

SERVED: January 27, 2009

NTSB Order No. EA-5429

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 January, 2009

LYNNE A. OSMUS,)
Acting Administrator,)
Federal Aviation Administration,)
Complainant,)
v.) Docket No. SE-17907
GREGORY S. WINTON,)
Respondent.)

ORDER DENYING RECONSIDERATION

Respondent seeks reconsideration of our decision in this proceeding, NTSB Order No. EA-5415, served October 31, 2008. In that decision, we affirmed the Administrator's order and the law judge's initial decision, finding that respondent violated 14 C.F.R. §§ 91.13(a), 91.139(c), and 99.7, by violating the requirements of a Notice to Airmen (NOTAM) when he took off and flew within the Washington, DC metropolitan area Air Defense Identification Zone (DC ADIZ) without squawking a discrete code. In Order No. EA-5415, we determined that respondent did not prove by a preponderance of the evidence that his failure to transmit the code was due to a transponder malfunction.

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In the decision below, the law judge denied respondent's appeal of the Administrator's order, and found that the Administrator proved that respondent had failed to comply with the requirements of NOTAM FDC 3/2126. In particular, the law judge stated that the possibility that a loss of the transponder's signal occurred because of a transponder malfunction is merely one of many possibilities, and that respondent did not assert that he had attempted to recycle the transponder or do anything to ensure that the transponder was functioning while in the air. The law judge also found respondent's witnesses less credible than the Administrator's witnesses. Respondent appealed the law judge's decision, and we denied the appeal, on the basis that respondent failed to prove that his transponder had indeed malfunctioned on the day in question, and that the law judge had properly evaluated the evidence. As such, we affirmed the law judge's initial decision and the Administrator's order of a 30-day suspension of respondent's commercial pilot certificate.

Respondent filed a "Petition for Rehearing, Reargument, Reconsideration or Modification of the Oral Initial Decision and Order of the Administrative Law Judge Based upon Newly Discovered Evidence," under 49 C.F.R. § 821.50.¹ Section 821.50(c) requires that such petitions "state briefly and specifically the matters of record alleged to have been erroneously decided, and the ground or grounds relied upon." Section 821.50 also provides for the submission of arguments based on new matter, when the petitioner sets forth the new matter in "affidavits of prospective witnesses, authenticated documents, or both, or an explanation of why such substantiation is unavailable," and directs petitioners to "explain why such

¹ Respondent also filed a request for leave to amend or supplement his petition, and subsequently submitted an amended petition. We note that respondent submitted his original petition 2 days before we issued Order No. EA-5415, and sought to supplement his petition once he received the order. Our Rules of Practice provide that such petitions, "must be filed with the Board, and simultaneously served on the other parties, within 30 days **after** the date of service of the Board's order on appeal." 49 C.F.R. § 821.50(b) (emphasis added). As such, respondent's October 29, 2008 petition for reconsideration was premature, and respondent created the exact scenario that our rules are intended to prevent; had respondent submitted his petition in accordance with § 821.50(b), respondent would not have needed to amend his petition.

new matter could not have been discovered in the exercise of due diligence prior to the date on which the evidentiary record closed." Id. § 821.50(c). Moreover, the new matter must be such that would materially affect the case; in Administrator v. Moore, 3 NTSB 55, 56 (1977), we stated that newly discovered evidence "must be more than impeaching in nature and must be such as would probably produce a different result." As such, new matter that a petitioner attempts to introduce in the context of § 821.50 must be matter that would likely affect the outcome of the case. Finally, § 821.50(d) provides that the Board will not consider, and will summarily dismiss, repetitious petitions for reconsideration.

Throughout much of his amended petition, respondent merely reargues the facts of this case, and discusses several areas in which he believes our decision was improper. Respondent implies that the weight of the evidence does not support our findings, and reiterates many details from evidence in the record of the underlying case. See Pet. at 5-7. In addition, respondent contends that our reliance on Administrator v. Zingali, NTSB Order No. EA-3597 (1992), which we cited in Order No. EA-5415 for this case, is misplaced. Pet. at 16-17. These assertions are duplicative and therefore inappropriate for review under our Rules of Practice. 49 C.F.R. § 821.50(d). We also note that, in portions of his petition, respondent impeaches his own evidence and undercuts his arguments in the underlying case that a transponder malfunction occurred; in his petition, respondent states that he could not have discovered evidence of a transponder malfunction before the date that the record closed, even though he based his appeal brief in the underlying case on an alleged transponder malfunction. Pet. at 16. Respondent asserts that he attempted to discover and introduce all available evidence that would support an affirmative defense of equipment malfunction, and relied to his detriment on a mechanic who has an airframe and powerplant certificate, with inspection authorization, that the transponder circuit breaker caused the problem. Pet. at 14.

To the extent that respondent attempts to introduce newly discovered evidence that indicates that his transponder failed on the day at issue, we find that respondent has not established that such evidence is material to the outcome of the case. Respondent alleges that an employee of the manufacturer of the transponder, Honeywell, stated that the "F05" code on respondent's transponder unit indicated that the unit was not functioning, and that the unit was not authorized for use in respondent's aircraft on the day at issue. Respondent asserts

that the radar could not detect his discrete transponder code because an intermittent transponder failure had occurred, "and/or" the transponder antenna was "in a known bad location[,] and/or due to a faulty transponder antenna cable." Pet. at 8. First, respondent's reliance on a mechanic who did not recognize or research the F05 code or its cause does not constitute a reason for reversing Order No. EA-5415 in the underlying case under our Rules of Practice. Second, respondent's various theories concerning what may have allegedly caused his transponder to malfunction are not material to the outcome of the case because they do not fulfill respondent's burden of proof. As we stated in our opinion in the underlying case, when a respondent asserts an affirmative defense, the respondent "must fulfill his or her burden of proving the factual basis for the affirmative defense, as well as the legal justification." Administrator v. Winton, NTSB Order No. EA-5415 at 19 (2008) (quoting Administrator v. Nadal, NTSB Order No. EA-5308 at 10 (2007)). Proffering speculative theories concerning what may have occurred does not suffice to fulfill this burden. Therefore, respondent has not provided newly discovered evidence that is material to the outcome of the case.

In addition, respondent's petition states that he could not have previously discovered: (1) the fact that the transponder did not contain the required Technical Standard Order authorization from the FAA after 2001; (2) that the transponder was "painted and in a known bad location" on the day at issue; and (3) that the transponder displayed an F05 code, which indicates a failure of the transponder processor. Pet. at 13. Respondent, however, does not explain why it was impossible for him to have discovered these circumstances prior to the conclusion of this case, but instead categorically states that he simply could not have discovered any of these alleged facts until a different mechanic tested and examined the transponder. Respondent acknowledges that he had seen the F05 code previously, as a photograph of the transponder in the record of the underlying case depicts the code. Pet. at 14-15. Respondent, however, does not explain why he was unable to research the meaning or significance of the code until after the conclusion of this case. Overall, respondent has not met the requirements concerning petitions for reconsideration in our Rules of Practice.

ACCORDINGLY, IT IS ORDERED THAT:

Respondent's petition for reconsideration is denied.

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