SERVED: February 17, 1998

NTSB Order No. EA-4622

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, 1998

JANE F. GARVEY, Administrator, Federal Aviation Administration, Complainant, v. CHRISTOPHER SMITH, Respondent.	)	Docket SE-14455

OPINION AND ORDER

Respondent appeals the oral initial decision of Administrative Law Judge William R. Mullins, rendered at the conclusion of an evidentiary hearing held on January 28, 1997.[1] By that decision, the law judge found that respondent violated section 105.29(a) of the Federal Aviation Regulations ("FAR"),

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

but sanction was waived on account of respondent's timely report pursuant to the Aviation Safety Reporting System.[2] We deny respondent's appeal.[3]

The Administrator's complaint alleged that respondent "allowed a parachute jump to be made from [his] aircraft through a cloud." The essential facts are mostly undisputed. Respondent was the pilot-in-command of a Cessna 182 aircraft conducting parachute operations near Dillingham Airfield ("HDH"), Hawaii, on the afternoon of July 10, 1995. Two inspectors employed by the Federal Aviation Administration ("FAA"), which at the time was engaged in enhanced oversight of operations at HDH, were nearby

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[2] The regulation (14 C.F.R. Part 105) provides, in relevant part, as follows:

> § 105.29 Flight visibility and clearance from clouds requirements.
>
> 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 –
>
> (a) Into or through a cloud;
>
> * * * * *

[3] In addition to his appeal brief, respondent has filed two additional briefs. These briefs, filed after the Administrator filed his reply brief and opposed by the Administrator, are entitled "Respondent's Response Brief" and "Respondent's Motion to Dismiss." The former, filed pursuant to 14 C.F.R. § 821.48(e), does not contain citations to supplemental authority and merely presents additional argument and is therefore rejected. The latter, filed pursuant to 14 C.F.R. § 821.17(d), raises no issue as to the Board's jurisdiction and is therefore also rejected.

that day and were notified by a third party of the parachuting activity. The inspectors observed several parachutists from respondent's aircraft pass through clouds, and respondent was later charged with violating section 105.29(a).[4]

Respondent alleges several procedural errors, and we address those first. Respondent argues that the Administrator's Notice of Proposed Certificate Action ("NOPCA") "violated" our stale complaint rule. Respondent claims that he did not receive notice of the Administrator's allegations until February 21, 1996, and that this was more than six months after the July 10, 1995, basis for the Administrator's charge. Respondent's ("Resp.") Brief at 7, 16-19; see 49 C.F.R. § 821.33. The law judge determined, however, that respondent must have received the NOPCA via certified mail no later than November 2, 1995. Respondent provides us no valid basis for disagreeing with the law judge's resolution of this issue,[5] and we adopt the law judge's determination that the Administrator's complaint was not stale.[6]

[4] Respondent disputes whether the parachutists passed through clouds. At respondent's hearing both parties relied almost exclusively on testimonial evidence to prove their version of the facts, and thus credibility issues were central to the law judge's factual determinations. See Transcript ("Tr.") at 276-279. We therefore defer to the law judge's finding that the parachutists did, indeed, pass through clouds. Administrator v. Smith, 5 NTSB 1560, 1563 (1986).

[5] Respondent, after obtaining affidavits of several postal employees about registered mail procedures, filed a motion for the law judge to reconsider his decision on the stale complaint issue. This motion was also properly denied. As the law judge (continued …)

Respondent also complains that the FAA inspectors improperly refused to retain a videotape -- unavailable by the time of the hearing -- that he claims exculpates him. Respondent's argument is unavailing. The record indicates that the inspectors approached Mr. Jaworski, a parachutist from respondent's aircraft who was wearing a helmet-mounted video camera, and asked for a copy of his video. Mr. Jaworski refused to relinquish the video and went into a nearby building used by respondent's parachute operation. It was only later, after Mr. Jaworski and his camera had been out of the inspectors sight, that the inspectors were offered a videotape. The inspectors viewed this videotape, but

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pointed out, the motion to reconsider provided no indication that the evidence of the United States Postal Service's registered mail procedures was previously unavailable when the stale complaint issue was originally litigated. Tr. at 12. Indeed, as respondent's motion makes clear, the information was not sought by respondent until more than two weeks after the original order denying the motion. Motion to Reconsider Respondent's Motion to Dismiss at 2. Moreover, as the law judge also noted, even if the "new" material were accepted into evidence it would not provide a sufficient basis for overturning the order denying the original motion to dismiss. The new material speaks in generalities about normal procedures for certified mail. The law judge's original order, in contrast, discusses specific facts which collectively provide strong circumstantial evidence that respondent was served with the Administrator's NOPCA even though, normal procedures notwithstanding, the return receipt cannot be found.

[6] A portion of the law judge's order is attached in excerpted form as "Appendix A." The chief law judge issued the order because at the time respondent filed his motion no law judge had been assigned to the case. See 14 C.F.R. § 821.35(a).

concluded it was not a recording of the jump they were investigating.[7]

Respondent also claims that the law judge erred in refusing to allow him to present exhibits allegedly depicting frames excerpted from the unavailable videotape, and in refusing to allow testimony about what was depicted on that videotape. Resp. Brief at 23. This claim has no merit. It was respondent's burden, as the proponent of the evidence, to establish that the exhibits were authentic excerpts from a videotape made during the July 10, 1995, jump in question. Absent such a foundation, the exhibits simply have no relevance and we find no error in the law judge's decision to exclude them. Cf. Fed. R. Evid. 104(a)-(b), 401, 402. We also note that both parties had ample opportunity to present testimony about whether or not the parachutists passed through clouds.

Turning to the substantive issues of this appeal, respondent argues against what he terms "collateral liability." Resp. Brief at 26-28. He claims that, ipso facto, he cannot be found to have violated section 105.29(a) because he determined that the parachutists could "depart [the] aircraft and proceed to the designated landing area clear of clouds," and the parachutists passed through clouds only after they had descended more than

[7] One of the inspectors testified that although he observed the parachutists wearing long pants, one of the tandem jumpers on the videotape was wearing shorts. Tr. 103.

7,000 feet from the altitude at which they jumped from his aircraft. Resp. Brief at 26. Respondent argues that any "failure of . . . the jumpers to properly maintain cloud clearance would be an action over which [he] could not have been responsible." Id. Respondent's arguments are inconsistent with our recent precedent on this issue.

In Administrator v. Foss, NTSB Order No. EA-4631 (1998), we addressed the precise duty of pilots under section 105.29(a). We concluded that "a pilot must actively participate in the decision-making as to whether or not a jump should go forward . . . because section 105.29 imposes upon pilots a duty, separate and independent from that of the parachutists onboard, to determine whether the intended jump can and will be made in compliance with cloud clearance requirements." Id. at 5. Respondent -- who admits that a parachutist aboard his aircraft acting as a jump master "took responsibility for the final spotting of the jump" -- has not demonstrated that he made the requisite evaluation of whether the jumpers could reach their intended landing point without passing through clouds.[8] Resp. Brief at 28. Respondent admitted that although he "[positioned] the aircraft in the

[8] The Administrator's witnesses testified that it was too cloudy to be conducting parachute operations. Tr. 32, 97. Respondent described the conditions as scattered, Tr. at 222, but stated that he "made a couple of passes . . . because on our initial jump run there were clouds obscuring the drop point." Tr. at 223.

general vicinity," he deferred to the judgment of the parachutists as to when they should actually exit the aircraft. Tr. at 224-225. That being the case, respondent cannot be said to have taken such steps as might be appropriate or necessary to ensure cloud avoidance.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied; and

2. The initial decision is affirmed.

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