SERVED: February 20, 1998

NTSB Order No. EA-4638

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 9th day of February, 1998

JANE F. GARVEY, Administrator, Federal Aviation Administration, Complainant, v. DAVID WINDWALKER, Respondent.	)	Docket SE-14102

OPINION AND ORDER

Respondent and the Administrator have appealed from the oral initial decision of Administrative Law Judge William R. Mullins, issued on October 17, 1995, following an evidentiary hearing.[1] The law judge affirmed an order of

[1] The initial decision, an excerpt from the hearing transcript, is attached.

the Administrator suspending respondent's airman certificate, on finding that respondent had violated 14 C.F.R. 91.7(a) and 91.13(a) in connection with his piloting of an unairworthy hot air balloon.[2] The law judge, however, reduced the Administrator's 180-day proposed suspension to one of 90 days. We deny respondent's appeal and grant that of the Administrator.[3]

Respondent's appeal raises two issues, both of which he raised before the law judge: the first, a claim that respondent was denied his right to an informal conference (and, therefore, that the case must be dismissed); and the second, an argument that the FAA is without authority to suspend pilot licenses. The second argument has been

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[2] Section 91.7(a) provides that "No person may operate a civil aircraft unless it is in an airworthy condition." Section 91.13, **Careless or reckless operation**, reads:

> (a) Aircraft operations for the purpose of air navigation. No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

[3] The Administrator has also moved to dismiss respondent's appeal on the grounds that his copy clearly was not sent within the 50 days our rules provide. (Respondent did not reply to this motion, nor to the Administrator's appeal.) The Administrator does not argue that the copy sent the Board was sent late, or that he was prejudiced by the delay in receipt. Although we do not condone respondent's methods, nor recommend them to others, and we agree our rules contemplate concurrent service, we do not find that Administrator v. Hooper, NTSB Order No. EA-2781 (1988), compels dismissal in such a case.

rejected many times. See, e.g., Go Leasing, Inc., v. NTSB and FAA, 800 F.2d 1514 (9th Cir. 1986). The first claim was the subject of a motion to dismiss, denied by the law judge in an August 1995 order. The law judge concluded that respondent had had the opportunity for an informal conference. Respondent suggests in his appeal that the lack of an "offer to negotiate" is confirmed by an admitted failure of the FAA to receive a return receipt for its Notice of Proposed Certificate Action. We fail to see how this proves respondent's point. There is other evidence in the record that the opportunity for a conference was continually made available to respondent, who failed to take advantage of it. The law does not require more.

The Administrator agrees that the sanction imposed by the law judge is within the range (30-180 days) set forth in his Enforcement Sanction Guidance Table, FAA Order 2150.3A, and that the law judge had discretion to modify the proposed sanction. Nevertheless, he challenges the law judge's reduction of the sanction from a 180- to a 90-day suspension, citing a number of factors: multiple flights (on one occasion with paying passengers); numerous discrepancies supporting the unairworthiness finding, including operating his balloon with a hole in the basket's floor; and the "willful and deliberate" nature of the incident. The Administrator believes that respondent acted

egregiously, “in willful disregard of the regulations” in piloting a hot air balloon when he had been told by Arizona Balloonport, the repair facility which at the time was performing an annual inspection on the aircraft, that the balloon was in an unairworthy condition. (Upon discovery of the discrepancies, apparently expensive to correct, the inspection was halted.)

The law judge’s reduction of the suspension is in great part the product of his credibility findings in favor of respondent. Although respondent was told by Arizona Balloonport that the balloon was not airworthy, he testified that he then consulted another repair facility. Respondent testified, in part:

> I then contacted another inspection station, as previously mentioned, Paul Stumpf Balloons in Rhode Island, discussed the discrepancies that were on this list and asked him for his advice. And he said to me - - suggested that I get the maintenance manual for the aircraft and look up these discrepancies and if they were permitted or not. As I described the items listed on the discrepancy sheet to him, he indicated to me that he did not feel that they were that serious.
>
> They were not serious enough to ground the balloon and if I would send it to him, he would take a look at it and give his own opinion.
>
> … I described the damage as listed on the discrepancy sheet to Paul Stumpf Balloons and he stated that he felt - - he had seen damage like that before and he felt that based on the description, on the sheet it was airworthy.

Tr. at 71-72, 75. Respondent also testified that the same hole was in the basket floor at the time of the 1993 annual

inspection, yet Arizona Balloonport had found the balloon airworthy at that inspection.

Although the law judge accepted this testimony, and the Administrator has offered no basis to overturn those credibility findings (see Administrator v. Smith, 5 NTSB 1560 (1987)), the weight of the evidence compels us to reverse the law judge's conclusion. See Chirino v. NTSB, 849 F.2d 1525, 1530-32 (D.C. Cir. 1988) (the Board, not the law judge, is the ultimate finder of fact, even regarding credibility determinations).

The Administrator's claims of multiple flights cannot, we think, support a finding that the law judge abused his discretion in reducing the sanction. On this record, we have testimony of only one flight; the law judge also made a finding only for the one October 27th flight. Tr. at 92. Although the Exhibit C-3 log excerpts show flights after the date of the discontinued annual, those records do not establish respondent as the pilot of those flights, nor did he admit to them.[4] See also Tr. at 79 (Administrator's counsel, in closing argument, discusses only the one flight).

