SERVED: December 15, 2014

NTSB Order No. EA-5734

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Issued under delegated authority (49 C.F.R. § 800.24)
on the 15th day of December, 2014

MICHAEL P. HUERTA, Administrator, Federal Aviation Administration, Complainant, v. JACKSON E. LANGFORD, Respondent.	Docket SE-18963RM1

ORDER REMANDING CASE TO LAW JUDGE

On September 17, 2014, the United States District Court Judge for the Western District of Texas denied the Administrator's motion for summary judgment and remanded the case to the National Transportation Safety Board law judge for further findings.

ACCORDINGLY, IT IS ORDERED THAT:

Respondent's case is remanded to the law judge for further findings in accordance with the District Court Judge's order.[1]

David K. Tochen
General Counsel

[1] A copy of the order is attached.

FILED
SEP 18 2014
CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY _____
DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

JACKSON LANGFORD,	§	
Petitioner,	§	
	§	
v.	§	**MO-13-CV-096**
	§	
MICHAEL HUERTA, Administrator,	§	
Federal Aviation Administration,	§	
Respondent.	§	

ORDER DENYING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT AND ORDER FOR REMAND

Before the Court are the Administrative Record (Doc. No. 8), Respondent's Motion for Summary Judgment (Doc. No. 9), Petitioner's Response to Federal Aviation Administration's Motion for Summary Judgment and Brief in Support and Appendix (Doc. Nos. 13–14), and Respondent's Reply to Petitioner's Response to Motion for Summary Judgment (Doc. No. 16). A hearing was held over this matter on August 13, 2014. After consideration, the Court is of the opinion that Respondent's motion should be denied.

BACKGROUND

I. FACTUAL

Petitioner is Jackson Langford, a pilot whose airline transport pilot certificate ("Certificate") was suspended by Respondent for a period of 90 days. At the time of the incident which led to the suspension, Langford served as the director of operations for Basin Aviation, Inc. in Midland, Texas and acted as chief pilot.

On October 12, 2009, Langford was pilot-in-command of a Learjet which landed at Midland Airpark. Matthew Hogg was his co-pilot. After landing the Learjet on runway 25, Langford turned

left onto runway 16 and then left again onto taxiway Echo. At this point the Learjet stopped and radioed a Cessna facing north on taxiway Bravo, which intersected with taxiway Echo. The Cessna was waiting behind the hold-short line on taxiway Bravo for clearance from air traffic control to take off on runway 16. On board the Cessna was Joseph Gillett, a student at Midland College, and David Goll, a Midland College flight instructor.

Langford radioed the Cessna and asked to trade places. That is, the Cessna blocked Langford's taxi route to his parking position. To trade places would have required the Cessna to cross the hold-short line. Goll told Langford they could not trade places because they were instructed to hold-short. Langford then spooled up his engines to start taxiing again. Goll and Gillett testified as the Learjet made its turn: Langford spooled up the engines further; they saw hot air coming at them; the Learjet's left wheels locked up and marked the pavement; and they felt the Cessna shudder violently. As the Cessna was shuddering, Gillet grabbed the yoked and pushed it forward to counteract the jet blast.

After the incident, Gillett taxied onto runway 16 and continued with his flight lesson. Some time after the lesson, Goll reported the incident to his chief pilot at Midland College but no further action was taken. Gillett then wrote a letter to the FAA complaining about the incident. Thereafter, the FAA opened an investigation into the incident.

II. PROCEDURAL

This case arises out of Langford's appeal of the National Transportation Safety Board's ("NTSB") Decision affirming the 90-day suspension of Langford's Certificate. *See* Langford's Appeal ¶1, Doc. No. 1. On October 7, 2010, the Federal Aviation Administration ("FAA") issued

Langford an Order of Suspension which included the following findings by the FAA Administrator (the "Administrator"):

1. At all times pertinent herein, [Langford] held Airline Transport Pilot Certificate No. 002781333.

2. On October 12, 2009, at approximately 14:15 hours, local time, [Langford] operated a Lear, Model 45, civil aircraft N145MW, at the Midland Airpark Airport (MDD), Midland, Texas.

3. On the date and time noted above, after you landed on RWY 25, you turned left on RWY 16, and turned left on taxiway Echo.

4. At t time you turned left onto taxiway E, a Cessna 172, civil aircraft N66045, the property of another, with a student pilot and an instructor on board, was parked on taxiway Bravo, holding short for RWY 16 while waiting for Midland TRACON's instructions.

5. At that time, you radioed the Pilots of N66045 and asked them to "trade places." They declined to do so because air traffic had not yet issued them a clearance to enter instrument meteorological conditions. Furthermore, at that time, there were other aircraft inbound for RWY 25.

6. After N60045 declined to "trade places," you turned ahead of the Cessna, located approximately 40 to 50 feet away, and you increased throttle to an excessive power setting while simultaneously applying your brakes.

7. Your actions as described above caused your aircraft to leave skid marks of approximately 75 feet in length on taxiway Bravo.

8. Your actions created a jet wash that caused the Cessna 172 to shutter violently and caused first one wing, then the other wing, to lift and then drop hard.

9. Your actions, as described above, were reckless in that they endangered the lives of the student pilot and the instructor as well as the Cessna aircraft itself.

Admin. Record at 1–2, Doc. No. 8. Based on the above findings the Administrator reasoned Langford violated Title 14 C.F.R. § 91.13(a), which states no person may operate an aircraft in a

careless or reckless manner so as to endanger the life or property of another. The Administrator then imposed a 90-day suspension of Langford's Certificate. Admin. Record at 2.

The FAA then filed the Order of Suspension as the Administrator's Complaint (the "Administrator's Complaint"). *Id.* at 8. Upon Langford's appeal of the Order of Suspension, NTSB Administrative Law Judge William R. Mullins (the "ALJ") held an evidentiary hearing. *Id.* at 464–720,730–801. The ALJ ultimately affirmed the 90-day suspension of Langford's Certificate. *Id.* at 789–99. Langford then appealed the ALJ's decision to the NTSB. The NTSB found the ALJ relied on an erroneous doctrine—the Collision Hazzard doctrine. *Id.* at 798 (Tr. 325:1–4). On appeal, the NTSB found the ALJ's reference to the Collision Hazard doctrine was erroneous and ordered the ALJ on remand to make his findings in accordance with the jurisprudence for § 91.13(a) cases. Admin. Record at 1039. Further, the NTSB also instructed the ALJ to make findings of fact, including specific credibility findings. *Id.* at 1034–41.

