

SERVED: February 28, 2011

NTSB Order No. EA-5573

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 25th day of February, 2011

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J. RANDOLPH BABBITT,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-18805
v.)	
)	
WAYNE ALLEN CARR,)	
)	
Respondent.)	
)	
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OPINION AND ORDER

Respondent appeals the August 27, 2010 written order of Administrative Law Judge Patrick G. Geraghty, granting the Administrator's motion for summary judgment.¹ In his order, the law judge affirmed the Administrator's suspension of respondent's airline transport pilot (ATP) certificate, but

¹ A copy of the law judge's decisional order is attached.

reduced the suspension period from 60 days to 55 days.² The Administrator had ordered suspension of respondent's certificate based on respondent's alleged violations of 14 C.F.R.

§§ 91.7(a),³ 91.9(a),⁴ and 91.13(a).⁵ We remand to the law judge, for completion of the factual record with regard to certain issues the parties have argued on appeal.

The Administrator issued the suspension order, which became the complaint in this case, on February 3, 2010. The complaint alleged that respondent performed flight testing of a Garmin 530 global positioning system (GPS) Wide Area Augmentation System (WAAS) during a maintenance ferry flight in a Cessna 550 on March 30, 2009, when he was not designated a flight test pilot. The complaint stated that, at the time of the flight at issue, the aircraft was not airworthy, due to certain maintenance

² The law judge's order notes that the Administrator sought suspension of respondent's ATP and mechanic certificates, but only affirmed suspension of respondent's ATP certificate, as the charges relating to respondent's mechanic certificate were dismissed earlier in the proceedings. Decisional Order at 5-6.

³ Section 91.7(a) prohibits operation of a civil aircraft that is not in an airworthy condition.

⁴ Section 91.9(a) provides that, "no person may operate a civil aircraft without complying with the operating limitations specified in the approved Airplane or Rotorcraft Flight Manual, markings, and placards, or as otherwise prescribed by the certificating authority of the country of registry."

⁵ Section 91.13(a) prohibits operation of an aircraft in a careless or reckless manner, so as to endanger the life or property of another.

discrepancies; as a result, the complaint alleged the aircraft was authorized for operation by a special flight permit (SFP) issued under 14 C.F.R. § 21.197(a)(1),⁶ in order to reposition the aircraft to a location wherein the maintenance discrepancies could be corrected. The complaint further stated the GPS at issue was installed for visual flight rules operations only, but that, on the March 30, 2009 flight, respondent conducted flight testing under instrument flight rules (IFR), to develop data in support of certifying the new GPS. The complaint also alleged respondent signed FAA Form 337,⁷ indicating a major alteration to the aircraft had occurred and the WAAS upgrade met the requirements for en route, terminal, and approach navigation under IFR. The complaint alleged respondent exceeded his authority under the SFP, because the SFP did not authorize the

⁶ Section 21.197(a)(1) provides as follows:

(a) A special flight permit may be issued for an aircraft that may not currently meet applicable airworthiness requirements but is capable of safe flight, for the following purposes:

(1) Flying the aircraft to a base where repairs, alterations, or maintenance are to be performed, or to a point of storage.

The complaint also cited § 21.191(b), in that it alleged § 21.191(b) provides the Administrator may approve flight tests and other operations to show compliance with the function and reliability requirements of the regulations.

⁷ For certain work, mechanics must complete and submit FAA Form 337, entitled, "Major Repair and Alteration (Airframe, Powerplant, Propeller, or Appliance)," in accordance with Advisory Circular 43.9-1E.

performance of any flight testing, nor did it allow generation of data concerning the GPS for IFR operations.⁸

In response to the Administrator's order, respondent submitted an answer, in which he admitted several of the allegations. The parties engaged in discovery, in which they exchanged interrogatories and took deposition testimony. Following the conclusion of discovery, the Administrator filed a motion to limit the hearing to the issue of sanction, and for partial summary judgment. Respondent then filed a cross-motion for summary judgment. In the order at issue here, the law judge resolved these pleadings by granting the Administrator's motion for summary judgment.

