

SERVED: September 11, 2007

NTSB Order No. EA-5314

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 6th day of September, 2007

<hr/>)	
MARION C. BLAKEY,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Dockets SE-17637
v.)	SE-17640
)	SE-17641
TIMOTHY WARREN DONOHUE,)	SE-17642
HENRY ALBERT YOUNGE, III,)	SE-17643
HENRY PAUL BRUCKNER,)	and SE-17644
ERIC SATORU MATSUMOTO,)	
GARRETT TAN SUGA, and)	
STUART SHIGETO NISHIMURA,)	
)	
Respondents.)	
)	
<hr/>)	

OPINION AND ORDER

Respondents have appealed from the oral initial decision of Administrative Law Judge William A. Pope, II in this matter,¹ issued following an evidentiary hearing held on July 10 and 11,

¹ A copy of the initial decision, an excerpt from the hearing transcript, is attached.

2006. The Administrator's orders suspended respondents' airman pilot certificates as follows:

Respondent Donohue: Airline Transport Pilot (ATP) certificate, suspended for 30 days

Respondent Younge: Commercial Pilot certificate, suspended for 60 days

Respondent Bruckner: Commercial Pilot certificate, suspended for 45 days

Respondent Matsumoto: ATP certificate, suspended for 60 days

Respondent Suga: Commercial Pilot certificate, suspended for 30 days

Respondent Nishimura: ATP certificate, suspended for 30 days

The law judge issued an order consolidating these cases on March 15, 2006. Each of the Administrator's orders alleged that respondents violated 14 C.F.R. § 119.5(1).² The law judge rejected respondents' affirmative defense, and found that the Administrator had fulfilled her burden of proving that respondents violated the aforementioned regulation, as charged. The law judge ordered the suspension of each respondent's airman certificate for a period of 2 days, except with regard to

² Section 119.5(1) states that, "[n]o person may operate an aircraft under this part, part 121 of this chapter, or part 135 of this chapter in violation of an air carrier operating certificate, operating certificate, or appropriate operations specifications issued under this part."

Respondent Younge, whose certificate the law judge suspended for a period of 60 days. We deny respondents' appeals.

The Administrator's orders, issued on January 4 and 5, 2006, alleged that from December 12, 2004, through December 22, 2004, each respondent acted as pilot-in-command (PIC) of scheduled flights for Molokai-Lanai Air Shuttle (MLAS). The Administrator's orders alleged that respondents did not file flight plans for these scheduled flights, and that the operations specifications under which MLAS operated required such flight plans. As a result, the Administrator alleged that respondents violated 14 C.F.R. § 119.5(1), which requires operators' compliance with the operating certificates and specifications under which they operate.

The consolidated cases proceeded to a hearing before the law judge on July 10 and 11, 2006, at which the Administrator presented the testimony of two witnesses and provided eight exhibits. The Administrator first called Mr. Joe Kennedy, who served as an aviation safety inspector from the Administrator's Honolulu Flight Standards District Office (FSDO) and principal operations inspector for the island of Maui at the time of the alleged violations. Tr. at 21. Mr. Kennedy testified that he had observed an MLAS flight proceed through a low cloud layer in Honolulu, and became concerned because he knew that MLAS was not

authorized to operate under an instrument flight rules flight plan. Tr. at 21-22. As a result, Mr. Kennedy testified that the Honolulu FSDO commenced an investigation into the operations of MLAS, and that Respondent Younge informed him that MLAS had stopped filing flight plans for their flights. Tr. at 22. The Administrator also called Mr. David Lusk,³ who testified that MLAS has an air carrier certificate, and may only operate flights on demand under visual flight rules (VFR), among other limitations. Tr. at 51-52. Mr. Lusk also stated that, given that MLAS is an on-demand operator, MLAS pilots do not fly on specified routes. Tr. at 54. Mr. Lusk also described the relationship between an operator's "General Operating Manual" and operations specifications: Mr. Lusk testified that operations specifications are analogous to a contract between the FAA and the operator, whereas manuals are means by which an operator can comply with the terms of the "contract." Tr. at 52. In support of her case, the Administrator also presented the paragraph from the operations specifications, which were effective in December 2004 and require PICs to file flight plans for each flight. Exh. C-2 at 2 (stating, "[p]ilots will file

