

SERVED: January 29, 2008

NTSB Order No. EA-5356

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 23rd day of January, 2008

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ROBERT A. STURGELL,)	
Acting Administrator,)	
Federal Aviation Administration,)	
)	
	Complainant,)	
)	Docket SE-17836
	v.)	
)	
CHRISTIAN GIANELLI,)	
)	
	Respondent.)	
)	
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OPINION AND ORDER

Respondent appeals the oral initial decision of Chief Administrative Law Judge William E. Fowler, Jr., issued on May 16, 2007, following a bifurcated evidentiary hearing.¹ By that decision, the law judge affirmed an order of the

¹ A copy of the initial decision, an excerpt from the hearing transcript, is attached.

Administrator suspending respondent's airline transport pilot certificate for 60 days, based on violations of 14 C.F.R.

§§ 91.13(b)² and 91.503(b).³ We deny respondent's appeal.⁴

The Administrator's September 12, 2006 order was filed as the complaint, and alleges that:

* * *

2. On or about September 5, 2005, you operated an aircraft, other than for the purpose of air navigation, on the surface of an airport used by aircraft for air commerce.

3. Specifically, on behalf of Colgan Air ... you operated a Saab 340B aircraft, identification number N242CJ ... for purposes of re-positioning the aircraft at Albany International Airport, Albany, NY.

4. Prior to the ... operation ... you failed to use the cockpit checklist.

5. As a result, you left the hydraulic switch in the "off" position.

6. As a result, during the operation, the brakes ... failed and you lost control of the aircraft.

² Section 91.13(b) prohibits operation of an aircraft, other than for the purpose of air navigation, on the surface of an airport used by aircraft for air commerce, in a careless or reckless manner so as to endanger the life or property of another.

³ Section 91.503(b) states that each cockpit checklist shall contain the following procedures and shall be used by the flight crewmembers when operating the airplane: (1) Before starting engines, (2) Before takeoff, (3) Cruise, (4) Before landing, (5) After landing, (6) Stopping engines, and (7) Emergencies.

⁴ Respondent, represented by counsel at both hearing sessions, now appears pro se.

7. As a result, the aircraft struck another aircraft....

8. As a result, both the aircraft and the second aircraft sustained substantial damage.

9. You thereby operated the aircraft in a careless or reckless manner so as to endanger the life or property of another.

The bifurcated hearing was held on February 8, 2007, and May 16, 2007. In the first hearing session, the Administrator presented the testimony of four Colgan mechanics, an FAA air worthiness inspector, Colgan's chief pilot, and an FAA aviation safety inspector, and presented eight exhibits. In the second hearing session, respondent presented the testimony of Colgan's vice president of safety and compliance, and testified on his own behalf. Respondent presented six exhibits in the first hearing session, and an additional three in the second.

The evidence that the Administrator presented supports the allegations of the complaint. That evidence indicates that four checklists that should have been accomplished before taxi of the aircraft addressed the position of the hydraulic pump in-cockpit switch. The evidence further indicates that respondent left the switch in the off position. This resulted in the loss of hydraulic pressure in the hydraulic system, which then resulted in the aircraft's loss of braking and steering capability. This led to respondent's loss of control of the aircraft while maneuvering on the ground, and, ultimately, an impact with

another aircraft. Respondent's theory of the case is that he did not fail to properly run the checklists, that he placed the hydraulic switch in the auto position, and that there was a failure of the hydraulic system.

At the conclusion of the hearing, the law judge affirmed the Administrator's order. The law judge briefly summarized the testimony and determined that the Administrator established a *prima facie* case that respondent had not been able to rebut. The law judge credited the testimony of the mechanics who went onboard the aircraft immediately after the accident and who testified that the hydraulic switch was in the off position. In weighing the evidence and assessing the testimony of the witnesses, the law judge concluded that the Administrator proved that respondent violated 14 C.F.R. §§ 91.13(b) and 91.503(b), and ordered a 60-day suspension of respondent's certificate.

Respondent raises five "objections" in his appeal brief. The Administrator opposes each of respondent's arguments. We find that respondent's contentions are without merit.

