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NTSB Order No. EA-4607

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 10th day of November, 1997

JANE F. GARVEY, Administrator, Federal Aviation Administration, Complainant, v. ROBERT C. PEACON, Respondent.	Docket SE-13828

OPINION AND ORDER

The Administrator has appealed from the written initial decision of Administrative Law Judge William A. Pope, II, issued in this proceeding on March 8, 1996, following the conclusion of an evidentiary hearing held on July 12-14, October 4-6, and December 14-15, 1995, in Fort Lauderdale and Miami, Florida.[1] By that decision, the law judge affirmed part of the Administrator's amended order, alleging violations of Part 91 of the Federal

[1]A copy of the written initial decision is attached.

Aviation Regulations (FAR), 14 C.F.R. Part 91, as a result of respondent's operation as pilot in command of N40485, a Boeing B-727 aircraft, on a passenger-carrying flight from Miami, Florida to Lagos, Nigeria.[2]

The Administrator's original order assessed a 180-day suspension of respondent's airline transport pilot (ATP) certificate. Prior to the hearing, the Administrator withdrew the FAR § 91.533(b) allegation and reduced the sanction to 170 days. At the beginning of the hearing, the Administrator also withdrew the FAR § 91.413(a) allegation. The law judge sustained only those allegations concerning operation in MNPS airspace without FAA approval and without approved long-range navigational equipment, carriage of unsecured cargo on board, and the failure to ensure that passengers received a full safety briefing, and a residual finding of a violation of FAR § 91.13(a). The law judge

[2]The Administrator's original order alleged that respondent violated FAR §§ 91.705(a) and (b), by operating without approved navigational equipment in North Atlantic Airspace (NAT) designated as Minimum Navigation Performance Specifications (MNPS) airspace and by operating in NAT MNPS without FAA authorization; FAR § 91.519(a), by taking off without ensuring that each passenger had received a safety briefing; FAR § 91.525, by permitting a mattress and box spring set to be carried in the aircraft's passenger compartment rather than in the cargo hold and when it was not otherwise secured properly; FAR § 91.533(b), by operating an aircraft with 80 passengers without having at least two flight attendants; FAR § 91.509(b)(2), by operating over water for more than 30 minutes without a life raft; FAR § 91.171(a)(1), by operating under IFR while using a VFR system without checking the radio within the last 30 days; FAR § 91.413(a), by using a transponder that had not been tested within 24 months, as required by FAR Part 43; and, residually, FAR § 91.13(a), by operating an aircraft in a careless and reckless fashion so as to endanger the lives or property of another.

modified the sanction to a 30-day suspension and a $1,000 civil penalty.

The only issue raised in this appeal concerns the law judge's sanction modification.[3] The Administrator contends that the law judge erred by not affirming a 170-day certificate suspension. The Administrator asserts that the law judge failed to defer to FAA written agency policy guidance related to sanctions, and that the law judge's sanction is inconsistent with Board precedent. The Administrator asserts that the law judge's explanation for reducing sanction was deficient. Finally, the Administrator contends that the law judge exceeded his authority by changing the type of sanction from a certificate suspension to a civil penalty. For the reasons that follow, we grant the Administrator's appeal.

The Board is authorized under the FAA Civil Penalty Administrative Assessment Act, 49 U.S.C. §§ 44709(d) and 46301(d), to modify the sanction ordered by the Administrator. However, the Act states that we are "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][4] is arbitrary, capricious, or otherwise not in accordance with law." As we noted in Administrator v. Reina, NTSB Order No. EA-4508 at 3, "[a] law

[3]Respondent has filed a brief in reply, urging the Board to deny the appeal. The parties do not dispute the facts found by the law judge for purposes of this appeal.

