

SERVED: August 5, 2009

NTSB Order No. EA-5468

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 4th day of August, 2009

_____)	
J. RANDOLPH BABBITT,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-18247
v.)	
)	
HOWARD SCHWARZMAN,)	
)	
Respondent.)	
)	
_____)	

OPINION AND ORDER

Respondent has appealed from the oral initial decision of Chief Administrative Law Judge William E. Fowler, Jr., in this matter,¹ issued on January 27, 2009, following evidentiary hearings held on September 23, 2008, and January 27, 2009.² The

¹ A copy of the initial decision, an excerpt from the hearing transcript, is attached.

² Respondent was unable to attend the September 23, 2008 hearing, due to illness. The Administrator presented evidence at the

Administrator's order suspended respondent's commercial pilot certificate for 30 days, based on alleged violations of 14 C.F.R. §§ 91.13(a),³ 91.139(c),⁴ and 99.7.⁵ The law judge rejected respondent's affirmative defense, in which respondent contended that he was unable to transmit the appropriate beacon code while in the ADIZ because his transponder malfunctioned. The law judge found that the Administrator fulfilled his burden of proving that respondent violated the regulations, as charged, and affirmed the suspension of respondent's commercial pilot certificate for a period of 30 days. We deny respondent's appeal.

On April 3, 2008, the Administrator issued an order suspending respondent's commercial pilot certificate for

(..continued)

hearing, however, and counsel represented respondent. The law judge issued a decision at the conclusion of that hearing, after which respondent filed a petition for reconsideration. The law judge granted the petition and accepted additional evidence at a hearing on January 27, 2009, after which the law judge issued the initial decision at issue here.

³ Section 91.13(a) prohibits careless or reckless operation so as to endanger the life or property of another.

⁴ Section 91.139(c) states that when a Notice to Airmen (NOTAM) has been issued under this section, no person may operate an aircraft within the designated airspace "except in accordance with the authorizations, terms, and conditions prescribed in the regulation covered by the NOTAM."

⁵ Section 99.7 requires each person operating an aircraft in the Air Defense Identification Zone (ADIZ) to comply with special security instructions in the interest of national security.

30 days, alleging that on June 9, 2004, respondent violated §§ 91.13(a), 91.139(c), and 99.7 when he acted as pilot-in-command of a Conaer C-1 at Martin State Airport in Maryland, and failed to become familiar with all available information concerning the flight, including a NOTAM concerning flight restrictions. The order also stated that respondent did not comply with the operating requirements and procedures specified in the NOTAM. The order alleged that respondent's entrance into the affected airspace in violation of the NOTAM placed respondent at risk of interception by military aircraft and possible use of deadly force, and that respondent's actions were careless or reckless.

The case proceeded to a hearing before the law judge, at which the Administrator initially presented the testimony of four witnesses and provided several exhibits. The Administrator first called Talwyn Haley, an air traffic control (ATC) specialist for systems operations security at FAA headquarters, who was instrumental in the development of NOTAMs concerning the ADIZ. Mr. Haley testified that NOTAM 3/2126 applies to airspace, which means that it applies once an airman leaves the ground, and remains effective through flight level 180. Mr. Haley also testified that NOTAM 4/0540 provides for special egress operations for "fringe airports" within the ADIZ. Tr. at

21. He stated that respondent did not follow the procedures outlined in the NOTAMs.⁶

David Gustavel, who is a detection enforcement officer at air and marine operations for Customs and Border Patrol (CBP), also testified on behalf of the Administrator. Mr. Gustavel described the procedures that CBP and other agencies take in response to an unauthorized incursion into the ADIZ, and opined that such incursions are hazardous because they cause disruption among the three major airports in the area, and because they can distract detection officers. Mr. Gustavel testified that when respondent took off from Martin State Airport, he was squawking 1200, which was not an appropriate code. Mr. Gustavel was on duty at the time of respondent's incursion, and stated that he contacted the ATC tower at Martin State to advise them of the incursion. On cross-examination, Mr. Gustavel stated that the ATC tower at Martin State had no way to determine whether respondent was squawking the permissible code while respondent was on the ground.

