SERVED: August 14, 2006

NTSB Order No. EA-5244

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 14th day of August, 2006

MARION C. BLAKEY, Administrator, Federal Aviation Administration, Complainant, v. THOMAS BANCROFT SHAFFER, Respondent.	Docket SE-17764

OPINION AND ORDER

Respondent appeals the oral initial decision of Administrative Law Judge William A. Pope, II, issued in this emergency revocation proceeding on July 25, 2006.[1] By that decision, the law judge upheld the Administrator's emergency revocation of all airman certificates held by respondent for violations of sections 91.13(a) and 91.111(a) of the Federal

[1] An excerpt of the hearing transcript containing the law judge's decision is attached.

Aviation Regulations (FARs).[2] We deny the appeal.

The Administrator's June 16, 2006, Emergency Order of Revocation, filed as the complaint in this proceeding, alleged, in amended form, the following:

> 1. At all times material herein you [i.e., respondent] were and are now the holder of Commercial Pilot Certificate No. [redacted].
>
> 2. On or about May 25, 2006, you made a telephone call to the Manager of the Tamiami Air Traffic Control Tower (ATC) complaining of the operations of an Embraer Regional Jet being operated in the Tamiami Airport (TMB) traffic area and sponsored by the Ohio State University to conduct a flight test program approved by the FAA.
>
> 3. On or about May 30, 2006, you operated civil aircraft N3050H, a PA-44-180, Piper Seminole twin-engine aircraft, on a flight in the vicinity of [TMB], Miami, Florida.
>
> 8. During the course of the above-described flight you operated N3050H making at least three passes in close proximity to an Embraer ERJ-170-100LR turbo-jet aircraft, registration number PP-XJB.
>
> 9. On at least one of the passes described above you operated N3050H so as to come within 100 feet of PP-XJB.
>
> 10. On each of the passes described above the pilot of PP-XJB had to take evasive action so as to prevent a collision.
>
> 11. Your operation of N3050H, as described

[2] FAR section 91.13(a), 14 C.F.R. Part 91, prohibits operating an aircraft for purposes of air navigation in a careless or reckless manner so as to endanger the life or property of another. FAR section 91.111(a), 14 C.F.R. Part 91, prohibits "operat[ing] an aircraft so close to another aircraft as to create a collision hazard."

above was intentional and deliberate and designed to interrupt and harass the flight operations of PP-XJB.

12. Your operation of N3050H, as described above created a collision hazard and endangered the lives of the persons onboard PP-XJB and the property of the aircraft. The flight described above was in operation as a direct air carrier or commercial operator.

13. Your operation of N3050H demonstrates that you lack the qualifications to be the holder of an airman pilot certificate.

14. As a result, you violated [FAR sections 91.13(a) and 91.111(a)].[3]

An evidentiary hearing was conducted in Miami on July 18-21 and July 24-25, 2006.[4] The law judge's decision sets forth the hearing evidence in sufficient detail. Briefly, the Administrator presented percipient testimony from the controller on duty in the TMB tower, as well as the manager of the TMB tower who reviewed the official recording of the relevant tower

[3] At the beginning of the hearing, the Administrator withdrew paragraphs 4, 5, 6, 7, and 14(c)-(e) of her complaint. The withdrawn factual allegations asserted, essentially, that notwithstanding respondent's request to ATC, immediately prior to his May 30th initial takeoff from TMB, to depart "westbound," he turned to a southwest heading contrary to ATC instructions; and, thereafter, while still in the TMB Class D airspace, respondent failed to maintain two-way radio communications and respond to an ATC query about his heading. Withdrawn paragraphs 14(c), 14(d), and 14(e) alleged, respectively, violations of FAR sections 91.123(a), 91.123(b), and 91.129(c)(2). FAR sections 91.123(a) and (b), 14 C.F.R. Part 91, require adherence to ATC clearances and instructions. FAR section 91.129(c)(2), 14 C.F.R. Part 91, requires that persons operating aircraft in Class D airspace meet certain 2-way radio communications requirements.

[4] The hearing was scheduled, in consultation with the parties, to last two days, from July 18-19, 2006.

frequency communications. The Administrator also introduced the audio recording, and certified transcript, of the relevant tower communications. See Hearing Exhibits (Ex.) A-3 and A-5.

