A-6 is a memo detailing information the FAA investigating agent obtained from an Assistant U. S. Attorney involved in the 1987 conviction. Respondent's objections against all the exhibits for the most part go to the weight they should be given rather than to their admissibility. Thus, for example, that the 1984 conviction may not have involved the use of aircraft does not make information about that conviction inadmissible.

Respondent objects to Exhibits A-7-10, which relate to the 1987 conviction, on the ground that use of them violated the plea agreement and grant of immunity he was extended in return for his cooperation. Respondent misunderstands the scope of that immunity. As best as we can determine from the record before us, the terms of the plea agreement were twofold: that no other "Federal criminal actions" (other than homicide indictments) would be brought against respondent based on his actions prior to the date of the agreement (see Reply at 16 and Exhibit A-10 at 166); and that, should a Federal or state law enforcement agency contemplate bringing charges against him based on prior "criminal acts," the Federal government would recommend that no charges be

brought (see Reply at 16). Neither of these provisions has been violated. This FAA action is not a Federal criminal action. And, as respondent's Exhibit 4 to his appeal indicates, the Department of Justice recommended against the bringing of these charges.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;
2. The Administrator's motion to strike is granted; and
3. The revocation of respondent's pilot and mechanic certificates shall begin 30 days from the date of service of this order.⁶

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

⁶For the purposes of this order, respondent must physically surrender his certificates to an appropriate representative of the FAA pursuant to FAR § 61.19(f).