Upon remand, the ALJ enunciated his credibility findings and upheld the 90-day Order of Suspension. *Id.* at 1134–46. Langford appealed the decision and the NTSB upheld the 90-day suspension of Langford's Certificate and affirmed the ALJ's credibility determinations and factual findings. *Id.* at 1227–43. Further, the NTSB concluded the 90-day suspension imposed by the ALJ was reasonable. *Id.*

Langford then appealed the NTSB's Order to this Court and requests a full and independent review under the newly promulgated Pilot's Bill of Rights ("PBR"), Pub.L. No. 112–153, 126 Stat. 1159 (2012). Langford's Appeal ¶¶17–18. Defendants request summary judgment in their favor and argue the administrative decision to suspend Langford's Certificate for 90 days was not arbitrary

or capricious. Therefore, while perhaps not the procedurally ideal vehicle,[1] the Court will rule upon the Respondent's motion for summary judgment.

STANDARDS OF REVIEW

I. Summary Judgment Standard

Summary judgment should be granted only where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). The moving party bears the initial burden of informing the court of the basis for the motion and demonstrating the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Meadowbriar Home for Children, Inc. v. Gunn*, 81 F.3d 521, 533 (5th Cir. 1996).

If the movant carries this burden, the burden shifts to the nonmovant to show the existence of a genuine issue for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The nonmoving party may not rest upon the allegations or denials contained in his pleading, but instead he must show specific facts creating the existence of a genuine issue that needs to be decided by a factfinder. FED. R. CIV. P. 56(e); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248–49 (1986). Conclusional allegations, speculation, improbable inferences, or a mere scintilla of

[1]Some courts have noted, for instance, a motion for summary judgment is not the proper procedural posture for reviewing an administrative agency's determination. *See, e.g., Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1579 (10th Cir. 1994); *Lodge Tower Condo. Ass'n v. Lodge Properties, Inc.*, 880 F.Supp. 1370, 1374 (D.Colo.1995), *aff'd*, 85 F.3d 476 (10th Cir. 1996); *Allglass Systems, Inc. v. Comm'r of Internal Revenue*, 330 F.Supp.2d 540, 543 (E.D. Pa. 2004); *Siquieros v. United States*, 2004 WL 2011367, at *3 n. 10 (W.D. Tex. 2004). Indeed, it is not the role of the Court to determine whether there are no material facts in dispute and the government is entitled to judgment. Instead, the Court's function is much more limited—whether the findings of facts by the NTSB are supported by substantial evidence.

evidence are insufficient to defeat a summary judgment motion. *Michaels v. Avitech, Inc.*, 202 F.3d 746, 754–55 (5th Cir. 2000).

Any inferences drawn from the underlying facts in dispute must be viewed in the light most favorable to the nonmoving party. *Matsushita*, 475 U.S. at 587. If the record, viewed in this manner, could not lead a rational trier of fact to find for the nonmovant, then summary judgment is proper. *Kelley v. Price-Macemon, Inc.*, 992 F.2d 1408, 1413 (5th Cir. 1993) (citing *Matsushita*, 475 U.S. at 577–78). If, on the other hand, the factfinder could reasonably find in the nonmovant's favor, then summary judgment should be denied. *Id.* (citing *Anderson*, 477 U.S. at 250). Finally, even if the standards of Rule 56 are met, a court has discretion to deny a motion for summary judgment if it believes that it would be prudent to proceed to trial. *Anderson*, 477 U.S. at 255.

II. Judicial Review of Administrative Record Standard

The parties disagree about the standard of review in this case. The Petitioner argues the Pilot's Bill of Rights provides a new standard of review—a full independent review. Petitioner, however, does not set forth what a full independent review encompasses. The Administrator argues judicial review under the PBR is governed by the Administrative Procedure Act ("APA") and courts should continue to apply the arbitrary and capricious standard.

Judicial review of NTSB orders revoking FAA certificates may be obtained by filing a petition for review in the appropriate United States court of appeals. *See* 49 U.S.C. § 44709(f); 49 U.S.C. § 46110(a). Such appeals may also be made by filing a petition for review in the appropriate federal district court. Pilot's Bill of Rights, Pub.L. No. 112–153, 126 Stat. 1159, 1161(d)(1) (2012). The PBR states "a district court shall give a full independent review of a denial, suspension, or revocation ordered by the Administrator, including substantive independent and expedited review

of any decision by the Administrator to make such order effective immediately." 126 Stat. at 1161(e)(1). Additionally, a district court's review shall include the record evidence from proceedings before the Administrator and before the NTSB. 126 Stat. at 1161–1162(e)(2).

The APA set forth standards governing judicial review of findings of fact made by federal administrative agencies." *Dickinson v. Zurko*, 527 U.S. 150, 152 (1999); *see* 5 U.S.C. § 706. In accordance with the APA, reviewing courts shall apply an arbitrary and capricious standard in their review of administrative records and decisions, including review of NTSB decisions. *See Seaquist v. Blakey*, 210 F. App'x 423, 425 (5th Cir. 2006); *see alsoTokoph v. Blakey,* 373 F. App'x 772, 773 (5th Cir. 2003); *Taylor v. Huerta*, 723 F.3d 210, 214–25 (D.C. Cir. 2013). Reviewing courts are to uphold a decision of the NTSB unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *see also City of Abilene v. U.S. EPA*, 325 F.3d 657, 664 (5th Cir. 2003). This standard is deferential and only requires that the agency articulate a rational relationship between the facts found and the choice made. *City of Abilene*, 325 F.3d at 664. Findings of facts by the NTSB are upheld if supported by substantial evidence. 49 U.S.C. § 1153(b)(3); *see also Blackwell v. Bond*, 619 F.2d 372, 373 (5th Cir. 1980). Substantial evidence "means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Seaquist,* 210 F. App'x at 425 (citations omitted). In sum, this Court will not substitute its own judgment for that of the agency and will affirm unless the agency fails to articulate a rational relationship between the facts found and the choice made. *See Tokoph,* 373 F. App'x at 773.

Additionally, a "[s]ubsequent statute may not be held to supersede or modify ... [the APA provisions dealing with judicial review] ..., except to the extent that it does so expressly." 5. U.S.C. § 559. Unless an exception is clearly expressed, courts should employ the APA standard for judicial

review of administrative decisions. *Dickinson*, 527 U.S. at 154–155. The PBR does not express the necessary congressional intent to supersede the APA standard of review. *See Dustman v. Huerta*, No. 13–C–3565, 2013 WL 5747079, at *6 (N.D. Ill. Oct. 23, 2013); *see also Creighton v. Dep't Transp.*, No. 6:13-CV-907-ORL, 2014 WL 1364495, at *3 (M.D. Fla. Feb. 28, 2014). Accordingly, this Court will employ the APA standard of review and only overturn the administrative decision to suspend Langford's Certificate if, based on the administrative record, it is deemed to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

DISCUSSION

I. Facts in the Administrative Record

People relevant to the October 12, 2009 incident:

Jackson Langford – pilot of the Learjet

Matt Hogg – Langford's co-pilot

David Goll – flight instructor and co-pilot of the Cessna

Joseph Gillett – Midland College student and pilot of the Cessna

Gordon Morris – FAA inspector, lead investigator of the incident

Lori Winter – General Manager of Basin Aviation

L.C. Durham – Director of Midland College's pilot program

Randi Estes – Director of aircraft maintenance for Basin Aviation

Dan Vengen – Aviations safety inspector with the FAA

Ray Guderjahn – FAA flight test engineer

A. David Goll's Testimony

David Goll has been a flight instructor for nine years, seven of those years have been spent at Midland Community College. Admin. Record at 503 (Tr. 40:17–21). On October 12, 2009, around 2:00 pm in the afternoon, Goll and his student Joe Gillett were going out on an instrument training flight. *Id.* at 504 (Tr. 41:18–20). Goll and Gillett were told to hold short on taxiway Bravo for multiple inbound planes to land. *Id.* at 504–05 (Tr. 41:21–42:2).