[4]See Administrator v. Reina, NTSB Order No. EA-4508 at 3 (1996), *modification denied*, NTSB Order No. EA-4552 (1997).

judge's discretion in sanction modification is not limitless." Thus, where the Administrator establishes before the law judge the existence of validly adopted written policy guidelines, the law judge must impose a sanction that falls within the range of sanctions suggested therein, unless he finds that application of the guidelines by the Administrator was arbitrary, capricious, or otherwise not in accordance with law.[5] Further, where the Administrator argues that Board precedent supports her suggested sanction, the law judge may not ignore that precedent, unless he distinguishes it by explaining on the record why the requested sanction is not "according to law." 49 U.S.C. § 44709(d); Administrator v. Kimsey, NTSB Order No. EA-4537 at 6, *stay granted* NTSB Order No. EA-4545 (May 6, 1997)(Reduction affirmed where there are no cases with facts similar to those here); Hinson v. NTSB, 57 F.3d 1144, 1150 (D.C. Cir. 1995)(Board may depart from precedent so long as it gives a reasoned explanation for its departure). Finally, where the Administrator provides the law judge with an explanation as to how the recommended sanction was derived, a law judge exceeds his authority by modifying that sanction without making a finding, on the record, that the Administrator was nonetheless arbitrary or capricious in making that decision. In the case before us, the law judge failed to perform this necessary analysis.

[5]The Administrator argues in this appeal that the law judge may not change a suspension to a civil penalty where the Administrator has selected a suspension as appropriate. Since precedent does not support imposition of a civil penalty here, we need not reach this issue.

In order to attempt to understand the law judge's sanction modification here, it is necessary to present the facts as he viewed them at the time of his deliberations. From 1963 to 1991, respondent, who has logged over 14,000 hours of flight time, served as a member of the flight crew, and ultimately as a B-727 captain, for Eastern Airlines, an air carrier no longer in operation. Respondent was subsequently hired by Allen Blattner, who operates Jetson Aerospace Services. Respondent helped Blattner with the planning and acquisition of aircraft for an intra-Nigerian air service that Blattner intended to operate. Respondent, on behalf of Blattner, located N40485 and ferried it to Miami, where the aircraft was serviced and sold to a Florida West Airlines subsidiary. Respondent was then hired by Allen Beni, the president of Florida West Airlines, to fly the aircraft to Nigeria.

On January 31, 1994, respondent operated the aircraft, as pilot in command, on a flight from Miami to Lagos, Nigeria, with stops in Gander, Newfoundland; Stanstead, England; Faro, Portugal; and Abuja, Nigeria. Respondent's passengers included Blattner; Beni; Maury Joseph, the chief executive officer of Florida West Airlines; Gil Holt and Douglas Belcher, pilots who were going to Nigeria to train crews for Florida West Airlines; Jim Gagnon, a mechanic hired by Blattner, and his wife; and a Nigerian aviation inspector.[6] Respondent's crew consisted of a flight engineer, a first officer, and one flight attendant.

[6]Eighty passengers, Nigerian nationals, apparently boarded the aircraft for the last leg from Abuja to Lagos, Nigeria.

The first stop was Gander. Shortly after departure from Gander, the aircraft had a loss of pressurization, forcing its return. Repairs were performed and the aircraft departed Gander a second time. Evidence from the Gander Air Traffic Control (ATC) Center establishes that following both departures N40485 was operated in NAT MNPS airspace, without authorization from the FAA and when the aircraft was not equipped with approved long-range navigational equipment. Respondent claimed that he had relied on others, i.e., Beni and Joseph, to obtain all necessary authorizations and permits. The judge accepted respondent's portrayal of these two men as the "true" operators of the aircraft and respondent as only the manipulator of the aircraft's controls. He found as a matter of fact that respondent believed authorization had been obtained by others to operate this flight in MNPS airspace. Initial Decision at 26.

Respondent admitted that he knew that a full-size mattress and box spring set was stored, unsecured, in the aft passenger cabin. He also admitted that he knew that the mattress set was resting flat on top of several rows of seats, and that it could have fallen off the seats during the flights and blocked the aft exit.[7] The law judge held that the carriage of unsecured cargo in the passenger compartment was inherently dangerous and presented an obvious potential safety hazard to the passengers. Nevertheless, the law judge determined, the mattress was permitted on board by Florida West officials in order to curry

[7]There is also evidence that two of the passengers slept on the mattress during the course of the flight.

favor with the Nigerian official, who owned the mattress set, and respondent did not play a part in making that decision.

