

SERVED: January 19, 2010

NTSB Order No. EA-5501

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 14th day of January, 2010

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J. RANDOLPH BABBITT,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-18366
v.)	
)	
TIMOTHY M. HACKSHAW,)	
)	
Respondent.)	
)	
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OPINION AND ORDER

Both the Administrator and respondent appeal the oral initial decision of Administrative Law Judge William A. Pope, II, issued April 22, 2009, in this matter.¹ By that decision,

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

the law judge affirmed, in part, the Administrator's complaint, which ordered a suspension of respondent's airline transport pilot (ATP) certificate, based on alleged violations of 14 C.F.R. §§ 91.7(a) and (b),² 91.13(a),³ and 91.703(a)(2) and (3).⁴ The law judge reduced the suspension period from 180 days to 100 days, based on respondent's reliance on the owner of the Cessna 402B at issue, who, as a mechanic who holds an airframe and

² Section 91.7 provides as follows:

- (a) No person may operate a civil aircraft unless it is in an airworthy condition.
- (b) The pilot in command of a civil aircraft is responsible for determining whether that aircraft is in condition for safe flight. The pilot in command shall discontinue the flight when unairworthy mechanical, electrical, or structural conditions occur.

³ Section 91.13(a) provides that, "[n]o person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another."

⁴ Section 91.703(a)(2) and (3) provide as follows:

§ 91.703 Operations of civil aircraft of U.S. registry outside of the United States.

- (a) Each person operating a civil aircraft of U.S. registry outside of the United States shall—

* * * * *

- (2) When within a foreign country, comply with the regulations relating to the flight and maneuver of aircraft there in force;

- (3) Except for §§ 91.117(a), 91.307(b), 91.309, 91.323, and 91.711, comply with this part so far as it is not inconsistent with applicable regulations of the foreign country where the aircraft is operated or annex 2 of the Convention on International Civil Aviation[.]

powerplant rating, told respondent that the aircraft was airworthy and fit to fly. The Administrator appeals the law judge's reduction in sanction, and respondent appeals the law judge's findings regarding the regulatory violations. We deny both appeals.

The Administrator's order, issued August 27, 2008, which serves as the complaint against respondent, alleges that respondent operated the Cessna 402B⁵ (hereinafter "N402SZ") on a passenger-carrying flight on May 16, 2007, while the aircraft was in an unairworthy condition. In particular, the complaint alleges that respondent operated N402SZ from George Charles Airport in St. Lucia, with intended destinations of E.T. Joshua Airport in St. Vincent and, thereafter, Port Salinas Airport in Grenada, with a planned return to George Charles Airport. The complaint states that, during the approach to land at E.T. Joshua, the aircraft displayed an intermittent unsafe landing gear indication, specifically, that the right main gear down and locked indicator delayed before it illuminated green. The complaint states that, while the aircraft was on short final approach, the gear indicator extinguished and then re-illuminated, and that respondent's co-pilot told respondent that he did not believe the gear was fully locked in the down position. Nevertheless, the complaint alleges that respondent

⁵ The Cessna 402B aircraft is a twin engine aircraft.

attempted to land on Runway 07 at E.T. Joshua, without taking measures to ensure or confirm the security of the landing gear. The complaint further states that, during landing, the right main landing gear began to collapse, and N402SZ began to sink to the right, causing the right propeller to strike the runway, which resulted in damage to the propeller. After this strike, the complaint asserts that respondent rejected the landing and completed a go-around, choosing to fly to Hewanorra Airport in St. Lucia, which required him to fly 23 nautical miles over the ocean. Once at Hewanorra, the complaint states that respondent used the emergency landing gear procedure to land, while never declaring an emergency with air traffic control (ATC).

The complaint also alleges that respondent, later in the day on May 16, 2007, flew N402SZ from Hewanorra back to George Charles, but did not have N402SZ inspected for damage, or approved as airworthy, nor did he obtain a special flight authorization, commonly known as a ferry permit, for the flight. The complaint states that respondent's flight from Hewanorra to George Charles occurred with two homemade locks securing the landing gear, as well as with damage to the right propeller and potential damage to the right engine, as a result of the propeller strike. Consequently, the complaint states that respondent operated N402SZ while it was in an unairworthy condition, which rendered its U.S. airworthiness certificate

invalid, and which resulted in a violation of St. Vincent and the Grenadines Civil Aviation Regulations 33.(1) and 52.(2)(2). Compl. at ¶ 19. Based on these allegations, the Administrator charged respondent with violations of 14 C.F.R. §§ 91.7(a) and (b), 91.13(a), and 91.703(a)(2) and (3).

The law judge held an evidentiary hearing on April 21 and 22, 2009, at which the Administrator presented the testimony of Gianni Deligny, who was in the cockpit of N402SZ with respondent on May 16, 2007.⁶ Mr. Deligny testified that he was unemployed in May 2007 and was not compensated by Mr. Sylvanus Ernest, who owned N402SZ and employed respondent, or by anyone else, for his assistance with the flights on May 16, 2007. Mr. Deligny testified that he merely sat with respondent to observe the flights, and did not log the time he spent on the aircraft. Mr. Deligny stated that he assisted as needed on the flights, but that respondent was the pilot-in-command (PIC). Mr. Deligny recalled that, on the incident flight into E.T. Joshua Airport, one of the three landing gear indicator lights took more time than the others to illuminate, and that he informed respondent of this. Mr. Deligny stated that either he or respondent recycled the gear to confirm that it was locked down, and that

⁶ On the final flight from Hewanorra to George Charles in St. Lucia, Mr. Deligny testified that he sat in the back of the aircraft. Tr. at 37. However, respondent testified that Mr. Deligny sat next to him during all flights on May 16, 2007. Tr. at 261.

respondent did not mention the issue to ATC at E.T. Joshua. Mr. Deligny testified that, as N402SZ touched down, he felt the aircraft "sinking" on the right side. Tr. at 29. Mr. Deligny recalled that it felt like "a filing vibration," and was an unusual sensation. Id. Mr. Deligny stated that, after feeling this sensation, respondent added power and they climbed. Mr. Deligny testified that he questioned the aircraft's condition, and "was certain that some parts of either the propeller or the gear door made contact with the runway." Tr. at 33.

In spite of the aborted landing, Mr. Deligny testified that respondent did not communicate with ATC about aborting the landing and taking off until after N402SZ had cleared the nearby terrain.⁷ Mr. Deligny testified that he and respondent did not discuss the situation while it was happening. After becoming airborne and upon clearing the terrain, respondent informed him that they would return to St. Lucia. Respondent initially stated that he would take N402SZ back to George Charles Airport, but then told Mr. Deligny that they would go to Hewanorra. At Hewanorra, Mr. Deligny recalled that they manually extended the landing gear, and requested that the ATC tower verify that the landing gear on N402SZ was down. Mr. Deligny testified that

⁷ Mr. Deligny stated that, at E.T. Joshua, a mountain is adjacent to Runway 07, and that, for this reason, aircraft typically do not take off from Runway 07, and instead use another runway.

both he and respondent saw three green lights, indicating that the landing gear was extended, and that the landing at Hewanorra was uneventful. Mr. Deligny stated that they did not declare an emergency at Hewanorra, nor did they inform ATC of any problems with the aircraft. Once at Hewanorra, Mr. Deligny recalled that he and respondent looked at the aircraft and noticed that the propeller looked "slightly filed" on the right side. Tr. at 35. Mr. Deligny stated that Mr. Ernest arrived with tools and looked at N402SZ, after which respondent, with Mr. Deligny on board, took off from Hewanorra and flew to George Charles, with no passengers.⁸ On cross-examination, Mr. Deligny stated that he felt a slight vibration on the right side of the aircraft during the flight to George Charles, and that they flew with the landing gear locked in place.

The Administrator also called Andrea Best, who is a senior airport officer for the Government of the Grenadines, to testify. Ms. Best stated that she works at E.T. Joshua Airport and oversees investigations of incidents that occur at the airport. Ms. Best testified that she investigated the May 16, 2007 incident involving N402SZ, but that she did not begin her investigation until a month later. Ms. Best stated that she concluded that respondent received a clearance to land at E.T.

⁸ Mr. Deligny also identified a report that he sent to Mr. Ernest shortly after the incident, and later sent to Mr. Greg McAlpin of the Eastern Caribbean Civil Aviation Authority (ECCAA).

Joshua from ATC, but overshot and proceeded to George Charles. Ms. Best stated that respondent did not provide ATC with his reason for going to George Charles. Ms. Best also identified transcripts of the ATC communications, as well as records from the airport concerning the incident. Ms. Best stated that touch-and-go's are generally not permitted on Runway 07 at E.T. Joshua for aircraft that are not high-performance aircraft, due to the terrain surrounding Runway 07, and that takeoffs typically occur on Runway 25 in the opposite direction. Ms. Best opined that N402SZ is not a high-performance aircraft, and testified that Runway 07 is 4,650 feet long. Ms. Best also stated that, for her investigation, she inspected Runway 07 and saw marks consistent with a propeller strike; however, Ms. Best clarified that she did not inspect the runway for such marks until July 2007.