Langford landed his Learjet on runway 25, turned left onto runway 16, and turned left again onto taxiway Echo and stopped. *Id.* at 505 (Tr. 42:12–15). The Learjet then radioed the Cessna and asked if they wanted to trade places. *Id.* at 506 (Tr. 43:12–15). Goll testified he told the Learjet "No. We're waiting on clearance." *Id.* (Tr. 43:15–16). Goll then stated the Learjet proceeded forward and he heard the engines spool up as the Learjet started to roll and turn left. *Id.* (Tr. 43:17–19). As the Learjet was turning left, Goll heard the engines spool up more and saw the hot air of the engine (or jet blast) coming back towards the Cessna. *Id.* (Tr. 43:19–23). Goll testified Gillett grabbed the yoke and pushed it forward to keep the nose of the plane on the ground. *Id.* (Tr. 43:24–25). Additionally, as the Learjet made the corner and spooled up the engines, Goll noticed the left main tires locked up, smoked, and made black marks on the pavement. *Id.* at 507 (Tr. 44:1–6). Goll testified the Cessna and its wings shook violently under the jet blast. *Id.* (Tr. 44:7–9). Goll stated he was in shock during the incident. *Id.* (Tr. 44:7–8).

After the incident, Goll testified he radioed the Learjet and asked them if they were ok, *id.* at 513 (Tr. 50:2–5), because he thought the Learjet may have had some kind of malfunction with the brake or throttle. *Id.* (Tr. 50:7–9). Goll stated he did not receive a response. *Id.* (Tr. 50:10–11).

Goll testified he did nothing when the incident occurred. *Id.* at 529–30 (Tr. 66:20–67:24). That is, Goll and Gillett proceeded with the instrument training flight as planned. *Id.* at 531 (Tr. 68:20–21). Before they proceeded on their training flight, Goll did not get out and physically inspect the Cessna for any damage the jet blast may have caused. *Id.* at 532–33 (Tr. 69:19–70:21). Subsequently, he reported the incident to his chief pilot at Midland College. *Id.* at 531 (Tr. 68:20–21).

B. Joseph Gillett's Testimony

On October 12, 2009, Gillett stated it was a nice day so he wanted to get some instrument flight time in. Admin. Record at 535 (Tr. 72:14–15). As Gillett was taxiing to take off, he was told to hold short. *Id.* (Tr. 72:21–23). Gillett testified he was about 10 feet behind the hold short line when the Learjet landed and taxied to taxiway Echo which was "just catty-corner" to where the Cessna was holding short. *Id.* at 535–36, 545 (Tr. 72:24–73:15, 82:14–15). The Learjet then asked to trade spots and Goll told the Learjet pilot that they could not trade positions because the Cessna was not cleared of the hold short line. *Id.* at 536 (Tr. 73:16–19). Gillett said the Learjet pilot said "ok" and proceeded to spool up his engines to get the Learjet rolling. *Id.* (Tr. 73:19–21). As the Learjet started rolling and making a left turn in front of the Cessna, Gillett testified the Learjet "really spooled it up." *Id.* (Tr. 73:21–23). Gillett stated at this time the Learjet engines were about 40 to 60 feet in front of them. *Id.* at 544 (Tr. 81:13–16). Gillett told Goll he thought they were about to get blasted and Gillett pushed the yoke of the Cessna forward because Gillett was afraid the plane might flip over. *Id.* at 536, 549 (Tr. 73:23–25, 86:21–24). Gillett testified the jet blast caused the Cessna to shake violently. *Id.* at 538 (Tr. 75:14–24).

During the incident, Gillett stated too much was going on to be worried. *Id.* at 539 (Tr. 76:1–2). However, after the jet blast ceased, Gillett testified he was worried. *Id.* (Tr. 76:4). Regardless, Gillett then stated he did not get out to inspect the Cessna for any damage and continued with the training flight. *Id.* at 559 (Tr. 96:2–6).

The day after the incident, Gillett wrote a letter about the incident and gave it to L.C. Durham, the director of the Midland College pilot program. *Id.* at 541–43 (Tr. 78:25, 79:8–9, 80:16–20). Gillett then sent the letter to the FAA because he was concerned somebody could jet blast another plane and get away with it. *Id.* at 543 (Tr. 80:23–24).

C. Gordon Morris's Report and Testimony

1. Report

The Administrative Record shows Gordon Morris was the FAA's aviation safety inspector assigned to investigate the October 12, 2009 incident. Morris's report consists of several forms with statements from people with knowledge of the incident. Some statements were taken in person and some by telephone.

On October 21, 2009, Morris talked with Lori Winter, Basin Aviation's General Manager, by telephone while driving to Midland. Admin. Record at 138. Morris reported Winter stated "you don't need to come down here, I know what happened and I already took care of it." *Id.* Morris asked Winter what happened and Winter replied "Matt Hogg was the first officer and after you called I did some checking and he was yelling at Jackson ... not to do it." *Id.* Hogg then reported Winter stated "It was stupid, Jackson was the one how [sic] did it, I already took care of it, and it wont [sic] happen again." *Id.*

Once Morris arrived in Midland on October 21, 2009, he spoke with Goll. *Id.* at 142. Goll told Morris the Learjet landed on runway 25, exited onto runway 16, and turned left onto taxiway Echo. *Id.* The Learjet then asked if the Cessna would trade places and Goll told the Learjet they could not because they were instructed to hold short. *Id.* Morris reported Goll then stated "[Langford] got mad, made a left ahead of us on Echo, held his brakes[, and] blasted us with his engines." *Id.* Goll further stated he "could see the smoke from [the Learjet's] main tires that left skid marks on the taxi way." *Id.* Morris asked Goll how he knew Langford was mad and Goll replied "he didn't say anything else on the radio[,] he just turned and blasted us and went down runway 16." *Id.* Morris reported Goll told Langford he needed to "check his main tires from all the smoke that came from them." *Id.*

On October 27, 2009, Morris interviewed L.C. Durham, Midland College's director of the pilot program, by telephone. *Id.* at 144. Durham stated Lori Winter, general manager of Basin Aviation, told him Langford was the pilot in command of the Learjet and his actions were deliberate and unprofessional when he applied excessive thrust to the engines and nearly caused damage to the Cessna. *Id.*

