

SERVED: January 8, 1992

NTSB Order No. EA-3469

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 7th day of January, 1992

\_\_\_\_\_  
BARRY LAMBERT HARRIS,  
Acting Administrator,  
Federal Aviation Administration,

Complainant,

v.

DON W. SMITH,

Respondent.  
\_\_\_\_\_

Docket SE-8577

SUPPLEMENTATION OF RECORD ON REMAND

By order filed November 15, 1991, the United States Court of Appeals for the District of Columbia Circuit remanded the record to the National Transportation Safety Board (NTSB). The Court directed the NTSB to consider what sanction policy the Federal Aviation Administration (FAA) had in place for unauthorized operations in Terminal Control Areas (TCAs) on the date of respondent's alleged violation. The Order also directed that the NTSB should consider "the nature of that policy, and, if necessary, whether the Federal Aviation Administration gave proper public notice of any changes in that policy as might be required by section 552 of the Administrative Procedures Act, 5 U.S.C. § 552." (Order p. 2).

Pursuant to Order of the Board, the FAA submitted documentation and an affidavit regarding the date(s) of Compliance/Enforcement Bulletin No. 86-2 which enumerated sanctions for unauthorized operations within TCAs. The FAA and respondent thereafter submitted comments on the matters ordered by the Court.

According to the records submitted by the FAA, Bulletin No. 86-2, which calls for a minimum 60-day suspension for TCA violations without aggravating factors, was effective before respondent's flight on November 7, 1986. The FAA records reflect that the final approval authorizing release of the Bulletin was signed by the Chief Counsel and dated October 2, 1986.<sup>1</sup> By memorandum dated October 6, 1986, an Assistant Chief Counsel stated that the policy enunciated in the Bulletin was "effective immediately." While respondent attacks the documentation in a number of insubstantial ways, the Board is satisfied that the provision for a 60-day suspension was in effect before respondent's flight.<sup>2</sup>

As to the issue of whether the Bulletin created a binding norm, we believe that it did not, particularly with regard to the decision-making process within this agency. The Board is not bound by the sanction selected by the FAA or by the policies underlying their selection.<sup>3</sup> While the Board has generally deferred to the FAA's imposition of a 60-day suspension for this class of offense, the Board can and, when appropriate, does reduce the period of suspension sought by the FAA for various regulatory violations.<sup>4</sup>

With respect to the issue as to whether the FAA gave proper public notice of any changes in its sanction policy under the Administrative Procedure Act, we do not believe that the matter was raised before the Board in the initial proceedings and we are thus uncertain how it can be considered relevant to respondent's proceeding before the court. In any event, this Board has generally declined any invitation to consider the validity of the

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<sup>1</sup>Respondent has not shown that the Chief Counsel lacked the authority to approve or authorize the issuance of this Bulletin.

<sup>2</sup>Respondent's affidavit which states that an attorney outside the FAA was unaware of the changes in sanction policy embodied in Bulletin No. 86-2 does not in any way undermine the FAA documents regarding the adoption and implementation of the Bulletin within the FAA.

<sup>3</sup>The Board, on appeal from an FAA-initiated enforcement proceeding, has the authority to amend, modify, or reverse the Administrator's order if it finds that "air safety in air commerce or air transportation and the public interest do not require affirmation of the Administrator's order." 49 U.S.C. § 1429(a).

<sup>4</sup>See Administrator v. Anderson, EA-3124, served May 30, 1990 (Board affirmed initial decision which reduced sanction from 60 to 30 days in a TCA incursion case).

Administrator's policy-making procedures,<sup>5</sup> as these are typically subject to direct judicial appeal.<sup>6</sup> Furthermore, the "binding norm" of the prohibition against unauthorized entry has at all relevant times been effective, and we do not believe that serious weight can be given to the argument that a violation may have been committed out of reliance on a lenient sanction policy, nor do we believe that respondent argued the existence of reliance.

The foregoing is hereby submitted in response to the Court's order of remand.

KOLSTAD, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART, and HAMMERSCHMIDT, Members of the Board, concurred in the above supplementation of record.

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<sup>5</sup>See, e.g., Administrator v. Langley, 3 N.T.S.B. 1218 (1980), citing Airline Pilots Association, International v. Quesada, 276 F. 2d 892 (2nd Cir. 1960), cert. denied, 366 U.S. 962 (1961). Cf., Watson v. NTSB and FAA, 513 F. 2d 1081 (9th Cir. 1975).

<sup>6</sup> Respondent made no claim before the Board as to the validity of the procedures for making and disseminating sanction guidelines within the Administration, nor has he argued that these guidelines might be capable of escaping review if not tested before us. Consequently, we will not offer an opinion on these matters.