

SERVED: April 14, 2011

NTSB Order No. EA-5578

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 April, 2011

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J. RANDOLPH BABBITT,)	
Administrator,)	
Federal Aviation Administration,)	
)	
	Complainant,)	
)	Docket SE-18744
	v.)	
)	
OLA USTAD,)	
)	
	Respondent.)	
)	
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OPINION AND ORDER

Respondent has appealed from the oral initial decision of Chief Administrative Law Judge William E. Fowler, Jr., issued on September 30, 2010.¹ The law judge's decision partially affirmed

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

the Administrator's order of suspension of respondent's airline transport pilot certificate, based on a finding that respondent violated 14 C.F.R. §§ 91.117(a) and (b)² and 91.13(a).³ It appears the law judge granted respondent's appeal with regard to the allegation that he also violated 14 C.F.R. § 91.9(a),⁴ but, later in the oral initial decision, the law judge also stated he found a technical violation of § 91.9(a). The law judge reduced the suspension period from 150 to 90 days. We remand for

² In the initial decision, the law judge misspoke, indicating respondent violated § 91.17(a) and (b), rather than § 91.117(a) and (b), which the Administrator alleged respondent violated. Section 91.117(a) and (b), entitled, "Aircraft speed," provides as follows:

(a) Unless otherwise authorized by the Administrator, no person may operate an aircraft below 10,000 feet MSL at an indicated airspeed of more than 250 knots (288 m.p.h.).

(b) Unless otherwise authorized or required by ATC, no person may operate an aircraft at or below 2,500 feet above the surface within 4 nautical miles of the primary airport of a Class C or Class D airspace area at an indicated airspeed of more than 200 knots (230 mph.) ... Such operations shall comply with paragraph (a) of this section.

³ Section 91.13(a) states, "[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 91.9(a) provides as follows: "[e]xcept as provided in paragraph (d) of this section, 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."

clarification concerning the law judge's order.⁵

The Administrator issued the order, which serves as the complaint in this case, on November 12, 2009.⁶ The complaint alleged that respondent violated the aforementioned regulations on December 21, 2008, when he acted as pilot-in-command of a North American Airlines flight in a Boeing 767-300 from Pope Air Force Base, North Carolina, to John F. Kennedy Airport in New York. The complaint alleged that respondent exceeded the 250-knot airspeed limit shortly after takeoff below 10,000 feet mean sea level (MSL), and also exceeded the 200-knot airspeed limit within 4 miles of the airport at Pope Air Force Base. The complaint further alleged that respondent's operation of the aircraft did not comply with the aircraft's operating limitations, in that respondent retracted the flaps on the aircraft while at 80 feet above ground level (AGL), when the applicable flight manual specified that pilots should not retract the flaps until at or above 400 feet AGL.⁷

⁵ We note that, in addition to filing an appeal brief, respondent also recently submitted a motion for oral argument concerning the use of data from the flight data recorder in this case. Given our disposition of respondent's appeal via remand, we need not decide respondent's motion at this juncture.

⁶ On August 10, 2010, the Administrator amended the complaint to withdraw an allegation involving a violation of 14 C.F.R. § 121.563. Further references to the complaint in this opinion and order will refer to the amended complaint.

⁷ The record indicates the elevation of Pope Air Force Base is

The case proceeded to a 3-day hearing in September 2010, in which both parties introduced several witnesses and exhibits. Respondent stipulated that he operated the aircraft at speeds between 270 knots and 290 knots while at 2,000 to 9,000 feet MSL, and that, in general, he operated the aircraft at speeds over 250 knots while under 10,000 feet MSL for over 2 minutes. Tr. at 16, 19. With regard to the allegation that respondent operated the aircraft in excess of 200 knots within 4 nautical miles of Pope Air Force Base, in violation of § 91.117(b), respondent also stipulated that he proceeded in excess of 200 knots for approximately 39 seconds. Tr. at 18.