The law judge's findings that respondent did not complete the cockpit checklist procedures and that respondent left the hydraulic switch in the off position, leading to a loss of hydraulic system pressure and steering and braking capability, resulting in a collision with another aircraft, is supported by a preponderance of reliable, probative, and substantial

evidence. After a thorough review of the entire evidentiary record, we find the evidence overwhelmingly in support of the Administrator's allegations. We do, however, address each of the issues respondent raises on appeal.

As to the first issue, a review of the record reveals that two witnesses, not one as respondent argues, testified that they saw the hydraulic switch in the off position immediately after the incident. Regardless of the number of witnesses who testified that they saw the switch in the off position, that evidence is certainly key in this case. According to respondent, the aircraft lost braking and steering before the collision. The testimony of mechanics who examined the aircraft after the incident and found no mechanical problems, and returned the aircraft to service with no repairs, establishes that it is very unlikely that respondent placed the hydraulic switch in the auto position.

Respondent's second issue, that there is no date stamp on the cockpit photo showing the switch in the off position, has no merit, because the mechanic who took the photo identified it, and testified that he took it immediately after the incident and that the switch was in the off position when he took the photo. Nothing further is necessary to "authenticate" the photo and for it to be properly admitted into evidence.

The third issue, addressing an alleged predisposition on the part of the mechanics to find the hydraulic switch in the off position, also has no merit. Respondent's only witness testified that, while it may have been improper for a mechanic to prejudge what he might find when beginning an investigation, the cause of the accident was respondent's failure to follow the checklist and place the hydraulic switch in the auto position.

The fourth issue, that the Administrator's own expert testified that it is possible to have a loss of hydraulic system pressure with the hydraulic switch in the auto position, goes to the burden of proof. While respondent established that such a system failure is possible, the overwhelming weight of the evidence indicates that the cause of the failure was the switch being left in the off position.

The fifth issue, that a system malfunction caused the incident, flows from the fourth. The evidence showed that there was not a malfunction of the hydraulic system, but a failure by respondent to properly follow the checklist that would have assured that the switch was in the proper position. Although respondent established that it was possible for a system malfunction to take place, he produced no evidence showing that it had. The Administrator, on the other hand, presented overwhelming evidence that no malfunction had occurred and that the switch was in the off position.

We have long held that the Board's law judges are in the best position to evaluate witness credibility.⁵ We have also held that credibility determinations are "within the exclusive province of the law judge," unless the law judge has made the determinations "in an arbitrary or capricious manner."⁶ In this regard, the Board is free to reject testimony that a law judge has accepted if the Board finds that the testimony is inherently incredible or inconsistent with the overwhelming weight of the evidence.⁷ Where parties challenge a law judge's credibility determinations, the Board will not reverse the determinations unless they are arbitrary, capricious, or clearly erroneous. Smith, supra at 1563. Respondent has not shown such an issue with the law judge's credibility determinations. After a careful review of the evidence, we agree with the law judge. Overall, we find that the law judge's credibility determinations and his findings of fact are in accord with the weight of the evidence.

⁵ Administrator v. Taylor, NTSB Order No. EA-4509 (1996) ("the law judge sees and hears the witnesses, and he is in the best position to evaluate their credibility").

⁶ Administrator v. Kocsis, 4 NTSB 461, 465 n.23 (1982); see also Administrator v. Smith, 5 NTSB 1560, 1563 (1986); Administrator v. Sanders, 4 NTSB 1062 (1983).

⁷ Administrator v. Blossom, 7 NTSB 76, 77 (1990) (citing Administrator v. Powell, 4 NTSB 642 (1983); and Administrator v. Klayer, 1 NTSB 982 (1970)).

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;
2. The law judge's initial decision is affirmed; and
3. The 60-day suspension of respondent's certificate shall begin 30 days after the service date indicated on this opinion and order.⁸

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

⁸ 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(g).

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
OFFICE OF ADMINISTRATIVE LAW JUDGES

* * * * *

In the matter of: *

MARION C. BLAKEY, *
ADMINISTRATOR, *
Federal Aviation Administration, *

Complainant, *

v. *

Docket No.: SE-17836
JUDGE FOWLER

CHRISTIAN GIANELLI, *

Respondent. *

* * * * *

National Transportation Safety Board
429 L'Enfant Plaza, SW
Conference Room
Washington, D.C.