³ We note that the law judge limited Mr. Lusk's testimony to factual matters only, and did not allow Mr. Lusk to provide any opinion testimony, due to the Administrator's counsel's failure to comply with the law judge's pretrial order regarding witness testimony at the hearing. Tr. at 42.

flight plans for all flights scheduled"); Tr. at 67. Among other exhibits, the Administrator also provided Respondent Younge's response to the Administrator's letter of investigation, in which Respondent Younge acknowledged that MLAS did not file flight plans for their flights. Exh. C-6; Tr. at 107.

At the conclusion of the Administrator's case in chief, respondents made a motion to dismiss, asking the law judge to find that the Administrator had not presented a *prima facie* case showing that they had violated § 119.5(1), as alleged. The law judge denied respondents' motion, and stated that the Administrator had presented evidence that could indicate that MLAS operations specifications required respondents to file flight plans. Tr. at 240-41. The law judge found that, on their face, the operations specifications did not appear to offer respondents a choice with regard to filing flight plans. Tr. at 241.

In support of their response to the Administrator's allegations, respondents all testified. First, Respondent Bruckner testified that he viewed the provisions in the operations specifications at Exhibit C-2, which require all pilots to file flight plans for scheduled flights, as interrelated with the provisions in the MLAS General Operations

Manual at Exhibit R-2, which specify that PICs "will utilize flight locating procedures." Respondent Bruckner testified that, given these two provisions, MLAS policy was to provide PICs with the option of either filing a flight plan or using the flight locating procedures. Tr. at 282-83. Respondent Bruckner testified that all PICs utilized the flight locating procedures, in lieu of filing flight plans, and that the flight locating procedures were safer and more efficient. Tr. at 266-68, 284-85. Next, Respondent Nishimura, who was a "line pilot" for MLAS, testified that Respondent Bruckner had taught Respondent Nishimura's ground school class as the check airman, and explained that the flight locating procedure was MLAS policy. Tr. at 336-38. Respondent Nishimura explained that before PICs for MLAS would depart, they would inform the appropriate personnel at the originating airport, who would then call the destination airport, so that the destination airport would know when to expect them. Tr. at 341.

Respondent Younge, an MLAS co-owner and the director of operations for the carrier, also testified. Respondent Younge testified that each PIC had copies of both the MLAS General Operations Manual and the operations specifications (Tr. at 358-59), and that the section of the operations specifications that requires PICs to file flight plans preexisted the Manual, which

discusses flight locating procedures. Tr. at 378-79.

Respondent Younge testified that, while he never prohibited PICs from filing flight plans, he worked to develop the company policy that provided PICs with the option of not filing flight plans. Tr. at 383, 386. Respondent Matsumoto also testified, and explained that he had received instructions indicating that PICs had the option of not filing flight plans in his training at MLAS. Tr. at 390. Respondent Matsumoto testified that an FAA inspector performed at least one "check ride" with him in which he did not file a flight plan, and told Respondent Matsumoto that the flight was "great." Tr. at 391, 396-97. Finally, Respondents Donohue and Suga testified, and their testimony was consistent with the other respondents' testimony with regard to the instructions they received and their understanding of MLAS policy, which provided PICs with the option of not filing flight plans. E.g., Tr. at 408, 450, 458-59.

