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NTSB Order No. EA-3814

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 1st day of March, 1993

JOSEPH M. DEL BALZO, Acting Administrator, Federal Aviation Administration, Complainant, v. KURT S. STRICKLEN, Respondent.	Docket SE-12910

OPINION AND ORDER

Respondent has appealed from the oral initial decision of Administrative Law Judge Jerrell R. Davis, issued on January 12, 1993, following an evidentiary hearing.[1] The law judge affirmed an emergency order of the Administrator revoking respondent's airline transport pilot certificate. We deny the appeal.

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

In his emergency order of revocation (complaint), as amended at the hearing, the Administrator charged respondent with violating 14 C.F.R. 91.9(a), 91.13(a), 91.307(c), and 135.21(a) in connection with a July 20, 1992 passenger-carrying, VFR[2] flight by Wings West Airlines, Inc.[3] The Administrator alleged

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[2]Visual flight rules.

[3]§ 91.9(a) reads:

> Except as provided in paragraph (d) of this section, no person may operate a civil aircraft without complying with the operating limitations specified in the approved Airplane or Rotorcraft Flight Manual, markings, and placards, or as otherwise prescribed by the certificating authority of the country of registry.

§ 91.13(a) reads:

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

[As amended, the complaint charged respondent with reckless conduct.]

§ 91.307(c) reads, in pertinent part:

> Unless each occupant of the aircraft is wearing an approved parachute, no pilot of a civil aircraft carrying any person (other than a crewmember) may execute any intentional maneuver that exceeds -
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> (1) A bank of 60 degrees relative to the horizon[.]

§ 135.21(a), as pertinent, reads:

> Each certificate holder, other than one who uses only one pilot in the certificate holder's operations, shall prepare and keep current a manual setting forth the certificate holder's procedures and policies acceptable to the Administrator. This manual must be used by the certificate holder's flight, ground, and maintenance personnel in conducting its operations . . . .

At the hearing, the Administrator withdrew an additional charge of violation of 14 C.F.R. 91.7(b).

that, during this scheduled flight between Modesto and San Jose, CA, in which respondent was flying pilot-in-command of a British Aerospace BAE-3201 Jetstream, he executed an unnecessary and unsafe acrobatic roll through 360 degrees.[4]

At the hearing, the incident itself was not disputed. Two persons who were on the flight testified on behalf of the Administrator. Respondent, although admitting to the maneuver, claimed that he rolled the aircraft to avoid a mid-air collision and that, for various other reasons, he had not violated the cited regulations and his action had not been dangerous.

The law judge affirmed all the claimed violations and the sanction of revocation. Respondent's appeal raises a number of procedural and substantive challenges to the initial decision, each of which is addressed in the sections that follow. To put the issues in context, respondent's claims of error are discussed in a different order than they appear in his appeal.

1. Did the law judge err in failing to find that respondent's 360° roll of the aircraft was justified by an emergency situation? Respondent claims that the § 91.9(a) violation does not lie because 49 C.F.R. 91.3(b) precludes a finding that respondent violated § 91.9(a).[5]

The first officer on the aircraft, David Mason, was sitting

[4]The record interchangeably uses the terms aerobatic and acrobatic.

[5]In fact, an emergency finding would excuse all violations alleged under Part 91.

in the right seat. He testified that he saw no approaching aircraft and that respondent alerted him to none. A few seconds after the roll, when Mr. Mason questioned respondent about it, respondent allegedly said that an aircraft had come towards them from the 10 o'clock position, and respondent pointed out to him an aircraft in the 3 o'clock position about 2 miles away and headed in the opposite direction. The first officer did not believe that the separation could have grown so great in the short time that had passed, or that he could have missed seeing an aircraft as close as respondent alleged.

Another Wings West pilot, Steven Waltrip, was in the aircraft at the time, sitting in a seat on the right hand side of the passenger compartment.[6] He, likewise, saw no approaching aircraft.

Respondent testified at the hearing that the first officer was mistaken, and that the other aircraft had approached from the **1** o'clock position, out of the sun, and that he had not seen it until it was approximately 300 feet away. Tr. at 643. He did not testify specifically regarding the other aircraft's position after the roll, stating only that it was "behind" them. Tr. at 721.[7] Respondent's expert witness testified that, during the time of the roll, an aircraft could have traveled the distance

[6]The aircraft had no jumpseat.