Wednesday,
May 16, 2007

The above-entitled matter came on for hearing, pursuant
to Notice, at 10:02 a.m.

BEFORE: WILLIAM E. FOWLER, JR.,
Chief Administrative Law Judge

APPEARANCES:

On behalf of the Administrator:

ZACHARY BERMAN, Regional Counsel
Federal Aviation Administration
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On behalf of the Respondent:

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ORAL INITIAL DECISION AND ORDER

ADMINISTRATIVE LAW JUDGE FOWLER: This has been a proceeding before the National Transportation Safety Board, held pursuant to the provisions of the Federal Aviation Act of 1958 as that Act was subsequently amended, on the appeal of Christian Gianelli from an Order of Suspension dated September 12th, 2006, which seeks to suspend Respondent Gianelli's Airline Transport Pilot Certificate number 002532216 for a period of 60 days.

The Administrator's Order of Suspension, as duly promulgated by the Board's Rules of Practice in Air Safety Proceedings, was issued by the Regional Counsel, Eastern Region, of the Federal Aviation Administration.

This matter has been heard before this United States Administrative Law Judge, and as is provided by the National Transportation Safety Board's Rules of Practice, specifically Section 821.42 of those rules, I am going to issue an Initial Oral Decision, sometimes referred to as a Bench Decision, forthwith at this time.

Following notice to the parties, this proceeding came on for trial on the second session. The first session was held in Albany, New York, on February 8, 2007, and we are in our second session, the final and concluding session here today, May the 16th, 2007, in Washington, D.C.

1 Following notice to the parties, this matter came on for
2 trial today, May 16, 2007. The Respondent, Christian Gianelli,
3 was present and at all times and was very ably represented by
4 Andrew M. Riolo, Esquire. The Complainant in this proceeding, the
5 Federal Aviation Administrator, was likewise very ably represented
6 by Zachary Berman, Esquire, of the Regional Counsel's Office,
7 Eastern Region of the Federal Aviation Administration.

8 Both parties have been afforded the opportunity to call,
9 examine, and cross-examine witnesses on behalf of the
10 Administrator and the Respondent. In addition, counsel for both
11 sides have been afforded the opportunity to make argument and
12 final summary statements on behalf of their respective sides of
13 the case.

14 I have reviewed the testimony and the documentary
15 exhibits. The Administrator has come forth with seven witnesses,
16 and approximately eight exhibits. Respondent has had two
17 witnesses, including the Respondent, himself, and has adduced a
18 total of ten exhibits.

19 The pertinent, salient, overriding, and central
20 justiciable issue to be decided here is, was there a violation?
21 Did the Respondent Gianelli leave the hydraulic switch off in the
22 aircraft, that we're concerned with, on September 5th, 2005 while
23 he was taxiing the aircraft from the hangar to the ramp at the
24 Albany, New York, airport? Did the Respondent leave that switch
25 in the off position? If so, was there a violation? If this

1 occurred, was this a careless or reckless operation on the part of
2 the Respondent? And if so, is a sanction of 60 days suspension of
3 the Respondent's Airline Transport Pilot Certificate apropos and
4 proper?

5 I have, as I mentioned, reviewed the record in this
6 proceeding, the exhibits and the testimony by the witnesses.
7 There are some unclear angles and some conflicting testimony. The
8 Administrator with seven witnesses, four of whom were mechanics,
9 one of whom is an Aviation Safety Inspector, a number of these
10 witnesses, including several of the mechanics, have testified
11 under oath that after the impact of the Colgan Air aircraft being
12 navigated on the Albany International Airport and the impact with
13 another aircraft, the hydraulic systems switch was found in the
14 off position.

15 As I said, I have reviewed all of the testimony in this
16 case, and while the Administrator's case, certainly I could not
17 list it as being among the strongest cases that I've had the
18 pleasure of hearing, at the very minimum through their seven
19 witnesses and the documentary exhibits, it is my finding and
20 conclusion and ultimate determination that the Administrator, at
21 the very minimum, has established a prima facie case.

