

SERVED: October 24, 2011

NTSB Order No. EA-5600

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 20th day of October, 2011

J. RANDOLPH BABBITT,
Administrator,
Federal Aviation Administration,

Complainant,

v.

MERLE W. AKERS,

Respondent.

Docket SE-18828

ORDER DENYING RECONSIDERATION

The Administrator petitions for reconsideration of our May 20, 2011 opinion and order affirming the law judge's reduction in sanction. We deny the Administrator's petition.

On March 1, 2010, the Administrator issued an order suspending respondent's airman mechanic certificate with airframe and powerplant ratings, and inspection authorization, for a period of 240 days. The Administrator's order alleged respondent violated 14 C.F.R. §§ 43.13(a) and (b), and 43.15(a)(1) in June 2009, when respondent performed an annual inspection on a Beech Model A23-24 civil aircraft, and indicated the aircraft was in an airworthy condition. The order stated an accessory not approved for the engine had been installed, rendering the aircraft

unairworthy. The order alleged additional discrepancies existed, which also rendered the aircraft unairworthy, but respondent nevertheless found the aircraft in an airworthy condition. The order also stated respondent failed to reference and ensure compliance with three separate airworthiness directives (ADs) applicable to the aircraft, its fuel injection servos, and its Lycoming engine. As a result, the Administrator sought a 240-day suspension based on the three instances of non-compliance with relevant ADs, and two instances of separate discrepancies, which involved an in-line filter and a crack in the engine case of the aircraft.

Respondent appealed the order. After the Administrator submitted the order as the complaint in accordance with our Rules of Practice, respondent failed to answer the complaint. On April 26, 2010, the Administrator filed a motion for judgment on the pleadings, on the basis that respondent had not submitted an answer. Respondent also did not respond to the Administrator's motion. The law judge entered judgment on the pleadings in favor of the Administrator, based on respondent's failure to answer.¹

The law judge's order entering judgment on the pleadings also reduced the Administrator's sanction from a suspension period of 240 days to 180 days. The law judge relied on previous Board cases in which we imposed suspension periods of less than the period the Administrator sought in this case. The law judge also cited the following language from the Administrator's Sanction Guidance Table:

When a single instance of noncompliance results in multiple violations of general and specific regulations involving the same or similar conduct, the FAA ordinarily does not compound the sanction to reflect the amount of sanction recommended in the table for each regulatory violations, FAA enforcement personnel consider the totality of the circumstances relating to the multiple violations.

FAA Order 2150.3B, Ch. 7, § 6.c. at 7-10 to 7-11.

Respondent and the Administrator appealed the law judge's order, and we denied both appeals. In our original opinion and order, we affirmed the law judge's reduction in sanction, finding the law judge's reasoning persuasive. NTSB Order No. EA-5585 (2011).

In the Administrator's petition for reconsideration, the Administrator now contends the law judge erroneously stated the Administrator sought a suspension period based upon three separate instances of noncompliance with the regulations at issue. The Administrator's petition clarifies the Administrator originally alleged five such instances. Pet. at 4. As a result, the Administrator states the law judge erred in computing the sanction to find 180 days' suspension was the appropriate time period. The Administrator's petition includes the following table, explaining how the Administrator calculated the sanction period to reach 240 days:

¹ See 49 C.F.R. § 821.31(b).

Violation	Sanction Range	Sanction Imposed in FAA Order
1. Stabilator	60 days - revocation	60-day suspension
2. Fuel control servos	60 days - revocation	60-day suspension
3. Fuel injector lines	60 days - revocation	60-day suspension
4. In-line filter	30 days – 120 days	30-day suspension
5. Crack in engine case	30 days – 120 days	30-day suspension

Pet. at 5.

Section 821.50(c) of our Rules of Practice requires that petitions for reconsideration “state briefly and specifically the matters of record alleged to have been erroneously decided, and the ground or grounds relied upon.” Although the petition raises no new matter and consists of arguments the Administrator should have included in the reply brief in response to respondent’s appeal, we will address the assertions, in the interest of ensuring that our decision on this reconsideration request is clear.²

Based upon the above chart, we understand the Administrator has sought, all along, to compound the sanction in this case. Since the Administrator previously did not provide specific justification for how he arrived at the proposed sanction, the law judge speculated as follows:

[A]n 80-day suspension was somehow allotted *per discrepancy* by adding the sanctions deemed appropriate for either: (a) respondent’s failure to perform maintenance and his failure to conduct a proper inspection with respect to each deficiency, or (b) each of the three regulatory violations to which each of the discrepancies gave rise.