[7]Respondent is incorrect in stating (Appeal at 29) that the first officer's testimony is corroborative. In this and other respects it is not.

respondent and the first officer had noticed.[8]

We decline to disturb the law judge's factual finding (Tr. at 845) that respondent never encountered a near mid-air collision. Indeed, the law judge's discussion reflects his failure to believe there was any aircraft in the immediate vicinity prior to the roll.

In view of the conflicting testimony, the initial decision is predicated to a great extent on the law judge's personal examinations of witness credibility.[9] We will not overturn such conclusions unless they are arbitrary or capricious or inherently incredible. Administrator v. Smith, 5 NTSB 1560, 1563 (1987); and Chirino v. NTSB, 849 F.2d 1525, 1530 (D.C. Cir. 1988).

Not only does respondent's testimony fail to stand as a cohesive, convincing whole, and respondent fail to identify a sufficient basis to find the law judge's decision incredible or otherwise arbitrary or capricious, respondent's testimony also conflicted directly with his earlier written version of events.

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[8]There is considerable conflicting testimony in the record regarding the amount of time taken from the start of the roll to when the second aircraft was noticed. These conflicts need not be resolved, as there were other bases in the record (see discussion infra) for the law judge to reject respondent's version of events.

[9]The law judge stated "Respondent was simply too convoluted and glib to be convincing." Tr. at 845. We also note respondent's apparent tendency to amend his version of events as inconsistencies in his testimony arose. See, e.g., Tr. at 672-3 compared to 669. See also Tr. at 643 (respondent is unable to identify the size of the other aircraft) and Tr. at 657 (respondent admits that he told Mr. Waltrip the other aircraft looked like a C-5, which is a very large transport aircraft) for another inconsistency.

Exhibit C-13 (respondent's narrative) states that the other aircraft approached from the 10 o'clock, not the 1 o'clock, position, thus casting doubts on respondent's hearing testimony overall.[10]

Respondent's behavior also supports the law judge's disbelief. The record establishes, contrary to respondent's version of events, that, some days after the incident and after he had resigned his employment with Wings West, respondent attempted to alter a station copy of the flight manifest of this flight so that Mr. Waltrip was identified as a crewmember rather than as a passenger.[11]

Finally, the record does not support a conclusion that performing the roll was necessary for collision avoidance, even assuming the aircraft was approaching from 1 o'clock and from 300 feet away as respondent claimed.[12] Other, less dangerous

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[10]The record indicates that no reports of near mid-air collisions were received.

Respondent's credibility was also compromised by testimony (Tr. at 546) that contradicted his statement (Tr. at 618) that he had never rolled an aircraft.

[11]Testimony especially damaging to respondent on this issue was elicited under questioning of respondent by Wings West counsel, who was allowed by the law judge to participate. Respondent urges that all such testimony be stricken, as Wings West is not a party to the proceeding. Although we do not necessarily condone participation by counsel for a non-party, in this case we decline to grant respondent's request. We cannot say that the law judge abused his discretion in conducting the hearing. Moreover, the testimony elicited during the two instances this occurred (Tr. at 699 and 803) is directed only to technical explanations of documents produced by Wings West and contributes to the building of an accurate and complete record.

[12]If the aircraft had been approaching from 10 o'clock, the

maneuvers, such as a steep bank turn, were available. Respondent offered no explanation why, as an experienced pilot, he chose to perform a roll in an aircraft that was not certificated for such a maneuver. Thus, contrary to respondent's allegation (Appeal at 30-31), respondent did not show that his decision was reasonable under the circumstances, and the burden of proof, therefore, did not shift back to the Administrator.

Respondent also urges that, because radar data that would have indicated the position of other aircraft at the time of the incident was not preserved by the FAA, an adverse inference should be drawn that these data would have confirmed respondent's version of events. As the law judge found, however,

> by the time the [FAA's] investigating inspector became aware of a possible mid-air collision and attempted to obtain the NTAP computer data, it was too late because such data had been destroyed in accordance with the agency's 15-day retention practice.

