

SERVED: May 29, 2013

NTSB Order No. EA-5659

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 29th day of May, 2013

_____)	
MICHAEL P. HUERTA,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	
v.)	Docket SE-19035RM
)	
JAMES WILSON SMITH,)	
)	
Respondent.)	
)	
_____)	

ORDER DENYING PETITION FOR RECONSIDERATION

Respondent filed a timely petition for reconsideration of NTSB Order No. EA-5646, issued January 16, 2013, wherein we remanded the above-captioned case for clarification. In particular, we instructed the law judge to evaluate whether the Administrator proved respondent violated 14 C.F.R. § 91.7(a) by establishing either (1) the aircraft at issue did not comply with the terms of its type certificate, or (2) the aircraft was not in a condition for safe operation.¹ At

¹ Section 91.7(a) provides, “[n]o person may operate a civil aircraft unless it is in an airworthy condition.” To be airworthy an aircraft must: (1) conform to its type certificate and applicable Airworthiness Directives; and (2) be in a safe condition for operation. Administrator v. Doppes, 5 NTSB 50, 52 n. 6 (1985) (citing 49 U.S.C. § 1423(c) [subsequently recodified as 49 U.S.C. § 44704(d)(1)]). Therefore, to carry the burden of proof, the Administrator need only prove an aircraft operator violated one of the two prongs.

the hearing and in establishing a record for the case, the parties did not focus on the two-prong standard of airworthiness. Although the law judge issued a thorough decision finding the aircraft was not in an airworthy condition after it collided with another aircraft on a taxiway before taking off, the decision did not include a discussion of the two-prong standard of airworthiness. As a result, we remanded the case for consideration of this standard.

Respondent now petitions us to reconsider our opinion and order, under our Rules of Practice.² Respondent asserts many arguments similar to those he asserted in his appeal brief; in particular, respondent again contends the law judge erred in excluding certain evidence at the hearing, and erred in determining the Administrator presented sufficient evidence to prove a violation of § 91.7(a). In addition, respondent argues our remand of this case was inappropriate, because we have long adhered to a *de novo* standard of review when determining whether to grant a party's appeal. The Administrator did not reply to respondent's petition for reconsideration. Following the Administrator's deadline for replying, respondent submitted two letters to the Board's General Counsel, contending the Administrator's failure to reply indicates the Administrator does not oppose respondent's petition. In the letters, respondent urges us to grant his petition and reverse the law judge's decision, under the presumption the Administrator agrees with this outcome.³

We decline to revisit the facts of this case, and will not consider the arguments in respondent's petition that he has already, or could have, raised in his appeal. At this juncture, we only note, for the purposes of ensuring our opinion and order was sufficiently clear, the law judge may exercise his discretion in deciding whether additional facts or arguments are necessary to determine whether the record is adequate concerning the two-prong airworthiness standard. This type of disposition is appropriate when the parties have not focused on the correct legal standard. Respondent is correct in stating the Board consistently reviews cases *de novo*, as we stated in our opinion and order remanding this case.⁴ However, when a record is insufficient—either factually or legally—in order to ensure the Board applies the correct legal standard in considering an appeal or petition for reconsideration, we will remand it for additional consideration. Such a disposition is consistent with our Rules of Practice⁵ and our precedent.⁶

² Section 821.50(c) of our Rules of Practice states, “[t]o the extent the petition is not based upon new matter, the Board will not consider arguments that could have been made in the appeal or reply briefs received prior to the Board’s decision.”

³ Respondent contends petitions for reconsideration under our Rules of Practice are analogous to motions for summary judgment; therefore, he argues a failure to reply to a petition constitutes agreement with it.

⁴ NTSB Order No. EA-5646 at 8; Administrator v. Frohmuth and Dworak, NTSB Order No. EA-3816 at 2 n.5 (1993); Administrator v. Wolf, NTSB Order No. EA-3450 (1991); Administrator v. Schneider, 1 N.T.S.B. 1550 (1972) (in making factual findings, the Board is not bound by the law judge’s findings).

⁵ Section 821.49(b) of our Rules of Practice states as follows:

ACCORDINGLY, IT IS ORDERED THAT:

Respondent's petition for reconsideration is denied.

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

(..continued)

(b) If the Board determines that the law judge erred in any respect, or that his or her initial decision or order should be changed, the Board may make any necessary findings and may issue an order in lieu of the law judge's initial decision or order, or may remand the proceeding for any such purpose as the Board may deem necessary.

⁶ See, e.g., Administrator v. Manin, NTSB Order No. EA-5586 at 7-8 (2011) (remanding for consideration under different standard); accord Administrator v. Langford, NTSB Order No. EA-5625 at 6-7 (2012).