

SERVED: December 21, 2011

NTSB Order No. EA-5609

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 December, 2011

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MICHAEL P. HUERTA, )  
Acting Administrator, )  
Federal Aviation Administration, )  
Complainant, )  
v. )  
TODD L. HOLLABAUGH, )  
Respondent. )

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Docket SE-18918

**OPINION AND ORDER**

**1. Background**

Respondent appeals the February 4, 2011 written order of Administrative Law Judge Patrick G. Geraghty, granting the Administrator's motion for summary judgment.<sup>1</sup> In his order, the law judge affirmed the Administrator's suspension of respondent's airline transport pilot

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<sup>1</sup> A copy of the law judge's decisional order is attached.

(ATP) certificate, but reduced the suspension period from 60 days to 40 days.<sup>2</sup> The Administrator had ordered suspension of respondent's certificate based on respondent's alleged violations of 14 C.F.R. §§ 135.263(a),<sup>3</sup> 135.267(d),<sup>4</sup> and 91.13(a).<sup>5</sup> We remand the case to the law judge for a hearing on the alleged § 91.13(a) violation.

The Administrator issued the suspension order, which became the complaint in this case, on July 27, 2010. The complaint alleged that, on November 1 and 2, 2009, respondent accepted assignments and operated aircraft as a required pilot crewmember on several flights, on behalf of two different air carriers. Respondent's total itinerary for November 1 and 2, 2009, included flights from Savannah, Georgia, to Gary, Indiana; from Gary, Indiana, to Lansing, Illinois; from Las Vegas, Nevada, to Los Angeles, California, and back to Las Vegas; and from Las Vegas to Teterboro, New Jersey. The complaint further stated respondent accepted the assignments for the above-listed flights without provision for at least 10 consecutive hours of rest during the 24-hour period preceding the completion time of the assignments. The complaint concluded with the allegation that respondent's operation of the aircraft for the second air carrier "in the manner and circumstances described above, was careless or reckless so as to endanger the life or property of another." Compl. at ¶ 9.

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<sup>2</sup> The Administrator withdrew the appeal he originally filed; therefore, the reduction in sanction is now uncontested.

<sup>3</sup> Section 135.263(a) provides as follows: "A certificate holder may assign a flight crewmember and a flight crewmember may accept an assignment for flight time only when the applicable requirements of §§ 135.263 through 135.271 are met."

<sup>4</sup> Section 135.267(d) provides that, "[e]ach assignment under paragraph (b) of this section must provide for at least 10 consecutive hours of rest during the 24-hour period that precedes the planned completion time of the assignment."

<sup>5</sup> 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.

Respondent admitted all allegations contained in the complaint, with the exception of the careless or reckless charge contained in paragraph 9. Based on respondent's admissions, the Administrator filed a motion for summary judgment on September 29, 2010. The Administrator's motion stated the complaint alleged respondent violated 14 C.F.R. § 91.13(a) because he violated 14 C.F.R. §§ 135.263(a) and 135.267(d). Such a charge is known as a "residual" charge derived from the other violations.<sup>6</sup> Respondent replied to the Administrator's motion, asserting—among other issues—that a residual § 91.13(a) charge was inappropriate in this case, because neither §§ 135.263(a) nor 135.267(d) were operational violations.

The Administrator filed an errata to the motion for summary judgment on November 19, 2010, seemingly in response to respondent's reply, stating the motion's reference to § 91.13(a) as a residual charge was an error "because the factual allegations in the [c]omplaint effectively charge [r]espondent with an independent charge of carelessness under ... § 91.13(a)." Errata at 1. Respondent contested the Administrator's submission of the errata, and urged the law judge to reject it. By order dated January 6, 2011, the law judge accepted the errata, stating it was permissible under the Board's Rules of Practice<sup>7</sup> and the complaint supported an independent charge of § 91.13(a).

The law judge then issued the decisional order at issue here, in which he determined all the factual allegations contained in the complaint were deemed proved, as respondent did not deny them in his answer. The law judge's order further stated his prior order accepting the

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<sup>6</sup> We previously have held the Administrator may prove a violation of § 91.13(a) by proving another operational violation occurred. See, e.g., Administrator v. Seyb, NTSB Order No. EA-5024 at 4 (2003) (stating, "[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, "[t]he cases that have established this policy are too numerous to list").

<sup>7</sup> The law judge's order referenced 49 C.F.R. § 821.12(a).

Administrator's errata determined the § 91.13(a) charge was independent. The law judge found respondent's acceptance of the flights for the second air carrier careless under § 91.13(a), and that potential endangerment existed due to respondent's lack of rest.<sup>8</sup> The law judge declined to defer to the Administrator's choice of sanction since the Administrator did not explain the rationale in concluding the sanction should be on the high end for the violations charged under the Sanction Guidance Table. The law judge lowered the sanction to a suspension period of 40 days.

