

SERVED: March 18, 1998

NTSB Order No. EA-4644

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 26th day of February, 1998

<hr/>)	
JANE F. GARVEY,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	
v.)	Docket SE-14381
)	
PETER S. WOERMANN,)	
)	
Respondent.)	
)	
<hr/>)	

OPINION AND ORDER

Respondent appeals the oral initial decision of Chief Administrative Law Judge William E. Fowler, Jr., rendered at the conclusion of a hearing held on June 18 and August 15, 1996.¹ By that decision, the law judge found that respondent violated section 105.13 of the Federal Aviation Regulations ("FAR") and

¹ An excerpt from the hearing transcript containing the initial decision is attached.

affirmed the Administrator's order suspending respondent's airline transport pilot ("ATP") certificate for fifteen days.² We deny the appeal.³

The Administrator's amended complaint alleges that on June 6, 1996, respondent was the pilot-in-command of a Cessna 182 ("C-182") operating in the vicinity of Orange County Airport ("MGJ"), New York, and "allowed a parachute jump to be made from the aircraft in close proximity to or in the path of an aircraft that was on final approach or landing at the airport."⁴ At the

² The regulation (14 C.F.R. Part 105) provides:

§ 105.13 General

No person may make a parachute jump, and no pilot in command of an aircraft may allow a parachute jump to be made from that aircraft, if that jump creates a hazard to air traffic or to persons or property on the surface.

³ Respondent has filed a motion, opposed by the Administrator, requesting oral argument before the Board. The motion is denied. The record in this case, including over 600 pages of transcript and numerous exhibits, provides an adequate basis for decision. The United States Parachuting Association ("USPA") has also filed a motion, opposed by the Administrator, seeking leave to submit an amicus curiae brief in support of respondent's appeal. In accordance with our regulations, USPA conditionally filed their brief pending our ruling on their motion. USPA's submission satisfies the requirements of our regulations and their brief is accepted. 14 C.F.R. § 821.9(b).

⁴ The Administrator's Order of Suspension serves as the complaint in proceedings before the Board. See 49 C.F.R. 821.31(a). The Order of Suspension alleged that respondent was piloting a King Air when the violation of FAR 105.13 occurred, but at the conclusion of her case-in-chief, the Administrator's counsel moved to "conform the pleadings to the proof." June 18, 1996
(continued . . .)

hearing, two of the Administrator's witnesses, United States Army personnel who were conducting a training flight in the C-182, testified that a parachutist drifted across the runway in close proximity to their aircraft as they crossed the runway threshold at MGJ. They also testified that while airborne they monitored MGJ's unicom frequency and made numerous announcements of their position and intention to land at MGJ, but that they never heard announcements of parachuting activity. The parachutists, who testified on respondent's behalf, denied having come within close proximity to the landing C-182. Respondent testified that he made numerous announcements of parachuting activity over MGJ's unicom.

We adopt the law judge's findings that a parachutist passed in front of the landing C-182, and that respondent did not make the claimed announcements of parachuting activity over MGJ's unicom. Conflicting testimony can only be effectively appraised after observing factors bearing on credibility, and we therefore defer to the law judge's implicit credibility findings in favor of the Administrator. Administrator v. Smith, 5 NTSB 1560, 1563

(continued . . .)

Transcript ("Tr. I") at 276. The record indicates that respondent was piloting a Cessna 182 when the alleged violation of section 105.13 actually occurred, and no persuasive argument has been made that the initial error in the Administrator's complaint prejudiced respondent in defending against the Administrator's allegations.

(1986). Aside from the issue of deference on matters of credibility, we note that the parachutists had an interest in the substance of their testimony because they are potentially liable under section 105.13 if they created a hazard. Moreover, if respondent had in fact made multiple unicom broadcasts, it is extremely unlikely that, as respondent claims, they all would have been blocked by simultaneous transmissions of other aircraft.

A parachutist drifting across a runway as an aircraft is landing plainly constitutes a hazard to air traffic. Cf. Administrator v. Lindsay, 7 NTSB 311 (upholding violation where parachutists "drifted over the airport runway at an altitude of less than 100 feet"). Thus, respondent allowed a parachute jump that created a hazard. However, because Part 105 does not impose strict liability, the issue becomes whether respondent exercised the care and judgment expected of a reasonable and prudent pilot.

The weight of the evidence indicates that standard practice, and prudence, dictates that a pilot in respondent's situation make announcements of parachuting activity over the unicom frequency. Two FAA inspectors testified that a prudent pilot would have made such announcements. Tr. I at 211-212, 252. Mr. Larry Bagley, who testified for respondent as an expert in aviation, air traffic control ("ATC") and parachuting, also testified that a pilot in respondent's situation would announce

parachuting activity over the unicom frequency. August 15, 1996, Transcript ("Tr. II") at 138. Indeed, respondent himself testified that his own personal "procedures," as well as those mandated by his employer, include announcing parachuting activity over the unicom frequency. Tr. II at 67.⁵

Given respondent's concession that "there's always something going on at [MGJ,]" we think he should have taken greater care to inform pilots operating in the vicinity of MGJ that there were parachutists descending upon the airport.⁶ Tr. II at 102. Respondent did not act as a reasonable and prudent pilot when he failed to announce parachuting activity over MGJ's unicom

⁵ Respondent suggests that because he was required by section 105.14 to maintain a "continuous watch" on the appropriate ATC frequency, he cannot be faulted for failing to announce parachuting activity over MGJ's unicom frequency. Respondent's Brief at 25. We need not determine, however, whether this regulation would prohibit momentary frequency changes. Given his testimony, albeit not credited by the law judge, that he made numerous broadcasts over the unicom frequency, whatever concerns respondent might now have about maintaining a continuous watch on the ATC frequency apparently did not persuade him that such broadcasts should not be made. Nevertheless, we note, in this connection, that Mr. Antonio Acosta, an FAA inspector who holds an ATP certificate and has over 11,000 flight hours, testified that permission to momentarily change frequencies in order to make an announcement over unicom would "most likely" be granted by ATC. Tr. I at 144, 213.

⁶ As the holder of an ATP certificate, respondent is held to the highest safety standards. Administrator v. Naypaver, NTSB Order No. EA-4127 at 10 (1994); Administrator v. Combs, NTSB Order No. EA-3616 at 6 (1992); Administrator v. Dohrn, 6 NTSB 852, 853 (1989).

frequency. We therefore uphold the finding that respondent violated section 105.13.⁷

ACCORDINGLY, IT IS ORDERED THAT:

Respondent's appeal is denied.

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

⁷ We have reviewed exhibit R-7, a videotape depicting a portion of the jump which resulted in the Administrator's charges, and it appears that the parachutists did not adhere to the cloud clearance requirements set forth in section 105.29(b).