⁶ NOTAM 3/2126, which became effective on March 18, 2003, prohibits entry into the "Washington DC metropolitan area Air Defense Identification Zone (DC ADIZ)," unless fulfilling certain requirements, including obtaining and squawking a discrete transponder code. Exh. A-1. NOTAM 4/0540, effective from January 23, 2004, until January 27, 2005, provided special "egress procedures" for certain airports within the ADIZ, in which a pilot may squawk 1205 to indicate his or her intent to depart "via the fringe airport procedures." Exh. A-2 at 2.

Randolph Horner, a quality assurance ATC support specialist at Potomac Consolidated Terminal Radar Approach Control (Potomac TRACON) for the Washington, D.C. area, also testified. He stated that he reviewed the evidence for this case, including the voice communications between Potomac TRACON and the ATC tower at Martin State. Mr. Horner testified that respondent contacted Williamsport Flight Service Station prior to his flight, and therefore knew he was entering the ADIZ and that he must comply with special instructions. Mr. Horner stated that respondent was squawking 1200, followed by 1205, while in the ADIZ, and that 1200 is a common code that pilots squawk to indicate they are conducting a flight under visual flight rules.

Finally, at the initial hearing, the Administrator concluded by calling Mark Valette, an aviation safety inspector at the Albany, New York Flight Standards District Office (FSDO), who testified that he investigated respondent's ADIZ incursion and determined that respondent did not squawk the appropriate code while in the ADIZ. Inspector Valette stated that, if he were conducting such a flight and was unsure of whether he was squawking the appropriate code, he would recycle the transponder. He also stated that respondent complied with all other requirements of the NOTAMs.

At the conclusion of the Administrator's case at the September 23, 2008 hearing, respondent's counsel stated that

respondent recycled his transponder after learning that his transponder was not squawking the appropriate code, and asserted that the transponder had a mechanical problem that caused it to squawk 1200. In response, the Administrator's counsel argued that respondent did not provide evidence, and that no maintenance records existed, to indicate that the transponder was faulty. The law judge concluded that, based on the evidence offered at the September 23, 2008 hearing, the Administrator proved that respondent violated the regulations, as charged.

After granting respondent's motion for reconsideration and continuation of the hearing, the law judge ordered an additional hearing, at which respondent testified on his own behalf. Respondent described the flight and stated that, when he taxied, he asked the ATC tower at Martin State to verify that he was squawking the appropriate code. Respondent testified that an air traffic controller told him they were unable to determine what code his transponder was transmitting until he was airborne. Respondent also stated that he had just had his transponder repaired and reinstalled, and that the numbers on his transponder showed he was squawking 1205. Tr. at 213; see also Exh. R-2 (Work Order Form dated May 12, 2004) and Exh. R-3 (Authorized Release Certificate returning aircraft to service and indicating unit was tested). Respondent described how he recycled the numbers on the transponder after he was advised

that he was squawking 1200 by ATC, but that recycling the transponder did not rectify the problem. Respondent testified that he turned off the transponder, and turned it back on, but that this also did not resolve the issue. Finally, he testified that he shut down the electric power to the aircraft to reboot the transponder, after which the transponder finally began to squawk 1205. He stated that he immediately flew to Hartford County Airport, where his mechanic had recently conducted an annual inspection for the aircraft. Respondent also stated that he filed a report under the Aviation Safety Reporting Program (ASRP) following the incident. Exh. R-1 (ASRP submission received June 15, 2004).⁷

On cross-examination, respondent acknowledged that, when he flew the aircraft from Hartford County Airport to Martin State 2 weeks prior to the incident flight, he did not have any problems with his transponder. He also acknowledged that he did

⁷ Under the ASRP, the Administrator may waive the imposition of a sanction, despite the finding of a regulatory violation, as long as certain other requirements are satisfied. Aviation Safety Reporting Program, Advisory Circular 00-46D at ¶ 9c (Feb. 26, 1997). The Program involves filing a report with the National Aeronautics and Space Administration (NASA), which may obviate the imposition of a sanction where (1) the violation was inadvertent and not deliberate; (2) the violation did not involve a criminal offense, accident, or action found at 49 U.S.C. § 44709; (3) the person has not been found in any prior FAA enforcement action to have committed a regulatory violation for the past 5 years; and (4) the person completes and mails a written report of the incident to NASA within 10 days of the violation.