## **2. Decision**

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 no factual issues exist, and the moving party is therefore entitled to judgment as a matter of law. 49 C.F.R. § 821.17(d).<sup>9</sup> In order to defeat a motion for summary judgment, the nonmoving party must provide more than a general denial of the allegations.<sup>10</sup>

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<sup>8</sup> The law judge rejected respondent's assertions that a factual issue existed concerning whether respondent's conduct was deliberate, because respondent was ineligible for a waiver of sanction under the Aviation Safety Reporting Program, due to not filing his report with NASA in a timely manner. The law judge also rejected respondent's affirmative defense of "unclean hands," on the basis that such a defense was not available to a party who has himself committed "unlawful conduct" in the matter at issue. Decisional Order at 4. Respondent did not appeal either of these conclusions.

<sup>9</sup> Administrator v. Wilkie, NTSB Order No. EA-5565 at 5 (2011); Administrator v. Doll, 7 NTSB 1294, 1296 n.14 (1991) (citing Fed. R. Civ. P. 56(e)); Administrator v. Giannola, NTSB Order No. EA-5426 (2009); see also 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).

<sup>10</sup> Administrator v. Hendrix, NTSB Order No. EA-5363 at 5-6 n.8 (2008) (citing Doll, *supra* note 9, at 1296).

On appeal, respondent argues granting summary judgment on the § 91.13(a) charge was inappropriate because § 91.13(a) only applies to operational violations. Respondent asserts that, because neither §§ 135.263(a) nor 135.267(d) are operational violations, his admissions concerning those violations cannot serve to prove he also violated § 91.13(a). In this regard, respondent argues the flights at issue occurred without incident, the Administrator failed to allege respondent was careless in his flight *operations*, and the Administrator did not allege respondent potentially endangered the life or property of another. Respondent contends the Administrator misapplies our case law concerning § 91.13(a) violations because Seyb<sup>11</sup> is inapplicable in this case, as Seyb only stands for the doctrine that the Administrator may prove a violation of § 91.13(a) when he has proven an operational violation. Based on the foregoing, respondent contends the law judge's acceptance of the Administrator's errata was improper.

Respondent further contends the sanction the law judge issued was improper, because several mitigating factors exist. Respondent also argues the Sanction Guidance Table states non-operational violations may warrant a different type of sanction, and the cases in which the Board has affirmed a revocation or suspension for violation of §§ 135.263(a) or 135.267(d) are distinguishable. The Administrator disputes each of respondent's arguments, and urges us to affirm the law judge's order.

Respondent's argument is unique, as we have no precedent on the specific issue of whether §§ 135.263(a) and/or 135.267(d) are non-operational violations that preclude the accompaniment of a residual § 91.13(a) charge. In addition, the Administrator handled this case in an unusual manner. The Administrator first alleged the § 91.13(a) charge derived from the

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<sup>11</sup> Supra note 6.

§§ 135.263(a) or 135.267(d) violations, but then altered the argument to assert the § 91.13(a) charge was independent, and could stand alone.

We uphold the law judge's decision to grant the Administrator's errata, altering the § 91.13(a) charge from residual to independent, as we find the law judge did not abuse his discretion in this case.<sup>12</sup> However, we once again urge the Administrator to plead explicitly in the complaint whether a charge under § 91.13(a) is residual or independent.<sup>13</sup> The amended complaint did not operate to the prejudice of respondent as we find the charge now requires more proof from the Administrator than that which he originally charged, and we further note the Administrator's errata did not constitute the addition of a new charge. Since the Administrator sought and ultimately obtained this errata, however, the Administrator now needs to prove an independent § 91.13(a) charge, requiring a higher threshold of evidence than a residual charge. As a result of this change to the charge, we believe factual issues exist as to whether respondent's conduct *independently* violated § 91.13(a). Given that the Administrator failed to produce facts indicating an independent violation of § 91.13(a), we find summary judgment was an inappropriate manner in which to dispose of this case. We remand this case to the law judge to hold a hearing solely on the independent § 91.13(a) charge.

**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.

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<sup>12</sup> See Administrator v. Western Air Express, Inc., NTSB Order No. EA-5486 at 9 (2009).

<sup>13</sup> See Administrator v. Smith, NTSB Order No. EA-5220 at 2 n.5 (2006); see generally Administrator v. Moore, NTSB Order No. EA-4929 at 9-10 (2001).