Finally, the law judge found that respondent had told the flight attendant that all but one of the passengers were airline personnel, and that he would leave the safety briefing of the passengers to her and she could tell the passengers what they needed to know. Evidence shows that she briefed the only "non-airline" person aboard, the wife of the mechanic. The law judge concluded that it was unreasonable for respondent to simply delegate to the flight attendant the entire responsibility to ensure each passenger knew all that is included in a safety briefing.

Based on these findings, and specifically recognizing that respondent, as pilot in command, had the ultimate responsibility for the safety of this flight, the law judge nevertheless reduced sanction to a 30-day suspension of respondent's ATP certificate and a $1,000 civil penalty. The question before us is whether such a substantial modification of sanction was proper.

The parties filed post-hearing trial briefs in lieu of closing argument. Administrator's counsel included in his brief a distinct sanction argument urging the affirmation of a 170-day suspension.[8] Since this sanction argument followed the Administrator's argument that all the allegations should be affirmed, the law judge did not have the benefit of the agency's

[8]Respondent's trial brief argued that the contested allegations had not been established. As to the unsecured cargo allegation, he claimed that no sanction should be imposed because it was a *de minimus* violation.

position on an appropriate sanction in light of the law judge's affirmation of only four of the charges. The Administrator argues in this appeal that the law judge was required, nonetheless, to defer to the Administrator's Sanction Guidance Table, FAA Order 2150.3A, Compliance and Enforcement Program, Appendix 4, and to Board precedent, both of which were cited in counsel's closing brief. The Administrator suggests that a 90 to 120-day suspension should be affirmed by the Board.

Respondent replies that the law judge was not required to defer to the Administrator's desired sanction. He contends that the sanction requested was clearly inconsistent with the Sanction Guidance Table. We agree. For example, we note, according to FAA counsel's trial brief, a suspension of 30 to 90 days is suggested in the Sanction Guidance Table as the appropriate sanction for the operation of an aircraft without required equipment. However, instead of then asking for a 30 to 90-day suspension for the separately charged FAR § 91.705(a) violation, he asserted to the law judge, without explanation, that respondent's operation of the subject aircraft without approved long-range navigational equipment merely "aggravated" the MNPS violation charged under FAR § 91.705(b). Moreover, since the Administrator asserted that this violation occurred twice, a 60 to 180-day suspension for each occurrence would have been consistent with the Sanction Guidance Table, but instead the Administrator argued at the hearing level for a 170-day suspension for all of the violations, and on appeal she now argues for a 90 to 120-day suspension, for all of the violations,

without any explanation as to how the Administrator determined these various periods of suspensions.

The Administrator did argue to the law judge that there were so many allegations, that initially it was thought that revocation was appropriate. Then, however, it was apparently agreed upon by "office management personnel," according to the investigating inspector, that 180 days would suffice. Although we do not fault the Administrator for the absence of an explanation of this determination,[9] it still remains that we can only speculate about her reasoning. As respondent also points out, when the Administrator withdrew one charge before the hearing, she reduced the sanction to 170 days, but when she withdrew another charge before the law judge took evidence, the Administrator continued to press for 170 days. In sum, we concur with respondent that it would be unreasonable to bind the law

[9]The Administrator's counsel asked the investigating inspector to explain why he recommended a sanction of 180 days. His testimony was cut off by the judge, who deemed this information "not pertinent" to his decision. (TR-91). Only when respondent's counsel indicated that he did not object to the testimony, which he noted could be relevant in the law judge's review of sanction, did the law judge permit the testimony to continue. However, before the inspector could explain how the decision to recommend a suspension rather than revocation was made, the law judge once again stopped his testimony, stating that "this has gone as far as I'm interested in hearing." (TR-94). We could not disagree with the law judge more. This information should have been considered by the law judge so that he could determine whether the Administrator's requested sanction was arbitrary, capricious, or not in accordance with law, and also so that factors in aggravation or mitigation would not be considered twice. This testimony would have aided not only the law judge's analysis, but also the Board's review of the case. We cannot understand the law judge's position, considering that he permitted testimony of other witnesses to extend over an eight-day period.