not apply for a ferry permit to depart from the ADIZ, nor did he consider contacting the local FSDO, because he did not expect the transponder to fail. However, respondent stated that he did ask ATC to verify the code, simply because he is meticulous. Tr. at 246. Respondent testified that, had he known while on the ground that his transponder was not squawking the appropriate code, he would not have taken off.

In rebuttal, the Administrator called Kim Barnette, the Acting Manager of the General Aviation and Avionics Branch at the FAA, who oversees the rules and policies concerning transponders, to testify. He provided expert testimony indicating that no radar evidence showed that respondent had recycled the digits on his transponder, and that such recycling would typically show on the radar tracks. Tr. at 272-73. Mr. Barnette opined that respondent did not reboot his transponder because rebooting would take approximately 30 seconds, but that there is no 30-second gap on the radar tracks; Mr. Barnette also stated that the only gaps on the radar tracks are "post-mode" losses, which occur when radar hits are unavailable due to the presence of buildings, hills, or other obstructions. Tr. at 277. Furthermore, he stated that, when a transponder returns to power, it automatically resets to 1200, rather than a specific code like 1205, and that the radar evidence did not indicate any such return to 1200. Mr. Barnette

testified that, if a transponder is transmitting a code other than that which the pilot has entered, there is no way to correct the problem in flight, because a qualified repair station or avionics specialist would need to disassemble the transponder and examine the clastron tube within the transponder. Tr. at 278, 280, 282. Mr. Barnette stated that rebooting the transponder would actually compound the problem, and that an airframe and powerplant mechanic with an inspection authorization likely would not be able to change the internal settings to correct the problem. Regarding respondent's transponder, Mr. Barnette stated that no maintenance records existed to indicate that respondent's mechanic repaired the transponder following the incident. Mr. Barnette testified that he did not identify any evidence indicating that the transponder failed on June 9, 2004.

At the conclusion of the final evidentiary hearing, the law judge issued a decision in which he again determined that the Administrator proved that respondent had violated §§ 91.13(a), 91.139(c), and 99.7 by entering the ADIZ while not complying with the provisions of the relevant NOTAMs. The law judge acknowledged that respondent asserted the affirmative defense that his transponder malfunctioned and transmitted the wrong code, but determined that the Administrator's evidence—particularly the testimony of Mr. Barnette—rebutted this

affirmative defense. The law judge affirmed the 30-day suspension of respondent's commercial pilot certificate, based on the fact that the Administrator proved that respondent violated the regulations and successfully rebutted respondent's affirmative defense, and based on the deference that the Board must show toward the Administrator's choice of sanction.

On appeal, respondent argues that the Administrator is at fault for his incursion into the ADIZ because the Administrator failed to provide a means at Martin State by which respondent could verify that his transponder was transmitting the correct code before taking off. Respondent also asserts that the ADIZ is a restricted area that includes aircraft sitting on the ground at Martin State, and that such an inclusive definition amounts to entrapment. Regarding the Administrator's allegation that respondent's conduct was careless or reckless, respondent asserts that ATC cleared him for takeoff, and that he believed his transponder was transmitting the correct code; as such, he argues that his conduct was neither careless nor reckless. Respondent also contends that he is eligible for a waiver of sanction under the ASRP, and that the Administrator's actions violated his rights under the equal protection⁸ and due process⁹

⁸ The equal protection clause provides, "[n]o [s]tate shall ... deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

clauses, as well as the Ninth Amendment,¹⁰ of the Constitution. The Administrator contests each of respondent's arguments, and urges us to affirm the law judge's decision.