At the conclusion of the hearing, the law judge affirmed the Administrator's complaint, holding that the Administrator had proven that respondents were required to file flight plans, and that their failure to do so resulted in a violation of § 119.5(1). The law judge cited Administrator v. Air East Management, Ltd., NTSB Order No. EA-5089 (2004), for the

proposition that the Administrator "is entitled to insist on strict adherence to the regulations and company procedures approved by the FAA." Initial Decision at 553. The law judge held that the flight locating procedures contained in the Operations Manual, Exhibit R-2, were "a redundant safety measure" that supplemented, but did not replace, the existing operations specifications, which required PICs to file flight plans. Id. at 554; see also Exh. C-2. The law judge also noted that the provision of the Operations Manual at issue was directed at MLAS in general, in its capacity as a carrier, rather than each PIC, whereas the operations specifications clearly applied to each PIC. Initial Decision at 554, 559. As such, the law judge concluded that respondents had violated § 119.5(1) because they did not file the required flight plans. Id. at 560. The law judge recognized, however, that Respondents Donohue, Bruckner, Matsumoto, Suga, and Nishimura had detrimentally relied on Respondent Younge's explanation of the MLAS policy. As such, with the exception of Respondent Younge's sanction, the law judge reduced each respondent's suspension period to 2 days, and affirmed the Administrator's 60-day suspension of Respondent Younge's certificate. Id. at 560-63.

On appeal, respondents argue that the law judge improperly shifted the burden of proof to respondents, requiring them to

prove that their failure to file flight plans was justified. Respondents also assert that the law judge denied them a fair hearing regarding their defense that the Operations Manual and operations specifications were inconsistent and ambiguous, and therefore could not be a basis for punitive sanction. In addition, respondents argue that the law judge's reliance on Air East was inappropriate, and that the increased suspension period of Respondent Younge's certificate was improper. The Administrator contests each of respondents' arguments, and urges us to affirm the law judge's decision.⁴

We do not find respondents' arguments persuasive. Whether respondents' contention that the Operations Manual and operations specifications were ambiguous or inconsistent constitutes an affirmative defense is not a deciding factor in this case. We have previously held that, in asserting an affirmative defense, a respondent must fulfill his or her burden of proving the factual basis for the affirmative defense, as well as the legal justification. Administrator v. Gibbs, NTSB Order No. EA-5291 at 2 (2007); Administrator v. Kalberg, NTSB Order No. EA-5240 at 3 (2006); Administrator v. Tsegaye, NTSB Order No. EA-4205 at n.7 (1994). Here, respondents argue that

⁴ We note that the Administrator does not dispute the law judge's reduction in suspension periods.

they do not have the burden to prove that their failure to file flight plans was justified, because they argue that the FAA-approved and FAA-accepted documents under which they operated never required them to file flight plans in the first place.

Overall, respondents' principal argument rests upon whether the Operations Manual and operations specifications required them to file flight plans at all.⁵ In this regard, we disagree with respondents' argument that Air East is inapplicable to this case. In Air East, the Administrator charged Air East, which was an air carrier, with several regulatory violations, including § 119.5(1), based on Air East's practice of failing to log maintenance discrepancies. We concluded that an operator's failure to adhere to the Administrator's requirements, even where such failure might be the result of a determination that the operator had a better, faster, or easier way of operating, nevertheless resulted in a violation of the regulations. Air East, supra, at 2. Indeed, we also recognized that an operator's failure to comply with established, approved

⁵ We recognize that the law judge interpreted respondents' defense as an affirmative defense at the hearing, because respondents mentioned throughout the hearing that their flight locating procedures were safer and better than the procedure of filing flight plans. In this regard, we do not find the law judge's interpretation erroneous, given respondents' mixture of arguments, but note that respondents' arguments, whether they are affirmative defenses or a defense to the factual basis of the allegations, are unavailing in either context.

procedures was unacceptable, "even if the certificate holders believe the changes are an improvement." Id. Respondents' argument that the law judge misapplied Air East and was focused on the reasoning in Air East in a biased manner is unavailing, given that we have not overturned our conclusion in Air East. Moreover, we note that the law judge's evidentiary rulings throughout the hearing were just, and respondents cannot show that the law judge was prejudiced. Finally, respondents' brief even recognizes that the Administrator may insist on strict compliance with her regulations. Respondents' Br. at 31. In sum, we find that the law judge did not err in applying Air East to this case, and that his ruling would not have changed if he had viewed respondents' defense as one in which they argued that the Administrator had not met her burden, or as one in which respondents had the burden of proving that their conduct was justified.