Concerning the allegation that respondent violated § 91.9(a) by operating the aircraft outside the scope of the aircraft's operating limitations, the Administrator introduced data from the Automated Flight Information Reporting System (AFIRS), which receives digital data from the aircraft's flight data acquisition unit. Several witnesses testified that the AFIRS data showed, at liftoff, the aircraft's pitch angle was 5.8 degrees, then increased to 15 degrees over the next 7 seconds, but then immediately lowered to 2.8 degrees. This lowering of the pitch angle resulted in a significant, rapid

(..continued)
approximately 217 feet above MSL.

increase in airspeed.⁸ In addition, the Administrator called witnesses who also testified that the AFIRS data indicated respondent began to retract the flaps on the aircraft 7 seconds after lift-off, at 80 feet AGL, even though Boeing guidance provides flap retraction should not begin below 400 feet AGL, and North American Airlines's procedures provide that flap retraction should begin after the aircraft reaches 1,000 feet AGL.

The evidence the parties introduced at the hearing also established that the flight at issue occurred under somewhat unique circumstances that respondent found challenging. In particular, the evening prior to the flight at issue, respondent and First Officer Thompson operated the same aircraft as an inbound flight from Bangor, Maine, to Pope Air Force Base with a load of charter passengers and baggage. Thereafter, respondent and First Officer Thompson were assigned to depart from Pope at approximately 1:30 am on runway 05, with only crew on board, and with a tailwind component that required maximum takeoff power. In addition, night instrument meteorological conditions prevailed, and ATC gave respondent and First Officer Thompson an

⁸ The AFIRS data, according to the testimony, showed the aircraft began descending in altitude when it was less than 900 feet above the ground. Tr. at 74-75 (First Officer Rye Thompson's testimony that, between 800 and 900 feet, he looked at the aircraft's vertical speed indicator to ensure the aircraft would not hit the ground); see also Exh. A-15 (AFIRS data).

altitude restriction before takeoff to climb and maintain 2,000 feet MSL.

At the hearing, respondent testified that First Officer Thompson experienced spatial disorientation after lift-off. In particular, at 400 feet, respondent stated he called for "flaps 1," but First Officer Thompson did not respond, as he appeared disoriented and incapable of performing his duties. Tr. at 605. First Officer Thompson did respond, however, when respondent called for "flaps 1" immediately thereafter. Following the flaps adjustment, respondent called for "climb thrust" (to reduce the power of the aircraft) and "V-NAV" (to engage vertical navigation mode), but First Officer Thompson again did not respond. Tr. at 608; see also tr. at 104 (First Officer Thompson's testimony that he was spatially disoriented for 2 seconds). At the hearing and now on appeal, respondent asserts that First Officer Thompson's incapacitation, combined with the challenging circumstances of the flight, explains respondent's failure to comply with the applicable airspeed limitations.⁹

In addition to the affirmative defense that First Officer Thompson was unable to perform his duties as needed, respondent

⁹ We note the Administrator also submitted an appeal of the law judge's decision, but the Administrator's appeal is dismissed, as the appeal brief was untimely filed.

also contends, in the event that he is found in violation of the regulations at issue, he is eligible for a waiver of sanction under the Aviation Safety Reporting Program (ASRP).¹⁰ At the hearing, respondent introduced a copy of the NASA report, indicating that he reported the occurrence in a timely manner. Exh. R-1. In addition, respondent's witnesses, as well as respondent, denied that respondent deliberately violated the regulations. Conversely, some of the Administrator's witnesses speculated that respondent must have acted deliberately in exceeding the airspeed limit, retracting the flaps too soon, and decreasing the pitch angle of the aircraft.

The law judge's decision on the issue of whether respondent acted in a deliberate and not inadvertent manner is confusing. The law judge stated, "[t]hese infractions were done by the Respondent knowingly," but then stated, "[respondent] was handicapped. He did not have a full-time first officer. It was

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

late at night. The conditions were very poor, fog and whatnot. It was in the wee morning hours." Initial Decision at 857.¹¹ For us to resolve whether a waiver of sanction under ASRP should apply in this case, the law judge must make specific findings as to whether respondent's testimony was credible concerning the deliberateness of the violation. In this decision, however, the law judge did not make any specific credibility findings.

Moreover, the law judge appeared to determine the Administrator failed to prove any violations of § 91.9(a), concerning respondent's alleged act of exceeding the operating limitations of the aircraft. However, in his decision, the law judge stated as follows:

[T]he operating limitations of the aircraft were exceeded, which the [r]espondent was cognizant of and tried to correct accordingly. There's insufficient proof and evidence, in my estimation and determination, as I stated earlier, concerning the flaps and the slats being still extended when the aircraft was operating in excess of 250 knots, and my findings will be made accordingly.