The ATC tower controller testified that he observed respondent maneuvering in the area of the final approach course being used for test flight purposes by the Embraer jet, and that respondent generally maneuvered between the extended final approach courses of the two parallel runways at TMB so as to apparently intentionally interfere with the Embraer jet. The ATC tower controller identified respondent as the pilot of N3050H, based on his observations after the aircraft landed and parked at the ramp. The Administrator also presented the testimony of Rogerio Ozay and Clodoaldo Matias, two professional flight test pilots aboard the Embraer aircraft who described their observations of respondent's maneuvering and their necessary actions to avoid respondent's aircraft.[5] They described respondent's actions as appearing to be deliberate and executed with intention to interfere with their flight operations.

In addition, the Administrator introduced a written report filed by Mr. Ozay after the May 30th incident. According to Ozay's written statement:

> ...During the last 3 approaches of our flight we saw on our TCAS a traffic that appeared to

[5] Messrs. Matias and Ozay traveled from Brazil to appear at the hearing. Mr. Matias is a senior test pilot, responsible for the Embraer 170 flight tests, who has accumulated approximately 6,000 flight hours. Prior to joining Embraer, Mr. Matias retired as a full colonel from the Brazilian Air Force. Mr. Ozay testified that he has accumulated approximately 9,000 flight hours, mostly in heavy, transport-category aircraft.

> be lost....It was flying irregular patterns close to the airport's class D airspace specifically on runway 9L's final. At first it appeared that the airplane was lost, but it became evident to us that the airplane was deliberately trying to jeopardize our flight testing. I can assure that the airplane had us in view since he tried to "chase us" at some times.
>
> We had to discontinue our approach in several occasions in order to avoid a possible mid-air collision. At one point we had to be very aggressive in pitching our airplane in order to follow a resolution advisory from our TCAS and avoid the airplane by about 100 feet....
>
> I understand that the aircraft was entitled to fly outside of class D airspace without speaking to anyone, but what is absolutely not acceptable is the manner the way this person conducted his airplane. He deliberately pointed his aircraft towards ours and if evasive maneuvers were not taken from our part, a disaster could have occurred. I have never seen such reckless flying in my whole life. This person jeopardized our safety as well as the safety of other aircraft that were flying into Tamiami....
>
> ...We had three pilots on board during our approaches (including a test pilot from ESAA, the European Authority). Any one of us can attest to this.
>
> I hope this can contribute in any way in order to avoid any type of event like this from happening again....

Ex. A-7. The manager of the TMB tower testified that respondent telephoned him several days prior to the incident, on May 25th, to complain about the negative community effect the Embraer jet flight tests would have on a TMB runway expansion proposal.

Respondent, who did not testify, presented the testimony of his expert, Robert Cauble. Mr. Cauble was accepted by the law

judge as an expert on radar and air traffic control practices. Mr. Cauble testified, based on his assessment of radar data, that N3050H was, indeed, the aircraft involved in the May 30th incident with PP-XJB described in the Administrator's complaint. Mr. Cauble, however, testified extensively about his conclusions, based on radar data and the testimony presented by the Administrator, that, essentially, it was the crew of PP-XJB, and not N3050H, that created the problems that occurred on May 30th.

The law judge, after thoroughly reviewing the relevant evidence, including testimony by respondent's expert, concluded that the Administrator proved by a preponderance of the evidence that respondent violated FAR sections 91.13(a) and 91.111(a). In reaching his decision, the law judge explicitly found critical witnesses, including the TMB tower controller and Embraer test pilot Ozay, to be entirely credible. See Administrator v. Smith, 5 NTSB 1560, 1563 (1986) (the Board gives deference to the credibility findings of its law judges unless shown to be clearly erroneous). The law judge also affirmed the sanction of revocation because he found that the Administrator proved the deliberate nature of respondent's actions, which resulted in a collision hazard with PP-XJB, demonstrated that he lacked the care and judgment required of a certificate holder.

On appeal, respondent argues that (1) there was not sufficient evidence for the law judge's finding that respondent was the pilot-in-command of N3050H; (2) there was no basis for the law judge's finding of a FAR section 91.111(a) violation,

given that respondent was not shown to have violated any communication requirements in uncontrolled airspace and did not violate any right-of-way requirements; and (3) the sanction of revocation is an excessive penalty. Respondent also raises numerous issues about purportedly prejudicial discovery deficiencies, and other procedural matters, that, essentially, amount to a claim that he did not receive a fair hearing. In turn, the Administrator argues that respondent's appeal has no merit, and urges us to uphold the law judge's decision.