Under the Board's Rules of Practice, a party may file a motion for summary judgment on the basis that the pleadings and other supporting documents establish that no factual issues exist, and that the party is therefore entitled to judgment as a matter of law. 49 C.F.R. § 821.17(d). We have previously considered the Federal Rules of Civil Procedure to be instructive in determining whether disposition of a case via

⁸ The complaint originally asserted that respondent also violated 14 C.F.R. §§ 65.85(a) and 65.87(a), which authorize work that a mechanic certificate holder who has an airframe and powerplant rating may perform, as well as § 183.29(h), which describes duties of a flight test pilot representative. The law judge granted respondent's motion for partial summary judgment, limiting the case to the issue of whether respondent violated §§ 91.7(a), 91.9(a), and 91.13(a). The Administrator did not appeal that finding.

summary judgment is appropriate.⁹ In this regard, we recognize that federal courts have granted summary judgment when no genuine issues of material fact exist.¹⁰ In order to defeat a motion for summary judgment, a party must provide more than a general denial of the allegations.¹¹

In his decisional order, the law judge opined that respondent's admissions to several of the Administrator's allegations, combined with the documentary evidence, showed no genuine issues of material fact remained for resolution. In particular, the law judge found that respondent's affidavit, which respondent attached to his cross-motion for summary judgment, contradicted both respondent's prior deposition testimony and respondent's completion of Form 337 concerning the issue of whether respondent performed only an "operational, functioning check" on the flight at issue. Decisional Order at 3-4. As a result, the law judge held the Administrator's evidence established that respondent engaged in flight testing

⁹ Administrator v. Doll, 7 NTSB 1294, 1296 n.14 (1991) (citing Fed. R. Civ. P. 56(e)).

¹⁰ Celotex Corp. v. Catrett, 477 U.S. 317, 322-24 (1986). A *genuine* issue exists if the evidence is sufficient for a reasonable fact-finder to return a verdict for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255-56 (1986). An issue is *material* when it is relevant or necessary to the ultimate conclusion of the case. Id. at 248.

¹¹ Administrator v. Hendrix, NTSB Order No. EA-5363 at 5-6 n.8 (2008) (citing Doll, supra note 9, at 1296).

of the GPS,¹² and that such flight testing was beyond the scope of the authority that the SFP provided. Id. at 4. The law judge clarified that he believed *flight checks* were for the purpose of assuring the proper functioning of installed, approved equipment systems, while *flight testing* would occur to obtain approval for the use of equipment or systems not previously approved for operational use. The law judge stated that the new GPS was not approved for installation in the aircraft at issue. Id. at 3. As a result, the law judge held respondent violated §§ 91.7(a), 91.9(a), and 91.13(a).¹³

On appeal, respondent raises several issues. In particular, respondent argues the law judge erred in taking judicial notice of § 21.191(b), because that regulation only applies to experimental aircraft, and that, in this case, the

¹² Based on his determination that respondent had engaged in flight testing, the law judge took judicial notice of § 21.191(b). Decisional Order at 3.

¹³ We have previously held that the Administrator may prove a violation of § 91.13(a) by proving that another operational violation has occurred. See, e.g., Administrator v. Seyb, NTSB Order No. EA-5024 at 4 (2003) (stating that, “[u]nder the Administrator’s interpretation of her regulations, a charge of carelessness or recklessness under § 91.13(a) is proven when an operational violation has been charged and proven,” and that, “[t]he cases that have established this policy are too numerous to list”). In this case, however, the law judge held that the facts established a violation of § 91.13(a) notwithstanding respondent’s other violations, as he believed respondent’s conduct was reckless and sufficed to prove an independent violation of § 91.13(a). Decisional Order at 5.

