SERVED: March 16, 1998

NTSB Order No. EA-4645

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 March, 1998

JANE F. GARVEY, Administrator, Federal Aviation Administration, Complainant, v. CHARLES NEIL KIMSEY, Respondent.	Docket SE-14230

ORDER DENYING PETITION FOR RECONSIDERATION

The Administrator requests reconsideration of our decision, EA-4537, served April 8, 1997. We have received no reply from respondent.[1] In our April 8th decision, we held that, if the Administrator intends that we defer to her sanction guidance table regarding a proposed sanction, she must raise the deference argument before the law judge and present evidence to support it. We stated:

[1] On September 23, 1997, more than 4 months after the relevant deadline, respondent also filed a petition for reconsideration, along with a motion to have it accepted out of time, that raises issues wholly unrelated to the matters argued in the Administrator's petition. The motion, opposed by the Administrator, is denied, as it demonstrates no reason, much less any "extraordinary circumstance" (see Section 821.11(c)), why the points respondent so belatedly urges us to consider could not have been brought to our attention within the 30-day timeframe established by our rules.

> The law judge cannot be expected to abide by valid sanction guidelines if he is not advised of them….

EA-4537 at 5. We deny the sought reconsideration.[2]

We have recently addressed similar issues. See Administrator v. Gartner, NTSB Order No. EA-4623 (March 5, 1998), where we held that, if the Administrator seeks our deference regarding her proposed sanction, she must offer evidence in support of it. We see no inefficiency in requiring the Administrator to offer the sanction guidance table in evidence when she seeks to rely on it and seeks our deference to it. It is unreasonable to assume the adjudicating agency would practically be able to, or be legally obliged to, maintain current versions of a document created by and used by the prosecuting agency.

The Administrator argues that Administrator v. St. Hilaire, 7 NTSB 48 (1990), compels a different result. In that case, we held that it was inappropriate for the law judge to decide the case on an issue the parties had not addressed and the law judge had not mentioned prior to his oral decision. Rather, the law judge should seek evidence and argument on the matter before any ruling. We reversed and reinstated the proposed sanction. Perhaps, in St. Hilaire, we should have remanded for evidence on the issue rather than reinstating the Administrator's proposed sanction. The importance of the case, in our view, is its direction to our law judges to provide parties "the opportunity to respond … to potentially dispositive issues the law judge may have identified." St. Hilaire at 48. It does not, in our minds, stand for the proposition that, any time a law judge fails to do so, the Administrator's sanction is automatically reinstated. To the extent it can be read for that proposition, it is overruled.[3]

Once a law judge indicates that he intends to modify the sanction, either sua sponte or at respondent's request, the Administrator is on notice that sanction evidence clearly is

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[2] Respondent has moved to strike the Administrator's petition, arguing that his pending request before the Ninth Circuit Court of Appeals to set aside our order in its entirely should be considered first. We decline this request.

[3] Even prior to the modification of 49 U.S.C. 44709(d)(3), law judges often modified the sanction absent evidence or argument by the parties on the subject. We did not routinely reinstate the Administrator's proposed sanction in such an event; instead we considered the law judge's action on the merits. If it was consistent with precedent, it was affirmed despite the procedural error.

necessary. Whether the law judge permits the Administrator to present it or not, she is obligated to make the offer. Even if the law judge does not raise the subject until announcing his decision from the bench, the opportunity exists, at that time, to raise the matter with the law judge, offering him the chance to correct his error. That is the reasonable and administratively efficient course.[4]

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's petition is denied;

2. The respondent's "Motion for Acceptance of Late Petition" is denied; and

3. In accordance with our Order of May 6, 1997, the suspension of respondent's certificate is stayed pending judicial review.[5]

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

[4] And there was such an opportunity here. See Tr. at 161. The Administrator could have offered the sanction guidance table as evidence to support her proposed sanction, or to make an offer of testimony regarding how that table was used to set the proposed sanction.

[5] For the purpose of this order, respondent must physically surrender his certificate to a representative of the Federal Aviation Administration pursuant to 14 C.F.R. 61.19(f).