Also on October 27, 2009, Morris interviewed Matthew Hogg, Langford's co-pilot, by telephone. *Id.* at 140. Hogg recounted that Langford landed the Learjet on runway 25, turned left onto runway 16, and left again onto taxiway Echo where they stopped because a Cessna was at the hold short line on taxiway Bravo. *Id.* Morris reported Langford told Hogg to radio the Cessna and tell them to move forward. *Id.* Morris further reported Hogg suggested Langford taxi down runway 16 instead. *Id.* Langford then called the Cessna and asked them to move forward. *Id.* The Cessna said they could not because they were told to hold short. *Id.* Morris then reported Hogg stated

Langford turned ahead of the Cessna and deliberately and simultaneously applied the brakes and added power to both engines while Hogg expressed his objections and told Langford "I hope you didn't blow them away." *Id.*

On November 3, 2009, Morris interviewed Tim Verble, technical support for Bombardier Aerospace. *Id.* at 136. Verble stated Langford was apparently holding the brakes while simultaneously applying excessive amounts of engine power. *Id.*

2. Testimony

Morris testified his supervisor informed him their FAA Lubbock Flight Standards District office received a complaint from a student at Midland College claiming an incident occurred where a Learjet blasted them while they were on the taxiway holding short. Admin. Record. at 572 (Tr. 109:2–9). The complaint was assigned to Morris and he began an investigation into the incident. *Id.* (Tr. 109:12).

Morris first testified upon direct examination about the interviews he put in his report. Morris's testimony mirrored the information he put in his reports.

Upon cross examination, Morris said he interviewed Langford on October 21, 2009. *Id.* at 584 (Tr. 121:8–11). Morris stated he wanted to hear Langford's side of the story but Morris already knew Langford piloted the Learjet and the Cessna was blasted. *Id.* at 585 (Tr. 122:3–6). Morris testified he expected Langford to say he had a bad day or he misjudged the distance between the Learjet and the Cessna. *Id.* (Tr. 122:6–10). Morris testified Langford instead was trying to justify what happened and Morris did not like the manner in which Langford was discussing the Learjet. *Id.* (Tr. 122:10–14). Morris then stopped the interview because he already had enough evidence and Langford's story was not adding up. *Id.* (Tr. 122:12–16).

Further, upon cross-examination Morris admitted he was driving while talking to Lori Winter on the phone and Winter's words he put in quotes in his report were not direct quotes. *Id.* at 599–600 (Tr. 136:16–137:17). Morris testified, however, the report was as accurate as it could possibly be. *Id.*

As to the length of the black marks, Morris stated he measured those to be 95 feet long. *Id.* at 616 (Tr. 153:9–12). Morris, however, did not measure the distance between the black marks and the hold short line during his investigation. *Id.* at 615, 625–26 (Tr. 152:12–22, 162:23–163:23). Morris testified he measured the distance between the black marks and the hold short line, which was about 124 feet, after the Suspension Order was issued. *Id.* at 615 (Tr. 152:12–22).

D. Jackson Langford's Testimony

On October 12, 2009, Langford stated he landed the Learjet at the Midland Airpark and a Cessna was holding short on taxiway Bravo next to runway 16. Admin. Record at 648 (Tr. 185:13–19). Langford testified he asked the Cessna to trade places and the Cessna told him they were holding short for departure and could not trade places. *Id.* (Tr. 185:20–21). Langford said to proceed he needed to make a sharp left turn onto taxiway Bravo. *Id.* (Tr. 185:21–25). Langford further stated he had to proceed quickly into the left turn because he was in the safety zone of an active runway. *Id.* at 656 (Tr. 193:1–7).

During the taxi and turn, Langford testified he did not use excessive thrust, *id.* at 649 (Tr. 186:1–2), nor did he sit on the brakes while throttling up the engines. *Id.* at 661 (Tr. 198:2–4). Langford states the black mark on the taxiway was probably caused by his threshold breaking—the point where the tire is going to skid but it is actually rolling and not locked up. *Id.* at 662 (Tr. 199:15–22).

E. Matthew Hogg's Affidavit and Testimony

1. Affidavit

On October 12, 2009, Hogg was second in command on the Learjet Langford landed at Midland Airpark. Admin. Record at 27 ¶ 2. Hogg stated they landed on runway 25, turned left onto taxiway Bravo and realized there was a Cessna on taxiway B at the hold short markings near Taxiway E. *Id.* at ¶ 3. They asked if the Cessna would taxi up far enough for the Learjet to taxi by and the Cessna said they could not because the "tower told them to hold short." *Id.* Realizing the Cessna was not going to move, Langford turned left onto Bravo and proceeded towards active runway 25 to taxi back to parking. *Id.* at ¶ 4.

During this time, Hogg states he was unaware that the break locked up or was dragging. *Id.* at ¶ 5. Hogg "noticed nothing out of the normal." *Id.* In fact, Hogg averred he knew of no event or act of Langford deliberately spooling up to blast the Cessna. *Id.* Hogg stated to Morris he did not think the incident constituted a safety concern. *Id.* at ¶ 7.

2. Testimony

Hogg testified he did not tell Morris that Langford "deliberately and simultaneously applied the brakes and added power to both engines." Admin. Record at 737–38 (Tr. 264:25–265:8). Hogg further denied saying to Langford that "I hope you didn't blow them away." *Id.* at 738 (Tr. 265:2–8).

Hogg then testified he did not remember Langford simultaneously applying the brakes and increasing the throttle to blast the Cessna. *Id.* (Tr. 265:17–20). Further, Hogg testified he did not experience any skidding in the Learjet nor did he know the plane left a black mark on the ground. *Id.* at 740 (Tr. 267:14–21). Hogg also stated he never yelled at Langford, *id.* at 741 (Tr. 268:2–3), and did not know there was an incident until several days later. *Id.* at 740–41 (Tr. 267:3–9).

F. Randi Estes's Testimony

Randi Estes is the director of maintenance for Basin Aviation. Admin. Record at 703 (Tr. 240:17–20). When asked if the tires of a plane can leave a black mark without locking the tires, Estes stated a mark could occur when the tire is being slowed to a rate that is less than the rate the aircraft is moving. *Id.* at 707 (Tr. 244:7–11). That is, the tire is not going to be turning as fast as it should and it will leave a black mark. *Id.* at (Tr. 244:11–13). Estes also testified if both brakes were locked on a Learjet, the plane would not move. If one break was locked, then the aircraft would end up off the taxiway and would not move straight down the road. *Id.* at 714 (Tr. 251:14–21).