We note that, under §§ 91.139(c) and 99.7, pilots are required to ensure that they comply with applicable NOTAMs and with special security procedures while in the ADIZ. Respondent does not cite any regulations or authority indicating that the Administrator is responsible for verifying a code that a pilot is transmitting before a pilot takes off. We have previously held, and the regulations provide,¹¹ that pilots are the responsible parties for ensuring that their aircraft contain equipment that functions appropriately, so as to comply with all regulatory requirements. See, e.g., Administrator v. Fincher, 4 NTSB 1003, 1005 (1983) (rejecting reliance defense and citing § 91.3(a)); see generally Administrator v. Easton, NTSB Order No. EA-4732 at 2 (1998) (acknowledging that significant risks exist when a pilot fails to confirm that an aircraft is

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⁹ The due process clause provides that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

¹⁰ The Ninth Amendment provides as follows: "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. Const. amend. IX.

¹¹ Title 14 C.F.R. § 91.3(a) provides that, "[t]he pilot in command of an aircraft is directly responsible for, and is the final authority as to, the operation of that aircraft."

airworthy following maintenance). Respondent's contention that the Administrator should be required to verify the code that a pilot's transponder is squawking before the pilot takes off is not persuasive, as it would shift the burden of ensuring that an aircraft's equipment is functioning from pilots to the Administrator, and no statute or regulation provides for such a shifting of responsibility.

Respondent's contention that the special requirements in the NOTAMs at issue apply to aircraft sitting on the ground is equally meritless. He provided no evidence of such an interpretation of the NOTAMs, while § 91.139 provides that the special requirements apply to pilots in "airspace." See supra note 4.

Respondent's argument that he did not conduct the flight in a careless or reckless manner is contrary to our longstanding precedent that an airman's violation of an operational regulation is per se evidence that the airman violated § 91.13(a). In Administrator v. Corrao, NTSB Order No. EA-5448 at 7-8 (2009), we held that the Administrator had proven that the respondent violated §§ 91.139(c) and 99.7, and that, based on those violations, respondent had operated the aircraft in a careless or reckless manner. Our holding in Corrao was largely based upon Administrator v. Seyb, NTSB Order No. EA-5024 at 4 (2003), in which we stated that, when the Administrator charges

a violation of § 91.13(a) that is residual, or based on the occurrence of an operational violation, then the Administrator need not show actual or potential endangerment, but can rely on the establishment of the operational violation(s) to prove the violation of § 91.13(a). In the case at hand, respondent acknowledges that he entered the ADIZ while not squawking the appropriate code, in violation of §§ 91.139(c) and 99.7, and cites no legitimate reason why our precedent concerning § 91.13(a) should not apply.

Regarding respondent's assertions that the Administrator violated his rights under the equal protection and due process clauses, as well as the Ninth Amendment, of the Constitution, respondent does not explain how the Administrator violated these provisions. Moreover, we have previously rejected such arguments.¹² We find them equally meritless here.

Finally, we have carefully considered respondent's argument regarding whether he is eligible for a sanction waiver under the

¹² In Administrator v. Riggs, we stated that, "[w]here the law judge has allowed the respondent the opportunity to present and cross-examine witnesses, we generally will not find a due process violation." NTSB Order No. EA-5436 at 15 (2009) (citing Administrator v. Corredor, NTSB Order No. EA-5322 at 9 (2007), and Administrator v. Nowak, 4 NTSB 1716 (1984)). Similarly, concerning the equal protection clause, we stated in Administrator v. McCullough that, "we have no authority to consider issues of selective prosecution by the Administrator." NTSB Order No. EA-4592 at 2 (1997) (citing Administrator v. Kaolian, 5 NTSB 2193, 2194 (1987)).

ASRP. We have previously imposed a strict standard with regard to the four requirements of the ASRP: in order to be eligible for a waiver of sanction, a respondent must show that he or she mailed a report of the incident to NASA in a timely manner and did not have a history of any regulatory violation within the preceding 5 years, nor a history of any criminal offense, accident, or action listed at 49 U.S.C. § 44709. Finally, and most importantly for this case, the violation at issue must be inadvertent and not deliberate. With regard to this requirement, we have previously held that a respondent's exercise of poor judgment, even when the respondent alleges that he or she believed that they chose the safest action, may amount to a deliberate action under the ASRP. Specifically, in Administrator v. Giffin, NTSB Order No. EA-5390 at 11-12 (2008), we held that a respondent's deviation from an ATC clearance, although allegedly in an attempt to dodge a thunderstorm, was not inadvertent and therefore not eligible for a waiver of sanction under the ASRP. Similarly, in Administrator v. Blum, NTSB Order No. EA-5371 at 9-10 (2008), we stated that a respondent must establish that his conduct was both inadvertent and not deliberate; in this regard, we quoted the following text from Ferguson v. NTSB and FAA, 678 F.2d 821, 828 (9th Cir. 1982):