installation of the new GPS was not a "major design change," so regulations under part 91 (rather than part 21) applied to the aircraft at issue. Respondent further contends that the law judge erred in determining that respondent's installation of the new GPS was unapproved, because the Administrator had previously stated that the GPS installation was valid by way of respondent's completion of FAA Form 337. Respondent asserts that the law judge erred in finding that respondent conducted flight testing of the GPS during the flight at issue, because the evidence only established that respondent performed operational checks of the new system. Furthermore, respondent takes issue with the law judge's ruling that the flight checks respondent performed were outside the scope of permissible activity outlined by the SFP. Respondent also argues the law judge erred in finding respondent acted recklessly, in reducing the sanction only slightly, and in not considering respondent's affirmative defenses.¹⁴ The Administrator contests each of

¹⁴ Respondent's affirmative defenses included his argument that the doctrine of reasonable reliance applied to the case at issue. Under the doctrine of reasonable reliance, we have held that, "[i]f ... a particular task is the responsibility of another, if the [pilot-in-command] has no independent obligation ... or ability to ascertain the information, and if [he or she] has no reason to question the other's performance, then and only then will no violation be found." Administrator v. Fay and Takacs, NTSB Order No. EA-3501 at 9 (1992). We have also specifically stated that the doctrine of reasonable reliance is one of narrow applicability. See, e.g., Administrator v. Angstadt, NTSB Order No. EA-5421 at 18-19 (2008) (citing Fay and

respondent's arguments, and urges us to affirm the law judge's decision.¹⁵

We have carefully reviewed the record, and conclude that certain discrepancies therein counsel in favor of collecting additional evidence, by way of holding a hearing, concerning whether respondent operated the aircraft in violation of the limitations of the SFP. In particular, respondent contends that his IFR operation of the aircraft was permissible on the flight at issue, because he was merely conducting operational checks of the new GPS, and that Inspector Laura Delewski,¹⁶ in her deposition testimony, indicated that the SFP did not preclude IFR operation. The transcript of Inspector Delewski's testimony, however, does not conclusively indicate that she believed the SFP permitted IFR operation.¹⁷ Moreover, respondent

(..continued)

Takacs and Administrator v. Jolly, NTSB Order No. EA-5307 at 10 (2007)). Respondent also asserted that the Administrator's interpretation of the regulations at issue here was arbitrary, capricious, an abuse of discretion, and not in accordance with the law, as well as unconstitutionally vague and contrary to the plain language of the regulations.

¹⁵ The Administrator did not appeal the law judge's reduction in sanction.

¹⁶ Inspector Delewski is an aviation safety inspector whom the Administrator identified early in discovery as an expert witness.

¹⁷ The transcript of Inspector Delewski's testimony states as follows:

Q. Now, nowhere in [the SFP] does it say [respondent

contends that his installation of the new GPS was not a major design change, but was a major alteration, thereby precluding applicability of § 21.191; the Administrator, however, argues that a major alteration is a "subcomponent of a major design change." Reply Br. at 12. We do not believe the law judge's decision was clear on this point, as the parties did not appear to address this issue adequately below. The record, therefore, lacks sufficient evidence concerning the Administrator's interpretation of § 21.191, and the basis for the Administrator's opinion that § 21.191 applied to respondent's March 30, 2009 flight.

Furthermore, the record will benefit from additional evidence concerning whether the installation of the new GPS was

(..continued)

is] prohibited from doing any type of flight checks of the avionics, does it?

A. No.

Q. So, for instance, if he were to perform a VOR check for IFR accuracy during the flight, that would not be something that was prohibited by you in the ferry permit; isn't that right?

A. I would have - the ferry permit only authorized the aircraft to be moved from one location to the other. It did not give authority to do anything other than that.

Inspector Delewski also stated as follows: "[a]s a pilot on board the aircraft he's absolutely authorized to check - crosscheck gauges and whatnot, absolutely, irregardless of whether the aircraft was on a ferry permit or not," and that respondent could check to ensure the equipment was operating and functioning properly. Respondent's Cross-Mot. for Summary J., Exh. 3 at 113-115.

approved. Respondent submitted a copy of FAA Form 337, indicating he had installed the GPS, and the appropriate FAA office issued an SFP in response to that submission. Therefore, factual evidence concerning whether the FAA approved the installation of the particular GPS that respondent installed is necessary for determining whether the Administrator proved this allegation of the complaint.

