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NTSB Order No. EA-4992

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 27th day of August, 2002

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MONTE R. BELGER,	)	
Acting Administrator,	)	
Federal Aviation Administration,	)	
	)	
Complainant,	)	
	)	Docket SE-16318
v.	)	
	)	
TED RAY MOORE,	)	
	)	
Respondent.	)	
	)	

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**OPINION AND ORDER**

Respondent has appealed from the oral initial decision of Administrative Law Judge Patrick G. Geraghty, issued on January 16, 2002, following an evidentiary hearing.<sup>1</sup> The law judge found that respondent, as alleged by the Administrator, had violated 14 C.F.R. §§ 91.123(a), 91.111(a), and 121.535(f) of the Federal Aviation Regulations (FARs), 14 C.F.R. Parts 91 and 121.<sup>2</sup>

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<sup>1</sup> The initial decision, an excerpt from the transcript, is attached.

<sup>2</sup> Section 91.123(a) prohibits deviation from air traffic control (ATC) clearances. Section 91.111(a) states that no person may

(continued...)

Because respondent timely filed a proper Aviation Safety Reporting System (ASRS) report, the proposed 60-day suspension of respondent's pilot certificate was waived. We deny the appeal.

Respondent was the pilot-in-command of a Hawaiian Airlines DC-10 passenger-carrying flight from Honolulu to Los Angeles. On arrival at Los Angeles Airport (LAX), respondent was cleared for a visual approach. He failed to turn in time to line up with the runway, overshot the turn, and came so close to a Boeing 747 aircraft landing on a parallel runway that the TCAS<sup>3</sup> systems in both aircrafts activated. The law judge rejected the affirmative defense that the autopilot had failed to capture the localizer (and respondent had reasonably relied on the autopilot).

Respondent's brief includes numerous extra-record items; most notably statements of individuals respondent allegedly had intended to call as witnesses. The Administrator has moved to strike all this material, as well as references to it in respondent's brief. Respondent has also filed a "Request for the Board's Notice" and a "Motion to Supplement the Record Hearing Bias - Witness Observations." The Administrator replied in opposition to these two motions. Respondent then filed an "opposition" (reply) to the Administrator's motion to strike. Much of the basis of these filings is the law judge's witness

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(continued...)

operate an aircraft so close to another aircraft as to create a collision hazard. Section 121.535(f) prohibits careless or reckless operations so as to endanger life or property.

<sup>3</sup> Traffic Alert and Collision Avoidance System.

exclusion, an issue that is also raised in respondent's appeal.

The law judge's trial order of November 20, 2001, governing discovery, required certain specific disclosures on specified dates. Respondent did not properly comply, filing documents on those dates but not responding directly to the order's requirements and not seeking a modification of that order. In response to the Administrator's complaint that his answers to discovery were vague and incomplete, respondent produced the very same answers, the very same wording, but in another format. See Tr. at 53-54 and Administrator's reply brief at 40-44, which succinctly recites the discovery history.

The law judge thoroughly reviewed the matter prior to hearing and issued written orders; he again reviewed the matter at the beginning of the hearing and ratified his earlier ruling that, as a sanction for respondent's failure to provide meaningful discovery to the Administrator, to which she is entitled, he be prohibited from offering any witnesses.<sup>4</sup>

The standard of review is whether the law judge abused his discretion. Respondent has fallen far short of meeting that exacting standard. Respondent's representative is familiar with the difficulties this Board and the Administrator have had in the past with his apparent lack of understanding and appreciation for the rules of evidence, the rules of practice before this Board, and the basics of ethical practice. See Administrator v. Moore,

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<sup>4</sup> He modified his order at the hearing to permit respondent himself to testify.

NTSB Order No. EA-4929 (2001), at n.6. He was there put on notice of possible sanctions should he fail to heed the warnings given him. Given this history, he should expect strict enforcement of our rules by the Board and our law judges.<sup>5</sup>

Discovery is not a game in which counsel attempt to obfuscate, delay, and trick each other. It is intended to give fair notice of the evidence and witnesses the parties plan to present so that they may adequately prepare and a full and complete hearing can be held. Respondent's representative did not properly or fully comply in the required descriptions of anticipated witness testimony, even when directed to do so for the second time.<sup>6</sup> The law judge's choice of sanction was not an abuse of discretion.<sup>7</sup> Administrator v. Ostrove, NTSB Order No. EA-4916 (2001), and cases cited there; Administrator v. Security Investment Bancorp and Patriot Airlines, Inc., NTSB Order No. EA-

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<sup>5</sup> Respondent's representative is not an attorney; the Board does not require representation by attorneys. However, all practitioners before us are required to abide by our rules of practice, and lack of an attorney is not grounds for special treatment.