SERVED: February 4, 2011

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

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J. RANDOLPH BABBITT, \*  
ADMINISTRATOR, \*  
FEDERAL AVIATION ADMINISTRATION, \*  
Complainant, \*

Docket : SE-18918

v. \*

TODD L. HOLLABAUGH, \*  
Respondent. \*

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**DECISIONAL ORDER**

This proceeding is before the Board upon the Appeal of Todd L. Hollabaugh, Respondent, from an Order of Suspension which seeks to suspend Respondent's Airline Transport Pilot Certificate (ATP) for a period of 60 days.

That Order was issued on behalf of the Administrator, Federal Aviation Administration (FAA), Complainant, and it serves herein as the Complaint.

Upon the circumstances and facts alleged in the Complaint<sup>1</sup>, it is charged that Respondent acted in regulatory violation of the pertinent provisions of Sections 135.263(b); 135.267(d) and Section 91.13(a), Federal Aviation Regulations (FARs).<sup>2</sup>

Respondent filed an Answer and an Amended Answer to the Complaint, and

<sup>1</sup> See Attachment No. 1, Order of Suspension/Complaint for complete statement of the allegations.

<sup>2</sup> Id. at 2, for pertinent provisions of the cited FARs.

therein admitted the validity of the allegations stated in Paragraph Nos. 1 through and including No. 8 of the Complaint; therefore, upon Respondent's admissions, the factual allegations stated therein are deemed proved. Consequently, I conclude that Complainant has established that Respondent acted in violation of the cited provisions of Sections 135.263(a) and 135.267(d), FARs.

Respondent denies the allegation in Paragraph No. 9, Complaint and the accompanying charge of having acted in violation of Section 91.13(a) FARs.

Complainant has filed a Motion for Summary Judgment, as amended, arguing that, upon Respondent's Answer, as amended, and the admissions therein, there exists no genuine dispute as to any material fact.

Respondent has submitted his reply in opposition, asserting that material issues do exist as require Hearing to resolve.

The dispute as to whether the Complainant's charge of Respondent's violation of Section 91.13(a) FARs is a residual or independent violation was resolved by Order of January 6, 2011. In that Order it was determined that, upon Respondent's admissions to engaging in flight operations and the inclusionary allegation of Paragraph No. 9, Complaint, the charge of violation of Section 91.13(a) FARs is charged as an independent violation and is, therefore, to be so considered in resolution of Complainant's Motion.

Complaint, Paragraph No. 9 alleges that operation of N178MM, as admitted by Respondent, was, excerpting the wording of Section 91.13(a) FARs, a "careless or reckless" operation. However, Complainant has specifically stated that a finding or charge of "reckless operation" is not sought.<sup>3</sup> On that concession, an issue as to whether Respondent has been charged with having acted in a careless or in a reckless manner does not exist.

Assertions that Respondent's conduct was inadvertent and not deliberate/innocent do not raise a material issue on this record. The cases cited by Respondent are inapposite as the question of whether the conduct in those cases was not deliberate and inadvertent was on the entitlement to a waiver of sanction on the timely submission of a NASA report under the Aviation Safety Reporting Program (ASRP). Herein such material

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<sup>3</sup> Compl't's Errata to Motion for Summary Judgment at 2.

issue does not exist as it has been determined that, by reason of Respondent's untimely filing of his NASA report, he is not eligible for consideration for waiver of sanction under the provisions of the ASRP.<sup>4</sup>

Respondent opposes Complainant's Motion, arguing that Complainant has not established factual evidence that Respondent's conduct was made with the intent to violate any FAR. Board precedent is that on a charge of careless operation in violation of FAR 91.13(a) [previously numbered Sec. 91.9 FAR] it is not necessary to allege or establish intent; rather, the essence of a violation of Section 91.13(a) FAR is carelessness, which connotes inattention or inadvertence.<sup>5</sup> Respondent's "intent" does not present a material issue whereas herein, the charge is that of careless operation contrary to Section 91.13(a) FARs.

Potential endangerment reasonably connected to the careless conduct is sufficient to establish a violation of Section 91.13(a) FAR and actual endangerment is not required to be proved.<sup>6</sup> Herein, I conclude that potential endangerment can reasonably be found on Respondent's performing a flight operation without having the required rest period. I find and conclude that upon the admitted circumstances and precedent that it is established that Respondent has acted in violation of the provision of Section 91.13(a) FAR, in that his accepting of and performance of the flight operation was a careless operation that potentially endangered life or property of others.

It is argued that Complainant's Motion be denied and that Hearing is necessary on Respondent's affirmative defense of "unclean hands" in initiating action against Respondent on behalf of Respondent's former employer, Eagle Jet Aviation (EJA). Assuming that EJA had a "get-even" motive for making a complaint to the FAA regarding Respondent's November 1-2, 2009, conduct, once the FAA received that complaint and assigned an FAA Aviation Safety Inspector (ASI) to the matter, the Inspector's duty was to investigate to determine if a violation of the FARs had occurred. In the course of that

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<sup>4</sup> Order, November 5, 2010.