Id. at 857-58. We direct the law judge to provide a decision that includes analysis concerning whether respondent's operation of the aircraft on the flight at issue was outside the scope of the aircraft's operating limitations. In particular, the law

¹¹ In summarizing First Officer Thompson's testimony, the law judge also stated that the first officer "experienced a few minutes of spatial disorientation and could not fully fulfill all his duties as assistant to the pilot-in-command." Id. at 856.

judge should issue clarified findings concerning both the charge that respondent exceeded the aircraft's operating limitations by reducing the pitch angle, and the Administrator's charge concerning respondent's retraction of the flaps. In addition, as discussed above, we request the law judge make credibility findings and discuss whether respondent is eligible for a waiver of sanction based on the ASRP.

Lastly, we recognize respondent has raised the issue of whether the law judge erred in admitting First Officer Thompson's e-mail message to North American Airlines's director of operations, which contains a narrative description of the flight. Exh. A-1. Respondent contends the e-mail contains the same text First Officer Thompson submitted in his voluntary report to North American Airlines under the Aviation Safety Action Program (ASAP).¹² FAA Advisory Circular 120-66 (Nov. 15, 2002), which governs the implementation of airlines' programs under the ASAP, provides, "[n]either the written report *nor the content of the written report* will be used to initiate or support company discipline or as evidence for any purpose in a FAA enforcement action." AC 120-66 at ¶ 11(c)(3) (emphasis

¹² Under the ASAP at North American Airlines, pilots have the option of submitting a voluntary report concerning a safety issue or incident, and the Administrator may review the report and opt not to initiate a certificate action against the reporting pilot.

added). Our concern with the law judge's decision to allow the e-mail correspondence into evidence arises out of the fact that such evidence could have a chilling effect on pilots' submissions of future ASAP reports. In this regard, the law judge should determine whether First Officer Thompson's filing of an ASAP report protects respondent from FAA enforcement action,¹³ and whether First Officer Thompson also filed an ASRP report in conjunction with his ASAP report.¹⁴

At this juncture, we instruct the law judge to refrain from considering Exhibit A-1 or any testimony specifically referring to that document, and to resolve the aforementioned issues concerning the protections offered under the ASRP and ASAP programs.

¹³ See AC 120-66 at ¶ 9(a) (stating, "[e]ach employee participating in ASAP must individually submit a report in order to receive the enforcement-related incentives and benefits of the ASAP policy"); compare ¶ 9(d) (stating non-reporting employees will have opportunity to submit ASAP reports) with ¶ 11(c)(3) (stating the FAA will not use an ASAP report for any purpose in FAA enforcement action) (emphasis added).

¹⁴ Title 14 C.F.R. § 91.25 states, "[t]he Administrator of the FAA will not use reports submitted to the National Aeronautics and Space Administration under the [ASRP] (or information derived therefrom) in any enforcement action except information concerning accidents or criminal offenses which are wholly excluded from the Program" (emphasis added). If First Officer Thompson also filed a report under the ASRP, this regulation would apparently preclude the use of that report in "any" enforcement action, including the action at issue here against respondent.

ACCORDINGLY, IT IS ORDERED THAT:

This case is remanded to the law judge for further proceedings consistent with this opinion and order, which may include accepting post-remand briefs from the parties.

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

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

* * * * *

In the matter of:	*	
	*	
J. RANDOLPH BABBITT	*	
ADMINISTRATOR,	*	
Federal Aviation Administration,	*	
	*	
Complainant,	*	
v.	*	Docket No.: SE-18744
	*	JUDGE FOWLER
OLA USTAD,	*	
	*	
Respondent.	*	

* * * * *

General Services Administration
26 Federal Plaza
Courtroom 238
New York, New York 10278

Thursday,
September 30, 2010

The above-entitled matter came on for hearing, pursuant to notice, at 9:30 a.m.