<sup>6</sup> If respondent's representative had a legitimate question about how he was supposed to comply, he should have asked the law judge rather than reproducing verbatim what he had previously filed that had been found wanting.

<sup>7</sup> For the reasons discussed *infra*, we do not see how the testimony of the various individuals would have changed the result. FAA employees are prohibited from giving expert or opinion testimony on behalf of anyone other than the Administrator. Respondent failed to turn as required to land and strayed into an adjacent, active approach. He blamed faulty equipment. Ultimately, given the long-standing law on the allegations of the complaint, none of the procedural issues raised here by respondent has any effect on whether, under case law, his action should be excused.

4137 (1994).

We have reviewed the entire transcript and find that, contrary to respondent's claim of bias, the law judge exhibited restraint here, and provided considerable assistance and guidance to respondent's representative, patiently assisting him throughout the proceeding in understanding and applying evidentiary principles. The law judge spent considerable time explaining to respondent's representative why his subpoenas of the Administrator's employees did not satisfy either FAA or NTSB rules. Tr. at 27-40. He explained how to lay a foundation for introduction of evidence. Tr. at 253. He straightforwardly dealt with the representative's repeated misstatements of the record evidence. He explained the things for which official notice could be taken. Indeed the law judge gave respondent's representative more leeway than he would have an attorney. See Tr. at 54-55 ("if that had been an attorney doing this, I wo[u]ld have real serious concerns about whether or not that was even ethical...if an attorney had done that, I would seriously consider reporting it to the Bar").

Respondent's representative should know that much of his addenda is impermissible new evidence. He did not attempt to justify its acceptance now, as our rules require. He made no proffer during trial, as is the proper and required course for information available at that time. This is not the time to attempt to rebut the Administrator's case. To the extent that respondent's representative offers affidavits to establish bias

on the part of the law judge, we would only add that a judge is not expected to be a saint; he is expected to be fair and impartial, not to show no human emotion. That the law judge might become frustrated with respondent's representative over the course of two days is not entirely unexpected; nevertheless, respondent fails to demonstrate conduct or rulings that warrant a finding of bias or abuse of discretion.<sup>8</sup>

We grant the Administrator's motion to strike the addenda and all references to it. We deny respondent's motion to supplement the record (which motion contains many of the same documents and arguments as the addenda). We deny respondent's Request for the Board's Notice. As the law judge explained (Tr. at 10), official notice does not take the place of legal argument or expert testimony about the impact of a regulation or policy in a particular case. While we could take official notice of the FARs, that is not the same as interpreting those rules and applying them to a particular set of facts, or otherwise providing expert testimony. Moreover, this is not the time to take official notice, as the record is closed.

Respondent's representative had the opportunity to introduce

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<sup>8</sup> Respondent also argued that the Administrator engaged in forum-shopping in somehow managing to make sure that this law judge was assigned the case. Respondent fails to establish why the Administrator would believe this law judge would be any more inclined to rule in favor of the Administrator than another. In any case, law judges are assigned to circuits. Law Judge Geraghty's circuit includes Los Angeles. Mr. Moore's last hearing was in Hawaii, where cases are rotated among the law judges.

evidence, by way of FAA rulings, or the FARs, for example, through his witness, respondent Moore, who is fully capable of discussing them. He failed to do so. He may not now introduce evidence to support new theories of the case or present new evidence for legal theories earlier raised.

Turning to the merits, the facts are not complicated. Respondent was the flying pilot. There were two other working crew -- a co-pilot and a flight engineer -- and a check engineer. Tr. at 239. Respondent was cleared by ATC for a visual approach. Visibility was excellent. Respondent knew, having landed at LAX many times, that there were parallel runways and that he needed to be extra vigilant to avoid straying into another aircraft's path. Tr. at 247, 295. Respondent was advised by ATC of the proximity of the 747. He intended to use the autopilot to assist in the approach. However, according to his testimony, the autopilot did not capture the ILS,<sup>9</sup> and therefore did not turn the aircraft into the final approach. The law judge found that 32 seconds elapsed between the time the autopilot could have captured the localizer and when respondent, by his testimony, realized it had not. Tr. at 407.<sup>10</sup> The aircraft encroached into the parallel landing path 4300 feet away. Tr. at 70. The two aircraft merged on the radar screen.

When the DC-10 did not start the turn where expected, ATC

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<sup>9</sup> Instrument Landing System.