Respondents also argue that the law judge denied them the opportunity for a fair hearing by finding that respondents' interpretation of the Operations Manual and operations specifications was erroneous. We disagree with respondents' argument in this regard. The law judge allowed respondents to submit the Operations Manual into evidence. Exh. R-2. The law judge read the excerpt of the Manual in conjunction with the

operations specifications, and heard a voluminous amount of testimony with regard to respondents' interpretation of the Manual and specifications. The law judge considered respondents' arguments, and concluded that the Manual supplemented the existing operations specifications, but did not replace the provisions of the Manual with a legitimate alternative to filing flight plans. We agree with the law judge's interpretation of these documents, and note that even the excerpt of the Manual that is in evidence does not prove that their interpretation is correct:

In order to comply with this bulletin *MOLOKAI-LANAI AIR SHUTTLE, INC.* will utilize flight locating procedures for all company-related flight activities, such as passenger transport, training, checking, or ferrying an aircraft. This will be done by filing and activating a flight plan with the Honolulu Flight Service for all flights or providing the equivalent information to a responsible person at the principal base of operations.

Exh. R-2 at 3 (emphasis in original). Respondents contend that the phrase "providing equivalent information" allowed them to avoid filing flight plans. We do not find this argument persuasive, given the existing requirement in the operations specifications that all PICs must file flight plans. Overall, we agree with the law judge's reading of the requirements.

With regard to sanction, respondents argue that the Administrator cannot impose a punitive sanction on any of the

respondents, because the Administrator's interpretation of the requirements at issue was erroneous, and subject to ambiguity. In addition, respondents argue that the increased suspension period of Respondent Younge's certificate is inappropriate. We do not find either of these arguments persuasive. As the law judge stated, respondents could have sought clarification from the Administrator regarding these requirements before assuming that the operations specifications did not apply to them, or assuming that they had the option of not filing flight plans. Respondents' citations to cases in which we have held that the Administrator cannot sanction a respondent based on what a respondent should have known, or based on unclear requirements, are inapposite, because the operations specifications in this case clearly required respondents to file flight plans. In addition, each respondent had a copy of the operations specifications and Manual, and some respondents testified that they once filed flight plans, but stopped doing so after the development of the policy that allowed PICs to refrain from filing flight plans. With regard to respondents' final argument that the law judge erred in imposing an increased suspension period of Respondent Younge's certificate, we disagree with respondents' contentions. The law judge acknowledged and considered mitigating factors with regard to the sanction that

he imposed on the other respondents, and the record does not indicate that the law judge was biased in affirming the Administrator's chosen sanction on Respondent Younge. We agree with the law judge's conclusion that Respondent Younge should be subject to an increased suspension period, given his statements to the other respondents that the acceptable company policy was to refrain from filing flight plans, even though he had assisted with authoring and developing the applicable operations specifications. Overall, respondents have not established that the law judge erred in his application of law, precedent, or policy concerning his imposition of a sanction against each respondent.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondents' appeal is denied; and
2. The 2-day suspension periods of the airman certificates of Respondents Donohue, Bruckner, Matusmoto, Suga, and Nishimura, and the 60-day suspension of Respondent Younge's commercial pilot certificate, shall begin 30 days after the service date indicated on this opinion and order.⁶

ROSENKER, Chairman, SUMWALT, Vice Chairman, and HERSMAN, HIGGINS, and CHEALANDER, Members of the Board, concurred in the above opinion and order.

⁶ For the purpose of this order, respondents must physically surrender their certificates to a representative of the Federal Aviation Administration pursuant to 14 C.F.R. § 61.19(g).