22 That being so, it has to be determined whether the
23 Respondent, with his testimony and the testimony of the one
24 witness that the Respondent adduced, other than the Respondent's
25 testimony, that is the witness David Vance, who is a Vice

1 President of Safety with Colgan Air, whether the Respondent's side
2 of the case successfully rebuts the Administrator's prima facie
3 case. It is my determination and conclusion that the Respondent
4 has not been successful in rebutting the Administrator's prima
5 facie case.

6 The mechanics, several of which, right after the impact
7 of the crash of these two aircraft on the taxiway at Albany,
8 New York, International Airport, several of those mechanics went
9 onboard the aircraft of the Respondent and they have testified
10 that the hydraulic system switch was in the off position.

11 The Respondent's side of the case said there was a
12 hydraulic system pump failure. That the pressure in the hydraulic
13 system due to that failure was insufficient and inadequate to
14 afford the braking system and the steering system on the aircraft
15 to function properly. And in addition, the Respondent's position
16 is that the mechanics and eyewitnesses as to the hydraulic switch
17 were predisposed, or had predisposed judgment, to find, as they
18 did, that the hydraulic system switch was in an off position when
19 the aircraft of the Respondent began to taxi.

20 The principal witness other than the Respondent himself
21 was the Vice President of Safety of Operations for Colgan Air, as
22 I mentioned earlier, Mr. David Vance. He testified quite
23 forthrightly and candidly, I thought. He said there were a number
24 of things that were unclear as to what caused this accident.
25 Unfortunately, the flight data recorder was of no help.

1 Mr. Vance has been a Chief Pilot. He has 17,000 hours
2 of flying experience, and his final judgment and determination and
3 conclusion was that the impact of these two aircraft was caused by
4 the hydraulic switch being in the off position and there not being
5 proper preflight execution on the part of Respondent Gianelli.

6 Now, Colgan Air does approve and okay a preflight on
7 their aircraft to be executed by one pilot, which is somewhat
8 different from many other airlines that require two pilots. But
9 the question is, even if that was allowed, which it was and is,
10 Respondent Gianelli has said that he gave the aircraft a thorough
11 preflight check before and during the taxiing of the aircraft.

12 Respondent Gianelli is a very experienced pilot; 15,000
13 hours, 6,000 hours he's testified to as a pilot in the Saab 340B
14 aircraft, which is what we're concerned with here. It's almost
15 beyond comprehension as to how, if he did a thorough preflight
16 check, he would miss the hydraulic system switch not being
17 properly in the auto position as he's testified to, and as his
18 documentary evidence that the copilot, Mr. Axelrod, said that
19 Respondent Gianelli told him after the impact that the hydraulic
20 system for the auto switch was in the auto indication.

21 Well, let's briefly review the Administrator's case.
22 Kenneth Scavone, a mechanic at Colgan, was the first one onboard
23 the Respondent's aircraft after it stopped. The engines were
24 turned off after the impact. He testified he saw the hydraulic
25 system switch and it was in an off position.

1 Witness Collazo has testified in his opinion that this
2 switch was in the off position.

3 The Regional Maintenance Manager, Mr. Richard Szanyi,
4 has testified that the hydraulic system switch was in the off
5 position.

6 Now, I cannot and will not dismiss, out of hand, a
7 number of these mechanics who went onboard the aircraft, looked at
8 the hydraulic system switch, and have testified that it was in the
9 off position.

10 The Administrator has adduced, also, a picture of that
11 switch in the off position which was taken the day of the impact
12 of the two aircraft on the taxiway.

13 The Chief Pilot, Mr. Thomas Brink, who has 18,000 hours
14 flying experience, 4,000 hours in the Saab, and supervises 330
15 pilots for Colgan Air, has testified that all checklists must be
16 used and must be thoroughly checked out and gone over in the
17 preflight operations before an aircraft goes in operation. Chief
18 Pilot Brink's final testimony was, in his opinion, the Respondent
19 did not follow proper procedures as set forth in the Colgan flight
20 air manual where using the checklists were concerned.