judge to the 170-day suspension. In any event, the law judge did not have a copy of the Sanction Guidance Table to refer to, since one was not entered into evidence by the Administrator's counsel. We question under such circumstances how the law judge was to know whether those guidelines spoke to the situation before him. Deference under the Civil Penalty Act is not a simple matter. As we have stated recently in several opinions, it is the Administrator's burden under the Act to clearly articulate the sanction she wishes, and to specifically ask the Board to defer to that determination, supporting her request with evidence showing that the sanction has not been selected arbitrarily, capriciously, or contrary to law. Kimsey, NTSB Order No. EA-4537 at 5. Clearly, the law judge believed he was no longer bound to the 170-day suspension urged by the Administrator. He notes at the outset of his sanction discussion that since the Administrator had originally ordered a 180-day suspension, dismissal or withdrawal of 6 out of 10 allegations alone warranted a substantial reduction. *Id.* at 33. Although we agree that dismissal of a significant portion of the charges required a reassessment of sanction, we do not think that a reassessment necessarily dictates a modification. Sanction assessments do not lend themselves to simple calculations. See Administrator v. Ribar, NTSB Order No. EA-4318 at 3 (1995).

The law judge recognized in his decision that even though respondent, as pilot in command, was ultimately responsible for the safety of his operation, the control of the aircraft was primarily performed by Florida West Airlines principals, and had

respondent not agreed to operate the aircraft as they desired, he would have lost his employment.[10] Therefore, the law judge concluded, respondent's lack of control was a mitigating factor and "clemency" was warranted, finding a 30-day suspension and a $1,000 civil penalty appropriate. In the Board's view, this rationale is inadequate. It certainly does not support the change from a certificate suspension to a civil penalty, in light of Board precedent raised by the Administrator's counsel. Nor is it consistent with the law judge's own findings.[11]

The Administrator recognized in his closing trial brief that some of the alleged FAR violations are not listed in his Sanction Guidance Table. And, with regard to the MNPS violations, the Administrator also recognized that Board precedent on point was lacking. Had the Administrator's argument ended there, perhaps we could agree with respondent that a law judge might impose an appropriate sanction of his choosing. See Kimsey, NTSB Order No. EA-4537 at 5. However, the Administrator also argued that an unauthorized incursion into MNPS airspace is analogous to an unauthorized incursion into a terminal control area [TCA],[12] in that in both situations there is a greater than normal danger of

[10]Respondent argued that no sanction should be imposed because he depended on his certificate for his livelihood.

[11]We are concerned that the law judge devotes an inordinate amount of his initial decision to a recitation of the testimony. Our review of a record on appeal is *de novo*. We would prefer that he focus on his findings of fact and conclusions of law, and insure that his entire legal analysis is reflected in his initial decision.

[12]Airspace is now classified as Class A through Class E and G airspace by the FAA.

a mid-air collision because of the high density of traffic and the need to ensure air traffic control's ability to maintain aircraft separation. And, the Administrator argued, the MNPS violation should be treated as a TCA violation for sanction purposes. Counsel asserted that a 60-day suspension is the recognized[13] sanction for an "unaggravated" TCA incursion, also citing the Board decisions in Administrator v. Ainsworth, 6 NTSB 665 (1988), and Administrator v. Pritchett, 7 NTSB 784 (1991).[14] Counsel further asserted that the MNPS incursion was aggravated because it occurred twice, and because the aircraft did not have approved long-range navigational equipment. The law judge appears to agree with the substance of counsel's analogy between TCA and MNPS violations, *id.* at 25, but then he fails to explain why Board precedent on TCA violations should not apply here. We accept his findings that respondent relied on others to obtain FAA authorization and that, with regard to the navigational equipment, his equipment was actually more technologically advanced than that approved by the FAA, as an implicit rejection of the argument to enhance sanction. However, no basis exists for reducing the suspension for this violation, the MNPS incursion, below 60 days. We will therefore affirm a 60-day suspension for this violation.

[13]The Sanction Guidance Table also suggests a suspension of 60 to 90 days for operation in a TCA without a clearance. Part III, F(16).

[14]Counsel then asserts that respondent's incursions here are aggravated because they occurred twice, and because respondent operated in the airspace without approved long-range navigational equipment. He then suggests that 180 days would be appropriate

(continued...)