We address, first, respondent's allegations that he did not receive a fair hearing. In doing so, we are cognizant of the inherent nature of emergency revocation proceedings, where only 60 days are afforded to complete all pre-hearing matters, conduct an adversarial hearing, and issue a final disposition of any appeal to the full Board. This accelerated procedure is for an airman's benefit, because the Administrator's order in emergency proceedings is immediately effective. An airman can choose to waive the 60-day requirement, yet still obtain expedited processing of an appeal, if he believes it necessary for adequate preparation of his defense.

Respondent's June 21st discovery request propounded 54 separate requests for documents and 30 interrogatories, and some of those were compound requests.[6] The Administrator appears to

[6] The circumstances in Administrator v. Henry, 5 NTSB 858, 860-862 (1985), and our ruling against the Administrator in that case, for example, are distinguishable from the present appeal because here the Administrator has not been shown to have engaged in the contumacious conduct, in contravention of the law judge's

have responded in good faith, albeit less than perfectly, to those requests. On July 6th, the day after responses to respondent's discovery request were purportedly due, and the July 5th deadline for exchange between the parties of certain information specified by the law judge's Pre-Hearing Order, respondent filed his Motion to Compel Production, Compliance with Pre-Hearing Order and for Sanctions. On the same day, July 6th, the Administrator also transmitted her materials in substantial compliance with the law judge's Pre-Hearing Order. The law judge limited the Administrator to using at the hearing only that evidence that was timely provided, and we discern no error in the law judge's resolution of these matters.[7] See Administrator v. Stricklen, NTSB Order No. EA-3814 at 14-16 (1993) (rejecting similar arguments in the context of an emergency revocation proceeding); see also Blackman v. Busey, 38 F.2d 659, 663-664 (6th Cir. 1991) ("it would seem that discovery of the adversary's trial evidence together with a hearing before an administrative

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explicit orders, that was exhibited in Henry.

[7] The law judge subsequently issued an order, on July 10th, requiring that, "[t]o the extent that the Administrator has not yet fully complied with the Respondent's discovery requests, I hereby ORDER that she do so forthwith." On the same day, July 10th, the Administrator transmitted her response to respondent's discovery requests (much of which had already been provided to respondent pursuant to the law judge's Pre-Hearing Order). As has already been mentioned, the law judge ultimately precluded the Administrator from making use at the hearing of any evidence not disclosed in her initial compliance with the Pre-Hearing Order. We view the measures implemented by the law judge to be a proper exercise of his discretion in presiding over the hearing. When viewed in the aggregate, they show that respondent received a fair hearing.

law judge and an appeal to the NTSB itself might meet procedural due process standards"). Indeed, respondent's complaints about the fairness of his hearing focus predominately on the quality and timing of the Administrator's production of radar data, but the record is clear that respondent's expert (1) made extensive use of the electronic radar data derived with the RAPTOR program (which the law judge precluded the Administrator from introducing at the hearing), and (2) did not indicate that he did not have the appropriate data or an ability (either because of when he received it or because of its quality) to ascertain relevant factual information to formulate the exhibits or opinions he testified about at the hearing.[8] We are constrained to consider

[8] Respondent also complains about his difficulties in obtaining, through subpoena, various documents and records from Empresa Brasileria de Aeronautica, S.A. (Embraer), the Brazilian manufacturer of PP-XJB. Respondent sought, inter alia, the cockpit voice recorder recordings, cockpit data recorder data, and all supplemental data recorded during the flights of PP-XJB on May 30th. On July 13th, counsel for Embraer responded via electronic mail and U.S. mail to respondent's subpoena (which Embraer's counsel's letter indicates was sent by respondent on or about July 8th via e-mail), asserting that the subpoena was "not enforceable because it has no extraterritorial effect and the method of service employed upon Embraer is unauthorized and invalid."

First, we find no error in the law judge's staff's request for additional information before authorizing issuance of a subpoena, in light of the language of 49 C.F.R. § 821.20(a), as respondent's broad request to Embraer was not clearly reasonable in scope. More importantly, it does not appear that respondent pursued the subpoena any further, and now merely complains, unpersuasively, that he did not have time to properly serve the subpoena. See, e.g., Air East, Inc. v. NTSB, 512 F.2d 1227, 1231 at n.8 (3rd Cir. 1975) ("[P]etitioners assert that they did not have sufficient time to prepare their defense and appeal to the Board. But, the expedited disposition mandated by the statute is for the benefit of the licensees, and they were free to waive it.").

on appeal only whether "any *prejudicial* errors" occurred, and, on the record as a whole, respondent demonstrates none.[9] See 49 C.F.R. 821.49(a)(4) (emphasis added); see, e.g., Administrator v. Wagner, NTSB Order No. EA-4081 at 7-10 (1994).

