

SERVED: November 26, 2003

NTSB Order No. EA-5067

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 25th day of November, 2003

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MARION C. BLAKEY		)	
Administrator,		)	
Federal Aviation Administration,		)	
		)	
Complainant,		)	
		)	
v.		)	
		)	
THOMAS M. O'BRIEN,		)	
		)	
Respondent.		)	
		)	
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Docket SE-16538

**OPINION AND ORDER**

Respondent appeals the oral initial decision of Administrative Law Judge Patrick A. Geraghty, issued on November 20, 2002.<sup>1</sup> By that decision, the law judge affirmed the Administrator's October 31, 2002 Amended Order of Suspension charging violations of sections 91.103 and 91.137(b) of the

<sup>1</sup> An excerpt of the hearing transcript containing the law judge's decision is attached.

Federal Aviation Regulations (FARs).<sup>2</sup> The law judge modified the

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<sup>2</sup> FAR sections 91.103 and 91.137, 14 C.F.R. Part 91, provide, in relevant part, as follows:

**Sec. 91.103 Preflight action.**

Each pilot in command shall, before beginning a flight, become familiar with all available information concerning that flight. This information must include --

(a) For a flight under IFR or a flight not in the vicinity of an airport, weather reports and forecasts, fuel requirements, alternatives available if the planned flight cannot be completed, and any known traffic delays of which the pilot in command has been advised by ATC;

(b) For any flight, runway lengths at airports of intended use, and the following takeoff and landing distance information:

(1) For civil aircraft for which an approved Airplane or Rotorcraft Flight Manual containing takeoff and landing distance data is required, the takeoff and landing distance data contained therein; and

(2) For civil aircraft other than those specified in paragraph (b)(1) of this section, other reliable information appropriate to the aircraft, relating to aircraft performance under expected values of airport elevation and runway slope, aircraft gross weight, and wind and temperature.

**Sec. 91.137 Temporary flight restrictions in the vicinity of disaster/hazard areas.**

\* \* \* \* \*

(b) When a NOTAM has been issued under paragraph (a)(1) of this section, no person may operate an aircraft within the designated area unless that aircraft is participating in the hazard relief activities and is being operated under the direction of the official in charge of on scene emergency response activities.

\* \* \* \* \*

90-day suspension of all of respondent's airmen certificates, including his private pilot certificate, sought by the Administrator to a 75-day suspension.<sup>3</sup> We deny respondent's appeal.

At the hearing, the only issue was sanction.<sup>4</sup> The Administrator called two witnesses, United States Army Lt. Col. Frank Morin and FAA Operations Inspector David Schuur. Lt. Col. Morin testified that he was the Army's liaison to the FAA's Northwest Mountain Region. Transcript (Tr.) at 12. Included in

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<sup>3</sup> The Administrator does not appeal the law judge's modification of sanction.

<sup>4</sup> Respondent stipulated and/or admitted to all factual allegations in the Administrator's complaint:

1. You are now, and at all times mentioned herein were, the holder of Private Pilot Certificate No. 532542354.
2. As a direct result of incidents that occurred in New York City and Washington, D.C. on September 11, 2001, the FAA issued emergency Notice to Airmen (NOTAM) Temporary Flight Restriction FDC 1/0373 ZSE OR. This NOTAM, which became effective September 22, 2001, prohibited all unauthorized flights within airspace directly over and around a certain defined area of Northeastern Oregon until further notice. As of October 18, 2001, this NOTAM remained in effect.
3. On October 18, 2001, you operated a Beech BE-35 aircraft, N8614Q, within the restricted airspace described in paragraph 2.
4. Prior to departing from Buttercreek airport in Hermiston, OR, on the above date for the flight at issue, you failed to become familiar with all available information concerning your flight, specifically the NOTAM referenced and described above.

Based on those admissions, the law judge affirmed, with agreement of respondent's counsel, the violations of FAR sections 91.103 and 91.137(b). See Hearing Transcript ("Tr.") at 7-8.

Lt. Col. Morin's responsibilities is the Umatilla Military Reservation, a chemical weapons depot, and the associated Temporary Flight Restriction ("TFR") that respondent flew through. Id. Morin explained that the TFR was implemented at the request of the Department of Defense as a result of heightened security after the aerial terrorist attacks of September 11, 2001. Tr. at 14. He explained that there were approximately 175 to 200 armed National Guard personnel providing perimeter security, and that some of these guards were equipped with anti-aircraft weapons. Tr. at 17-18. Inspector Schuur identified the Administrator's Sanction Guidance Table.<sup>5</sup> Inspector Schuur also testified that he spoke to respondent by telephone during the course of the investigation, and that respondent's response to the investigation was "good" and he was cooperative. Tr. at 38.

