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NTSB Order No. EA-4604

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 31st day of October, 1997

JANE F. GARVEY,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	Docket No. SE-14465
)	
RICHARD D. KARNS,)	
)	
Respondent.)	
)	

OPINION AND ORDER

The Administrator has appealed from the oral initial decision issued by Administrative Law Judge William R. Mullins on September 9, 1996, at the conclusion of a hearing limited to the issue of sanction.¹ By that decision, the law judge modified the Administrator's order by imposing a \$1,500 civil penalty, instead of a 60-day suspension of respondent's airline transport pilot (ATP) certificate. The law judge had previously granted summary judgment on the Administrator's allegation of violations of

¹An excerpt from the hearing transcript containing the

Sections 91.13(a) and 135.83(a) of the Federal Aviation Regulations (FAR), 14 C.F.R. Parts 91 and 135, based on respondent's admission that he had unintentionally overlooked a preflight checklist item that required the removal of control surface locks.² As a result of this error, respondent had to abort the takeoff, and the aircraft was damaged when it went off the runway. Neither respondent or his passenger were injured.

The sole issue before the Board is the propriety of the law judge's sanction modification. The Administrator asserts that the law judge failed to defer to the Administrator's selection of suspension as the appropriate type of sanction, arguing that deference was required under the FAA Civil Penalty Administrative Assessment Act, 49 U.S.C. 44709(d) and 46301(d). Further, the Administrator argues, the reasons cited by the law judge for modifying the sanction -- respondent's successful completion of a flight proficiency reexamination, his college-level aviation

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initial decision is attached.

²FAR §§ 91.13(a) and 135.83(a) provide, in pertinent part, as follows:

§ 91.13 Careless or reckless operation.

(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.

§ 135.83 Operating information required.

(a) The operator of an aircraft must provide the following materials, in current and appropriate form, accessible to the pilot at the pilot station, and the pilot shall use them:

- (1) A cockpit checklist....

education, and his dependence on his ATP certificate -- do not support a reduction in sanction. Respondent urges the Board to affirm the law judge's initial decision.

The Board agrees with the Administrator that the law judge's modification of sanction cannot stand. However, our decision is based on other grounds. In our view, the Administrator failed to establish that a 60-day suspension was not "arbitrary, capricious, or otherwise not according to law." 49 U.S.C. § 44709(d)(3). We find that the sanction urged is excessive in light of the Administrator's own written policy guidance, and Board precedent. For the reasons that follow, we reverse the law judge's sanction modification and instead affirm a 30-day suspension of respondent's ATP certificate.

The Administrator presented the testimony of Larry Young, the supervisory operations inspector who reviewed the allegations against respondent. Mr. Young testified that he used the Enforcement Sanction Guidance contained in FAA Order 2150.3A in his review of the 60-day suspension recommended by the investigating inspector. He testified that he considers gear-up landing cases analogous to the case at hand. He then explained that 30 days is "common" in gear-up landing cases, but where there are "aggravating" factors such as actual damage caused to property, 60 days, he "believes," is "standard" for airline transport pilots. (TR-47-48). He also noted that this incident could have resulted in a disaster, and that respondent owed a higher duty of care because he had a paying passenger on board.

(TR-47).

We view this testimony as little more than a *post hoc* rationalization of the Administrator's litigation position, because it urges what appears to be an arbitrarily selected sanction. We reach this conclusion because we find nothing in the record to explain why the Administrator would rely on guidance applicable to gear-up landings, when the Sanction Guidance Table specifically provides for 15 to 30-day suspensions in cases alleging an air carrier pilot's failure to use a pre-flight cockpit checklist. Section II, Paragraph F(1).³ The inspector's testimony that respondent's sanction should be enhanced because he was carrying a paying passenger also indicates that he fails to recognize that the range of sanctions suggested in Section II of the Sanction Guidance Table are specifically applicable to air carrier pilots. We think it is fair to assume that the nature of the operation has already been considered and is reflected in the sanctions suggested therein. Indeed, we note, on appeal the Administrator essentially concedes that the testimony of the witness is inaccurate, in that the Administrator now takes the position that the 60-day suspension is supported by imposition of a 30-day suspension under Section II, Paragraph F(1) **and** another 30-day suspension for the "independently pled" allegation of a FAR § 91.13(a) violation.

³The Administrator's failure to place the Sanction Guidance Table into evidence deprived the law judge of the opportunity to refer to the Table as he considered the inspector's testimony, and it denied respondent the opportunity to effectively cross-

We reject this argument, as it is, in our view, yet another litigation position unsupported by the Table and precedent.

The Board has reviewed numerous cases alleging violations of FAR § 91.9, now FAR § 91.13(a), and FAR § 121.315(c), a regulation imposing a duty to use checklists on Part 121 airline transport pilots similar to that imposed on respondent under FAR § 135.83. In those cases where, as in this case, the failure to use a cockpit checklist resulted in actual damage to property, the Administrator's order proposed a 30-day suspension of the airman's ATP certificate, and a 30-day suspension was upheld by the Board. See, e.g., Administrator v. Cowley, NTSB Order No. EA-3779 (1993)(parking brake not set before starting engines and airman could not stop aircraft which hit a power cart and destroyed both the power cart and the right engine's propeller); Administrator v. Butler, 7 NTSB 735 (1991)(airman failed to use abnormal checklist when gear door warning light went on and gear doors damaged on landing); Administrator v. Maxwell, 1 NTSB 234 (1968)(gear lock pins not removed resulting in gear up landing). See also Administrator v. McCartney, NTSB Order No. EA-3807 (1993)(30 days ordered and affirmed where respondent started engines before doors closed and gate agent struck by propeller); Administrator v. Engelfried, 6 NTSB 1318 (1989)(30 days ordered and affirmed where an open door was not discovered during preflight and the aircraft lost pressurization and was forced to return); Administrator v. Kierstead, 4 NTSB 1591 (1984)(30 days

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examine the witness on the contents of the Table.

ordered and affirmed where tape on static ports not found during preflight, requiring takeoff to be aborted). We note that this precedent is consistent with the Sanction Guidance Table, as it is at the high end of the range of sanctions contained therein, apparently reflecting the actual hazard caused in these cases to the safety of persons or property. Cf. Administrator v. Stimble, NTSB Order No. EA-4177 (1994)(15 days ordered and affirmed against airman on a Part 135 flight where open gas cap missed during preflight inspection and passenger observed fuel spilling out of aircraft during taxi).

Finally, we would be remiss if we did not state, once more, that "[a] law judge's discretion in sanction modification is not limitless." Administrator v. Reina, NTSB Order No. EA-4508 at 3 (1996), *Order Denying Modification*, No. EA-4552 (1997). The Administrator's failure to cite Board precedent is not an excuse for our law judges to choose whatever type and whatever amount of sanction they deem appropriate, particularly when to do so would allow a law judge to ignore years of Board precedent that is not distinguishable, and which we expect our law judges to follow. Cf. Administrator v. Peacon, NTSB Order No. EA-4607 (1997)(law judge must consider Board precedent that is relied on by Administrator's counsel).

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's appeal is granted to the extent that the law judge's initial decision is reversed as to sanction;
2. A 30-day suspension of respondent's airline transport pilot certificate is affirmed; and
3. The 30-day suspension of respondent's airline transport pilot certificate shall begin 30 days from the date of service of this order.⁴

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

⁴For the purposes of this order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to FAR § 61.19(f).