The Administrator also called Albert Frank, an FAA principal operations inspector responsible for foreign air carriers that fly into the United States, to testify.⁹ Inspector Frank stated that he learned of the events of May 16, 2007, after receiving a copy of a facsimile from Mr. Ernest that Mr. Ernest sent to the ECCAA in Antigua. Inspector Frank

⁹ Inspector Frank stated that N402SZ is not affiliated with a carrier that flies into the United States, but that it has a U.S. registration. Inspector Frank testified that he assisted with N402SZ obtaining a registration to operate in the United States.

identified documents that Mr. Ernest and the ECCAA exchanged regarding N402SZ, including one document from the ECCAA stating that N402SZ had been grounded in the Caribbean because Mr. Ernest could not demonstrate that it complied with a service bulletin from Teledyne Continental. Inspector Frank identified a copy of a Teledyne Continental Aircraft Engine Mandatory service bulletin, which he verified as applicable to N402SZ.

Inspector Frank also described several documents of written correspondence, as well as records summarizing telephone conversations that he had with respondent and with Mr. Ernest. The records indicate that respondent was responsible for piloting N402SZ, and that Mr. Ernest was responsible for the maintenance of the aircraft. Inspector Frank stated that Mr. Ernest described the homemade locks that he used to secure the landing gear for the flight from George Charles to Hewanorra.¹⁰

Inspector Frank also testified that he spoke with a technical support engineer at Cessna, who indicated that N402SZ would have needed no more than 2,000 feet to land at E.T.

¹⁰ The Administrator's counsel engaged in a conversation on the record with the law judge and respondent's counsel regarding Mr. Ernest's appearance at the hearing. The Administrator's counsel stated that she had issued a subpoena for Mr. Ernest's appearance, but received a written refusal to appear from Mr. Ernest's attorney, on the basis that the FAA did not have jurisdiction to enforce the subpoena.

Joshua, based on the environmental conditions on May 16, 2007. Inspector Frank opined that respondent could have completed the landing at E.T. Joshua, and stated that, if he were in that situation, he would have accomplished a second attempt by using the emergency landing gear extension, as respondent did at Hewanorra.¹¹ Inspector Frank stated that he recommended suspension of respondent's certificate as a result of respondent's actions on May 16, 2007, and identified the Administrator's Sanction Guidance Table, FAA Order 2150.3A, which recommends a suspension of 30 to 180 days for the violations at issue. Exh. A-33 at 16, No. 20.

On cross-examination, Inspector Frank reiterated that he would have declared an emergency and landed at E.T. Joshua. Inspector Frank also stated that significant damage to a propeller or loss of a propeller tip might not always affect the RPM, oil pressure, or oil temperature, so N402SZ could have sustained damage to its right propeller that the displays might not have indicated. Inspector Frank also opined that the aircraft was not airworthy on the flight from Hewanorra to George Charles when the gear was locked down, because this condition meant that it did not comply with its type design.

¹¹ Inspector Frank indicated that he based his opinion on his experience as a pilot who has held an ATP certificate since 1985, as well as other certificates and several ratings.

Inspector Frank also acknowledged on cross-examination that respondent had successfully completed a reexamination under 49 U.S.C. § 44709(a),¹² in response to the Administrator's request for a reexamination, but stated that successful completion of a reexamination does not preclude the Administrator from taking enforcement action.

Before concluding the Administrator's case-in-chief, the Administrator's counsel re-called Ms. Best and Mr. Deligny to the stand. Ms. Best testified that the aviation regulations applicable to St. Vincent mandate notifying ATC if an airman believes the aircraft that he or she is operating has a problem. Mr. Deligny further testified that respondent never informed Mr. Deligny that he would be serving as a copilot, but that Mr. Deligny sometimes wore a uniform on flights in N402SZ indicating that he was the first officer. Tr. at 230.¹³

In response to the Administrator's case, respondent testified on his own behalf. Respondent stated that, in May 2007, he was employed by General Aviation, which Mr. Ernest owns, and with which Digicel, a telecommunications company in St. Lucia, arranged for its transportation. He further

¹² Section 44709(a) states that the Administrator may reexamine an airman who holds a certificate under 49 U.S.C. § 44703.

¹³ On the flight at issue, respondent testified that Mr. Deligny wore a uniform indicating he was the first officer. Tr. at 250.

testified that Mr. Ernest is a pilot and a mechanic who holds an A&P certificate, and that Mr. Ernest kept N402SZ at George Charles, where he had a maintenance hangar to work on aircraft. Respondent stated that, on May 16, 2007, he planned to fly the regular Wednesday route in N402SZ for Digicel, and had flown to St. Vincent several times over the last 24 years. Respondent acknowledged that no departures from Runway 07 at E.T. Joshua are permitted without prior approval from ATC. Respondent recalled that, on May 16, 2007, he received clearance to land on Runway 07, and that three green lights came on and no horn sounded, thus indicating that the landing gear was down. Respondent described the attempted landing, in which he touched down, and stated that the aircraft felt "unbalanced." Tr. at 248. Respondent testified that he aborted the approach and took off, and did not inform ATC of any problems. Respondent testified that, when he felt the right side of the aircraft sinking, it was instinctive for him to do a go-around, and that he did not think ahead, but just "went by reflex." Tr. at 251.

Respondent stated that he subsequently conducted the visual flight rules flight back to St. Lucia, and decided to land at Hewanorra, which is the international airport on St. Lucia and was closer than George Charles. Respondent testified that he instructed Mr. Deligny to inform ATC that there was no problem, but that he knew that something unusual had occurred with the

gear. Respondent stated that he did not believe it was an emergency. Tr. at 254. Respondent stated that all indications were normal as they approached Hewanorra, and that, once there, they received approval from ATC to land. Respondent testified that he used the backup system to extend the gear manually for the landing, and asked ATC to verify that the gear was down. Respondent stated that he received this verification, and that he landed and taxied N402SZ to the terminal building, where he called Mr. Ernest.

Respondent stated that Mr. Ernest flew to George Charles, looked at the right propeller, and stated that it "got a filing." Tr. at 258. Respondent recalled that Mr. Ernest pointed out that a cross tube, which is a silver rod on the right side of the landing gear, was cracked. Respondent also recalled that Mr. Ernest subsequently flew another aircraft to George Charles and came back with a brace for the landing gear of N402SZ, which Mr. Ernest attached. Respondent testified that Mr. Ernest measured and inspected the right propeller, and stated that it was not at all damaged, and that, if the propeller had hit the runway in St. Vincent, it had only barely scraped it. Respondent stated that Mr. Ernest told him that N402SZ was "totally fit for flight," and to fly the aircraft back to George Charles. Tr. at 260-61. Respondent further testified that he relied upon Mr. Ernest's assessment that the

aircraft was fit for operation, and that he did not know that the aircraft might be in an unairworthy condition when he flew it from Hewanorra to George Charles. Respondent also stated that he was unaware that he needed a ferry permit for the return to George Charles, and that, if he did need one, he had no idea that he, as PIC, would be the person responsible for obtaining the permit.

After summarizing the evidence in detail, the law judge held that the Administrator had fulfilled the burden of proof with regard to each of the regulatory violations alleged, but reduced the sanction to a 100-day period of suspension of respondent's ATP certificate. The law judge based his conclusions largely on credibility determinations, in finding that Inspector Frank's testimony that respondent should have declared an emergency in his approach to E.T. Joshua was persuasive, and that Mr. Deligny was a credible witness. The law judge determined that Runway 07 was long enough for a safe landing, and that respondent was able to land safely at Hewanorra, so he must have been able to land in a safe manner at E.T. Joshua. The law judge stated, "[a]t the very least, to attempt to land in the first instance [at E.T. Joshua] and the following takeoff [on Runway 07] was the result of extremely poor judgment and constituted careless or reckless operation." Initial Decision at 339. The law judge stated that respondent's

continuation of flight from Hewanorra to George Charles was a violation of § 91.7(a) and (b), and that respondent knew or should have known that N402SZ was unsafe to fly, because it did not conform to its type certificate. Id. at 342–43. The law judge further determined that the totality of the evidence established that the right engine propeller struck the ground during the attempted landing at E.T. Joshua, and that respondent was aware of this. As a result, the law judge concluded that the Teledyne Continental service bulletin required disassembly and repair of the engine. The law judge rejected respondent's defense that he relied upon Mr. Ernest in his determination that the aircraft was safe for flight, because respondent did not base this assessment on any maintenance record or certification indicating that N402SZ was safe. The law judge opined that the aircraft neither complied with its type certificate, nor was in a condition for safe operation.