A few days after the October 12, 2009 incident, the FAA contacted Estes and they looked at the tires. *Id.* at 708 (Tr. 245:9–25). Estes stated in his experience if a tire is locked and skidding for 95 feet, it would need to be changed. *Id.* at 710 (Tr. 247:12–16). However, Estes stated the Learjet's tires did not need to be replaced until the end of their service life which was not until June 15, 2010. *Id.* at 709, 633 (Tr. 246:9–12, 170:15–20).

G. Dan Vengen's Testimony

Dan Vengen is an aviations safety inspector with the FAA. Admin. Record at 630 (Tr. 7–8). Vengen testified to the maintenance records of the Learjet. Specifically, Vengen was going to testify the records showed the Learjet did not experience any mechanical irregularities or malfunctions on October 12, 2009. However, during Vengen's testimony, Petitioner stipulated to that fact. *Id.* at 631–32 (Tr. 168:23–169:4).

Vengen did state he looked at the Learjet's tires after the incident and noticed flat spots on the left tires. *Id.* at 634 (Tr. 171:21–25). Vengen talked to Estes about the flat spots but Estes did not change the tires because they were not wore out beyond their limits. *Id.* at 635 (Tr. 172:3–10).

The flat spots were not logged into the maintenance report for the Learjet because there was "nothing unserviceable about the aircraft." *Id.* at 636 (Tr. 173:7–10).

H. Ray Guderjahn

Ray Guderjahn is a flight test engineer for the FAA. Guderjahn's deposition was admitted during the proceedings before the ALJ. In his deposition Guderjahn testified to the meaning behind a temperature chart and a temperature and velocity chart for the Learjet (collectively, "blast charts"). Based on the temperature chart, at sea level, a danger area extending 40 feet behind a Learjet's tailpipe exists when idling. Admin. Record at 879–80, 926 (Guderjahn Dep. 23:21–24:3). That area doubles for take-off RPM. *Id.* According to the temperature and velocity chart, at sea level, the wind speed generated by the Learjet 120 feet behind its tailpipe at take-off power would be approximately 50 miles per hour. Admin. Record 899–909 (Guderjahn Dep. 43:14–46:16; 48:9–51:23). Guderjahn testified the wind speed would decrease with higher ambient temperatures and at any point above sea level. *Id.* at 900 (*Id.* at 44:4–23). Guderjahn also testified as an engine moved away from a certain point, the temperature and blast would decrease in relation to that point. *Id.* at 903 (*Id.* at 47:5–12).

I. DVD Demonstration

Petitioner recreated the October 12, 2009 event and recorded said event on DVD. The DVD was viewed by the ALJ and entered into evidence. Admin. Record 669–72 (Tr. 206:23–209:11). On the DVD Langford piloted a Learjet and made a left turn from taxiway Echo to Bravo in front of a similar Cessna which was located 10 feet behind the hold short line on Bravo. *Id.* Randy Estes piloted the Cessna for purposes of the demonstration. *Id.* Langford taxied the Learjet to the point at which the mark on the runway made the subject of the hearing was visible and lined up his left

tires with the mark at approximately 134 feet[2] from the Cessna. *Id.* Langford then held the brakes and increased the throttle on the Learjet to nearly take-off RPMs. *Id.* Langford took the Learjet to RPM levels that exceeded what he used on October 12, 2009 to over exaggerate the conditions that occurred on October 12, 2009. *Id.* At near take-off level RPMs, in the demonstration, the Cessna experienced some shaking. *Id.* Its occupants, however, including Estes, never felt in danger. *Id.* The occupants in the Cessna stated the demonstration provided no more jet blast effect on the Cessna than a normal windy West Texas afternoon could produce and were never in fear for their safety. *Id.*

II. ALJ and NTSB's Findings on Remand

A. ALJ findings

Upon remand, ALJ Mullins found Goll and Gillet were credible witnesses because they testified consistently with one another and with the physical evidence—tire marks left by the Learjet. *See* Admin. Record at 1139 (Amended Decisional Order on Remand at 6). The ALJ further found the purported quotations contained in Morris's notes and attributed to people whom Morris interviewed regarding the incident were "credible" because they were consistent with physical evidence and the testimony of Goll and Gillet. *Id.* at 1140–42 (Amended Decisional Order on Remand at 7–9). The ALJ, however, also found Langford's testimony was not credible. *Id.* at 1143 (Amended Decisional Order on Remand at 10). The ALJ based this finding on inconsistencies between Langford's testimony and physical evidence, the testimony of Goll and Gillet, and evidence of the statements made to Morris. *Id.* The ALJ stated Langford's "attempt to characterize the

[2]The 134 feet is comprised of the distance between the beginning of the black skid marks and the hold short lined measured to be 124 feet and the evidence that the Cessna was sitting at least 10 feet behind the hold short line at the time of the incident for a combined total distance of 134 feet.

physical evidence of the tire marks as being the result of differential braking was not consistent, particularly as these skid marks were beyond the intersection of the taxiways where differential braking might be required, and also because these skid marks were in a straight line." *Id.* The ALJ also found Hogg's testimony was not credible, citing inconsistency between his testimony that he was not aware of any "skidding" by the Learjet and the evidence, in Morris's notes, of his prior extemporaneous statements to Morris and Winters suggesting he was aware Langford had engaged in a high-thrust maneuver while taxiing around the Cessna. *Id.* at 1144 (Amended Decisional Order on Remand at 11). Ultimately, the ALJ found Langford's conduct (accelerating his engine while holding the breaks directly in front of the Cessna) deliberate, careless, and reckless, causing endangerment to the Cessna and its occupants in violation of Federal Aviation Regulation ("FAR") 91.13(a). *Id.* at 1146 (Amended Decisional Order on Remand at 13). Accordingly, the ALJ affirmed the Administrator's order of suspension for 90 days. *Id.*

B. NTSB findings

On appeal from remand, the NTSB affirmed the ALJ's credibility findings and factual findings. Further, the NTSB concluded the 90-day suspension imposed by the ALJ was reasonable; the ALJ found Langford's action was "deliberate" and was calculated to cause "anxiety" to the pilots of the Cessna. Therefore, the NTSB affirmed the 90-day sanction imposed by the ALJ.

III. Administrator's Motion for Summary Judgment

The Administrator filed a motion for summary judgment seeking a ruling that the 90-day suspension of Langford's Certificate was not arbitrary nor capricious. That is, the Administrator argues there is substantial evidence in the record that Langford recklessly operated an aircraft, which potentially endangered the life and property of others in violation of Federal Aviation Regulation

91.13(a). Langford responds summary judgment should be denied for the following reasons: (1) the ALJ used an incorrect standard of law; (2) the ALJ's credibility determinations were arbitrary and capricious; (3) specific acts were never proven; and (4) the 90-day suspension was improper and based on un-alleged grounds.