Moreover, respondent did not argue his affirmative defenses in the pleadings and discovery preceding the submission of dispositive motions. Therefore, the record also does not contain evidence concerning on whom respondent may have relied, pursuant to our doctrine of reasonable reliance. The Administrator contends that respondent's appeal brief is the only pleading, other than his answer, in which respondent mentioned the affirmative defenses. Similarly, respondent argues that the Administrator did not raise certain facts, such as a declaration from FAA flight test pilot Joe Brownlee asserting that respondent's flight testing was not permissible under the terms of the SFP, until the Administrator submitted a reply to respondent's cross-motion for summary judgment. As a result, respondent argues the record is incomplete on this issue, because respondent did not have the opportunity to rebut Inspector Brownlee's declaration.

The parties' arguments, therefore, indicate that gaps exist in the record. As such, we consider a remand to be the most appropriate manner of addressing respondent's appeal. While the law judge's decisional order indicates that he carefully reviewed the entire record and articulated his rationale for his decision on each allegation, we nevertheless believe additional fact-finding and evidence is necessary concerning the allegations of the Administrator's complaint and respondent's affirmative defenses.

ACCORDINGLY, IT IS ORDERED THAT:

This case is remanded to the law judge for further proceedings consistent with this opinion and order.

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

SERVED AUGUST 27, 2010

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
OFFICE OF ADMINISTRATIVE LAW JUDGES

J. RANDOLPH BABBITT, *
ADMINISTRATOR *
Federal Aviation Administration *
Complainant *

v. *

WAYNE A. CARR, *
Respondent. *

DOCKET NO. SE-18805
JUDGE GERAGHTY

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DECISIONAL ORDER

This matter comes on now for disposition upon the following Pleadings: Complainant's Motion to Limit Hearing to Sanction/Partial Summary Judgment; Respondent's Reply thereto, and Cross Motion for Summary Judgment; Complainant's Response to Respondent's Cross Motion.

Complainant, Administrator, Federal Aviation Administration (FAA), issued against Respondent an Order of Suspension, Complaint herein, which seeks to impose a sixty-(60)-day suspension of Respondent's Airline Transport Pilot and his Mechanic Certificate and attached ratings. That sanction is sought upon the allegations stated in the Complaint and the charge of regulatory violation of the Federal Aviation Regulations

(FARs) cited in the Complaint, i.e., Sections 91.7(a); 91.9(a); 91.13(a); 65.85(a); 65.87(a); and 183.29(h), FARs.¹

Previously, Respondent had filed a Motion for Partial Summary Judgment seeking to dismiss from the Complaint charges that Respondent had acted in violation of Sections 65.85(a), 65.87(a), and 183.29(h), FARs. Complainant responded in opposition. Upon consideration of the arguments made in those Pleadings, disposition was entered by Order on August 2, 2010, wherein Respondent's Motion was granted and the charges of Respondent's violation of Sections 65.85(a), 65.87(a), and 183.29(h), FARs, were ordered stricken and dismissed.² Accordingly, this matter now proceeds for resolution on the charges that Respondent acted in violation of Sections 91.7(a), 91.9(a), and 91.13(a), FARs.

In support of their respective Motions and Responses thereto, the Parties have attached numerous documents and exhibits, all of which have been reviewed and considered. And, wherein an allegation, by either Party, which is supported by admissible evidence and not thereafter contested by opposing admissible documentation/evidence, a mere denial of that allegation is not sufficient to contest its validity.

The Parties, in their respective Pleadings have expressly agreed, although upon disparate grounds, that no genuine issues of material fact remain in dispute.³ This proceeding, therefore, presents for decisional disposition upon the Parties' submissions. For clarity, I review the basis for my findings with respect to each of the Paragraphs of factual allegations of the Complaint.

Respondent filed an Amended Answer to the Complaint and therein admitted the truth of the allegations stated in Paragraphs: 1-4; 8; 10; 11-12; and 17.