As to the allegation concerning the carriage of unsecured cargo, the Administrator called for a sanction of 30 days based on Board precedent supporting a range of certificate suspensions from 15 to 30 days. The law judge, citing Administrator v. Magnuson, 4 NTSB 616 (1982), where the Board affirmed a 30-day suspension for the carriage of heavy metal cargo in a passenger compartment, nonetheless assessed a $500 civil penalty for this violation.[15] In our view the law judge was limited to a selection of a sanction within the parameters set by the precedent relied on by the Administrator, which does not differ significantly from the facts presented here. We will therefore set aside the civil penalty and affirm a suspension of 15 days for that violation, recognizing again the law judge's findings in mitigation of this violation.

As to the safety briefing violation, the Administrator asserted to the law judge that the Sanction Guidance Table demands a minimum sanction for every operational violation of 30 days, citing all of the subsections of Part III(F), Operational Violations, in the Sanction Guidance Table. He also cited Administrator v. Kittelson, NTSB Order No. EA-4068 (1994), where the Board affirmed a 180-day suspension of a commercial pilot

(..continued)
for these offenses.

[15]We reject respondent's contention that this violation was *de minimus*. The mattress set could have shifted at any time, particularly during the multiple takeoffs and landings. Respondent's passengers were therefore exposed to potential endangerment on more than one occasion, and the sanction assessed by the law judge should have reflected that fact, or otherwise explained it away.

certificate because of the pilot's failure to ensure that a safety briefing was given to his passengers and because he then failed to operate above minimum safe altitudes. The law judge specifically found that respondent did nothing to ensure that the flight attendant gave the required briefings before each takeoff, and that it was unreasonable for respondent to delegate the entire responsibility to her. However, he again assessed a $500 civil penalty, without explanation. We do not think the law judge was necessarily bound to the Sanction Guidance Table, since the Administrator's assertion that every operational violation merits a 30-day suspension is contradicted by the precedent she had previously cited regarding cargo violations.[16] Nevertheless, the law judge offers us no insight into why he would find a civil penalty appropriate.[17] We will instead impose a 15-day suspension, consistent with the precedent relied on by the Administrator elsewhere in this proceeding.

In sum, the only basis for assessing a civil penalty that we are able to glean from the law judge's initial decision is his concern for the economic impact of a suspension on respondent, and his finding that respondent acquiesced in the decisions made by Florida West officials in order to protect his employment.

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[16]It is also not substantiated by a review of the Sanction Guidance Table. See Part III, F(2) and (5); see also Part II, wherein the sanction guidance for pilot operational violations when operating under an air carrier operating certificate generally ranges from 15 days to revocation.

[17]Even more perplexing is the law judge's citation to Kittleson, which supports imposition of a suspension of at least some period of time.

Even these explanations for modification are inconsistent with Board precedent. Respondent's dependence on his certificate for his livelihood is not an appropriate factor for mitigation of sanction below an otherwise reasonable suspension period. Administrator v. Florent, NTSB Order No. EA-3777 at 6 (1993). *Cf*. Administrator v. Benson, NTSB Order No. EA-4513 at 6 (1997), *citing* Administrator v. Mohumed, 6 NTSB 696, 700 (1988)(Economic impact of suspension is not a factor in mitigation). Nor was respondent's reliance reasonable. Administrator v. Fay and Takacs, NTSB Order No. EA-3501 at 9-10 (1992). Respondent is an experienced former airline pilot, and the holder of an ATP certificate. He owed his passengers the highest standard of due care. We believe his acquiescence was inexcusable.

Ordinarily we would remand this case to the law judge so that he could reconsider his sanction deliberations in light of our opinion. However, because of, among other factors, the amount of time that has passed since the date of the violations, we will instead affirm a 90-day suspension, as it is not inconsistent with the precedent discussed herein.

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's appeal is granted;

2. The law judge's initial decision is affirmed as to the findings of fact and the findings of law and reversed as to the sanction imposed;

3. A 90-day suspension of respondent's ATP certificate is affirmed; and

4. The 90-day suspension of respondent's ATP certificate shall begin 30 days after service of this order.[18]

HALL, Chairman, FRANCIS, Vice Chairman, HAMMERSCHMIDT, GOGLIA, and BLACK, Members of the Board, concurred in the above opinion and order.

[18]For the purpose of this order, respondent must physically surrender his certificate to a representative of the Federal Aviation Administration pursuant to FAR § 61.19(f).