Respondent also testified. He confirmed that he did not check NOTAMS and that he flew through the TFR associated with the Umatilla depot. Tr. at 43. During cross-examination, he acknowledged that the incident flight was probably only the second time that he had flown since the September 11 terrorist attacks. Tr. at 46-48.<sup>6</sup>

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<sup>5</sup> Inspector Schuur also confirmed that, to his knowledge, there were no communications from ATC to the Umatilla depot during respondent's transgression. Tr. at 35-37.

<sup>6</sup> Respondent also testified that he voluntarily surrendered his pilot certificate to the FAA prior to the hearing, and the law judge, without objection, credited this time period, which was approximately 30 days, as "time served" against the ultimate suspension ordered.

The law judge reduced the 90-day suspension sought by the Administrator to a 75-day suspension, citing respondent's positive, post-incident attitude for the modification of sanction. In rejecting respondent's argument for a 30-day suspension, however, the law judge noted the heightened state of alert following the events of September 11, that the TFR was associated with a military weapons depot, that, as a consequence, there was increased risk of a lethal response to the TFR violation and associated risk for both respondent and persons on the ground, and, finally, that respondent's failure to check NOTAMS occurred during a flight made approximately only one week since the FAA had authorized general aviation aircraft to resume operations in the National Airspace System.

On appeal, respondent urges the Board to "modify the Order in this case to reflect the fact that a violation of a TFR imposed as a result of the events of September 11, 2001 should not be treated differently than a violation of a TFR existing before that date," and seeks a suspension of "not more than 30 days." The Administrator urges us to uphold the law judge's decision.

Respondent provides no basis for us to modify the 75-day suspension. When reviewing enforcement matters initiated by the Administrator, the Board "is bound by all validly adopted interpretations ... of written agency policy guidance available to the public related to sanctions to be imposed under [section 44709] *unless the Board finds an interpretation is arbitrary,*

*capricious, or otherwise not according to law.*" 49 U.S.C. § 44709(d)(3) (emphasis added). At the hearing, counsel for the Administrator argued that the Administrator's choice of sanction was based in part on the seriousness of the post-September 11, 2001 circumstances surrounding the regulatory violation and the fact that respondent violated two FAR provisions. The FAA's sanction guidance table recommends a suspension of between 30 and 90 days, "per violation," of both "[o]peration within prohibited or restricted area..." and "[f]ailure to obtain preflight information." On this record, where the Administrator's choice of sanction is well within the range specified in the publicly-available sanction guidance table, and the Administrator's explanation of her choice of sanction is neither arbitrary nor capricious, respondent's appeal cannot succeed.<sup>7</sup>

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<sup>7</sup> Respondent's reliance on the sanction sought by the Administrator in other cases with different underlying facts is misplaced, for he does not demonstrate that the Administrator's choice of sanction, for the reasons she provided, was arbitrary or capricious. Similarly, respondent's arguments based on the sanction originally sought by the Administrator are irrelevant (notwithstanding the fact that the original 150-day sanction sought by the Administrator does demonstrate a consistent and non-arbitrary view that a post-September 11 TFR violation is a serious matter), and we confine our review to the contents of the Administrator's Amended Order of Suspension (which sought a 90-day suspension) litigated at respondent's hearing.

**ACCORDINGLY, IT IS ORDERED THAT:**

1. Respondent's appeal is denied;
2. The law judge's decision affirming the Administrator's Amended Order of Suspension and imposing a 75-day suspension (with credit for respondent's prior voluntary surrender of his certificate to the Administrator) is affirmed; and
3. The suspension of respondent's airman certificate(s)<sup>8</sup> shall begin 30 days after the service date indicated on this opinion and order.

ENGLEMAN, Chairman, ROSENKER, Vice Chairman, and GOGLIA, CARMODY, and HEALING, Members of the Board, concurred in the above opinion and order.

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<sup>8</sup> For the purpose of this order, respondent must physically surrender his certificate(s) to a representative of the Federal Aviation Administration pursuant to 14 C.F.R. 61.19(f).