A person who turns suddenly and spills a cup of coffee has acted inadvertently. On the other hand, a person who places a coffee cup precariously on the edge of a

table has engaged in purposeful behavior. Even though the person may not deliberately intend the coffee to spill, the conduct is not inadvertent because it involves a purposeful choice between two acts—placing the cup on the edge of the table or balancing it so that it will not spill. Likewise, a pilot acts inadvertently when he flies at an incorrect altitude because he misreads his instruments. But his actions are not inadvertent if he engages in the same conduct because he chooses not to consult his instruments to verify his altitude.

In applying this rationale to the instant case, we find that, while respondent's actions do not appear to have been deliberate, we cannot find that his conduct was inadvertent. He alleged that he sought verification from the ATC tower at Martin State that his transponder was operating properly and squawking the appropriate code, which suggests that he suspected his transponder would be faulty; however, respondent did not consider obtaining a ferry permit, contacting the local FSDO, or cancelling his flight in order to ensure that his transponder was functioning. To the extent that respondent believed that his transponder may have mechanical problems, he should not have operated the aircraft with the transponder in the ADIZ until he was certain that his transponder was operating properly. Moreover, we note that the evidence supports the law judge's determination that respondent did not prove his affirmative defense that his transponder had malfunctioned; specifically, the testimony of Mr. Barnette was particularly probative, in that Mr. Barnette testified that the radar evidence did not

support respondent's recollection of the events. In addition, respondent produced no maintenance records to support his assertion that his transponder was faulty. Overall, the evidence does not indicate that respondent's violation was inadvertent. As such, we do not find that respondent meets the criteria for a waiver of sanction under the ASRP.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;
2. The law judge's decision is affirmed; and
3. The 30-day suspension of respondent's commercial pilot certificate shall begin 30 days after the service date indicated on this opinion and order.¹³

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

¹³ 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).

APPEARANCES:

On behalf of the Administrator:

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ORAL INITIAL DECISION AND ORDER

ADMINISTRATIVE LAW JUDGE FOWLER: This has been a proceeding before the National Transportation Safety Board, held pursuant to the provisions of the Federal Aviation Act of 1958, as that Act was subsequently amended, on the appeal of Howard Schwarzman, from an Administrator's Order of Suspension, dated April 3, 2008, which seeks to suspend Respondent Schwarzman's Commercial Pilot Certificate [Number omitted], for a period of 30 days.

1 The Administrator's Order of Suspension, as duly
2 promulgated pursuant to the National Transportation Safety Board's
3 Rules of Practice in Air Safety Proceedings, was issued by the
4 Office of the Chief Counsel, Enforcement Division of the Federal
5 Aviation Administration.

6 This matter has been heard before this United States
7 Administrative Law Judge and, as provided by the Board's *Rules of*
8 *Practice*, specifically Section 821.42 of those Rules, as the Judge
9 in this proceeding, I have the option either to, which for me is
10 always a luxury, subsequently issue a written decision or do what
11 I'm about to do at this time, to issue an oral initial decision on
12 the record.

13 Following notice to the parties, this matter came on for
14 trial, the second session, on January 27, 2009. You may recall,
15 we had the original, the first session, on September 23, 2008,
16 here in Baltimore, Maryland, as we are here today in Baltimore.
17 Both parties have been afforded the opportunity to call, to
18 examine, and cross-examine witnesses, on behalf of their
19 respective cases.

20 In addition, both parties have been afforded the
21 opportunity, through counsel, to make final argument in support of
22 their respective positions.