The law judge stated that the Administrator ordered the maximum sanction of a 180-day suspension under the Sanction Guidance Table, and found that the mitigating factors in this case did not support this period of suspension. In particular, the law judge stated that respondent's contention that he relied upon Mr. Ernest's assessment that the aircraft was in a safe condition for flight was a mitigating factor. The law judge further stated that, in Administrator v. Scuderi, NTSB Order

No. EA-5321 (2007), we affirmed the law judge's reduction of sanction from 180 to 100 days for the respondent's operation of an unairworthy aircraft.¹⁴

Respondent's Appeal

Respondent appeals the law judge's determination that he violated the regulations. Respondent's appeal is principally based on his argument that the law judge erred in denying respondent's pretrial motion to dismiss, which respondent filed on October 24, 2008. In the motion, respondent contended that the Administrator lacked jurisdiction because the events of May 16, 2007, occurred outside the United States and within the jurisdiction of the ECCAA. The motion further stated that the Administrator's complaint was stale under the Board's Stale Complaint Rule, 49 C.F.R. § 821.33, because the Administrator did not serve the complaint until September 22, 2008. Finally, respondent's motion asserted that the Administrator was estopped from taking action against respondent's certificate because respondent successfully completed a reexamination of his ability

¹⁴ In Scuderi, we held that the Administrator proved that the respondent violated § 91.7 when the wingtip of the Cessna 182 that the respondent operated bumped against the wingtip of a Beechcraft King Air. We stated that the respondent knew that the contact had caused the glare shield on his Cessna to bend, and that the aircraft was not in a condition for safe operation after the respondent attempted to bend it back before taking off again. Id. at 10.

to exercise the privileges of his ATP certificate on November 5, 2007.

We conclude that the law judge correctly denied respondent's motion. Title 49 U.S.C. § 44709 provides the Administrator with the authority to amend, modify, suspend, and revoke certificates that the Administrator has issued.

Respondent does not deny that the Administrator issued his ATP certificate, and provided N402SZ with a U.S. registration. In addition, 14 C.F.R. § 91.703(a)(2), supra note 4, states that airmen must "comply with the regulations relating to the flight and maneuver of aircraft there in force" in foreign countries. In the response to respondent's motion, the Administrator provided a letter from Mr. McAlpin of the ECCAA, stating that N402SZ was unairworthy on May 16, 2007, as it was not in compliance with the Teledyne Continental service bulletin, and was therefore not in compliance with ECCAA regulations.

Respondent has provided no evidence, nor presented any arguments, in an attempt to contravene Mr. McAlpin's and the Administrator's assessments that N402SZ was unairworthy under ECCAA regulations. Therefore, we do not find the argument that the Administrator lacks jurisdiction to be persuasive.

We also reject respondent's argument that the Administrator's complaint was stale under our stale complaint rule. Title 49 C.F.R. § 821.33, entitled, "Motion to dismiss

stale complaint," provides as follows: "Where the complaint states allegations of offenses which occurred more than 6 months prior to the Administrator's advising the respondent as to reasons for proposed action ... the respondent may move to dismiss such allegations as stale." In the case at hand, respondent does not dispute that the Administrator issued the notice of proposed certificate action on November 14, 2007, and that respondent received the notice on November 16, 2007. Respondent does not contest that the notice was issued before the expiration of 6 months from the events at issue, which occurred on May 16, 2007. However, respondent appears to contend that the Administrator's delay in issuing the *complaint* for this case should result in our dismissal of the complaint under the stale complaint rule.

We have previously held that an issuance of a notice of proposed certificate action serves as sufficient notice for purposes of the stale complaint rule.¹⁵ Respondent proffers no reason for us to depart from our established precedent, which provides that a notice of proposed certificate action will stop

¹⁵ See, e.g., *Administrator v. Swann*, NTSB Order No. EA-3936 at 2 (1993) (order denying interlocutory appeal) (stating that, "[t]he vehicle the Administrator uses for advising certificated persons of the allegations is the Notice of Proposed Certificate Action (NOPCA), and the certificate holder is notified upon actual or constructive receipt of the NOPCA" for purposes of the stale complaint rule).

the computation of time for purposes of the stale complaint rule. As such, we likewise do not find this argument persuasive.

We also reject respondent's argument that the Administrator is estopped from pursuing this case because, in November 2007, the Administrator requested, and respondent satisfactorily completed, a reexamination of his qualifications to hold an ATP certificate.¹⁶ We have previously rejected the argument that equitable estoppel precludes the Administrator from taking action against an airman when the public interest and safety in air commerce are at stake.¹⁷ In general, a successful completion of a reexamination is a separate issue from an enforcement action based on a respondent's conduct prior to the reexamination.¹⁸ In the case at hand, given the law judge's

¹⁶ We have previously recognized that equitable estoppel is a legal doctrine that prevents a person from adopting a new position that contradicts a previous position when reliance on the new position would result in prejudice. Administrator v. Coughlan, NTSB Order No. EA-5197 at 10 n.10 (2005) (citing Merriam-Webster's Dictionary of Law (1996)).

¹⁷ Administrator v. Fisher, 6 NTSB 1292 (1989), aff'd, Fisher v. Dep't of Transp., 917 F.2d 27 (9th Cir. 1990); see also Administrator v. Brzoska, NTSB Order No. EA-4288 (1994) (holding that the Administrator's issuance of additional type ratings to the respondent did not preclude the Administrator from pursuing a revocation action against the respondent, because the issue of the respondent's lack of responsibility to hold a certificate was unrelated to his technical qualifications).

¹⁸ We note that we have previously stated that, "remedial training is ordered to assure an airman's competency, while a

assessment that respondent exercised extremely poor judgment throughout the events of May 16, 2007, we cannot find that respondent's satisfactory completion of a reexamination precludes the Administrator from pursuing this action.

The Administrator's Appeal

The Administrator appeals the law judge's reduction in sanction from 180 to 100 days. In his appeal brief, the Administrator asserts that the law judge exceeded his authority in lowering the sanction, because he did not find that the Administrator's sanction was arbitrary, capricious, or otherwise not in accordance with law; given the absence of such a finding, the Administrator asserts that we are bound by the Administrator's published Sanction Guidance Table. In this regard, the Administrator asserts that we must read 49 U.S.C. § 44709(d) in concert with § 44709(d)(3), to conclude that our

(..continued)

certificate suspension is imposed to vindicate the enforcement interests raised by FAR violations. Thus, the purposes of these remedies ... are not, therefore, mutually exclusive." Administrator v. Evans, 7 NTSB 1278, 1279 n.6 (1991) (citing Administrator v. Smith, 2 NTSB 2527, 2530 (1976)). In Evans, we based our holding that the Administrator did not prove that the respondent acted carelessly or recklessly on the Administrator's lack of evidence to show that the respondent's alleged operational error, and not severe windy conditions, caused a lack of control of the aircraft. We considered the respondent's successful completion of a reexamination in windy conditions to be probative with regard to whether the law judge had erred in assessing the evidence, and we stated, with regard to sanction, that, "the extent, if any, to which a reduction in sanction in a particular case is appropriate depends upon a thorough appraisal of all aspects of that case." Id. at 1279.

authority to modify the Administrator's sanction against a certificate holder is limited.¹⁹ The Administrator asserts that the sanction in this case was appropriate, because respondent operated two flights in N402SZ when it was unairworthy; as such, the Administrator asserts that he could have imposed a suspension of up to 360 days. We note that the Administrator does not explain why he chose the sanction of 180 days.

The Administrator also argues that the law judge's modification of the sanction in this case is inconsistent with our precedent. The Administrator cites Administrator v. Reina, NTSB Order No. EA-4508 (1996), for the proposition that a law judge must either rule in a manner that is consistent with Board precedent, or clearly explain any deviation from Board precedent. The Administrator asserts that the law judge did not

¹⁹ The relevant portions of § 44709 state as follows:

(d)(1) A person adversely affected by an order of the Administrator under this section may appeal the order to the National Transportation Safety Board. After notice and an opportunity for a hearing, the Board may amend, modify, or reverse the order when the Board finds ... that safety in air commerce or air transportation and the public interest do not require affirmation of the order.

(3) When conducting a hearing under this subsection, the Board is not bound by findings of fact of the Administrator but is bound by all validly adopted interpretations of laws and regulations the Administrator carries out and of written agency policy guidance available to the public related to sanctions to be imposed under this section unless the Board finds an interpretation is arbitrary, capricious, or otherwise not according to law.

explain why he was not deferring to the Administrator's choice of sanction, and that, in prior cases, we have held that a suspension in excess of 180 days is appropriate when multiple flights in an unairworthy aircraft occur. FAA Appeal Br. at 11 (citing Administrator v. Carter, NTSB Order No. EA-4765 (1999)). The Administrator also argues that the case on which the law judge relied for the sanction modification, Scuderi, supra, is distinguishable from this case, because respondent holds an ATP certificate, and the respondent in Scuderi held a commercial pilot certificate.

We reject the Administrator's argument that we lack the jurisdiction to modify the sanction that the Administrator imposes on an airman. Board case law requires us to defer to the Administrator's choice of sanction when such deference is appropriate. We have held that it is the Administrator's burden under 49 U.S.C. § 44709 to articulate clearly the sanction sought, and to ask the Board in a timely manner to defer to that determination. We have also held that the Administrator must support the request for deference with evidence showing that the sanction has not been selected arbitrarily, capriciously, or contrary to law.²⁰

²⁰ See, e.g., Administrator v. Peacon, NTSB Order No. EA-4607 at 10 (1997); see also Administrator v. Oliver, NTSB Order No. EA-4505 (1996) (no deference where the Administrator introduced no evidence regarding applicable or relevant sanction guidance).