Tr. at 842. Despite respondent's extensive argument on this point at the hearing, he presented no evidence that the FAA knew of the incident within 15 days, or even that somehow and for some reason it avoided such knowledge.

Moreover, the data would have been preserved had respondent either timely requested that this be done or reported a near-miss to air traffic control. He apparently did neither. Accordingly, respondent has failed to demonstrate that the law judge's findings on this emergency defense, predicated as they are on

(..continued)
roll to the left would have been a turn in towards the approaching craft.

credibility assessments, should be overturned.

2. Did the law judge err in finding a violation of § 91.307(c)? Respondent admitted that the aircraft's occupants were not wearing parachutes. He argues, however, that the third person on the aircraft, Mr. Waltrip, was a crewmember and that the regulation only requires parachutes if the aircraft has a passenger.[13] We see nothing in respondent's appeal that warrants a result different from that reached by the law judge. The only logical reading of this rule requires that crewmember means a crewmember on that particular flight.[14] Both the first officer and Mr. Waltrip himself recognized that he was not a crewmember, but was a non-revenue passenger flying to his jobsite. Also supporting this conclusion are the facts that this aircraft has only two crew (and seats for only two crew), Mr. Waltrip was performing no airline duties, and he was not being paid at the time. Although the complaint termed him a "deadheading" captain, that appears technically incorrect (and harmless error, as respondent was aware of Mr. Waltrip's status). Respondent's interpretation would compromise safety in that dangerous maneuvers (such as banks greater than 60°) could be performed regardless of parachute availability if aircraft occupants were

[13]The Administrator does not dispute respondent's conclusion (Appeal at 24) that, in amending the rule to its current language (referring to carrying any person other than a crewmember), the FAA intended no substantive change from prior language (referring to carrying passengers).

[14]See 14 C.F.R. 1, "**crewmember** means a person assigned to perform duty in an aircraft during flight time."

airline employees.

3. Did the law judge err in failing to find that the flight was a ferry flight under Part 91?[15] Consistent with his prior argument that Mr. Waltrip was not a passenger, respondent argues that, because there were no passengers or cargo on board, this was a ferry flight, not a scheduled, Part 135 commuter flight. To be a ferry flight as defined in the Airman's Information Manual, the flight must be returning an aircraft to base, delivering an aircraft from one location to another, or moving an aircraft to or from a maintenance base. Ferrying allows the carrier to position an aircraft for future use and, therefore, these flights are sometimes called positioning flights. Respondent has not shown that this was such a flight. Because this was a flight in scheduled service by a for-hire carrier, it was not returning an aircraft to a base or delivering an aircraft from one location to another as those phrases are meant to be read or as they are logically read.[16] And, respondent does not argue that it was a movement from a maintenance base. Respondent's references to FAA documents (e.g., Exhibit R-30) do not convince us otherwise, as the special circumstances to which those documents are directed are not of record for comparison. Accordingly, we affirm the law judge on

[15]Had the flight been a ferry flight, Part 135 would not apply (see § 135.1(b)), and the § 135.21(a) violation would not lie.

[16]Moreover, respondent alleges but has not proven that San Jose was the aircraft's base.

this question.

4. Did the law judge err in finding a violation of § 91.13(a)? Respondent argues that, in this case, the claim of reckless conduct was derivative of the other allegations. He points out that, because the charge that respondent violated § 91.7(b) was withdrawn, the law judge's related finding that respondent failed to make an entry in the aircraft's maintenance log after the incident may not be used to support a finding of reckless behavior. The Administrator does not deny that the § 91.13(a) finding is derivative but responds in part that, because the law judge found respondent acted in total disregard for safety and that Mr. Waltrip felt his life had been endangered (Tr. at 845), the finding should be upheld.

In light of our affirmation of the law judge's findings that respondent violated § § 91.9(a) and 91.307(c), there is more than adequate basis to find a derivative violation of § 91.13(a)'s prohibition against reckless endangerment. Moreover, both the aircraft manual and a placard in the cockpit (see Exhibit C-8, Tr. at 219) prohibited acrobatic maneuvers. The Administrator introduced sufficient evidence to prove that the roll performed by respondent is such a maneuver,[17] despite conflicting testimony in the record on this point. Tr. at 201-202, 326-327, 678 and 788. It is immaterial that in this case no damage was done and the aircraft did not exceed its stress limitations. Administrator v. Haney, NTSB Order EA-3202 (1990). See also

[17] Administrator v. McClellan, 5 NTSB 2217 (1987).