21 That is one of the reasons it makes me say again that
22 Respondent is guilty here of not thoroughly having a preflight
23 check, and a subsequent check before the aircraft was moved, which
24 means his hydraulic system switch was not taken into account.
25 This is further buttressed by the next to last witness on behalf

1 of the Administrator, Mr. Peter LaCagnina, who is an Air Safety
2 Investigator. His opinion, likewise, was that the hydraulic
3 system switch was in the off position when the Respondent was in
4 motion.

5 So that ladies and gentlemen, in view of all this
6 evidence by the Administrator, the Administrator has a very valid,
7 well thought out and presented case, which, unfortunately, for the
8 Respondent, the Administrator has established a prima facie case.

9 The Respondent has not, it is my determination, successfully
10 rebutted that prima facie case and I will make my final rulings
11 and determinations accordingly.

12 We know there were no mechanical deficiencies or
13 malfunctions found in the aircraft after it was thoroughly checked
14 after this incident occurred on September 5th, 2005. We know by
15 Witness Vance's testimony that no cockpit checks were audible
16 prior to or after the engine start. And as I've mentioned,
17 maintenance personnel observed the hydraulic system switch being
18 off after the mishap. This evidence is quite potent, if I may use
19 that term, where the Respondent is concerned.

20 I will mention again, experienced airman that he is, I
21 don't know how Mr. Gianelli missed that hydraulic system switch
22 being in the off position, and this the Administrator has
23 successfully proven that by a fair and reasonable preponderance of
24 the material, relevant, probative and substantial evidence adduced
25 during the two days of this proceeding.

1 So that ladies and gentlemen, based on the evidence,
2 coupled with the documentary exhibits that's been adduced before
3 me during the two days that we've been in session here, I will now
4 proceed to make the following specific findings of fact and
5 conclusions of law:

6 1) The Respondent, Christian Gianelli, admits and it is
7 found that he was and is the holder of Airline Pilot Transport
8 Pilot Certificate number (omitted).

9 2) The Respondent admits and it is found that on or
10 about September 5, 2005, Respondent Gianelli operated an aircraft
11 other than for the purpose of air navigation on the surface of an
12 airport used by aircraft for air commerce.

13 3) The Respondent admits and it is found that
14 specifically on behalf of Colgan Air, Respondent operated a
15 Saab 340B aircraft identification number N242CJ for purposes of
16 repositioning the aircraft at Albany International Airport,
17 Albany, New York.

18 4) It is found that prior to the above referenced
19 operation Respondent properly failed to use the cockpit checklist.

20 5) It is found that as a result, Respondent left the
21 hydraulic switch in an off position.

22 6) It is found that as a result during the operation
23 the brakes of the aircraft failed and Respondent lost control of
24 the aircraft.

25 7) It is found that as a result the aircraft struck

1 another aircraft, a Saab 340B aircraft identification number
2 N339CJ.

3 8) It is found that as a result, both the aircraft and
4 the second aircraft sustained substantial damage.

5 9) It is found that Respondent operated the aircraft in
6 a careless manner so as to endanger the life or property of
7 another.

8 10) It is found that by reasons of the foregoing, the
9 Respondent Gianelli violated the following sections of the Federal
10 Aviation Regulations:

11 a) Section 91.13(b), and I'm incorporating that section
12 by reference without spelling it out as it is stated in the
13 Administrator's complaint.

14 b) Section 91.503(b), the meaning of which I'm also
15 incorporating by reference as it is set forth in the
16 Administrator's complaint.

17 11) This Judge finds that safety in air commerce or air
18 transportation and the public interest does require the affirmance
19 Administrator's Order of Suspension dated September 12th, 2006, in
20 view of the Respondent's violation of Section 91.13(b) and
21 Section 91.503(b) of the Federal Aviation Regulations.

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ORDER

It is ordered and adjudged that the Administrator's Order of Suspension dated September 12th, 2006, be and the same is hereby affirmed.

This order is issued by William E. Fowler, Jr., United States Administrative Law Judge.

EDITED & DATED ON
June 6, 2007

WILLIAM E. FOWLER, JR.
Chief Judge