We believe that the facts of this case support a sanction of a 100-day suspension. We agree with the law judge's conclusion that Mr. Ernest's approval of the aircraft for a flight from Hewanorra to George Charles was a mitigating factor. In addition, respondent did not have passengers on the flight from Hewanorra to George Charles. While we do not condone respondent's operation of the aircraft on that flight, we agree with the law judge that a sanction of 100 days is appropriate under the circumstances of this case. The Administrator did not submit the Sanction Guidance Table into the record for this case, and did not explain the computation of and reasoning for the sanction until the Administrator filed the FAA appeal brief, which includes a brief footnote referencing the Sanction Guidance Table. Based on these circumstances, we do not believe absolute deference to the Administrator's choice of sanction is required. Therefore, we deny the Administrator's appeal on the basis that the facts of this case do not warrant a 180-day suspension.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;
2. The Administrator's appeal is denied;
3. The law judge's initial decision, including the reduction in sanction from 180 to 100 days, is affirmed; and

4. The 100-day suspension of respondent's ATP certificate shall begin 30 days after the service date indicated on this opinion and order.²¹

HERSMAN, Chairman, HART, Vice Chairman, and SUMWALT, Member of the Board, concurred in the above opinion and order.

²¹ 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).

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ORAL INITIAL DECISION

ADMINISTRATIVE LAW JUDGE POPE: The following is my oral initial decision in the matter of the Acting Administrator, Federal Aviation Administration, Complainant, versus Timothy Hackshaw, Respondent, Docket Number SE-18366.

This is a proceeding under the provisions of 49 U.S.C. Section 44709, formerly Section 609 of the Federal Aviation Act, and the provisions of the Rules of Practice in Air Safety Proceedings of the National Transportation Safety Board.

Respondent, Timothy Hackshaw, has appealed to the

1 National Transportation safety Board from the Acting
2 Administrator's Order of Suspension, dated August 27, 2008, which,
3 pursuant to Section 821.31(a) and 821.55(a) of the Board's Rules
4 of Practice in Air Safety Proceedings, serves as the complaint,
5 dated March 22, 2008 in this proceeding.

6 The Order suspends the Respondent's airline transport
7 pilot certificate for 180 days because of alleged violations of
8 FAR, Sections 91.7(a), 91.7(b), 91.13(a), 91.703(a)(2), and
9 91.703(a)(3), resulting from incidents on or about May 16, 2007,
10 involving a malfunctioning landing gear and a propeller strike.

11 In his answer to the complaint, the Respondent admitted
12 nothing and denied the complaint in its entirety. At the hearing,
13 however, the Respondent amended his answer to admit Paragraphs 1,
14 2, 10, and 11, of the complaint. Thus, the Respondent admitted
15 that he is the holder of an airline transport pilot certificate,
16 as alleged; that on or about May 16, 2007, he was the pilot-in-
17 command of civil aircraft N402SZ, a Cessna 402B owned by Sylvanus
18 Ernest on a passenger-carrying flight from George Charles Airport,
19 St. Lucia (TLPC), with an intended destination of E.T. Joshua
20 Airport, St. Vincent (DVSV), then to Point Salinas Airport,
21 Grenada (TGPY), and return to George Charles Airport; that he
22 initially elected to fly from E.T. Joshua Airport, St. Vincent to
23 George Charles Airport in St. Lucia and flew the aircraft 23
24 nautical miles over the ocean, finally deciding to proceed to
25 Hewanorra Airport, St. Lucia, and with reference to a checklist,

1 used the emergency landing gear extension procedure to land there,
2 and at no time did N402SZ declare an emergency.

3 FAR Section 91.13(a) provides that, "No person may
4 operate an aircraft in a careless or reckless manner so as to
5 endanger the life or property of another."

6 FAR Section 91.7(a) provides, "No person may operate a
7 civil aircraft unless it is in an airworthy condition. Section
8 (b) provides, "The pilot-in-command of a civil aircraft is
9 responsible for determining whether that aircraft is in condition
10 for safe flight. The pilot-in-command shall discontinue the
11 flight when unairworthy, mechanical, electrical or structural
12 conditions occur."

13 FAR Section 91.703(a) provides, "Each person operating a
14 civil aircraft U.S. registry outside the United States shall,"
15 Subsection 2, "When within a foreign country comply with the
16 regulations relating to the flight and maneuver of the aircraft
17 there in force" and 3, "Except for Section 91.117(a), 91.307(b),
18 91.309, 91.323, and 91.711 comply with this part so far as it is
19 not inconsistent with applicable regulations of the foreign
20 country where the aircraft is operated or annexed, or operated,"
21 period.

22 The case of *Administrator v. Thibert*, EA-5306 (2007), at
23 Pages 5 to 7, contains a summary of Board law pertinent to this
24 case. In that case, the Board said, "In reviewing the law judge's
25 decision and considering the Administrator's appeal, we emphasize

1 that the Administrator has the burden of proving that the aircraft
2 was unairworthy by a preponderance of the evidence," *Administrator*
3 *v. Van Der Horst*, NTSB Order No. EA-5179 at 3 (2005), (recognizing
4 that NTSB Order No. EA-5226 at Page 2 (2006), stating that, "it is
5 the Board's role to determine, reviewing the evidence the
6 Administrator presents, whether she has met her burden of proof").

7
8 "Administrator has the burden to prove that an aircraft
9 is not airworthy in order to prevail on her allegation that the
10 Respondent violated 14 C.F.R. Section 91.7(a), and holding that
11 the Administrator did not prove this key fact." See also
12 *Administrator v. Schwandt*, NTSB Order No. EA-5226 at 2 (2006),
13 stating that, "It is the Board's role to determine, reviewing the
14 evidence of the Administrator whether she has met her burden of
15 proof."

16 "In cases in which the Administrator alleges that an
17 operator has violated 14 C.F.R. Section 91.7, we have long held
18 that the standard for airworthiness consists of two prongs: (1)
19 whether the aircraft conforms to its type certificate and
20 applicable Airworthiness Directives; and (2) whether the aircraft
21 is in a safe condition for operation," *Administrator v. Doppes*,
22 5 NTSB 50, 52, note 6 (1985), citing 49 U.S.C. Section 1423(c).
23 See also *Administrator v. Anderson*, NTSB Order No. EA-3976 at 2
24 (1993); *Administrator v. Nielsen*, NTSB Order No. EA-3755 at 4
25 (1992); *Administrator v. Copsy*, NTSB Order No. EA-3448 (1991).

1 "We have recognized that the term airworthiness is not
2 synonymous with flyability." *Doppes, supra*, at 52, note 6. "We
3 have also concluded, however, that when small, insignificant
4 deviations are present, an aircraft may still substantially
5 conform to its type design," *Administrator v. Frost*, NTSB Order
6 No. EA-4680 (1998) *Administrator v. Calavaero, Inc.*, 5 NTSB 1099,
7 1101 (1986).

8 "In determining whether an aircraft is airworthy in
9 accordance with the aforementioned standard, the Board considers
10 whether the operator knew or should have known of any deviation of
11 the aircraft's conformance with its type certificate." See, e.g.,
12 *Administrator v. Yialamas*, NTSB Order No. EA-5111 (2004);
13 *Administrator v. Bernstein*, NTSB Order No. EA-4120 at 5 (1994).

14 In a footnote in *Thibert, supra*, at 7, N.4, the Board
15 said that, "Previous Board cases have implied that manuals
16 governing an aircraft's maintenance and flight protocol are also
17 principal components in discerning the aircraft's FAA-approved
18 type design. *See Frost, supra*, at 1, note 3."

19 The Board further stated in its decision in *Thibert*,
20 *supra*, at 3 that, "Assuming *arguendo* that these discrepancies
21 would render in an unsafe condition, the Administrator still must
22 prove that the Respondent's either knew or should have known of
23 the discrepancies prior to operating the aircraft, *Yialamas*,
24 *supra*, at 3."

25 In another case, *Administrator v. Anderson*, NTSB Order

1 No. EA-3976 (1993), the Board said at Pages 4 to 5, "An airworthy
2 aircraft must conform to its type certificate and be in a
3 condition for safe operation," *Administrator v. Doppes*, supra. "To
4 prove a violation of Section 91.29(a), the Administrator must show
5 that the airman operated an aircraft that he knew or recently
6 should have known was not airworthy," *Administrator v. Parker*, 3
7 NTSB, 2997 (1980). See also *Administrator v. Gasper*, NTSB Order
8 No. EA-3242 (1991).

9 " There is no question that holders of ATP certificates
10 are held to the highest degree of care. It is also true that a
11 pilot's action or actions should be based against what a prudent
12 pilot would have done in the same instance based upon conditions
13 of which the pilot was aware or which could have reasonably
14 anticipated," *Administrator v. Baxter*, 1 NTSB 1391, 1394 (1972).
15 In that case, the Board said that, "The aircraft could be flown
16 does not necessarily mean it was airworthy. It is well-settled
17 that an aircraft that is flyable may nonetheless be considered
18 unairworthy." See *Administrator v. Brodmax*, 3 NTSB, 2795, 2797
19 (1980); *Administrator v. Blackwell*, 2 NTSB 360, 361 (1973).