¹ See Attachment 1, Order of Suspension, pgs. 1-4, allegations, and pg. 4 for provisions of the cited FARs.

² Complainant apparently concedes that by reason of the dismissal of those charges that basis no longer exists as to support suspension of Respondent's Mechanic Certificate and ratings. See, Complainant's Response to Cross Motion at 5.

³ Respondent's Reply and Cross Motion at 1; Complainant's Response to Cross Motion at 1.

Those allegations are, therefore, established. Respondent denied Paragraph 21; however, the FAR cited therein speaks for itself and judicial notice is had of the provisions of Section 21.191(b), FARs, and this Paragraph is deemed established. Based upon Complainant's Motion, Exh. 1, not contested, Paragraph 5 is proven. Paragraphs 6 and 7 are established by admission and the Special Flight Permit (SFP), Complainant's Motion, Exh. 2, pg. 1, 2. Paragraphs 14, 15, 22, and 23 are considered established upon the SFP Exhibit; Complainant's Motion, Exh. 11, pg. 4; Part 43 FARs and provisions of Section 183.13(c).

As noted previously, the Parties agree that no material facts are in dispute; however, what is disputed is the disparate interpretation of those facts.

The equipment/system at issue herein is the Garmin GNS530 WAAS (Wide Area Augmentation System, the System) installed in the aircraft operated by Respondent. Respondent contends that actions he took with respect to that System were accuracy flight checks and not a flight test of that System. On the record herein, Respondent's contention is a jejune argument grounded on effort to conflate or confuse variant procedures. Flight checks are made and expected of pilots to assure proper functioning of installed, approved equipment systems. Flight testing is accomplished to obtain approval for use of equipment or a system, not previously approved, for operational use after its installation in the aircraft.⁴ Herein, the System at issue was an unapproved installation.⁵

I have considered the Respondent's Affidavit attached to Respondent's Cross Motion attesting that during the SFP flight, he only performed operational, functioning check, i.e., flight checks, and at no time performed any flight testing.⁶ I reject and attach no weight to Respondent's Affidavit assertions as they are contradicted by his prior deposition testimony and the certification he executed on the FAA Form 337 on

⁴ The FARs distinguish the procedures. See, e.g., FAR 91.171, VOR operational check; FARs 21.191(a)(b), flight test new installations, FAR 182.29(h), flight test pilot representative may make flight tests.

⁵ Complainant's Response, Delewski Declaration, page 5; Brownlee Declaration.

⁶ Respondent's Reply Cross Motion, Exh. 4.

March 30, 2009.⁷ In his deposition testimony, Respondent acknowledges that he engaged in flight testing of the WAAS System in order to obtain installation approval for IFR operations, and that he did so with reference to certification procedures called for in FAA Advisory Circular, AC-20-138A.⁸ I also considered that by the FAA form 337 submitted to FAA executed by Respondent, equipment is certified by him to have been test flown and found to meet requirements of AC-20-138A. The clear purpose of that Advisory Circular is to provide guidance for accomplishing flight testing to obtain airworthiness approval. Lastly, I note the statement by Mr. Enge in his letter of May 1, 2009, in which he states that Respondent, as part of Respondent's March 30, 2009 flight, "...made an LPV coupled approach to Runway 22...."⁹ And, the Advisory Circular calls for performance of LPV approaches and states that the "...objective of this test (emphasis supplied) is"¹⁰ I find and conclude upon a preponderance of the credible evidence that Respondent, during his flight of March 30, 2009, did engage and conducted flight testing of the Garmin GNS530 WAAS System. I further hold that the allegations of Complaint, Paragraphs 9 and 13 are established.