Administrator v. Werner, 3 NTSB 2082 (1979) and Administrator v. Akin, 5 NTSB 1318 (1987). Although the § 91.7(b) claim was not pursued, we may still consider that respondent's failure immediately to report the roll, choosing instead to rely on his own inadequate inspection of the aircraft, led to its continued use in for-hire service without a thorough inspection.[18] In any case, a derivative § 91.13(a) violation has no effect on sanction. See, e.g., Administrator v. Buller, NTSB Order EA-2661 (1988).

5. Is the sanction of revocation consistent with "written agency policy guidance available to the public relating to sanctions" and prior Board precedent? Respondent correctly notes that Section 609(a) of the Federal Aviation Act (49 U.S.C. App. 1429(a))[19] provides, in part:

> During the conduct of its hearings under this subsection, the Board shall not be bound by any findings of fact of the Administrator but shall be bound by all validly adopted interpretations of laws and regulations administered by the Federal Aviation Administrator and of written policy guidance available to the public relating to sanctions to be imposed by this subsection unless the Board finds that any such interpretation is arbitrary, capricious, or not otherwise in accordance with law.

Respondent argues that revocation is not consistent with the FAA's published, written policy guidance available to the public relating to sanctions. In support, he offers excerpts from the

[18]Respondent did not and could not perform the testing needed to ensure that no damage had been done. See, e.g., Tr. at 598 (avionics were not inspected).

[19]As amended by P.L. No 102-345, the FAA Civil Penalty Administrative Assessment Act of 1992.

FAA's "Enforcement Sanction Guidance Table,"[20] in which penalty guidance is provided.[21]

We are not persuaded that revocation in this matter is not consistent with the policy guidance published by the Administrator. The parts of the "Enforcement Sanction Guidance Table" produced in the record counsel that "multiple violations (i.e., multiple violations of a single regulation, a single violation of multiple regulations, or multiple violations of multiple regulations) may result in a sanction greater than the sum of sanction ranges for the particular violations cited" (see Exhibit C-14, emphasis in original). They also do not purport to enumerate the factors that should be deemed to transform a multiple violation case into one that presents an issue of lack of qualifications so as to warrant revocation. Consequently, the Board cannot review the sanction sought by the Administrator solely by reference to written policy guidance, but must, as well, exercise its own statutory discretion to evaluate the appropriateness of revocation. Doing so here has led us to conclude that the Administrator's choice of sanction fits within the range of sanctions imposed in prior related cases.

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[20]See Exhibit R-42. The FAA had introduced another portion of this table in Exhibit C-14.

[21]Circled items in Exhibit R-42 indicate the following sanction guidance: failure to make entries in aircraft log -- 15-60 day suspension; operation of unairworthy aircraft -- 30-180 day suspension; exceeding operating limitations -- 30-90 day suspension; and performing acrobatics when all passengers are not equipped with parachutes -- 60-90 day suspension.

In Haney, supra, respondent was found to have violated § § 91.31(a) and 91.9 (the previous codification of 91.9(a) and 91.13(a)) on four occasions of acrobatic flight in an aircraft not certificated for that type of flight. In Akin, five acrobatic flights were involved. In both of these cases, revocation was sought and affirmed by the Board.

In contrast, in Administrator v. Walsh, 2 NTSB 1772 (1975), five regulatory violations (including two identical to those before us and others involving low level acrobatics over congested areas) were found in connection with two acrobatic flights in aircraft certificated for such maneuvers. A 90-day suspension was imposed (in comparison to the 270 days the Administrator had recommended).