A. Standard of law used in this administrative case at the trial level

Langford asserts ALJ Mullins tried and decided the case under the wrong standard of law. Specifically, Langford claims ALJ Mullins tried the case initially under the *Lindstam* doctrine causing irreversible harm to Langford. At the initial hearing, Langford asserts the Administrator argued incorrectly they "need not prove the specific acts of carelessness to support a violation of Federal Aviation Regulation 91.13, but by using circumstantial evidence need only establish a *prima facie* case by creating a reasonable inference that the incident at issue would not have occurred but for Langford's carelessness." Admin. Record at 490–91. Langford contends the correct standard of review required the Administrator to prove the specific allegations set forth in the Order of Suspension against Langford. As such, Langford argues once the evidence and the initial case was presented under *Lindstam* and the ALJ "reviewed the case through that lens, there was no turning back short of a new trial." Resp. at 10, Doc. No. 13.

Although the Administrator mentioned *Lindstam* in its arguments at the initial hearing, it acknowledged the doctrine did not apply to this case in its reply brief to Langford's initial appeal. Admin. Record at 1023. Further, the Administrator argues this case was not decided under the *Lindstam* doctrine. This Court agrees.

During the first trial, the Administrator did mention *Lindstam* as the standard of review. Admin. Record at 490–91 (Tr. 27:22–28:4). Upon a review of the trial transcript, however, the ALJ

did not use this doctrine; the ALJ relied on another erroneous doctrine—the Collision Hazzard doctrine. *Id.* at 798 (Tr. 325:1–4). On appeal, the NTSB found the ALJ's reference to the Collision Hazard doctrine was erroneous and ordered the ALJ on remand to make his findings in accordance with the jurisprudence for § 91.13(a) cases. *Id.* at 1039. The NTSB further found the *Lindstam* doctrine inapposite because in this case the Administrator chose to allege specific acts of carelessness. *Id.* at 1040. The NTSB then ordered on remand the Administrator must prove those specific acts in order to carry his burden of proof and cannot rely on inferences of carelessness. *Id.*

On remand, the ALJ found the Administrator proved the allegations set forth in the Order of Suspension. *Id.* at 1145–46. Further, without addressing the merits yet, the record shows the ALJ made his credibility findings in accordance with § 91.13(a) cases as directed by the NTSB. *Id.* at 1137–44. That is, the ALJ's findings discussed Langford's actions: they were careless and caused endangerment the Cessna. In addition, neither the *Lindstam* nor Collision Hazzard doctrines were referenced by the ALJ on remand. On appeal, the NTSB affirmed the ALJ's credibility findings and decision concluding the Administrator met his burden. *Id.* at 1240. Nothing in the record shows the ALJ used improper considerations of standards of law.

B. ALJ's credibility findings

The Administrator argues there is substantial evidence to support the ALJ's credibility findings. Langford argues the ALJ's credibility determinations were arbitrary and capricious. Specifically, Langford asserts the following in support of his argument: (1) Goll and Gillett were inconsistent with their version of events; (2) Gillett is a known liar; (3) Langford and Hogg were found not credible but this finding was based on unreliable out of court statements; (4) the ALJ's finding that Langford was not credible because he did not hear the call from the Cessna over the

radio was irrelevant to the facts of the case; and (5) the ALJ's finding that the mark on the runway was too far away from the turn to be caused by differential breaking was not supported by the evidence in the record.

To begin, as the NTSB noted, this case presented several factual disputes with respect to several issues, such as when the engines of the Learjet excessively spooled up, whether the spooling was excessive, the location of the Learjet's alleged application of thrust and breaking in relation to the Cessna, and the effects of that thrust on the Cessna at the hold-short line. Regardless, substantial evidence in the record supports the ALJ findings of credibility and the NTSB's order affirming those findings. At the initial hearing, Goll, Gillette, Langford, and Mullins all testified that the Learjet landed on runway 25, taxied over to taxiway Echo, and stopped to ask the Cessna holding short at taxiway Bravo to trade places. All four witnesses also testified the Cessna responded it could not trade places because it was instructed to hold short. They also all stated the Learjet then took a left turn onto taxiway Bravo away from the Cessna. The testimony diverges upon the amount of spooling and breaking done by the Learjet during its left turn in front of the Cessna onto taxiway Bravo.

During the administrative hearing, Goll testified he heard the Learjet spool up to start taxiing. Goll then stated as the Learjet turned he heard the engines continue to spool up and saw smoke coming from the Learjet's tires. Thereafter, Goll testified he then felt the jet blast, his student Gillette pushed the Cessna's yoke forward, and the Cessna shook violently. While the record shows Gillett's testimony was somewhat inconsistent on when then Learjet excessively spooled up his engines while applying his brakes (during the left turn, when the Learjet was directly in front of the Cessna, or when the Learjet was about 134 feet in front of the Cessna), his testimony imparted that

at some time during the Learjet's turn he saw smoke from the tires, held the yolk of the Cessna forward, and felt the plane shake violently. Gillett stated at the time of the jet blast the Learjet engines were about 40 to 60 feet in front of them while the Cessna was holding at 10 to 20 feet short of the hold-short line. The Court finds as a whole, the testimonies of Goll and Gillette were consistent with one another and that testimony taken together with the black skid marks amounts to substantial evidence to support the ALJ's same finding (Goll and Gillet were credible witnesses because they testified consistently with one another and that testimony was consistent with the physical evidence of the tire marks left by the Learjet). Because these credibility findings were not arbitrary nor capricious, the Court defers to these credibility findings by the ALJ. *See Administrator v. Porco*, NTSB Order No. EA-5591 at 13 (2011), *affirmed by* 472 F. App'x 2 (D.C. Cir. 2012) (The ALJ's credibility findings should be given deference unless those findings are arbitrary and capricious.).

The Court notes Langford and Hogg contradicted the testimony of Goll and Gillette both stating Langford did not apply excessive thrust during the turn. Further, Langford and Estes stated the black marks could have been left by differential breaking. Lastly, the ALJ's finding that these two witnesses were not credible is based on weak reasoning (not hearing the radio call, the differential breaking explanation, and testimony inconsistent with out of court witness statements). Nevertheless, based on the standard of review in this Court, the ALJ's credibility findings in the context of all the evidence are not arbitrary or capricious. As the NTSB noted, the ALJ provided a rationale for his credibility assessments and assessed the witnesses' credibility in the context of competing evidence. *See City of Abilene*, 325 F.3d at 664 (This standard is deferential and only

requires that the agency articulate a rational relationship between the facts found and the choice made.).

The Court further notes, as did the NTSB, the ALJ improperly found certain out of court statements from Winters, Durham and Hogg were credible. However, as the NTSB held, those statements were not "essential to a resolution of this case," because the ALJ's credibility findings regarding the testimony of Goll and Gillet together with the photographs of the skid marks amount to substantial evidence which shows these findings were not arbitrary or capricious.