The SFP which authorized Respondent's flight of March 30, 2009, did not extend any authorization for the conduct or performance of flight testing of the WAAS System for installation approval. The flight testing conducted by Respondent, therefore, was an unauthorized operation beyond the scope of the authority extended by the terms of the SFP, and I conclude that the evidence herein supports that determination.¹¹ The purpose of the SFP was to authorize operation of the unairworthy aircraft to a location for repair/maintenance. The operation outside the authority granted by the SFP—I agree with Respondent—did not make the aircraft more unairworthy; rather, the aircraft simply reverted to the unairworthy condition as it existed prior to issuance of the SFP. I conclude and find, therefore, that Respondent, by operating beyond the scope of authority given in

⁷ Complainant's Motion, Exhs. 3, 4.

⁸ Id. Exh. 3, pg. 51, 52, 53. And Exh. 6.

⁹ Complainant's Motion, Exh. 5.

¹⁰ Complainant's Motion, Exh. 6, pg. 4, item (vi), (A).

¹¹ Complainant's Motion, Exh. 2. Complainant's Response, Exh. 6, Brownlee's Declaration, pg. 9.

the SFP, operated an unairworthy aircraft. The preponderance of evidence establishes the allegations of the Complaint, Paragraphs 16, 18 and 19, and I so find.

I find and conclude that the credible evidence, by preponderance, establishes that Respondent, on his conduct of the March 30, 2009 flight, did act in regulatory violation of the provisions of Sections 91.7(a) and 91.9(a), FARs. Those are operational violations and upon Board precedent, support a finding that Respondent also acted in violation of Section 91.13(a). However, upon the fact that Respondent's actions were not accidental but intentionally taken, I conclude that the violation of Section 91.13(a) is not merely residual, but, herein is independently established. And I find further that Respondent, therefore, did operate said flight in a reckless manner so as to potentially endanger life or property of others.

As noted previously, the Parties are in agreement that no genuine dispute as to a material fact is presented herein; rather, that the dispute is to opposing conclusions to be drawn from those facts. Upon my consideration of all pleadings and supporting documentation submitted by both the Parties, I find and conclude, for the reasons stated and discussed, that the preponderance of the reliable credible evidence warrants the affirmation of Complainant's Motion for Summary Judgment as evaluation of the evidence, even performed in a way favorable to Respondent, would not on this record lead a reasonable Trier of Fact to find in Respondent's favor.

Turning to the issue of appropriate sanction, the first factor to consider is that, by reason of the granting of Partial Summary Judgment in Respondent's favor, three (3) of the charges of FARs violations were dismissed. Usually such event would support a reduction in the sanction originally sought as such was based upon Complainant's charge of violation of all the FARs cited in the Complaint. Complainant, however, argues that the original sixty-day (60-day) suspension is still warranted by this record. While the range of sanction for operation of an unairworthy aircraft is 30 to 180 days, nevertheless, Complainant chose in his Complaint to seek a 60-day suspension for all the FARs violations cited in the issued Complaint.

In determining what I conclude is the appropriate sanction as to act as a deterrent and to satisfy public interest in air safety, I have considered the following matters: Respondent is holder of an Airline Transport Pilot (ATP) certificate, and, thus, is

held to a higher degree of judgment and responsibility than holders of lesser grade pilot certification. Respondent is also holder of a Mechanic Certificate and, thus, is chargeable that he should have known his actions were not authorized and were in violation of cited FARs. As stated in the granting of Partial Summary Judgment, that ruling did not condone or minimize the safety implications of Respondent's actions. The conclusion is that Respondent has acted in a reckless disregard of the FAR requirements. For said reasons, I find that upon the record only a slight reduction in the period of sanction is warranted. I, therefore, will modify the period of suspension from that of sixty (60) days to a period of fifty-five (55) days.

IT IS SO ORDERED:

1. The Complainant's Motion for Summary Judgment is granted.
2. Respondent's Cross Motion for Summary Judgment is denied.
3. The Order of Suspension, the Complaint herein, as modified by the grant of Partial Summary Judgment for Respondent is affirmed.
4. The period of suspension of sixty (60) days of Respondent's ATPC is hereby modified to that of fifty-five (55) days.
5. This proceeding is hereby terminated.

ENTERED this 27th day of August 2010, at Arlington, TX.

PATRICK G. GERAGHTY
ADMINISTRATIVE LAW JUDGE