

SERVED: May 7, 2008

NTSB Order No. EA-5385

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 May, 2008

_____)	
ROBERT A. STURGELL,)	
Acting Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-18124
v.)	
)	
THOMAS P. MALLORY,)	
)	
Respondent.)	
)	
_____)	

ORDER DENYING RECONSIDERATION

Respondent seeks reconsideration of our decision in NTSB Order No. EA-5350, served January 7, 2008, in which we denied his appeal of the law judge's order granting the Administrator's motion for summary judgment and dismissing respondent's appeal.

The Administrator filed a motion for summary judgment after respondent failed to file an answer to the complaint. A failure to deny the truth of the allegations in the complaint, by filing an answer to the complaint, may be deemed an admission of the truth of the allegations not answered.¹ Because respondent failed to comply with the Board's Rules of Practice, the Administrator was entitled to, and moved for, summary judgment on that basis.

¹ See the Board's Rules of Practice, 49 C.F.R. § 821.55(b).

Although it is clear that respondent does not appreciate the procedural rules in this administrative proceeding,² precedent is equally clear—our procedural rules will be strictly enforced.³

Respondent again demands a hearing, and challenges the reference in our opinion and order to his responsibility for knowing our rules. The emergency suspension order directed him to our rules. Our Office of Administrative Law Judges (OALJ) included a copy of the rules in the docketing notice sent to him. The notice also directed him to call the OALJ upon receipt and to give the OALJ his telephone numbers; respondent failed to do either. The notice also advised that he must file an answer and that he could waive emergency procedures, thereby extending the time for filing an answer. Having ignored that guidance, respondent will not now be heard to complain that he did not understand our rules. By failing to satisfy the requirement to file a timely answer to the complaint, respondent, in effect, and by operation of law, admitted all allegations of the complaint, and eliminated the need for a hearing.⁴

² For example, he contends that he has a complaint against the FAA, and that, because his complaint followed the Administrator's complaint (the formal pleading), respondent has now become the complainant and the Administrator is now the respondent.

³ See Administrator v. Mallory, NTSB Order No. EA-5350 at 4-5 (2008).

⁴ We are not unmindful that it was respondent's noncompliant attitude that brought about the enforcement action. What he apparently does not seem to recognize is that his failure to follow the Administrator's multiple requests and direction to submit to a reexamination of his competence to hold a certificate is what led to the suspension, which was effective only until he submitted to reexamination. An inquiry into the reasonableness of a reexamination request is a narrow one, namely, that a "basis for questioning competence has been implicated, not that a lack of competence has been demonstrated." Administrator v. Santos and Rodriguez, NTSB Order No. EA-4266 (1994). Respondent's continued argument about the termination of the Designated Pilot Examiner status of his examiner is largely irrelevant, even in an examination on the merits, as opposed to the procedural stance upon which we denied his appeal. See Santos and Rodriguez, where the Board further stated:

[I]n the face of circumstances strongly suggesting that many individuals may have obtained certificates without demonstrating the knowledge and skill necessary either to obtain or hold them, [the Administrator] was fully justified in seeking, if not obligated in the public interest to seek, re-examination of any or all of the licensees he fairly suspected had not been required to

On consideration of the petition for reconsideration and the Administrator's response,⁵ we have concluded that the petition, which simply repeats arguments previously considered and rejected, neither establishes error in our original decision nor otherwise presents a valid basis for reconsidering it.⁶ Further, to the extent respondent may be considered to have presented new matter, he fails to explain why such new matter, if any, could not have been discovered in the exercise of due diligence prior to the closing of the evidentiary record.⁷

ACCORDINGLY, IT IS ORDERED THAT:

Respondent's petition for reconsideration is denied.⁸

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

(..continued)

establish their qualification. His suspicions ... were ... validated by the evidence of deficient testing the [] inspectors uncovered in their investigation of the examiner.

⁵ The Administrator replied to the petition for reconsideration in accordance with our Rules of Practice. Respondent submitted an "answer" to the reply, which is not consistent with our rules. Title 49 C.F.R. §§ 821.50 and 821.48(d). Therefore, we decline to consider respondent's additional pleading.

⁶ Repetitious petitions for reconsideration are not "entertained by the Board and will be summarily dismissed." See § 821.50(d).

⁷ The only petitions that the Board will entertain in emergency proceedings are those based on the ground that new matter has been discovered. § 821.57(d). Such petitions must set forth the new matter; contain affidavits of witnesses, authenticated documents, or or an explanation of why such substantiation is not available; and contain a statement explaining why such new matter could not have been discovered in the exercise of due diligence prior to the date on which the evidentiary record closed.

⁸ Respondent states that he has "taken the DC-3 type rating, single engine sea private, single engine sea commercial, and multi engine sea commercial," and "has requested, and may take the FAA-requested check ride in the near future." As the Board said in Administrator v. Casino Airlines, Inc., NTSB Order No. EA-5091 (2004), his "efforts should be directed to that purpose, not to an effort to re-open a case whose opportunity for hearing was forfeited through neglect."