C. Specific Act findings

Langford claims the Administrator did not prove the following specific acts: (1) the Learjet was 40 to 50 feet away from the Cessna when the alleged jet blast occurred; and (2) Langford used excessive power while simultaneously holding the breaks. Langford argues the closest the Learjet got to the Cessna was 72 feet which would have been when the Learjet was beginning its turn and the Cessna was about 10 feet behind the hold short line. Langford contends because both Goll and Gillett stated the Lear made the turn prior to the jet blast, the Administrator did not prove the specific act—the Learjet was 40 to 50 feet away from the Cessna when it applied excessive throttle while simultaneously applying the breaks.

The express language of § 91.13(a) prohibits operation of an aircraft "in a careless or reckless manner so as to endanger the life or property of another." 14 C.F.R. § 91.13(a). Violation of Section 91.13(a) requires both danger or a potential for danger to life or property of another and careless or reckless operating manner. *Administrator v. Slikker*, NTSB Order No. EA-4736 at 2 (1998). "Carelessness" means an individual has failed to do all things reasonably necessary for safe operation. *Id.*

Again, under the *Lindstam* doctrine, the Administrator would not need to allege or prove specific acts of carelessness to support a violation of § 91.13(a). Here, however, this doctrine is inapposite. The Administrator charged Langford with specific acts of carelessness and as the NTSB admonished in its April 11, 2012 Order, "the Administrator must prove those specific acts in order to carry his burden of proof and cannot rely on an inference of carelessness." Admin. Record at 1040.

On remand, ALJ Mullins made the following findings of fact:

1. Respondent holds Airline Transport Pilot Certificate No. 00278133.

2. On October 12, 2009, [Langford] was pilot-in-command of civil aircraft N145MW at Midland Air Park, Midland, Texas.

3. After landing at Midland Air Park on RWY25, [Langford] turned left on taxiway Echo.

4. At this time, it was not raining and taxiways were dry.

5. At the intersection of taxiway Echo and taxiway Bravo, a Cessna 172 was holding short on taxiway Bravo awaiting an IFR clearance from ATC. On board the Cessna was Mr. David Goll, a flight instructor for Midland College, and Mr. Joseph Gillet, an instrument student pilot.

6. As [Langford] approached that intersection, he asked the Cessna by radio to "trade places." The Cessna declined because they didn't have their clearance.

7. After the Cessna declined to "trade places," [Langford] began a left turn down taxiway Bravo in front of the Cessna.

8. As the Lear jet operated by [Langford] began its roll around the corner, the engines began to spool up and continued to increase power around the corner as the Lear jet came directly in front of the Cessna.

9. After the Lear turned directly in front of the Cessna and the engines continued to accelerate, the nose of the Lear dipped and smoke began to come from the left main gear of the Lear.

10. The Lear left 75 feet of skid marks in a straight line away from the Cessna.

11. The actions of the Lear pilot ([Langford]) by accelerating his engine while holding the brakes directly in front of the Cessna with Messrs. Goll and Gillet caused the Cessna to buffet extremely, and the wings to rock up and down.

12. The actions of the [Langford] required the pilots of the Cessna to hold the yoke forward and deflect the ailerons from one side to the other while simultaneously holding their brakes to keep the Cessna in place.

Admin. Record at 1145–46. The ALJ then found the conduct of Langford "by accelerating the Lear Jet engines while holding in its brakes was deliberate, careless, and reckless, causing endangerment to the Cessna and its occupants, and was in regulatory violation of FAR 91.13(a)." *Id.* at 1146. The NTSB stated the ALJ's finding— Langford violated § 91.13(a)—is supported by the preponderance of the evidence. The NTSB, therefore, affirmed the ALJ's findings.

Clearly, however, the ALJ did not make a finding as to the specific act that the Learjet was 40 to 50 feet away from the Cessna when it began to increase throttle to an excessive power while simultaneously applying the brakes. This finding is significant because the distances between the two planes goes to whether the alleged jet blast was careless and whether the jet blast could have put the Cessna in harms way. Notably, there is evidence in the record relevant to this finding, including but not limited to, the blast charts, DVD demonstration, and measurement of the distance between the black marks and the hold short line, which was about 124 feet. Consequently, the ALJ's finding that Langford violated § 91.13(a) is arbitrary and capricious in light of the lack of finding as to the specific act that the Learjet was 40 to 50 feet away from the Cessna when it began to increase throttle to an excessive power while simultaneously applying the brakes.

D. 90-day suspension

The Administrator argues there is substantial evidence to suspend Langford's Certificate. Langford asserts the 90-day suspension is based upon un-alleged grounds. That is, Langford points out he was charged with careless or reckless behavior regarding the jet blast but the suspension was based on intent or deliberate conduct. Additionally, Langford argues the 90-day suspension was improper because the sanction guidance table was not timely offered into evidence and there was not proof that the 90-day sanction was justified.

1. Sanction based on un-alleged grounds

In the underlying administrative case, Langford was charged with reckless or careless behavior. During the administrative trial, Langford attempted to address the issue of intent or deliberate conduct and the ALJ made clear that intent and deliberate conduct were not required elements under § 91.13(a) and were not at issue in the case. Admin. Record at 587–89 (Tr. 124:2–126:5). The following is the exchange regarding intentional and deliberate conduct.

Q.[3] Where in the complaint in this case has Mr. Langford been charged with deliberate or intentional conduct?

A. By the rule, careless or reckless under 91.13(a), if an act is reckless, then it was deliberate; it was done intentionally.

Q. Where do you get that from? Is that something you're just coming up with off the top of your head today, or is that a rule that we can look up or a statute or --

A. Yes, sir. Well, it is the rule, and you can look it up. And it was part of my training as an FAA inspector.

[3]Mr. Kaiser, Langford's attorney, is questioning Gordon Morris, the inspector.

Q. So you're saying that every prosecution under 91.13, the Administrator must prove deliberate and intentional conduct to get a conviction -- or not a conviction, but a finding of responsibility?

MR. LANDER:[4] Objection; calls for a legal conclusion from this witness.

MR. KAISER: Your Honor --

MR. LANDER: He's not an attorney.

MR. KAISER: -- he's opened the door for it. He's trying to give legal conclusions.

ADMINISTRATIVE LAW JUDGE MULLINS: Well, I'm going to sustain the objection because, I think, as I suggested earlier, in my 22 years hearing these cases, if the Administrator really was hell-bent on reckless, this would be a revocation.

MR. KAISER: That may be true, Your Honor. But deliberate and intentional should be specifically pled because they're bound by the four corners of the complaint.

ADMINISTRATIVE LAW JUDGE MULLINS: Well --

MR. KAISER: If that's not an element that they're required to prove and we don't have notice of it --

ADMINISTRATIVE LAW JUDGE MULLINS: They're required to prove 91.13. And I think we're just circling-- you know, beating around the bush here.

MR. KAISER: Can I tell you why I think it's important?

ADMINISTRATIVE LAW JUDGE MULLINS: Go ahead.