23 I have reviewed the testimony and evidence in this
24 proceeding, which consists of five witnesses on behalf of the
25 Administrator, and 15 exhibits; and 5 exhibits on behalf of the

1 Respondent and 1 witness, the Respondent himself, on behalf of the
2 Respondent.

3 It is my determination and conclusion that the
4 Administrator's five witnesses, both on direct and cross-
5 examination, as well as the rebuttal testimony on behalf of the
6 Administrator, as established by the material, relevant, reliable
7 and probative evidence, all of the allegations, or you might deem
8 them charges, as set forth in the numbered paragraphs in the
9 Administrator's Order of Suspension of April 3, 2008, it is my
10 determination and conclusion that the Administrator was validly
11 premised, that there was a violation of the Sections here set
12 forth in the Administrator's Order of Suspension. Violation of the
13 Sections 91.13(a), 91.139(c) and 99.7 of the Federal Aviation
14 Regulations.

15 I'm not going to duly belabor the facts in this
16 proceeding, this the second and final session. We reconvened
17 today to have the testimony of the Respondent himself, who was not
18 available for the first session of September 23, 2008, being ill
19 at that time.

20 Respondent has testified voluminously and copiously as
21 to what he deemed happened on June 9, 2004, in the vicinity of the
22 Martin State Airport, in Maryland. Respondent has raised, which
23 could be deemed, a number of affirmative defenses.

24 After careful analysis, I feel that the Administrator
25 has successfully rebutted those affirmative defenses adduced by

1 the Respondent in his testimony and in the Respondent's exhibits.

2 The Respondent did not meet the burden of proof in
3 sustaining those affirmative defenses on his own behalf, but in
4 addition to that, as I mentioned a moment ago, the testimony
5 adduced by the witnesses of the Administrator, was very
6 persuasive, cogent and compelling. Not only in setting forth the
7 Administrator's case as the Administrator has alleged in the
8 Administrator's Order of Suspension of April 3, 2008, but has
9 successfully rebutted the Respondent's affirmative defenses.

10 It's true that the NASA Report was adduced by the
11 Respondent and was admitted into evidence. However, we have a
12 very seasoned pilot here, Respondent Schwarzman. His testimony
13 brought out the fact that he has been flying since 1952, which is
14 a considerable period of time, in addition to that, he is very
15 familiar with Martin State Airport. He has taken off and flown
16 from there many times.

17 Respondent's testimony was that he knew code 1205 was
18 the proper code to be on his transponder prior to takeoff. He
19 said he wasn't able to verify that. Martin State Airport did not
20 have the facilities, while he was on the ground, to verify that
21 his transponder was on 1205. So he took off, only to be told
22 after he was in the air for a few minutes, that he was squawking a
23 1200 code which was not the proper, relevant, or cogent code to be
24 in the ADIZ which is what he was in because the whole Martin State
25 Airport area and vicinity is in the ADIZ.

1 He violated two NOTAMs. He was in those NOTAMs in
2 excess of two minutes, whereupon Respondent, in his affirmative
3 defense, said he was manipulating or struggling to get the
4 transponder to operate properly. He said he did eventually get it
5 on the correct 1205 transponder code, which was a part of his
6 affirmative defense.

7 However, the Administrator's case and particularly the
8 testimony of Mr. Kim Barnette, who is the general manager of the
9 Aviation Branch and has 32 years of experience in this regard, in
10 total aviation maintenance, who was identified as an expert in
11 total aviation maintenance. Witness Barnette was very
12 instrumental in his testimony in successfully rebutting much of
13 the affirmative defenses of Respondent Schwarzman.

14 Respondent's testimony, you may remember, was he took
15 three separate actions to finally get to the correct code of 1205
16 while he was in flight, that he turned on and off the transponder
17 switch in attempting to get the transponder to work. However, the
18 evidence, both through the testimony and by the evidence, both by
19 the Administrator's witnesses, particularly Witness Barnette, and
20 Administrator's Exhibit A-9, shows that the transponder was not
21 turned off. The Administrator's radar tracking evidence shows
22 that. There's no record of a repair being made on the transponder
23 in question.