BEFORE: WILLIAM E. FOWLER, JR.,
Chief Administrative Law Judge

APPEARANCES:

On behalf of the Administrator:

DAVID M. COHEN, Regional Counsel
Federal Aviation Administration
Eastern Region
1 Aviation Plaza
Jamaica, New York 11434
(718) 553-3270
(718) 995-5699 (fax)
David.M.Cohen@faa.gov

On behalf of the Respondent:

GREGORY S. WINTON, Esq.
Aviation Law Experts, LLC
One Research Court, Suite 450
Rockville, Maryland 20850
1-877-4-AIR LAW
mailto:Greg@AviationLawExperts.com

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ORAL INITIAL DECISION AND ORDER

ADMINISTRATIVE LAW JUDGE FOWLER: This has been a proceeding before the National Transportation Safety Board and held pursuant to the provisions of the Federal Aviation Act of 1958, as that Act was subsequently amended, on the appeal of Ola Ustad from an Amended Order of Suspension issued by the Regional Counsel of the Eastern Region of the Federal Aviation Administration. Said Amended Order of Suspension, dated August 10, 2010, purports to suspend Respondent Ustad's airline transport pilot certificate number (omitted) for a period of 150 days.

I am William E. Fowler, Jr., Chief Judge for the National Transportation Safety Board. I have been selected by the Board as the Judge to preside at this hearing and, it is my intention, pursuant to the Board's Rules of Practice, specifically, 821.42 of those Rules, and that section, to issue an Oral Initial Decision at this time on the record.

As I stated a moment ago, the Administrator's Amended Order of Suspension, duly promulgated by the Federal Aviation Administration pursuant to the Board's Rules of Practice, was issued by Regional Counsel, Eastern Region of the Federal Aviation

1 Administration. I have heard this proceeding as a United States
2 Administrative Law Judge, and under the Rules of Practice I'm
3 going to issue a decision forthwith at this time.

4 Following notice to of the parties, this matter came on
5 for trial in New York City on September 28th, 29th, and today,
6 September 30th, 2010. The Respondent, Ola Ustad, was present at
7 all times, and very ably represented by Gregory Winton, Esquire.
8 The Administrator was also very ably represented by David Cohen,
9 Esquire.

10 Both parties have been afforded the opportunity to offer
11 evidence, to call, examine and cross-examine witnesses in behalf
12 of their respective cases. In addition, the parties were afforded
13 the opportunity, through counsel, to make argument in support of
14 their respective positions.

15 I have reviewed the testimony and the evidence and the
16 documentary exhibits in this case. During the course of this
17 three-day proceeding we have had -- the Administrator has adduced
18 approximately 56 exhibits and had 8 witnesses testify. The
19 Respondent has proffered approximately 34 exhibits, and Respondent
20 has had 4 witnesses, including the Respondent, himself.

21 As you recall, the facts in this case involve the flight
22 on December 21, 2008, when Respondent acted as a pilot-in-command
23 of a North American Airlines flight, Number 986, a Boeing 767-300
24 flight from Pope Air Force Base, North Carolina to John F. Kennedy
25 Airport here in New York. Regarding that flight, the

1 Administrator in his Amended Order of Suspension has charged the
2 Respondent, Captain Ustad, with violating four Federal Aviation
3 Regulations: 91.17(a), 91.17(b), 91.13(a) and 91.9(a).

4 It is my determination and conclusion that the
5 Administrator has been successful by a fair and reasonable
6 preponderance of the reliable, substantial and probative evidence
7 adduced in proving the majority of those allegations. The
8 Administrator's case, it is my determination, is lacking in
9 proving that the flaps were extended when the aircraft was
10 exceeding 250 knots and also where the slats in the wings were
11 concerned. And I am going to make a modification and reduce the
12 Administrator's sought sanction from 150 days to 90 days in that
13 regard.

14 Reviewing the testimony, very briefly, we have
15 diametrically opposing testimony here coming from both sides of
16 the case. I find it very interesting. The first officer, as set
17 forth in Administrator's Exhibit A-1, who describes his flight, he
18 was very surprised and shocked by some of the flying behavior of
19 Captain Ustad. He experienced a few minutes of spatial
20 disorientation and could not fully fulfill all of his duties as
21 assistant to the pilot-in-command, Captain Ustad.

22 On the opposite side of the case, we have the deputy
23 manager of NASA, Mr. Don White, who while he stated the ASIRS
24 information that he used to complete his investigation of this
25 flight of December 21, 2008 was not complete in all respects, he

1 said the flight was steady and regular, there was no complete stop
2 of the aircraft, and that this flight was really a low level
3 altitude takeoff, a takeoff of full throttle, which Mr. White
4 called a challenging type and nature of flight, but not uncommon,
5 and not unheard of. Contrary to First Officer Thompson's
6 testimony, you can see the contrast between the testimony of
7 Mr. White and Mr. Thompson.

