

SERVED: March 31, 2004

NTSB Order No. EA-5086

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 26th day of March, 2004

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MARION C. BLAKEY,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-16563
v.)	
)	
CORBY SOMERVILLE,)	
)	
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 November 21, 2002, following an evidentiary hearing.¹ The law judge affirmed an order of the Administrator suspending respondent's private pilot certificate for 240 days, on finding that respondent had violated 14 C.F.R. 91.103, 91.137, and 91.139 of

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

the Federal Aviation Regulations ("FAR," 14 C.F.R. Part 91).² We deny the appeal.³

In the late morning on September 11, 2001, respondent flew his aircraft approximately 17 miles from his home near Blue Ribbon Farm airstrip, WA, to Port Townsend, WA airport, and back. Prior to the flight, the FAA had issued NOTAM FDC 1/9731, grounding all civilian aircraft across the United States in response to the hijackings and terrorist attacks. Respondent testified that the purpose of the flight was to obtain gas for a potential emergency flight to Seattle in which he would be transporting a heart transplant patient.⁴ Respondent saw no

² Section 91.103, Preflight action, begins "[e]ach pilot in command shall, before beginning a flight, become familiar with all available information concerning that flight." The rule goes on to require familiarity with particular information in certain circumstances. Section 91.137, Temporary flight restrictions, is quite extensive. Briefly, it directs issuance of notices to airmen (NOTAMs) designating an area within which temporary flight restrictions apply and specifying the hazard or condition requiring their imposition. The rule indicates when such NOTAMs will be issued and defines the conditions when aircraft may be operated in violation of a NOTAM and the permissions necessary to do so. Section 91.139, Emergency air traffic rules, describes the NOTAM process and prohibits operations inconsistent with a NOTAM.

³ We also grant the Administrator's motion to strike. The materials respondent offers are not new evidence; they could and should have been offered to the law judge (whether respondent believed it futile or not). That is what our rules require and that would have preserved the issues for appeal.

⁴ Respondent stated that he had to be ready to depart with the patient as soon as they were advised that a donor heart had been found. There was no testimony in the record as to how quickly that might have occurred, whether it actually did ever occur, and whether respondent would actually be needed or used for the transportation. We have only respondent's belief that he needed to have a full gas tank that day.

reason to call for NOTAMs. Although prior to the outbound flight he had learned of the attacks, respondent saw no difficulties for his flight. The weather was good. When he landed at Port Townsend, he talked with one person, Stephen Goodwin, a mechanic at the airport. Mr. Goodwin testified that he and respondent discussed the attacks, and that he told respondent that the FAA had grounded all aircraft. Transcript (Tr.) at 29. Respondent denied that he had been so advised.⁵ He believes that he acted reasonably and had no reason or obligation to obtain more information than he had.

Respondent's first argument on appeal relates to the behavior of the law judge: respondent believes that the law judge was biased, and consistently prevented respondent's counsel from pursuing reasonable lines of inquiry. We can find no impropriety warranting corrective action. Respondent's primary example demonstrates that the law judge sought information beyond the knowledge of a witness, but was doing so to try to develop an understanding of the conditions that day in the area. This is not an abuse of discretion, nor do respondent's other examples justify reversal on the grounds of bias. While perhaps the law judge might maintain a calmer aspect, his irritation in the face

⁵ On appeal, respondent suggests that Mr. Goodwin recanted his testimony on cross-examination. He did not. His later testimony involved airport closures, not aircraft grounding. In any case, whether respondent was told that all aircraft were grounded is not critical to this case, although it is certainly relevant to the issue of sanction. He is charged with failure to become familiar with all available information concerning the flight.

of what he saw as continued excursions into irrelevant details does not equate to reversible error.

Overall, respondent shows us no issue or law judge ruling that would cause us to reach a different result regarding respondent's violation of the cited regulations.

Respondent's second allegation of error - that Mr. Goodwin's testimony was inconsistent and prejudicial - warrants little discussion. Respondent attempts to create confusion where there is none. Mr. Goodwin's testimony is not inconsistent, but is the natural result of an honest person attempting to report what he remembers of a year-old conversation. The law judge had the opportunity to scrutinize him when he testified and judge his credibility; we have no grounds to reverse the law judge's determination that Mr. Goodwin, not respondent, should be believed.⁶

Next, respondent argues that § 91.103 is void for vagueness. Certainly in this case it is not. In this case, "all available information" means first and foremost the NOTAM prohibiting all flights. All respondent had to do to learn of this NOTAM was to call a flight service station. Respondent chose to assume that he knew everything he needed to know for a safe flight. He was wrong. It is no answer that other pilots might act similarly. They would do so at their own risk, as well. Indeed, given what

⁶ In any case, as we stated earlier, it is not critical to a finding of a violation that Mr. Goodwin told respondent that aircraft were grounded.

he knew about what had happened earlier that day in the East, respondent's lack of consultation with the FAA prior to his flight was highly irresponsible and personally dangerous.

Next, respondent argues that the NOTAM in this case was broader than the explicit scope of § 91.137. We find nothing arbitrary or capricious or otherwise unlawful in the Administrator's application of section 137 to the events of September 11. The September 11th NOTAM covering the United States was a reasonable response to a hazard of unknown scope and a reasonable interpretation of the rule.

Respondent also claims that he did not violate § 91.139 because he did not fly in the "air traffic control system" because air traffic control was not involved directly in the flight. This claim fares no better. In one sense or another, the air traffic control system blankets the entire United States. Indeed, respondent acknowledged that his aircraft was equipped with a transponder, which was on during the flight (thus allowing ATC to monitor his location). Tr. at 113. In any case, the rule as written does not require that the flight be in the ATC system, but that an emergency condition exists that compromises the FAA's ability to operate the ATC system. It was no error for the Administrator to conclude on the morning of September 11th that the terrorists' attacks and possible unknown attacks to come might pose such a condition.

While the Administrator's actions on September 11th may raise issues of first impression regarding the scope of various

rules, we have no difficulty with the NOTAM issued that day. The Administrator need not stop and issue emergency rules before using existing rules to protect American airspace and travelers flying America's skies.

Finally, respondent claims that the sanction imposed is excessive and violates the Administrative Procedure Act in that it was adopted after September 11. We find neither claim convincing. The case cited by respondent deals with sanction policy, not sanction amount. The regulation under which respondent was charged has been in effect for quite some time. The circumstances of the events typically affect the length of suspension sought. Respondent has not shown the Administrator's sanction choice to be arbitrary or capricious. See Reply at 30-33 (the two flights, the two regulatory violations, and the exceptional nature of events on that day). Respondent's continued arguments, especially those justifying his practice of not obtaining NOTAM or other available preflight information, show a lack of compliance disposition that warrants heightened sanction.⁷

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's motion to strike is granted;
2. Respondent's appeal is denied; and

⁷ The respondent's negative compliance disposition is also demonstrated by the persuasive evidence, fully discussed and credited by the law judge, that the second of respondent's two flights involved a deliberate disregard of the NOTAM's grounding of all flights.

3. The 240-day suspension of respondent's private pilot certificate shall begin 30 days after the service date indicated on this opinion and order.⁸

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

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