Turning to the substantive matters at issue in this appeal, we have no hesitation in affirming the law judge's decision. The law judge found credible the only evidence on the identity of the pilot of N3050H, namely, the testimony of the ATC tower controller. Aside from his unsuccessful attempt to raise doubt about the credibility of this witness, respondent (the owner of the flight school that operates the aircraft) provided no evidence whatsoever as to who was, or was not, piloting N3050H.[10]

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In any event, respondent does not demonstrate actual prejudice in failing to obtain the records and data he sought. Respondent's expert, Robert Cauble, testified extensively about the maneuvers of PP-XJB, and the record is clear that the law judge accepted Mr. Cauble's factual assertions about the position, speed, headings, and maneuvers of the Embraer aircraft. In light of the record in this case, therefore, respondent's unsubstantiated claim that the records and data might have contained "possibly other information exonerating [respondent]," or his expectation that the information sought by subpoena could have provided additional evidence to rebut the testimony of the Embraer pilots or corroborate Mr. Cauble's testimony does not demonstrate prejudice or error.

[9] Respondent has not demonstrated that the law judge's curative efforts, including ordering the Administrator to produce to respondent during the hearing contested information and records (for example, portions of the Enforcement Investigative Report (EIR) and a recording of the TMB ground control frequency), manifest any prejudicial error.

[10] Respondent's arguments do not demonstrate that the law judge's credibility determination in favor of the TMB tower controller who identified respondent as the pilot of N3050H, or the law judge's assessment of the proper weight to be afforded his unrebutted identification testimony, was clearly erroneous.

We adopt the law judge's rationale for his finding that respondent was proven by a preponderance of the evidence to be the pilot of N3050H at the time of the incident on May 30th.

We also adopt the law judge's analysis of the incident on May 30th, specifically, that the preponderance of the evidence supports the conclusion that respondent deliberately maneuvered his aircraft to interfere with PP-XJB and, as a result, created a collision hazard in violation of FAR sections 91.13(a) and 91.111(a). In this regard, we note that the Administrator presented credible and percipient witness testimony by professional test pilots aboard the Embraer jet and an experienced air traffic controller. These witnesses were very convincing in their characterization of respondent's maneuvers and apparent intentions on May 30th.[11] Respondent, on the other hand, provided no explanation. Instead, he only offered the testimony of Mr. Cauble, who predominately surmised, based on his analysis of the radar data-derived depictions of factual

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See, Smith, supra.

[11] The ATC transcript reflects the contemporaneous observation of the TMB controller stating to respondent, over the open ATC frequency, that, "we watched you the whole time you flew[,] you blocked finals caused near midair collisions with an [E]mbraer jet on final[,] and you just returned back from the south and ah just about hit him again[.]" Ex. A-5. In response, respondent transmitted, "okay good thanks[.]" Id. To that, the TMB controller stated, "okay ah we'll be contacting fsdo for your reckless flying ah you can give the tower a call after landing[.]" In response, respondent transmitted, "okay roger[.]" Id. Respondent never telephoned the TMB tower, or otherwise responded to the controller's over-the-air assessment of his intentions. We think this latter fact is significant.

information about the relative position, speed, course, and altitude of the two aircraft, and the testimony by the PP-XJB pilots, that the PP-XJB pilots, not respondent, inadvertently or intentionally created the collision hazard.[12] See Administrator v. Reinhold, NTSB Order No. EA-4185 at n.12 and associated text (1994) (respondent is not exculpated for creating a collision hazard merely because another pilot may have also been at fault in the incident). We have also considered, as did the law judge, the fact that there were multiple occasions when the Embraer pilots had to take evasive action. This fact further compels a conclusion that the maneuvering of N3050H in close proximity to PP-XJB was not inadvertent, particularly when respondent's own expert testified that respondent probably saw PP-XJB during the first close encounter. Finally, we find it significant that, when the TMB tower controller accused respondent, over the TMB tower frequency, of intentionally interfering with PP-XJB and flying recklessly, and stated his intention of contacting the

[12] Mr. Cauble also testified to his belief that the aircraft did not actually get close enough together to create a collision hazard, except as a result of actions by PP-XJB. The weight of the evidence does not support this conclusion, where two experienced pilots aboard PP-XJB found by the law judge to be credible witnesses, testified that respondent's maneuvers caused them to take evasive action, in at least one case abruptly, in response to a TCAS resolution advisory, to avoid a collision. Cf. Administrator v. Werner, 3 NTSB 2082, 2083 (1979) (rejecting appeal of a carelessness violation based on respondent's alleged creation of a collision hazard, notwithstanding "[t]he fact that respondent's aircraft may not have [come] closer tha[n] 3000 feet to another plane" since a "highly experienced pilot ...[,] in testimony found credible by the law judge, stated that respondent's plane was sufficiently close to prompt him to [take evasive action to avoid a possible midair collision]").