MR. KAISER: The level of sanction. I think that what they're going to try and do is say that if it's deliberate and intentional, they can justify their 90-day sanction. But they haven't charged him with deliberateness or intentional conduct so he has no way to defend himself against it. If it's not deliberate and not intentional, which he hasn't been charged with, that should be a factor that the Court considers.

ADMINISTRATIVE LAW JUDGE MULLINS: That's why I say I think if they were going for deliberate and intentional it would be a revocation.

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[4]Mr. Lander is the attorney for the FAA.

BY MR. KAISER:

Q. And I don't think that you're going for deliberate or intentional in the complaint charge. Do those words appear in the complaint charge?

A. Sir, I don't recommend the sanction. I gather the information.

ADMINISTRATIVE LAW JUDGE MULLINS: He doesn't draft the document and he doesn't recommend sanction. Let's move on, counsel.

Admin. Record at 587–89 (Tr. 124:2–126:5). As such, Langford was not allowed to put on evidence regarding intent or deliberateness. The ALJ, however, found the conduct of Langford "by accelerating the Lear Jet engines while holding in its brakes was deliberate, careless, and reckless, causing endangerment to the Cessna and its occupants, and was in regulatory violation of FAR 91.13(a)." Admin. Record at 146 (emphasis added). Further, on appeal, the NTSB affirmed the 90-day sanction stating they were compelled to take into account the Learjet's proximity to an active runway while performing the jet blast to harass pilots in another aircraft. *Id.* at 1242. The NTSB upheld the ALJ's 90-day suspension stating the ALJ found Langford's "action was deliberate and was calculated to cause anxiety" for the Cessna pilots. *Id.*

Upon review, the NTSB makes clear it upheld the ALJ's 90-day suspension based on the finding that Langford's action was deliberate. Admin. Record at 1242. At one point even the Administrator, in its Reply Brief regarding Langford's appeal of the ALJ's initial oral decision, argued the ALJ affirmed the 90-day sanction because he found that Langford's conduct constituted a deliberate act. Admin. Record 1028. The Administrator has then since capitulated and argued the ALJ and NTSB did not base their decisions on intent but rather on recklessness. Admin. Reply Brief at 5, Doc. No. 16. Regardless, neither intent nor deliberate conduct was at issue and Langford did not have an opportunity to present evidence regarding intent or deliberateness. *See Administrator*

v. Lepping, NTSB Order No. EA-4874 at 2 (2000) (It was prejudicial error for the ALJ to base his decision on un-alleged grounds.). Therefore, as far as the ALJ and NTSB's finding that the 90-day suspension is based on deliberate or intentional conduct, the finding is arbitrary and capricious.

2. Improper sanction

Langford also argues the ALJ should not have considered the sanction guide table in this case because the Administrator did not offer it into evidence. Further, Langford argues the Administrator failed to present any evidence to show the 90-day sanction was not arbitrary or capricious.

Under the FAA Civil Penalty Administrative Assessment Act, 49 U.S.C. §§ 44709(d) and 46301(d), the NTSB is "bound by...written agency guidance available to the public relating to sanctions to be imposed...unless the Board finds that any such interpretation [or in this case sanction guidance] is arbitrary, capricious, or otherwise not in accordance with law." However, as the NTSB stated in *Administrator v. Peacon*, NTSB Order No. EA-4607 at 10 (1997), it is the Administrator's burden under the Act to clearly articulate the sanction he wishes, and to specifically ask the Board to defer to that determination, supporting the request with evidence showing that the sanction has not been selected arbitrarily, capriciously, or contrary to law. *See Administrator v. Hewitt*, NTSB Order No. EA-4892 at 2 (2001). It is "the Administrator's obligation explicitly and timely to raise the deference argument." *Administrator v. Murphy*, NTSB Order No. EA-5355 at 4 (2008) (quoting *Administrator v. Kimsey*, NTSB Order No. EA-4537 at 2 (1997)).

Here, the Administrator did not introduce the Sanction Guidance Table 2150.3B into evidence in its case-in-chief. Rather, in its closing rebuttal, the Administrator asked the ALJ to defer to the Administrator's choice of sanction as listed in 2150.3B of the sanction guidance table. Admin. Record 788–89 (Tr. 315:12–316:3); *see Hollumn v. Postmaster General*, EEOC Decision No.

01943004 at *3 (1995) (in an administrative hearing a party may not offer new evidence in its closing argument.). The Administrator further stated the case law that was submitted to the ALJ stands for the proposition that Langford's violation warrants a 90-day sanction. *Id.* The case law referenced by the Administrator, however, was no where in the administrative record. Because the Administrator did not timely raise the deference argument, the ALJ is not bound by sanction guidance table. *See Administrator v. Murphy*, NTSB Order No. EA-5355 at 4 (2008); *Administrator v. Kimsey*, NTSB Order No. EA-4537 at 2 (1997)). That is, upon remand, the ALJ is not required to defer to the 90-day sanction; rather, the ALJ must review the evidence proffered by the Administrator to determine whether that evidence adequately supports the sanction imposed. *See Administrator v. Murphy*, NTSB Order No. EA-5355 at n.15 ("Failure to introduce the Sanction Guidance Table during the Administrator's case in chief means that the Board will not grant deference to the Administrator's choice of sanction. It does not mean that the Administrator is precluded from justifying the proposed sanction in argument by otherwise commenting on the evidence in the record.").

CONCLUSION

Based on the above-stated reasons, the Court finds the ALJ's credibility findings are based on substantial evidence. The Court, however finds the ALJ's lack of findings regarding specific acts charged and the NTSB's affirmation of those lack of findings is arbitrary and capricious. Further, the ALJ and NTSB's finding that the 90-day suspension was warranted due to deliberate conduct is arbitrary and capricious. Finally, the Court finds because the Administrator did not timely introduce the Sanction Guidance Table 2150.3B or raise the deference argument, the ALJ is not bound by sanction guidance table. Accordingly,

IT IS ORDERED that Respondent's Motion for Summary Judgment (Doc. No. 9) is hereby **DENIED**.

IT IS FURTHER ORDERED that this case is hereby **REMANDED**.

IT IS FURTHER ORDERED that upon remand, the ALJ shall make the following findings in light of the evidentiary record: (1) whether the Learjet was 40 to 50 feet away from the Cessna when it began to increase throttle to an excessive power while simultaneously applying the brakes; and (2) how that finding impacts whether or not Langford violated § 91.13(a).

IT IS FURTHER ORDERED that upon remand the ALJ shall make his findings as to whether Langford violated § 91.13(a) and whether the 90-day suspension was warranted based upon the alleged grounds of reckless and careless conduct, not intentional or deliberate conduct.

IT IS FURTHER ORDERED that upon remand, the ALJ shall review the evidence to determine whether the 90-day suspension is adequately supported.

IT IS SO ORDERED.

SIGNED on this 17th day of **SEPTEMBER, 2014.**

ROBERT JUNELL
United States District Judge
Western District of Texas