Order at 5. The law judge’s reduction in sanction, from 240 days to 180 days, clearly was based upon his disagreement with the Administrator’s compounding the sanction, evidenced by the fact that he engaged in a detailed comparison of the sanction in this case to other cases involving very severe maintenance violations in which the Administrator obtained a similar sanction.

To the extent, in this petition for reconsideration, the Administrator contends the law judge miscalculated the number of violations, as he only calculated the penalty for three rather than five violations, we find the Administrator failed to raise this argument below and provides no justification for why this should be considered new matter when it was clearly available to the Administrator. We believe the law judge’s computation of 180 days for respondent’s violations was appropriate and would reach the same result if we conducted *de novo* review. We would not compound the sanction for the AD violations but instead would allot: (1) one 60-day period for

² We note the Administrator failed to raise this argument that the law judge considering the sanction based on three violations versus five violations during the original cross-appeal to us. Furthermore, while the Administrator had opportunities both before the law judge and this Board on direct appeal to discuss the specific calculations the Administrator used to reach the proposed sanction, the above chart appears for the first time as part of this petition for reconsideration.

the three AD violations; (2) one 60-day period for the in-line filter violation; and (3) one 60-day period for the crack in engine case violation.

The Administrator's petition for reconsideration, as well as the Administrator's appeal brief, indicates the Administrator believes the law judge disregarded the sentence in the Sanction Guidance Table that precedes the language quoted above concerning compound sanctions. This preceding sentence states as follows: "[c]onversely, multiple violations may be so serious in their consequences for safety and the public interest as to require a penalty greater than the sum of the recommended amount of penalty provided for in the table for each violation." FAA Order 2150.3B, Ch. 7, § 6.b. at 7-10. The Administrator contends this language in the Sanction Guidance Table indicates compounding of sanctions was appropriate here. However, the Administrator cites no cases indicating the failure to list more than one AD is *per se* serious enough to warrant a compound sanction.³

The Administrator also argues, as an overarching matter, that the Board is bound to defer to the Administrator's choice of sanction, in accordance with 49 U.S.C. § 44709(d)(3), and that we failed to do so in this case. We have long recognized this statutory language concerning deference.⁴ However, we also have indicated such deference is not blind; indeed, we will consider aggravating and mitigating factors in determining whether the Administrator's choice of sanction was arbitrary and capricious.⁵ In this regard, the Administrator argues we erred in indicating the Administrator should have listed aggravating factors. However, if the Administrator seeks to show the seriousness of respondent's conduct justifies the compounding of sanctions pursuant to the language of the Administrator's own Sanction Guidance Table, we would expect the Administrator to argue certain aggravating factors existed.

We do not believe our prior opinion and order in this case was contrary to the requirements of 49 U.S.C. § 44709(d)(3) or our precedent concerning deference. The Administrator cites no expert opinion, nor any prior Board cases, indicating that respondent's failure to cite the ADs at issue was serious enough to warrant the compounding of sanctions. In

³ We indicated the importance of verifying compliance with ADs, and listing such compliance in the aircraft logbook, in Administrator v. Turmero, NTSB Order No. EA-5547 at 8 (2010). In Turmero, we granted the Administrator's appeal of the law judge's reduction in sanction; however, the sanction the Administrator imposed was a suspension period of only 90 days for a variety of conduct that led to *four* separate regulatory violations (14 C.F.R. §§ 43.9(a), 43.11(a), 43.13(a), 43.15(a)(1)). Given that minimal sanction period for the number of serious violations charged, we do not believe the Administrator in Turmero sought to compound the sanction for the respondent's failure to list two separate ADs in the logbook. In general, it appears the Administrator does not impose separate sanctions for each AD.

⁴ Administrator v. Peacon, NTSB Order No. EA-4607 at 10 (1997).

⁵ See, e.g., Administrator v. Simmons, NTSB Order No. EA-5535 (2010) (aggravating factors); Administrator v. Hackshaw, NTSB Order No. EA-5501 (2010) (mitigating factors), reconsideration den., NTSB Order No. EA-5522.

this regard, we believe the law judge was correct in his determination that the Administrator interpreted the language in the Sanction Guidance Table in an arbitrary and capricious manner.

ACCORDINGLY, IT IS ORDERED THAT:

The Administrator's petition for reconsideration of NTSB Order No. EA-5585 is denied.

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