8 Then we have an affidavit by a flight attendant,
9 Ms. Judy Harwood, on the Respondent's side of the case, who has
10 testified that there was nothing unusual or abrupt about the
11 flight and, to make a long story short, she was very praise-worthy
12 and exemplary of Captain Ustad, she has known him and flown with
13 him in excess of eight years.

14 The Administrator, as I mentioned earlier has proven his
15 case. These infractions were done by the Respondent knowingly.
16 He was handicapped. He did not have a full-time first officer.
17 It was late at night. The conditions were very poor, fog and
18 whatnot. It was in the wee morning hours. Taking all that into
19 consideration, ladies and gentlemen, I'm sure by this time you
20 follow the ultimate drift of my determination here, that the
21 operating limitations of the aircraft were exceeded, which the
22 Respondent was cognizant of and tried to correct accordingly.
23 There's insufficient proof and evidence, in my estimation and
24 determination, as I stated earlier, concerning the flaps and the
25 slats being still extended when the aircraft was operating in

1 excess of 250 knots, and my findings will be made accordingly.

2 So that, ladies and gentlemen, I make the specific
3 following facts and conclusions of law:

4 The Administrator's Amended Order of Suspension consists
5 of 14 numbered paragraphs. The first four of those paragraphs,
6 paragraphs 1, 2, 3, and 4, have been admitted by the Respondent,
7 through his counsel, and I incorporate them by reference.

8 Paragraphs 5, 6, and 7 of the Administrator's Order of
9 Suspension, I incorporate those paragraphs by reference, and they
10 have been proven by a fair and reasonable preponderance of the
11 reliable, substantial, and probative evidence adduced during the
12 course of this proceeding.

13 As I mentioned a moment ago, paragraph 8, pursuant to
14 the aircraft's maximum indicated airspeed when the slats are
15 extended beyond 250 knots, the evidence was not sufficient in my
16 estimation to prove that violation.

17 And paragraph 9, it was the same situation there. I
18 incorporate it by reference. The evidence is insufficient to
19 prove a violation of what's set forth in paragraph 9.

20 As well as paragraph 10, my finding is specifically
21 Respondent did not operate the aircraft when the slats were
22 extended at an indicated airspeed in excess of 270 knots.

23 I do find, though, that based on all the evidence
24 adduced during the course of this proceeding, that the aircraft
25 was being operated without complying with the operating

1 limitations specified in the approved flight manual by the Boeing
2 Aircraft manufacturer and the Federal Aviation Administration.
3 The only markings and placards in the aircraft were pertaining to
4 flaps, nothing to slats. I incorporate by reference paragraph 12,
5 pursuant to the maintenance manual and possibly having to been
6 indicative of the possible damage that may have occurred to the
7 slats while they were being extended, even though it is my finding
8 and determination this was not in excess of 250 knots speed.

9 Paragraph 13, I incorporate that by reference, but my
10 finding is that the Respondent, Captain Ola Ustad, was careless in
11 his operation as pilot-in-command and captain of this flight
12 because as every airline transport pilot must at all times
13 exercises due care, good judgment, and responsibility. And he was
14 using excessive speed during the course of this flight from Pope
15 Air Force Base to JFK, which the Administrator's case amply
16 demonstrates, sets forth and proves.

17 I'll make the following final finding, which will be
18 finding 14, I believe. My finding is that this Judge finds that
19 safety in air commerce and air transportation and the public
20 interest does require the affirmation of the Administrator's
21 Amended Order of Suspension, dated August 10, 2009, in view of the
22 aforesaid violations of Section 91.17(a), 91.17(b), and I did make
23 a finding of 91.13(a) because of the careless manner in which the
24 aircraft was operated.

25 Section 91.9(a), I deem to be a technical violation

1 because the only placard in the aircraft was pertaining to flaps
2 and not slats and this would be a technical violation, at best.

3 ORDER

4 IT IS ORDERED AND ADJUDGED, that the Administrator's
5 Amended Order of Suspension dated August 10, 2009, be and the
6 same, is affirmed with a modification of sanction to a period of
7 suspension of ninety days.

8

9

10 EDITED ON

WILLIAM E. FOWLER, JR.

11 OCTOBER 26, 2010

Chief Administrative Law Judge