SERVED: March 5, 1998

NTSB Order No. EA-4623

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 11th day of February, 1998

JANE F. GARVEY, Administrator, Federal Aviation Administration, Complainant, v. CARLOS ERNESTO GARTNER, Respondent.	Docket SE-14023

ORDER DENYING PETITION FOR RECONSIDERATION

The Administrator has appealed our decision, EA-4495, served November 8, 1996. In that decision, we affirmed the Administrator's allegations that respondent violated Chapters 3.1.1 and 4.5(b) of Annex 2 to the Convention on International Civil Aviation.[1] We waived sanction, however,[2] for a number of reasons. See EA-4495, at 6-8. It is this waiver that the Administrator has appealed.[3]

[1] These chapters contain altitude restrictions for operations over the high seas and prohibit negligent or reckless operations.

[2] The Administrator had sought a 90-day suspension of respondent's pilot certificate.

[3] The Administrator has moved that we strike certain statements in the respondent's reply on the ground that they erroneously characterize the record. We deny the motion. The Board is aware of the record evidence and what it does and does not support.

The Administrator argues that we exceeded our authority by imposing a "duty to warn" on the FAA, and by failing to defer to the FAA's sanction judgment, as required by 49 U.S.C. 44709(d). We disagree. The FAA reads too much into our decision.

We imposed no duty to warn. Instead, we recognized an obligation on the part of the FAA, especially important given its law enforcement role, not to mislead -- either by acts of omission or commission -- those subject to its authority. We did so simply as a matter of fairness. We did not intend, and do not, in the FAA's words, "hobble" its methods of communicating with airmen regarding safety concerns. The record established that FAA employees were familiar with the high seas operations of the Brothers to the Rescue organization, indeed had met with members of the group and had discussed rescue and assistance operations. Despite knowing how those operations were conducted, e.g., that they included flights below 500 feet, FAA employees failed to advise respondent and others, at a meeting called by the FAA with the group to discuss its operations, that such flights violated Chapter 4.5(b). It is nothing more than the most basic fairness to require as much; otherwise, one could liken the FAA's action to entrapment of a sort. Indeed, a discussion of the dangers of an operation, without reference to its unlawfulness, would suggest to the reasonable person that the action **was not** unlawful.[4] What we are imposing here is not a duty to warn but a duty to deal fairly and thoroughly when providing information that can be misinterpreted. Administrator v. Smith, NTSB Order No. EA-4088 (1994), cited in our prior decision, continues to be a good analogy, in our view.

We also find the FAA's argument regarding sanction deference inappropriate in this case, as it mischaracterizes the circumstances here. We do not disagree with most of the FAA's recitation of the law.

We agree that our authority to modify sanction, once a violation is established, is not unlimited. We are required to defer to "all validly adopted interpretations … of written agency policy guidance available to the public related to sanction … unless the Board finds an interpretation is arbitrary, capricious, or otherwise not according to law." 49 U.S.C. 44709(d). This does not mean, as the FAA suggests, that every FAA order of suspension or revocation is a valid interpretation of sanction guidance to which the Board must defer. Although we

[4] Such a conclusion is all the more expected where, as here, the FAA advised that other activities -- operations with an aircraft door removed -- were not lawful without special rule waiver by the agency.

agree that the Administrator's sanction guidance table (Order 2150.3) is written agency policy guidance, litigating positions are not necessarily "validly adopted interpretations … of written agency policy guidance available to the public." (See legislative history, quoted by the Administrator on page 12 of his petition, "This does not mean, however, that NTSB should simply defer to litigation positions of the FAA prosecutor.")

Further, § 44709(d) does not require that we impose a sanction contained in FAA written guidance even when the sanction's effect would be "arbitrary, capricious, or otherwise not according to law." Thus, authority exists for the NTSB to decline to impose what is otherwise a validly adopted interpretation of written agency policy guidance available to the public.

In this case, the FAA at no point offered the law judge evidence of any written agency policy guidance, nor did counsel mention either that such guidance existed, or that the proposed 90-day suspension constituted a validly adopted interpretation of written agency policy guidance. The propriety of the proposed sanction was never discussed on the record other than in the context of applicability of the waiver available under the Aviation Safety Reporting Program.[5] FAA counsel should lay the groundwork for these deference claims; we can not perform that function for the complainant. The FAA may not be heard to argue that we have ignored validly adopted interpretation of written agency policy guidance when it has failed to introduce that written guidance and failed to make the question of sanction an issue in the case before the law judge.[6]

ACCORDINGLY, IT IS ORDERED THAT:

The Administrator's appeal is denied.

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[5] We are not persuaded by its claim that, on appeal, the FAA logically addressed only the law judge's conversion of the sanction to a civil penalty. The applicability of the proposed 90-day suspension remained an issue of proof, if only because the Administrator desired us to impose it.

[6] Indeed, in this case, even after the law judge stated his belief that the sanction should be a civil penalty rather than a suspension, counsel for the FAA offered no response when given the opportunity by the law judge. See Tr. at 319.

HALL, Chairman, HAMMERSCHMIDT, GOGLIA, and BLACK, Members of the Board, concurred in the above order. FRANCIS, Vice Chairman, did not concur, and submitted the following dissenting statement:

> I have not concurred in the denial of the FAA's petition for reconsideration in this case. I continue to believe that a substantial sanction should be imposed for such serious proven violations as low flight and careless operation resulting in damage sufficient to render the aircraft unairworthy.
>
> Contrary to the opinion, this decision could well impair the FAA's ability to communicate with the aviation community. I see no real or practical distinction between a "duty to warn" and an "obligation not to mislead - either by acts of omission or commission." The latter clearly is imposed by the opinion. And, whatever its nature and extent, the potential to "hobble" the agency's safety dialogue with operators exists as a practical matter. If each failure to specifically address each regulation that could be violated is construed as sufficiently misleading or unfair to excuse conduct that clearly violates important and basic safety regulations, the safety dialogue to promote voluntary and clear compliance can be rendered effectively meaningless. I can not concur in that possibility.