<sup>10</sup> Respondent misuses the radar data in attempting to argue that his turn was started earlier. Tr. at 121-123.

attempted to assist respondent, noting, "try not to go thru final if possible," then giving him turning instructions and later instructions to halt his descent when the DC-10 got even closer to the 747. Respondent obeyed the instructions. Both aircraft landed safely. ATC personnel were shaken up, and the 747 pilot filed a near midair collision report. At no time did any crewmember on the DC-10 initiate or maintain any dialogue with ATC to advise of their situation.

At their closest, the DC-10 and 747 were separated 800 feet vertically and 60 feet horizontally. See Exhibit C-4, the radar plot. Respondent offers many challenges to the law judge's opinion, which we address in turn.

1. Respondent claims he was denied due process in the Administrator's failure thoroughly to investigate.<sup>11</sup> We do not judge the quality or extent of the Administrator's investigation. The Administrator has the burden of proof and a poor investigation can result in dismissal of the complaint; Equal Access to Justice Act fees may also attach. In any case, the Administrator certainly had enough evidence in this case to proceed.

2. Respondent claims he did not deviate from his clearance; he followed all instructions (which should be considered amendments to the clearance). This argument is frivolous. Respondent was given a clearance to perform a visual approach.

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<sup>11</sup> Respondent's other due process arguments have already been addressed.

The burden then was his to do so properly. ATC's intervention, due solely to respondent's failure to act, is not an amended clearance any more so than would be an ATC directive to pull up to avoid a midair collision. Whether or not the clearance required respondent to line up with the extended center line of the runway (an issue respondent's representative disputes but respondent conceded, Tr. at 293), it obviously required that he not intersect the parallel, active runway.

3. Respondent claims he was faced with an emergency, to which he reacted reasonably. Emergencies of one's own making do not excuse the violation. Administrator v. Moore, supra; Administrator v. Sidicane, 3 NTSB 2447, 2450 (1980) ("the violations are not excused where the situation was of the pilot's own making and could have been avoided by the exercise of sound judgment before and or during the flight"). Any emergency here was of respondent's making. Respondent contends that he appropriately relied on the autopilot and it let him down. He also believes he reacted timely once he identified the problem. However, we have consistently held that the responsibility of the airline transport pilot to fly the aircraft cannot be transferred to equipment that is intended to be an assist to the pilot. We have discussed this principle many times in relation to autopilots and other cockpit electronics. Administrator v. Bjorn and Lucas, NTSB Order No. EA-3829 (1993); Administrator v. Jensen, NTSB Order No. EA-4036 (1993); Administrator v. Baughman, NTSB Order No. EA-3563 (1992); and Administrator v. Frederick and

Ferkin, NTSB Order No. EA-3600 (1992). Respondent is held to the highest degree of care. He did not meet the obligation when he failed to notice that the aircraft was not turning when it needed to to intersect the runway. (And, he did not establish that there were so many other matters requiring his attention that he legitimately did not notice; there were also three other crew in the cockpit.)

4. Respondent claims that there was no collision hazard, that the 747's Captain Catry had some "clarifications" affecting his written report, that the crew had the 747 in sight, and that the FARs and FAA policies allow separations of this size.

Respondent's arguments have no merit. Our precedent clearly and logically supports finding a collision hazard here.

Administrator v. Magnusson, NTSB Order No. EA-4780 (1999);

Administrator v. Tamargo, NTSB Order No. EA-4087 (1994);

Administrator v. Reinhold, NTSB Order No. EA-4185 (1994); and

Administrator v. Werner, 3 NTSB 2082 (1979). Captain Catry's evidence merely supports the finding; it is not necessary to it.

People in the tower and in the air were truly and deeply afraid.

That respondent's crew may have had the 747 in sight at all times

does not advance his defense. To the contrary, it makes his failure to recognize the need to take corrective action sooner than he did all the more difficult to understand.

5. Respondent claims that his failure to contact ATC and advise what was going on was not careless; they were busy in the cockpit and ATC already knew they had missed the turn.

Respondent's failure to accept responsibility and understand the need to maintain communication with ATC is a critical failure of judgment here. There were four crew in the cockpit. Someone should have been in constant contact with ATC so that actions could be coordinated. It was respondent's obligation to see that this occurred.

**ACCORDINGLY, IT IS ORDERED THAT:**

1. Respondent's appeal is denied;
2. The Administrator's motion to strike is granted;
3. Respondent's motions are denied; and
4. The initial decision is affirmed.

CARMODY, Vice Chairman, and HAMMERSCHMIDT, GOGLIA, and BLACK, Members of the Board, concurred in the above opinion and order. BLAKEY, Chairman, did not participate.