20 In another case, *Administrator v. Gordon*, NTSB Order No.
21 EA-4329 (1995), the Board noted the record in that case
22 established that, "There are substantial risks involved in flying
23 with damaged propellers, specifically, that bent and nicked areas
24 could be stressed to the point where pieces of the propeller might
25 come off in flight and the propellers could become unbalanced,

1 which could result in vibration, performance degradation, engine
2 failure, and further damage, and this might occur at any time."
3 In that case, the Board said, "We have interpreted Section 91.7(b)
4 as requiring upon occurrence of an unairworthy condition a landing
5 at the first available point consistent with the safe operation of
6 the aircraft," *Administrator v. Genereaux*, 4 NTSB 1245, 1247
7 (1984), quoting the law judge's initial decision; *Administrator v.*
8 *Halbert*, NTSB Order No. EA-3628 (1992).

9 Section 1.1 of the FARs defines a pilot-in-command as,
10 "The person who (1) has the final authority and responsibility for
11 the operation of that flight; (2) has been designated as pilot-in-
12 command before or during the flights; and (3) holds the
13 appropriate category, class and type ratings if appropriate for
14 the conduct of the flight."

15 In *Administrator v. Cooper*, NTSB Order No. EA-4433, and
16 I don't have the date, the Board stated, citing *Administrator v.*
17 *McCartney*, 4 NTSB 925 (1983), that, "The pilot-in-command is the
18 individual who has overall responsibility for and control of the
19 flight."

20 However, the Board also held that, "The pilot-in-command
21 is not necessarily the pilot who physically operates the controls
22 or directs the course of a given flight. Rather, the pilot-in-
23 command is the pilot who possesses ultimate decisional authority
24 for such control or directive whether exercised or not,"
25 *Administrator v. Funk*, NTSB Order EA-2915 (1989).

1 In *Administrator v. Buboltz*, EA-3907 (1993), the Board
2 said, "The pilot-in-command is responsible for the overall safe
3 operation of an aircraft."

4 In *Administrator v. Dillon*, NTSB Order No. EA-4132
5 (1994), the Board said that, "The pilot-in-command of an aircraft
6 is responsible for its safe operation in conformance with Federal
7 Aviation Regulations."

8 In *Administrator v. Hamre*, NTSB Order No. EA-4232
9 (1994), Footnote 3, the Board quoted from its decision in
10 *Administrator v. Copsey*, supra at Page 5, as follows: "The test
11 for airworthiness is not flyability. The aircraft must be in
12 conformance with its type certificate and in condition for safe
13 flight."

14 In *Administrator v. Barber*, NTSB Order No. EA-4304
15 (1994), the Respondent in that case operated his aircraft under
16 IFR conditions even though the special airworthiness certificate
17 issued for the flight authorized only operation under VFR
18 conditions.

19 In *Barber*, the Board held that, "Without a ferry permit,
20 the aircraft could not be legally operated at all since it was not
21 airworthy by U.S. standards."

22 The facts in this case are not complex. At
23 approximately 7:10 a.m. local time, November 402 SZ, a Cessna
24 402B, with the Respondent as pilot-in-command departed the George
25 Charles Airport in St. Lucia destined for the E.T. Joshua Airport

1 in St. Vincent on a regular flight with five passengers.

2 Accompanying him in the right seat was Gianni Deligny, a
3 British and St. Lucia citizen, and a holder of a Canadian and
4 Eastern Caribbean multi-engine certificate. Deligny had
5 accompanied the Respondent on other flights for familiarization
6 and was not a crew member. He was on board with the permission of
7 the owner of the aircraft, one Sylvanus Ernest.

8 On this flight, Deligny was manning the radio but may
9 also have manipulated some of the controls, including the flaps
10 and the landing gear lever. The flaps and the landing gear were
11 lowered on the approach to St. Vincent, but Deligny saw that the
12 green right side gear down locked light delayed for five to seven
13 seconds before turning green. The Respondent confirmed three
14 green lights.

15 On short final to Runway 07, Deligny noticed that the
16 right side gear down light went out for a few sections, then
17 turned green. He said to the Respondent that he did not believe
18 the gear is fully locked down. The landing gear was recycled, and
19 there were three green lights showing, indicating the gear was
20 down. But Deligny saw the right side gear light flicker a few
21 times more.

22 During the landing, the left gear, then the nose gear
23 and, finally, the right gear contacted the runway surface, but the
24 aircraft started sinking towards the runway on the right side.
25 The Respondent applied takeoff power, and the aircraft took off on

1 Runway 07, which had elevated terrain at the end and was not used
2 normally by the airport for takeoffs or touch and gos except by
3 high-performance aircraft, which November 402SZ was not.

4 Just before that, Deligny felt a slight vibration on the
5 right side, but all engine instruments were within normal
6 operating limits. The Respondent then announced his intention to
7 return to George Charles Airport in St. Lucia and instructed
8 Deligny to tell Air Traffic Control of the change in destination.
9 At Deligny's suggestion, the Respondent subsequently changed the
10 destination to Hewanorra Airport, St. Lucia, but did not inform
11 Air Traffic Control at E.T. Joshua Airport until a couple minutes
12 after informing Air Traffic Control that they were headed for
13 George Charles Airport.

14 The flight to Hewanorra Airport involved 20 to 25 miles
15 over water. Before landing at Hewanorra Airport, St. Lucia, the
16 landing gear was lowered manually, and Hewanorra Air Traffic
17 Control confirmed that the gear was down. The aircraft landed
18 without further incident.

19 At Hewanorra Airport, Deligny and the Respondent
20 inspected the exterior of the aircraft, and Deligny saw that the
21 right propeller appeared to be slightly filed. They were met by
22 the owner of the aircraft, Sylvanus Ernest, and Deligny saw the
23 owner and the Respondent go out to the aircraft. Ernest appeared
24 to have some instruments with him, and about two and a half, one
25 to two and a half hours later, the Respondent with Deligny in the

1 rear-most seat took off for George Charles Airport in St. Lucia.
2 The flight from St. Vincent to St. Lucia was uneventful except
3 Deligny felt a slight vibration. He said the landing at George
4 Charles Airport was uneventful.

5 Andrea R. Best, a senior airport officer at the E.T.
6 Joshua Airport, who had been in charge of quality control and
7 training of controllers at the time of this incident and had 15
8 years' experience as a controller conducted an investigation of
9 the incident at E.T. Joshua Airport in June and July of 2007. She
10 sponsored in evidence a transcript, or transcripts, rather, of
11 E.T. Joshua approach frequency, backup coordination line, a copy
12 of the AT incident/accident log, and a copy of a flight progress
13 strip.

14 The ATC log indicates that N402SZ was given clearance to
15 land but overshot the runway. When ATC asked 402SZ what its
16 intentions were, the reply was, "We will be going to St. Lucia to
17 either George Charles or Hewanorra." They were told to contact
18 St. Lucia approach and given the frequency for Air Traffic
19 Control.

20 Air Traffic Control at E.T. Joshua contacted Hewanorra
21 and notified them that N402SZ had not landed and was coming back
22 to George Charles Airport. It had done an overfly of the E.T.
23 Joshua field.

24 Ms. Best said that the runway, that Runway 07, at E.T.
25 Joshua is 4,650 feet long. On July 21st, 2007, she and

1 Mrs. Robertson, the director of airports, inspected Runway 07.
2 She saw marks on the runway consistent with propeller strikes on
3 the landing end of Runway 07, and Ms. Robertson photographed them.
4 Copies of the photograph were admitted into evidence as Exhibits
5 A-9 and A-10. The originals of the photographs cannot be located.
6 Ms. Best said that they accurately depicted what she saw.

7 Aviation Safety Inspector Albert E. Frank, a principal
8 operations inspector at the FAA Miami International Field Office,
9 which has oversight of U.S.-registered aircraft operating in St.
10 Lucia and St. Vincent, holds an ATP, multi-engine land, and
11 commercial single-engine certificate, as well as ground
12 instructor, advanced and instrument instructor. He identified a
13 letter the Respondent sent in response to a Notice of Proposed
14 Certificate Action, admitted as Exhibit A-26.

15 The Respondent said in his response to the FAA's Notice
16 of Proposed Certificate Action that he felt that the right landing
17 gear was not supporting the aircraft when he attempted to land at
18 E.T. Joshua Airport, St. Vincent, but he did not know or was not
19 sure of a propeller strike. He decided to return to St. Lucia,
20 which had a longer runway. He said all engine instruments and
21 indicators were within the green. He said that after he landed at
22 St. Lucia, maintenance inspected the aircraft and determined that
23 the right engine propeller had struck the ground but told the
24 Respondent that the propeller was within limits and it was safe to
25 fly the aircraft. Maintenance placed two brackets on the landing

1 gear so the aircraft could be flown to George Charles Airport and
2 told the Respondent that the aircraft was safe to fly.