24 Respondent's testimony is that he corrected or overrode
25 the internal malfunction of the transponder. The Administrator's

1 expert testimony alleged that this could not be self-corrected,
2 that it was an internal problem, if there was a malfunction by the
3 transponder.

4 Then, gentlemen, if you remember, the radar track data
5 by the Administrator negates directly, and completely, the actions
6 that Respondent said he took in trying to get the transponder to
7 function properly while he was in flight.

8 As I mentioned, there's no maintenance records filed by
9 the Respondent following this flight of June 9, 2004, and even
10 though the NASA Report has been admitted in evidence on behalf of
11 the Respondent, Respondent did what he shouldn't have done, when
12 he took off from Martin State Airport without knowing or having it
13 verified that he was on the proper code 1205. The Administrator
14 has alleged that this constitutes a careless or reckless
15 operation. I don't agree with that.

16 I think it's close to being deemed a deliberate action,
17 that the Respondent did not exercise the requisite due care that a
18 commercially certificated pilot must exercise at all times. He
19 waited until he got airborne above Martin State Airport to verify
20 that he was on the proper transponder code. He was then informed
21 by the air traffic controller that he was not, whereupon he went
22 through a series of motions according to Respondent's testimony,
23 which is not borne out, as I also mentioned earlier, by the
24 Administrator's radar track which was quite extensive and in depth
25 as set forth in Administrator's Exhibit A-9.

1 There was no repair work done on the transponder by an
2 avionics specialist, which is a necessary type of skilled
3 individual to repair a malfunctioning transponder, which was set
4 forth in Witness Barnette's testimony.

5 So, ladies and gentlemen, as you, may get the drift of
6 my discussion here in issuing this decision. The five witnesses
7 presented by the Administrator, it is my determination and
8 conclusion, successfully showed by the reliable, probative,
9 material and relevant evidence, that Respondent operated within
10 the aforementioned NOTAMs without complying with the rules and
11 regulations pertaining to flights which are in or about to enter
12 the Aviation Defense Identification Zone, known as a NOTAM.

13 If I might mention once again, in passing, the several
14 actions Respondent said that he took to try and rectify and make
15 the transponder correct itself, these should have been indicated
16 on Administrator's radar tracks, but they were not. At no time
17 was the transponder turned off, according to the radar track, and
18 for 2 minutes and 11 seconds approximately, it's the
19 Administrator's testimony, Respondent was in both NOTAMs squawking
20 a wrong code, 1200 as opposed to the correct code which should
21 have been 1205. The Respondent subsequently did get his
22 transponder to indicate while he was airborne and enroute.

23 So ladies and gentlemen, based on the allegations set
24 forth in the Administrator's Order of Suspension of April 3, 2008,
25 I will now proceed to make the following specific findings of fact

1 and conclusions of law:

2 (1) It is found that the Respondent, Howard Schwarzman,
3 was, and is, the holder of Commercial Pilot's Certificate [Number
4 omitted].

5 (2) It is found that on, or about, June 9, 2004,
6 Respondent Schwarzman acted as the pilot-in-command of a CONAR C-1
7 aircraft, identification number N24HA, operating on a flight in
8 the vicinity of the Martin State Airport, Maryland.

9 (3) It is found that, at the time of the aforesaid
10 flight, a Notice to Airman (hereinafter referred to as a NOTAM)
11 was in effect, affecting the airspace in which Respondent
12 operated.

13 (4) It is found that the NOTAM prohibited operation of
14 aircraft within the Washington, D.C. area described in the NOTAM,
15 except in accordance with the operating requirements and
16 procedures specified, as set forth in the NOTAM.

17 (5) It is found the NOTAM was issued pursuant to 14
18 C.F.R. 99.7 and 91.139 of the Federal Aviation Regulations.

19 (6) During the aforesaid flight, Respondent operated
20 the aircraft within the area described in the NOTAM.

21 (7) It is found that for the flight, the Respondent did
22 not comply with the operating requirements and procedures as
23 specified in the NOTAM.

