

SERVED: April 9, 2010

NTSB Order No. EA-5518

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 8th day of April, 2010

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J. RANDOLPH BABBITT,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-18376
v.)	
)	
WESTERN AIR EXPRESS, INC.,)	
)	
Respondent.)	
)	
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ORDER DENYING MODIFICATION

The Administrator seeks modification of our opinion and order in this case, NTSB Order No. EA-5486, served November 2, 2009. In that decision, we affirmed the law judge's initial decision, in which he determined that respondent violated 14 C.F.R. §§ 119.5(1) and 135.421(a), by operating a series of revenue flights in a Beechcraft Queen Air, model BE-65-A80-8800, when the aircraft did not comply with its operations specifications. We concluded that the law judge did not err in affirming the Administrator's complaint, because the Administrator's counsel made an offer of proof at the hearing showing that the Administrator could prove the allegations in the complaint, and a representative on behalf of respondent did

not appear at the hearing to contest the Administrator's allegations.

In our original opinion, we stated, "[t]he law judge ... found that the Administrator had fulfilled the burden of proving that respondent violated 14 C.F.R. §§ 119.5(1) and 135.421(a), based on the Administrator's offer of proof and respondent's failure to rebut any evidence that the Administrator's counsel described during the offer of proof." We rejected the arguments that respondent submitted on appeal, that: the stale complaint rule, codified at 49 C.F.R. § 821.33, barred the Administrator's action against respondent's certificate; the law judge erred in allowing the Administrator to amend the complaint regarding the correct set of operations specifications; the law judge erred in denying a continuance of the hearing; and safety and the public interest do not require the suspension, pending compliance, of respondent's certificate.

The Administrator now seeks modification of our original opinion and order, arguing that our opinion incorrectly summarized the law judge's decision. Respondent did not reply to the Administrator's petition, which states that, in the law judge's initial decision, the law judge "stated that he based his decision on the Administrator's offer of proof and 'primarily on the failure of [respondent's representatives] to appear' at the hearing." Pet. for Modification at 2. The Administrator's petition also states, "[a]lthough it is true that respondent ... did not appear at the hearing and therefore failed to rebut any evidence that the Administrator described during the offer of proof, the Board's statement does not accurately reflect the [law judge's] basis for affirming the Administrator's order of suspension in this case." Id. Respondent did not reply to the Administrator's petition.

In his oral initial decision, the law judge stated, "[b]ased on that offer of proof and based primarily on the failure of [respondent's representatives] to appear here today -- and let me state that when this matter was originally set for hearing on May 5th, at that time, because of an amendment ... [respondent] requested a continuance." Initial Decision at 36. The law judge then explained the continuance and the fact that he sent notice of the continuance to respondent. At the conclusion of his decision, the law judge continued, "based on the failure of the parties to appear, and based on the offer of proof as just presented by the Administrator, I find that the Administrator's continuing order of suspension of the air -- not

airworthiness, but the air operation certificate of Western Air Express[,] is hereby affirmed." Id. at 37.

We believe our original opinion and order in this matter accurately reflects the fact that the law judge based his decision in this case upon two factors: the fact that respondent's representatives did not appear at the hearing to contest the Administrator's allegations, and the fact that the Administrator's counsel made an offer of proof indicating that the Administrator had adequate evidence showing that respondent violated 14 C.F.R. §§ 119.5(1) and 135.421(a). Here, respondent failed to appear in the course of an appeal it initiated, failed to challenge the Administrator's case, and thus permitted the Administrator to proffer the factual foundation of the allegations that the Administrator originally lodged against respondent. Respondent's failure to appear at the hearing, of which respondent had sufficient advance notice, thus permitted the law judge to decide the disputed matters procedurally.¹ We agree that the effect of the law judge's statements in his decision was to deem the Administrator's allegations to be uncontested. We believe our decision accurately summarized the basis of the law judge's decision, and we therefore decline to alter our original opinion and order in this case.

ACCORDINGLY, IT IS ORDERED THAT:

The Administrator's petition for modification is denied.

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

¹ See Administrator v. Haynes, NTSB Order No. EA-4690 (1998), aff'd, Haynes v. FAA, 198 F.3d 258 (10th Cir. 1999), in which the Board affirmed the law judge's dismissal of the respondent's appeal when the respondent did not attend the administrative hearing, at which the law judge permitted the submission of evidence.