3 Inspector Frank received a copy of a fax from Sylvanus
4 Ernest to Greg McAlpin, director of flight safety, ECCA, Antigua,
5 admitted as Exhibit A-11. Was A-11 withdrawn?

6 MS. MARSHALL: Yes, Your Honor. It was.

7 ADMINISTRATIVE LAW JUDGE POPE: All right. Strike that.
8 In a telephone call with Inspector Frank on or about October 12th,
9 2007, Sylvanus Ernest, the registered owner of N402SZ said he had
10 put two homemade locks on the landing gear before the flight from
11 Hewanorra Airport to George Charles Airport. And he had showed
12 the pilot the damaged propeller tips and that the same pilot who
13 flew the aircraft on the original flight flew it with another
14 pilot from Hewanorra Airport to George Charles Airport on May 16,
15 2007.

16 In another conversation, telephone conversation, with
17 Inspector Frank, on October 30th, 2007, Ernest said that he had
18 inspected the aircraft at the Hewanorra Airport and found it safe
19 for flight. He said the pilot did not stop on the runway at St.
20 Vincent but kept going after hitting the prop and decided not to
21 return to St. Vincent Airport, which was only 4,000 feet long and
22 there was a mountain at the far end, requiring that the aircraft
23 land only towards the mountain and depart only in the opposite
24 direction, away from the mountain and over the ocean, which
25 required the pilot to climb at a maximum rate so as to clear the

1 obstacles, as it is almost impossible to do a go-around in St.
2 Vincent, Exhibits A-28 and A-29.

3 Exhibit A-13 is a document received by Inspector Frank
4 from George McAlpin, Eastern Caribbean Civil Aviation Authority,
5 dated September 26th, 2007, stating that N402SZ had been grounded
6 because Mr. Ernest had been unable to demonstrate that he had
7 complied with the requirements of Teledyne Continental Service
8 Bulletin SB96-11A, which requires mandatory complete disassemble
9 of all rotating engine parts following any propeller strike. It
10 states that the log sheet shows that the propeller was removed
11 after it had struck the ground in St. Vincent while attempting to
12 land. However, the rotating engine was not disassembled and
13 inspected.

14 Exhibit A-17 is a customs-type general declaration for
15 flight from St. Lucia to St. Vincent, dated May 16, 2007, showing
16 the Respondent as pilot-in-command, Deligny as co-pilot, and five
17 passengers.

18 Exhibit A-18 is Teledyne Continental Aircraft Engine
19 Service Bulletin SB96-11A, which was in effect in May 2007. It
20 mandates complete disassembly and inspection of the rotating
21 engine components following a propeller strike. A propeller strike
22 is defined as any incident that requires repair of the propeller
23 other than minor dressing of blades or any incident while the
24 engine is operating in which the propeller makes contact with any
25 object that results in a loss of engine RPM. Propeller strikes

1 against the ground or any object can cause engine and component
2 damage even though the propeller may continue to rotate and can
3 result in catastrophic failure.

4 Exhibit 20 is the FAA registration for N402SZ, showing
5 that it has a Continental engine.

6 Exhibit A-22 is an enroute chart showing the distance
7 between St. Vincent and Hewanorra Airport to be 38 nautical miles.

8 Exhibit A-27 is a record by Inspector Frank of a
9 telephone conversation he had with the Respondent on October 29th,
10 2007. The Respondent said he did not declare an emergency during
11 the continuation of the flight from St. Vincent to Hewanorra
12 Airport because there was no need to declare an emergency. He
13 said he ferried the aircraft from Hewanorra Airport to George
14 Charles Airport after having the landing gear supported, the
15 crankcase checked for out of round, and replacing the propeller.
16 He said no other persons were on board the aircraft when he
17 ferried it.

18 Exhibit A-28, however, is another record by Inspector
19 Frank of a telephone conversation with Respondent on November
20 20th, 2007, in which the Respondent said he and the co-pilot were
21 the only persons on board the ferry flight on May 16, 2007.

22 Exhibit A-37 are documents concerning service of a
23 subpoena upon Ernest outside the United States and Ernest's
24 refusal to appear at this hearing on grounds of lack of
25 jurisdiction.

1 Exhibit A-29 is a record by Inspector Frank of a
2 telephone conversation with Sylvanus Ernest on October 12, 2007,
3 in which Ernest said that he was in the process of removing the
4 engine of N402SZ and would send it to High Performance Accessory
5 Services, Inc. located in San Juan, Puerto Rico, for teardown and
6 inspection.

7 Exhibit A-33 is the Administrator's enforcement sanction
8 guidance table, which shows for operation of a non-airworthy
9 aircraft, a sanction of suspension from 30 to 180 days.

10 Inspector Frank testified that no ferry permit
11 authorizing a flight from Hewanorra to George Charles Airport on
12 May 16th, 2007 had been issued by the FAA. Exhibit R-2 is a
13 compilation of what is required for issuance by the FAA of special
14 airworthiness certificates for operation of unairworthy aircraft,
15 commonly referred to as ferry permits. He said that St. Lucia
16 also has similar provisions in its Civil Aviation Regulations.

17 Inspector Frank acknowledged that he issued a
18 reexamination order to the Respondent, premised in large part on
19 the incident of May 16, 2007, and that the Respondent passed the
20 reexamination. He denied that he told the Respondent that passing
21 the reexamination would preclude certificate action or a citation
22 for violations of regulations.

23 Exhibit A-38 was FAA Order 8130.2(f), which interprets
24 the term of airworthiness of U.S.-type certificated aircraft and
25 provides that the aircraft must conform to its type certificate,

1 and conformation to type designed is considered attained when the
2 aircraft configuration and the components installed are consistent
3 with the drawings, specifications, and other data that are part of
4 the TC, which includes any supplemental type certificates, or
5 STCs, and field approval alterations incorporated in the aircraft.
6 Further, the aircraft must be in a condition for safe operation.

7 Exhibit A-39 is the type certificate database, which
8 includes Cessna 402B Aircraft, including N402SZ, which has a
9 serial number falling in the range of serial numbers covered by
10 the datasheet. It does not provide for operation of the aircraft
11 with a damaged propeller or defective landing gear or operation
12 with a homemade lock installed on the landing gear to prevent the
13 landing gear from collapsing.

14 Andrea Best, recalled as a witness, said that, as
15 reflected in Exhibits A-5 and A-6, N402SZ told ATC that its new
16 destination after it did not land at St. Vincent was George
17 Charles Airport in St. Lucia and then two and a half minutes later
18 changed the destination to Hewanorra Airport on St. Lucia. The
19 voice on the radio was not that of the Respondent, whose voice she
20 recognized from previous contact.

21 She said that when an aircraft landing at the St.
22 Vincent Airport has a problem, ATC must be notified so that
23 emergency services can be alerted. The PIC must file a mandatory
24 report, which is forwarded to the Eastern Caribbean Civil Aviation
25 Authority before the aircraft can take off again. The report is

1 mandatory under the St. Vincent and the Grenadines Civil Aviation
2 Regulations, issued by the minister responsible for aviation, who
3 currently and in May 2007, is also the prime minister. She said
4 that the terrain at the end of Runway 07 rose 1,250 feet straight
5 ahead and over 700 feet to the east.

6 Mr. Deligny was recalled as a witness by the
7 Administrator. He said that he was not a member of the crew of
8 N402SZ on May 16, 2007. He said he had not been hired by nor was
9 he paid by the owner of the aircraft or by the Respondent. He
10 denied that he was paid \$500 per month by the owner of the
11 aircraft. He acknowledged that he sometimes wore a uniform
12 consisting of black pants and a white shirt, which he had on that
13 day, and three-stripe shoulder boards, indicating a co-pilot,
14 which he did not have on that day. He said he got the uniform
15 during flight training. He said that the general declaration,
16 Exhibit A-17, was not in his handwriting. He is listed on it as
17 the co-pilot.

18 The Respondent elected to testify in his own behalf. He
19 said he is 41 years old, is married, and lives in St. Lucia, where
20 he was born. He has three children. He holds an ATP and has
21 approximately 11,200 flight hours. He received his ATP in January
22 1993, and was rated on the Beech 1900 Aircraft. He also has pilot
23 licenses from St. Lucia, Grenada, and St. Vincent.

24 On May 16th, 2007, he was employed by General Aviation
25 in St. Lucia, which is owned by Sylvanus Ernest, who is a pilot

1 and holds an ATP and has a hangar at George Charles Airport on St.
2 Lucia, where he performs maintenance mainly on privately owned
3 aircraft. N402SZ was based at George Charles Airport and was
4 under lease to a company called Digicel, a communications company
5 in St. Lucia. The Respondent generally flew their personnel three
6 times a week to various Caribbean islands. The flight operations
7 were under Part 91.

8 On May 16, 2007, his schedule was from St. Lucia to St.
9 Vincent to Grenada and return to St. Lucia. He has flown into the
10 E.T. Joshua Airport in St. Vincent over the last 24 years. He
11 said that, normally, takeoffs from that airport are not conducted
12 from Runway 07 because of high terrain at the end, but it is
13 permitted with permission from ATC. He said if an aircraft goes
14 straight ahead on Runway 07 to take off, the terrain rises about
15 1,200 feet. If it goes east, there is a valley and the terrain
16 rises about 700 feet.