FSDO about respondent's "careless" operation of N3050H, respondent made no exculpatory claim nor sought to follow up with anyone at the FAA on the matter. In short, the overwhelming weight of the evidence supports the law judge's conclusion that respondent deliberately maneuvered so as to create the collision hazard with N3050H, and, in the process, violated FAR sections 91.13(a) and 91.111(a).

Finally, we turn to the issue of sanction. Respondent's arguments ignore the essential component of the law judge's findings, which we agree with, i.e., that respondent deliberately maneuvered his aircraft in a manner that created repeated collision hazards and demonstrated a blatant disregard for safety.[13] In Administrator v. Oliveira and Morais, we addressed similarly-deliberate and irresponsible maneuvering. In that case, we stated:

> We have consistently held that revocation is an appropriate sanction for pilots who demonstrate that they lack the care, judgment and responsibility required of airmen. We find that respondents' decision to operate

[13] In his discussion of sanction, the law judge treated respondent's FAR section 91.13(a) violation as residual to the operational violation of FAR section 91.111(a). It is clear from the decision, however, that this was because the separate penalties to be ascribed respondent's section 91.13(a) violation would not be germane to the law judge's sanction determination in light of his determination that revocation was warranted not on account of the regulatory violations, per se, but on account of respondent's demonstrated lack of qualification to hold a certificate. It should be noted, nonetheless, that the Administrator specifically argued that respondent's violation of section 91.13(a) was not a residual violation. Although it is not a factor we consider in reaching the decision to affirm revocation, we would agree that respondent's conduct was reckless.

> impermissibly low over people and property in dense airspace without using their transponders demonstrates an unacceptable disregard for the safety of others and, most important for our decision with regard to sanction, a disposition to flaunt important safety regulations. See, e.g., Administrator v. Blackman, 7 NTSB 341, 343 (1990) (upholding revocation for a TCA airspace violation, in large part because evidence that respondent turned off transponder to avoid detection after penetrating TCA demonstrated willingness to advance personal interests even when doing so would compromise air safety); see also Administrator v. Hock, 5 NTSB 892, 894 (1986) (a "single incident of regulatory noncompliance reflecting a deliberate disregard or gross indifference to the requirements of air safety may ... warrant the conclusion that the airman, due to inability or disinclination" cannot be trusted to follow the rules and regulations imposed by the Administrator).

NTSB Order No. EA-4995 at 13 (2002) (internal footnote references omitted); see also Stricklen, supra, at 13 ("although only one incident is at issue ... [r]espondent's actions ... reflected an egregious disregard for safety that cannot be countenanced and that demonstrate a lack of qualification") (internal citations omitted). The record supports the law judge's finding as to sanction.[14]

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[14] Respondent also argues that the Administrator's sanction guidance table specifies a suspension of 60 to 180 days for a violation of FAR section 91.111(a). However, the Administrator's internal guidance clearly specifies numerous appropriate considerations for deviating above the normal sanction range, including "demonstrated lack of qualifications." Ex. A-32; see Stricklen, supra, at 4-5. We also find no fatal defect in the Administrator's alleged administrative deficiency in adhering to the notation on page two of the Administrator's internal sanction guidance about coordination of deviations from sanction guidance with AGC-200, and noting the "basis for such departure" in the EIR file. Most importantly, none of respondent's arguments demonstrate that the Administrator's choice of sanction was

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied[15]; and

2. The law judge's decision, upholding the Administrator's emergency order of revocation, is affirmed.

ROSENKER, Acting Chairman, and HERSMAN and HIGGINS, Members of the Board, concurred in the above opinion and order.

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arbitrary, capricious, or otherwise not in accordance with law.

[15] To the extent we have not discussed other specific arguments raised by respondent on appeal, we have nonetheless considered them in the context of the record as a whole and found them to be without merit.