[4] Contrary to closing argument by counsel for the Administrator (Tr. at 81), it is not respondent's obligation to "contradict" the Administrator's allegations. It is the Administrator's obligation to prove them.

However, we cannot find that respondent acted reasonably or consistent with his duty of care given the information he was provided by Arizona Balloonport regarding the condition of the balloon. We agree with the Administrator that respondent acted with willful disregard of legitimate safety concerns.

We do not fault respondent for seeking another opinion. We recognize (and it is admitted on this record) that even FAA inspectors may differ regarding whether a particular item results in a lack of airworthiness. Further, not every minor defect whereby the aircraft departs from its state at time of manufacture makes an aircraft unairworthy. Administrator v. Calavaero, 5 NTSB 1099, 1101 (1986). But it was unreasonable for respondent to rely on Stumpf's telephone opinion as much as he did, if only because that opinion was given without any examination of the balloon.[5] In light of Arizona Balloonport's serious concerns, respondent's duty as a pilot was to **ensure** the safety of the craft. In Administrator v. Dailey, 3 NTSB 1319, 1322 (1978), we said "Respondent had reason to believe that the

[5] We also note that respondent offered no evidence from Paul Stumpf Balloons to confirm the conversation, but offered only his own testimony of its content. Further, even respondent's version of the conversation indicated that Stumpf wanted to look at the balloon.

aircraft was not airworthy; under no circumstances should he have flown the aircraft until he was sure that it was completely safe to do so." Respondent did not (and could not) fulfill this duty by preferring his own opinion and, to support it, obtaining a general telephone comment from someone who had not seen the balloon.

The evidence indicates that the basket was old, with the wicker frayed,[6] and at least one hole (approximately 1-2 inches in the floor). See Exhibit C-1 ("verticle [sic] rattan reeds broken on downside corner," "gondola wearing substrates worn on outside edges possible cracks," and "gondola floor damaged from excessive tank wear"). Although respondent testified that, in flight, the hole was covered by tank pads (Tr. at 78), Arizona Balloonport was concerned with the overall integrity of the basket. Other discrepancies involved excess wear on the metal frame and the skids, and a broken pyrometer and altimeter. It is not satisfactory for respondent simply to disagree and locate someone whose statements could be interpreted as some general support for his continuing to fly. In the circumstances, we agree with the Administrator that respondent's actions reflect such a disregard for safety and

[6] One of the passengers, when asked about the condition of the basket, recalled that it was old and some of the wicker was frayed or coming apart. Tr. at 45.

regulatory compliance that a 180-day sanction is appropriate.

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's motion is denied;

2. The Administrator's appeal is granted;

3. Respondent's appeal is denied; and

4. The 180-day suspension of respondent's commercial pilot certificate shall begin 30 days from the date of service of this order.[7]

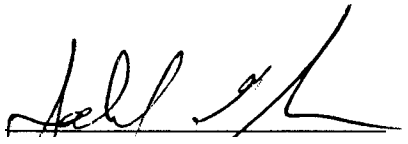
HALL, Chairman, FRANCIS, Vice Chairman, HAMMERSCHMIDT, GOGLIA, and BLACK, Members of the Board, concurred in the above opinion and order. GOGLIA, Member, submitted the following statement:

[7] For the purposes of this order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to Federal Aviation Regulation section 61.19(f).

John J. Goglia, Member, concurring:

I concur in the Board's decision to grant the Administrator's appeal because I agree with the majority's ultimate disposition. Following an inspection by a qualified repairman, respondent was told that the balloon basket was not airworthy. Instead of proceeding with expensive repairs, respondent sought a second opinion, which as the majority notes, was not an unreasonable action to take. However, respondent never obtained a second opinion. Instead, another repairman told him that his aircraft might be airworthy, based on respondent's reading the list of discrepancies to him over the telephone. But even respondent admitted that the second repairman conditioned his statement by offering to "take a look at it." It was only then that he could give respondent his opinion, and respondent was clearly not reasonable in relying on this telephone conversation. His actions reflect a disregard for safety and regulatory compliance, and therefore a 180-day suspension is appropriate.

Nevertheless, I disagree with the majority's decision to reverse the law judge's credibility findings, because it is unnecessary to do so in this case. [1] The law judge's ruling that respondent was not reckless and that therefore a 180-day suspension was unwarranted was a legal conclusion, and not a credibility finding. Even if the hole in the basket had existed at a prior inspection when the basket was found airworthy, the facts found by the law judge show that respondent also ignored numerous other discrepancies that raised serious questions about the overall integrity of the balloon. In other words, respondent's operation of this balloon with passengers was reckless, based on the facts as found by the law judge.



[1] In my opinion, we are too quick to reverse our law judge's credibility findings. In addition to having the opportunity to observe the witnesses' demeanor, they are often able to get a sense about a case that we could simply never glean from a bare transcript. We have vested our law judges with the authority to evaluate these cases on our behalf, and more deference needs to be given to their decisions.