17 On May 16, 2007, he received clearance to land from ATC
18 in St. Vincent. He said he lowered the landing gear and recalled
19 asking the co-pilot, Gianni Deligny, if they had three green
20 lights after the gear was lowered. He recalled Deligny saying he
21 was not sure, but the Respondent himself saw three green lights.
22 In any event, the Respondent recycled the landing gear, and they
23 both agreed there were three green lights.

24 When he landed, he felt the aircraft go down on the
25 right and knew something was wrong and, as a matter of reflex more

1 than thought, decided to take off because he knew he safely could.
2 At about 500 to 700 feet altitude, he raised the flaps and landing
3 gear and made a turn to the east down the valley. He said he did
4 not feel the propeller strike but felt or heard something
5 scraping, either the gear door or the propeller. The aircraft was
6 climbing well, however. He told Gianni Deligny that they were
7 going to St. Lucia and he heard Deligny tell Air Traffic Control
8 they were going to George Charles Airport. He told Deligny to
9 tell Air Traffic Control they were going to Hewanorra Airport.

10 He said that Air Traffic Control asked if they had any
11 problems and he told Deligny to answer they were okay. He said he
12 knew that there was something wrong with the landing gear, but
13 nothing was wrong with the engine. He said he felt the right gear
14 had not been supporting the aircraft during the landing. He did
15 not see any drop in RPM and no other instruments showed anything
16 to be wrong.

17 He said the approach to Hewanorra Airport was normal,
18 and he contacted Air Traffic Control there and reported they were
19 inbound and gave his altitude and estimated arrival. He said he
20 put the gear down and there were three green lights, but he
21 decided to let Deligny fly while he manually lowered the gear and
22 he heard the handle click. He said he decided to fly by the tower
23 and ask Air Traffic Control if the gear was down. The tower said
24 it appeared to be.

25 After the Respondent landed, he called Ernest on the

1 telephone and told him he felt that the landing gear was not
2 supporting the airplane. Ernest flew from George Charles Airport
3 in his own Cessna 172. He and the Respondent looked at the
4 propeller and Ernest said the propeller had been filed. And he
5 saw a crack in the right landing gear torque tube.

6 Ernest said he was going back to George Charles Airport
7 for some braces he had in the hangar there. And he came back
8 later with the braces and some tools. Ernest did some
9 measurements and said the propeller was within limits. If it had
10 hit, it had just barely scraped. He put the braces on the landing
11 gear and told the Respondent that the aircraft was totally fit to
12 fly and to take it back to George Charles Airport. The Respondent
13 said he told Ernest, "If you say so," and flew the aircraft back
14 to George Charles Airport.

15 The Respondent said he figured that if a mechanic had
16 fixed the aircraft, it was fit to go. He said he knew about ferry
17 permits from two previous occasions, which were in no way similar
18 to this occasion, and he did not know he had to obtain one for
19 flight to George Charles. He said he thought that if a ferry
20 permit was needed, the mechanic would be the one to get it, not
21 the pilot. He said he never knew the aircraft was unairworthy.
22 He said he thought the reexamination had ended the matter was
23 surprised to receive the NOPCA.

24 On cross-examination, he acknowledged that he had not
25 requested anything from the St. Vincent ATC regarding his

1 departure on May 16th, 2007. He said he had heard a filing sound
2 on the aborted landing but did not feel any impact. When he felt
3 the aircraft sinking, he instinctively pulled up. He said he went
4 to Hewanorra rather than land at E.T. Joshua Airport at St.
5 Vincent because there were obstructions along the sides of the
6 runway and their emergency response there was poor. He
7 acknowledged that he had not told ATC at Hewanorra that he had
8 experienced landing gear problems. He said that Ernest later
9 changed the propeller at St. George [sic] but said he did not have
10 to do that.

11 The first error made by the Respondent as pilot-in-
12 command of N402SZ was to attempt a landing at all at the St.
13 Vincent Airport after there were indications that the right main
14 landing gear was not down and locked because Deligny reported
15 intermittent flickering of the green down and locked light. But
16 without declaring an emergency and advising ATC of his predicament
17 and lowering the landing gear manually, the Respondent elected to
18 land anyway. The Respondent was the PIC and he was solely
19 responsible under Board precedent for the safe operation of the
20 aircraft. He could not legally shift that responsibility to a
21 passenger who is not a member of the crew seated in the right
22 front seat. To the extent the Respondent may have shifted any
23 duties to the non-crew member, even though that person may have
24 also been a pilot does not in any way relieve the Respondent of
25 his overall responsibility for the safe operation of the aircraft.

1 There is credible testimony from Inspector Frank that
2 what the Respondent should have done was to declare an emergency
3 to Air Traffic Control, manually extend the landing gear and
4 sought guidance from Air Traffic Control or a competent mechanic.
5 By doing all of these things, the Respondent would have taken
6 every reasonable precaution to ensure a safe landing at St.
7 Vincent. There was ample runway length for him to make a safe
8 landing at the E.T. Joshua Airport.

9 The runway at St. Vincent was long enough, in fact, by
10 about 2,000 feet for a safe landing, and it was obviously the
11 closest airport for the Respondent to land after discovering
12 problems in flight with the landing gear deploying and locking.
13 In fact, had he done what was required of him there, he would
14 essentially have been in no different posture at E.T. Joshua than
15 he was when he landed later at Hewanorra Airport.

16 Instead, he did none of the above. The landing gear was
17 recycled, but Deligny, who I find to be a credible witness, saw
18 the green light still flickered. The Respondent, though,
19 proceeded to try to land on Runway 07, which had mountainous
20 terrain at the end, and when he experienced the landing gear
21 collapsing, took off without clearance or even notice to ATC. It
22 was because of the mountainous terrain at the end of the Runway 07
23 that takeoffs from Runway 07 at St. Vincent were not usually
24 allowed. That the Respondent was able to take off without
25 colliding with terrain when the landing gear on the right side

1 began collapsing and he suspected either the landing gear door or
2 the propeller on that side had struck the ground, is simply
3 fortuitous and is not the result of the exercise of reasonable
4 care.

5 At the very least, to attempt to land in the first
6 instance and the following takeoff was a result of extremely poor
7 judgment and constituted careless or reckless operation of the
8 aircraft so as to endanger life or property of another.

9 By failing to exercise the level in care and judgment
10 expected of a holder of an ATP before attempting to land, as just
11 discussed, the Respondent put himself and the passengers in the
12 aircraft in the position that he had no safe options when he tried
13 to land at St. Vincent, and the right landing gear began
14 collapsing. His only options then were to either try to takeoff
15 and run the risk of striking the mountain or continue to land and
16 risk whatever consequences might follow if the aircraft went out
17 of control, which, in any event, might very well have been less
18 severe than colliding at takeoff power with a mountain.

19 Moreover, he was later able to land safely at Hewanorra
20 Airport after manually extending the landing gear. And it is a
21 reasonable supposition that he could have done so safely at St.
22 Vincent Airport if he had first manually extended the landing gear
23 and alerted Air Traffic Control to his problem.

24 From that point on, things went from bad to worse for
25 the Respondent. He continued to fly the aircraft to Hewanorra

1 with what turned out to be a damaged propeller. And here I find
2 from his own admission to Inspector Frank that he well knew or
3 suspected that the propeller had struck the ground and that engine
4 damage was at least a possibility.

5 Continuing the flight from St. Vincent to Hewanorra
6 Airport in St. Lucia was a violation of FAR Section 91.7(b)
7 because the Respondent did not land at the first available point
8 consistent with the safe operation of the aircraft. In point of
9 fact, his landing at Hewanorra Airport in St. Lucia was no safer
10 than a landing at St. Vincent would have been and, in all,
11 probably was less safe because even then, the Respondent did not
12 advise Air Traffic Control he was having landing gear problems.
13 It was also a violation of Section 91.7(a) because the Respondent
14 knew or should have known that the aircraft was unairworthy and
15 was unsafe to fly.

16 The Respondent then flew N402SZ from Hewanorra to George
17 Charles Airport, which was a short duration flight, but was a
18 flight not authorized by a ferry permit while he was carrying a
19 passenger who was not a member of the crew. The Respondent, it
20 turns out from his testimony, was not completely unfamiliar with
21 ferry permits.

22 It is patently obvious, in any event, as well-
23 established by the evidence, in the exhibits admitted during the
24 hearing, that with a damaged propeller and unauthorized brackets
25 locking the landing gear in the down position, N402SZ did not

1 conform to its type certificate and, further, was not safe to fly,
2 as no reasonable and appropriate steps had been taken such as
3 disassembling the engine with a damaged propeller to determine if
4 it had been damaged and to ascertain whether it was safe condition
5 to operate. It is not relevant that Inspector Frank did not
6 himself look at the aircraft's type certificate until the hearing.