Here, although only one incident is at issue, the aircraft was not certificated for the performed maneuver and, in contrast to the cases cited, the aircraft and the pilot in command were employed in Part 135, for-hire service to which a higher standard of conduct applies. Respondent's actions in the aircraft and in failing immediately to report the roll reflected an egregious disregard for safety that cannot be countenanced and that demonstrate a lack of qualification. See Administrator v. Wingo, 4 NTSB 1304 (1984) (conduct during one event can demonstrate lack of qualification).[22]

6. Did the law judge err in denying respondent's motion

[22]As previously noted, the only other violation -- § 91.13(a) -- does not affect sanction analysis.

for sanctions and motion for summary judgment? Respondent alleges that the Administrator did not comply adequately with his request for discovery, and that the law judge agreed with the Administrator's lack of compliance, but failed to take the proper action of dismissing the complaint for this failure. Respondent further alleges that, because his requests for admissions were not answered, they should be considered admitted and that his motion for summary judgment (based on the implied admissions) should have been granted. The Administrator answers in the main that respondent has mischaracterized the law judge's ruling, and that discovery is not available in emergency cases.

Respondent's construction of our rules (Appeal at 18) is correct. While we see no need to have to do so, we state categorically that discovery is available in emergency proceedings. Responses to a Freedom of Information Act request may not suffice.[23] We expect the Administrator, who controls the timing of the complaint and whether it is characterized as an emergency, to respond timely and in good faith to reasonable discovery requests without the need for a motion to compel. In this case, nonetheless, and in view of the balance that must be struck between a respondent's opportunity to pursue discovery and the Board's obligation to complete a proceeding, we find no evidence that respondent's right to a fair hearing was

[23]Despite the Administrator's argument here and the lack of specificity in our rules, in the past he has acceded. See, e.g., Administrator v. Air East, Inc., 2 NTSB 870 (1974). In a future rulemaking, we intend to address this matter by proposing a revision to our rules that leaves no doubt on the question.

compromised.

Respondent specifically challenges the Administrator's degree of compliance with his discovery requests. However, contrary to respondent's characterization, the law judge found that the Administrator sufficiently answered with the "core information" the law judge had ordered him to produce.[24]

While the Administrator's behavior is not countenanced, we are equally concerned that a barrage of interrogatories, document production requests, and requests to admit, such as were filed by respondent, and the timing of such requests, could seriously compromise the Board's ability to complete emergency proceedings in the prescribed 60 days.[25] Admittedly, the nature of these emergency proceedings constrain respondents in their preparation of a defense. The 60 days, however, is to protect the respondent, as he is deprived of his certificate without a hearing, and respondent is free to waive the time limit. Blackman v. Busey, 938 F.2d 659 (6th Cir. 1991).

More importantly, in this case respondent fails to specify how the discovery that was not completed harmed his ability to

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[24]The Administrator's request that the law judge reconsider his earlier order to compel, therefore, was rendered moot.

[25]The complaint was filed on December 21, 1992. Respondent's interrogatories and document production requests were served December 29, and his 31 requests to admit were served January 3, 1993. On January 7, respondent served the Administrator and Wings West with subpoenas for the attendance at the hearing of numerous individuals. The hearing was scheduled for January 11. The law judge repeatedly commented that respondent engaged in more discovery in this case than the law judge had ever seen.

present his defense. Sanctions in this instance are not appropriate.

We further note that the Federal Rules of Civil Procedure do not form a part of the Board's rules of practice and respondent's reliance on them is misplaced. The law judge was not required to assume various admissions due to the Administrator's initial refusal to answer. In any case, the law judge directed that the parties meet at the onset of the hearing and respondent was provided with numerous answers to various requests to admit. Therefore, it was not error for the law judge to deny the motion for summary judgement. Throughout, the law judge appears to have struck a reasonable balance between developing an adequate record and avoiding burdensome, non-productive exercises. Again, there is no specification of what useful information respondent was denied that would have changed the course of the hearing.[26]

[26]On February 10, 1993, respondent filed a motion to strike certain portions of the Administrator's reply, on the grounds that the Administrator had misstated the facts. We agree that, after its amendment, the complaint did not allege a violation of § 91.7(b), and the law judge did not so find. But we can find no place in the Administrator's reply where the contrary is stated. The Administrator simply restated the complaint, as filed, failing to note the withdrawal of the § 91.7(b) charge, and stated that the law judge affirmed the order of revocation. Accordingly, we deny the motion.

We also deny respondent's February 16, 1993 request for oral argument. The issues before us can be fully aired on a written record.

ACCORDINGLY, IT IS ORDERED THAT:

Respondent's appeal is denied.

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