24 (8) It is found that by entering the affected airspace
25 without complying with the operating requirements and procedures

1 specified in the NOTAM, Respondent in actuality risked
2 interception by military aircraft with the intentional possible
3 use of deadly force.

4 (9) It is found that it would appear that the
5 Respondent therefore and thereby operated an aircraft in a
6 possibly careless manner so as to potentially endanger the life or
7 property of another.

8 (11) It is found by reason of the following violations
9 of the following sections of the Federal Aviation Regulations, it
10 is found that the Respondent violated (1) Section 91.13(a), and
11 I'm incorporating what that section says by reference as it's
12 spelled out in the Administrator's Order of Suspension, (2)
13 Section 91.139(c), which I'm also incorporating by reference as
14 that section is spelled out in the Administrator's Order of
15 Suspension, and (3) Section 99.7, incorporating that section by
16 reference as it's set out in paragraph 3 of the Administrator's
17 Order of Suspension.

18 (12) This Judge finds that safety in air commerce or
19 air transportation and the public interest does require the
20 affirmation of the Administrator's Order of Suspension, dated
21 April 3, 2008, in view of the Respondent's violation of Section
22 91.13(a), Section 91.139(c) and Section 99.7 of the Federal
23 Aviation Regulations.

24 ORDER

25 IT IS ORDERED AND ADJUDGED that the Administrator's

1 Order of Suspension, dated April 3, 2008, be and the same hereby
2 is affirmed.

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7 EDITED ON

William E. Fowler, Jr.

8 FEBRUARY 17, 2009

Administrative Law Judge

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APPEAL

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JUDGE FOWLER: Either party may appeal the Judge's Oral Initial Decision just issued within the time allowed. The Appellant shall file his Notice of Appeal within 10 days following the Judge's Oral Initial Decision issued on this date of January 27, 2009. In order to perfect his appeal, the Appellant must file a brief within 50 days following the Judge's Oral Initial Decision, setting forth his objections to the Judge's Decision. The Notice of Appeal and the brief shall be filed with the Office of Judges, National Transportation Safety Board, 490 L'Enfant Plaza East, Southwest, Washington, D.C. 20594.

If no appeal to the Board from either party is received, or if the Board of its own volition does not choose to review the Judge's Decision within the time allowed, then the Judge's

1 Decision shall become final. Timely filing of such an appeal,
2 however, shall stay the order as set forth in the Judge's
3 Decision.

4 Off the record.

5 (Off the record.)

6 JUDGE FOWLER: On the record.

7 Let the record indicate that, as counsel for the
8 Administrator has pointed out, even though the NASA Report on
9 behalf of the Respondent had been received in evidence, my
10 determination on not giving full credence to the NASA Report is
11 based on the fact that this was not an inadvertent action by the
12 Respondent when he took off. He took off, it could be said,
13 deliberately. Certainly it wasn't inadvertently, and he had not
14 verified as a careful, prudent, qualified commercially
15 certificated pilot should do at all times, use the highest degree
16 of care.

17 In addition, the Board has stated repeatedly, where the
18 Administrator has proven his case which is the situation here, by
19 a preponderance of the reliable, probative material and relevant
20 evidence, that the Judge has to defer to the sanction sought by
21 the Administrator. While I can feel some empathy for Respondent
22 Schwarzman, I am bound by rules and regulations of the Board to
23 defer to the sanction sought by the Administrator of a 30-day
24 period of suspension of the Respondent's commercial certification.

25 Let the record further indicate that the Respondent has

1 indicated, as well as counsel for the Respondent, they will be
2 filing a Notice of Appeal to the Judge's Decision just issued in
3 this proceeding.

4 If there's nothing further at this time, I will declare
5 the hearing closed, but before we go off the record, I would like
6 to thank both Mr. Collaku and Mr. Cohen, counsel in this
7 proceeding, for their extremely industrious and able -- as well as
8 diligent efforts on behalf of their respective clients. I would
9 also like to thank all of the witnesses for their help, assistance
10 and cooperation during the course of this proceeding. Thank you
11 all.

12 We stand adjourned.

13 (Whereupon, the hearing in the above-entitled matter was
14 adjourned.)