7 There can be no genuine dispute that the aircraft did
8 not leave the factory with homemade locks on the landing gear to
9 keep the gear in the down and locked position and with a damaged
10 propeller. Further, there is ample evidence that the damaged
11 propeller was sufficiently damaged to the blade tips, that the
12 owner later removed it from the aircraft. That would hardly be
13 unexpected when the rotating propeller struck the hard surface of
14 a runway.

15 Because a lapse of time, the photographs admitted in
16 this proceeding of parallel marks on the runway indicative of a
17 propeller blade strike do not conclusively prove that they were
18 made by the Respondent's aircraft. However, combined with the
19 testimony of Mr. Deligny and the Respondent's own admissions to
20 Inspector Frank, the totality of the circumstantial evidence
21 establishes that more likely than not, the right engine propeller
22 had struck the ground during the attempted landing at St. Vincent
23 on May 16, 2007 and that the Respondent was aware of that fact.

24 There can be no serious argument that a propeller is not
25 designed to take such abuse, and in fact, the Teledyne Continental

1 Service Bulletin mandates disassembling and inspection of the
2 engine components after there is a propeller strike. There may be
3 no direct evidence that when the propeller struck the ground the
4 RPM went down. But, again, with the abrasion of the propeller
5 tips on the hard surface of the runway, it is reasonable to assume
6 that the RPM would at least momentarily decrease whether anybody
7 was watching the RPM indicator at that precise moment or not.
8 And, thus, disassembly of the engine was required.

9 Perhaps the engine was undamaged or perhaps it was not.
10 The point is, no one competent to make that determination took
11 adequate steps to find out, and the Respondent as the pilot-in-
12 command was well aware of that fact. The Respondent as the pilot-
13 in-command and the holder of an ATP certificate had an independent
14 obligation to make sure that the aircraft was in a safe condition
15 for flight before he continued the flight from Hewanorra Airport
16 to George Charles Airport.

17 He knew with his ATP certificate and wealth of
18 experience as a pilot, should have known, that the aircraft was
19 obviously unairworthy and in an unsafe condition with the damage
20 to the propeller and the homemade braces on the landing gear
21 especially as the right landing gear had started to fail during
22 the aborted landing at E.T. Joshua Airport and a crack in the
23 landing gear structure had been pointed out to him by Ernest.
24 Further, he knew that he did not have a ferry permit for the
25 flight of the aircraft.

1 Again, as the holder of an ATP with his level of
2 experience, I do not believe that the Respondent is unfamiliar
3 with the requirement for a ferry permit to fly an unairworthy
4 aircraft and I do not find him to be a credible witness.

5 It is not a valid defense here that Sylvanus Ernest, the
6 aircraft's owner, may have told him that the aircraft was safe to
7 fly. Even if Ernest is the holder of an A&P certificate or, more
8 precisely, a mechanic's certificate with A&P privileges, the
9 Respondent knew that he had not completed any maintenance record
10 of the aircraft, for the aircraft, of whatever he did to it and
11 had not certified on the maintenance record that the aircraft was
12 returned to service as airworthy. The Respondent knew that Ernest
13 had done nothing more than look at the propeller and the landing
14 gear, make a few measurements before telling the Respondent it was
15 totally fit and instructing him to fly the aircraft to George
16 Charles Airport.

17 Ernest, in fact, completely ignored the Teledyne
18 Continental Service Bulletin mandating disassembly and inspection
19 of the engine after the propeller strike and further ignored the
20 requirement for a ferry permit. These were not so esoteric
21 requirements that the Respondent could not be expected to know
22 them also. It was obvious even to a layman, let alone the holder
23 A&P, or an ATP, who has the highest level of responsibility that
24 the propeller was damaged and there were homemade locks installed
25 to keep the gear from retracting. As to the condition of the

1 engine, the Respondent knew nothing had been done to inspect it
2 internally.

3 It is obvious even to a layman that propellers are not
4 built to withstand striking a hard surface runway at running speed
5 without any damage whatsoever. No reasonable and prudent pilot,
6 much less the holder of an ATP would reach such an unreasonable
7 and unwanted conclusion. Nothing was done, as the Respondent
8 observed, other than the owner taking some external measurements
9 and pronouncing the aircraft safe to fly. But that had little
10 relevance, if any, to the internal condition of the engine and
11 certainly there was no assurance that pieces of the damaged
12 propeller would not break off during the flight causing
13 unpredictable damage.

14 The same reasoning applies to the impromptu remedy of
15 applying non-authorized brackets of some sort to keep the landing
16 gear from retracting. No one, least of all the Respondent, was
17 legally authorized by the aircraft maintenance manual or the
18 manufacturer to make such a temporary repair. And it was not part
19 of the type certificate data sheet, as any reasonable and prudent
20 ATP holder might expect. Again, there was no reasonable way for
21 the Respondent or the owner, for that matter, to ascertain if the
22 improvised locks would withstand the shock of a landing.

23 I find, therefore, that N402SZ was not airworthy, as
24 that term is applied in *Administrator v. Thibert*, supra, the
25 Administrator has proven by a preponderance of the evidence that

1 the aircraft on the flight from St. Vincent to Hewanorra Airport
2 in St. Lucia and from there to George Charles Airport in St. Lucia
3 did not conform to its type certificate and applicable
4 Airworthiness Directives in the manufacturer's maintenance
5 manuals.

6 And, further, it was not in a safe condition for flight.
7 The fact that the aircraft made the flights without a catastrophe
8 does not establish that it was in a safe condition to fly. As the
9 Board has said, the term airworthiness is not synonymous with
10 flyability.

11 Finally, the Respondent was well aware that the
12 propeller had struck the ground and had ad hoc, unauthorized
13 braces installed to keep the landing gear from retracting and was
14 further fully aware that effective and reasonable steps had not
15 been taken to ascertain whether the engine and damaged propeller
16 were in a safe condition to operate and still met the type
17 certificate. Under these conditions, the Respondent knew or at
18 least should have known that the aircraft was no longer airworthy
19 and wasn't safe to fly without a ferry permit issued by the
20 Administrator.

21 I do not find the Respondent's attempt to shift the
22 responsibility that rested on him to someone else to be credible,
23 reasonable or prudent. In this instance, he tried to shift the
24 responsibility to Sylvanus Ernest.

25 The evidence in this case establishes that the

1 Respondent operated N402SZ in violation of FAR Section 91.7(a) and
2 (b). At the very least, these violations supported the derivative
3 violation of Section 91.13(a), careless or reckless operation.
4 The evidence is sufficiently strong to support a finding of a
5 derivative violation of 91.13(a) or a standalone violation of FAR
6 91.13(a). I find the evidence supports either theory but that for
7 sanction purposes, it is immaterial as the range of sanctions for
8 operating an unairworthy aircraft alone covered the sanction
9 imposed by the Administrator.

10 Finally, with respect to FAR Section 91.703, there is
11 ample evidence of record that the Civil Aviation Regulations of
12 St. Vincent and the Grenadines, found in Exhibit A-23, parallel
13 the FARs with regard to forbidding a pilot to operate an
14 unairworthy aircraft. Clearly, and I so find, that the Respondent
15 also violated FAR Section 91.703(a)(2) and (a)(3) by failing to
16 comply with the Civil Aviation Regulations of St. Vincent and the
17 Grenadines while operating a U.S.-registered aircraft and holding
18 a U.S.-issued ATP certificate.

19 That leaves the question of the appropriateness of the
20 sanction imposed by the Administrator of suspension of
21 Respondent's ATP certificate for 180 days. That is the high end
22 of the range of sanctions provided in the Administrator's Sanction
23 Guidance Table and further Board precedent record a number of
24 cases in which lesser periods of suspension for not dissimilar
25 violations have been approved.

1 I find some mitigating factors to be worth considering
2 in that, first and foremost, the holder of a U.S. A&P certificate,
3 or a mechanic's certificate with A&P privileges, told the
4 Respondent the aircraft was fit to fly from Hewanorra Airport to
5 George Charles Airport without a ferry permit and the Respondent,
6 albeit unreasonably and unjustifiably, relied on that advice,
7 possibly because the mechanic was also his employer and the owner
8 of the aircraft. I find that, considering all of the relevant
9 factors in this case surrounding the violations, a suspension of
10 100 days is appropriate and is in line with suspensions approved
11 by the Board in *Administrator v. Scuderi*, supra, in which the
12 Board approved reduction of a 150-day suspension to a 100-day
13 suspension for violations that included 91.13(a) and 91.7(a).

14 Upon consideration of all the substantial, reliable and
15 probative evidence of record, I find that the Administrator has
16 proven by a preponderance of the evidence that the Respondent
17 violated FAR Sections 91.7(a) and (b), 91.13(a), 91.703(a)(2) and
18 (a)(3) as alleged in the complaint, but that reduction of the
19 sanction from suspension of his ATP certificate from 180 days to
20 100 days is warranted.

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ORDER

ACCORDINGLY, IT IS ORDERED THAT the Respondent's appeal is granted in part and denied in part. The Administrator's order with the respect to the FAR violations alleged in the complaint is affirmed. The Administrator's order with respect to sanction shall be modified to provide that any ATP certificate held by the Respondent shall be suspended for 100 days.

EDITED ON
MAY 19, 2009

William A. Pope, II
Administrative Law Judge