<sup>5</sup> See, e.g., Administrator v. Trier, 2 NTSB 379, 380 (1973); Administrator v. Karlovich 3 NTSB 3678, 3679 (1981).

<sup>6</sup> Administrator v. Schoenbachler, 1 NTSB 682, 684 (1969); Administrator v. Katinszky, 3 NTSB 1595, 1597 (1979).

investigation EJA personnel apparently submitted statements to the ASI on irrelevant matters which the ASI included in his EIR, Proof of Facts; however, that does not constitute bias as the ASI would be required to include all data gathered and not undertake to edit that data. Aside from such consideration is the fact that Respondent's affirmative defense of "unclean hands" is an equitable defense which requires that the party seeking to interpose that defense must himself have "clean hands".<sup>7</sup> It is held that such equitable defense is not available to a party who has himself committed "unlawful conduct" in the matter with relation to which that party seeks relief.<sup>8</sup> Herein Respondent, it is established, has acted "unlawfully", that is, in violation of the pertinent FARs in this matter. I conclude, therefore, that upon precedent and Respondent's admissions, the defense of "unclean hands" is not available to Respondent as a matter of law and thus no material issue exists relative thereto.

Upon consideration of the record it is determined that no material facts are in dispute as require Hearing to resolve.<sup>9</sup> I also conclude that this record, even considered in a light favorable to Respondent, would not provide a basis for a reasonable trier of fact to find in favor of the Respondent. Accordingly, I find and conclude that Complainant's Motion is sustained as a matter of fact and precedent and therefore, will be granted.

The final issue is that of appropriate sanction for the regulatory violations found as committed by Respondent. I find that that can be reasonably resolved upon the pleadings submitted by the parties. By Statute, deference is to be given to Complainant's choice of

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<sup>7</sup> Wilson Building Co. v. Leatherwood, 268 F. Supp. 609 (WD.N.C. 1967).

<sup>8</sup> Houston Oilers, Inc. v. Neely, 361F2d.36 (10<sup>th</sup> Cir 1966), cert. den. 385 U.S. 840 (1966).

<sup>9</sup> The Complaint is not subject to dismissal under Rule 821.33. Issues addressed to; for evaluation of FAA enforcement in terms of FAA Order 21.50.3B; or FAA exercise of its discretion are not reviewable by the Board; Administrator v. Gentile, 6 NTSB 60,66 (1988). The case of Administrator v. Bashor 5 NTSB 2116 (1987), is inapposite as therein the issue concerned FAA, ATC compliance with a duty that was mandatory on the part of the FAA's ATC, Controllers to advise a pilot if possible altitude deviation. How FAA utilized an Enforcement Decision Tool for choice of sanction or sanction chosen are not matters reviewable by the Board.

sanction, unless it is found to be arbitrary, capricious, and not in accord with precedent.

In support of the sanction sought, Complainant has attached to his Motion the FAA's Sanction Guidance Table, and, although the sanction FAA seeks to impose is within the range stated in the Table, Complainant has not cited any precedent supporting that sanction, nor made argument that that sanction – which is two-thirds (2/3s) of the maximum listed in the Table, is warranted. I decline, therefore, to defer to Complainant's sanction choice.

For the purpose of assessing sanction, I view the established violations as distinct, i.e., non-operational, Part 135 and the operational Part 91. FARs. For the non-operational violation of Sections 135.263(b), 135.267(d) FARs I accept the low stated in the FAA Sanction Table of 15 days. For the operational violation of 91.13(a) careless, potential endangerment, I conclude that 30 days is adequate. Lastly, while Respondent's submission of an ASRP-NASA Report was untimely, I nevertheless will give Respondent a benefit of a 5-day reduction on consideration that his Report can be said to have at least contributed data to ASR Program. Accordingly, I will modify the sanction to be imposed to that (40) forty days which I find would be sufficient to act as a deterrent to Respondent and any other individuals similarly disposed, and to satisfy the public interest in aviation safety.

IT IS ORDERED THAT:

1. Complainant's Motion for Summary Judgment is granted.
2. The Complaint/Order of Suspension is modified to provide for a sanction forty (40) days instead of sixty (60) days.
3. The Complaint/Order of Suspension as so modified is affirmed.
4. The proceeding is hereby terminated.

***ENTERED this 4th day of February, 2011, at Denver, Colorado.***

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PATRICK G. GERAGHTY  
JUDGE