

SERVED: March 20, 1992

NTSB Order No. EA-3517

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 4th day of March, 1992

BARRY LAMBERT HARRIS,
Acting Administrator,
Federal Aviation Administration,

Complainant,

v.

Docket SE-9265
SE-10431

ROBERT L. FRIES
and CHARLES W. LONG,

Respondents.

OPINION AND ORDER

Respondents have appealed from an initial decision of Administrative Law Judge Jimmy N. Coffman, issued orally at the conclusion of a hearing held on October 4, 1989.¹ By that decision, the law judge affirmed the Administrator's determination that respondents had violated section 91.9 of

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

the Federal Aviation Regulations ("FAR," 14 C.F.R. Part 91)² during a flight from Traverse City to Detroit, Michigan, on December 18, 1986.³ In addition, the law judge sustained the sanctions that had been ordered by the Administrator' for such alleged FAR section 91.9 violations.⁴

In connection with their appeals, both respondents contend that the law judge erred in denying motions for a continuance which their attorneys submitted in advance of the hearing, and they have asserted that the law judge's denials of their motions were arbitrary and deprived them of an opportunity to present their defenses to the Administrator's allegations. In addition,

²FAR § 91.9 provides as follows:

" § 91.9 Careless or reckless operation.

No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another."

³On that flight, respondent Fries was the pilot-in-command and respondent Long was the first officer. The Administrator's assertion that respondents operated their aircraft carelessly or recklessly stems from an allegation that they failed to activate the aircraft's deicing system in a timely manner during its landing approach.

⁴With respect to respondent Fries, the Administrator waived the imposition of a sanction under the Aviation Safety Reporting Program (ASRP). As to respondent Long, a 31-day suspension (45 days, with 14 days thereof to run concurrently with a company-imposed suspension) had been ordered. At the hearing, counsel for the Administrator related that, while respondent Long had filed the necessary report to qualify for a waiver of sanction under the ASRP, "he ha[d] not at this point elected to take advantage of" that program. Tr. 25. On that basis, the law judge upheld the 31-day suspension of his airman certificate. Id. 26. The meaning of counsel's reference to an "election" under the ASRP is, however, unclear, especially in view of respondent Long's answer, in which he relies upon his filing of a report in compliance with the ASRP as an affirmative defense to the order of suspension.

respondents maintain that the law judge exhibited bias against them, and contend that this is illustrated by comments he made at the hearing, which were highly critical of their attorneys' attempts to enlist the aid of the Board's General Counsel and Chief Administrative Law Judge in seeking to secure a continuance of the hearing. Respondents' bias allegation also points to remarks made by the law judge as to the desirability of expeditious disposition of certificate actions together with his observation that respondents are permitted to fly during the pendency of their certificate enforcement cases. Finally, respondents maintain that the Administrator did not present sufficient evidence at the hearing to support the affirmance of his orders.⁵

A review of the record in this case discloses that an order of suspension was issued by the Administrator against respondent Fries in April 1988. As a result of the retirement of the law judge to whom respondent Fries' case was initially assigned, it was reassigned to Law Judge Coffman in early July 1989. On July 17, 1989, a hearing in the matter was scheduled for October 4 in Detroit. Thereafter, on July 28, counsel for respondent Fries filed a motion for a continuance, citing a conflict with a pending matter. That motion was denied on August 2, on the basis

⁵The Administrator has filed a reply brief, in which he takes no position with respect to respondents' arguments concerning the denial of the motions for a continuance and disputes respondent's assertions regarding the alleged bias of the law judge and the sufficiency of the evidence presented at the hearing in support of his charges.

that counsel "has received more than sufficient notice of the hearing," and that the case had already been pending for more than a year at that time.

Meanwhile, on July 27, 1989, the Administrator issued an order of suspension against respondent Long, who appealed that order several days later. On August 7, the Administrator filed a motion for consolidation of the actions against respondents Long and Fries. Respondent Fries' attorney then filed a second motion for a continuance on August 11, in which he again noted the existence of a conflict on October 4 and represented that he needed time to coordinate matters relevant to the case with counsel for respondent Long.⁶ Additionally, respondent Fries' counsel noted that respondent Long's attorney had indicated to him that he also had a pending matter scheduled for October 4. On August 15, the law judge issued an order granting the Administrator's motion for consolidation and confirming the October 4 hearing date without commenting on the merits of the pending motion for a continuance.

Thereafter, on September 8, 1989, respondent Long, through counsel, filed a motion for a continuance. In support of the motion, respondent Long's attorney noted that he had a prior commitment to represent another pilot in a proceeding before the Air Pilots' System Board in Pittsburgh, Pennsylvania during the

⁶Both that motion and respondent Fries' initial motion for a continuance were unopposed by the Administrator.

entire week of October 2-6, 1989.⁷ That motion was unopposed by the Administrator and was supported by respondent Fries--indeed, respondent Fries submitted yet another motion for a continuance on September 15, again citing the unavailability of counsel for respondents on the scheduled hearing date. Both motions were subsequently denied by the law judge without comment in late September 1989.

The hearing then proceeded as scheduled on October 4, in the absence of respondents and their attorneys. At the hearing, the law judge noted this, and, in a "statement for the record," related that he believed that he had a mandate from the Board to hear certificate enforcement cases as expeditiously as possible in order to help reduce a backlog of pending cases.⁸ The law judge also indicated that he had considered the amount of time he anticipated this case would take in setting his docket for the week, and noted that he would not be making any further trips to Detroit to hear cases during the remainder of 1989.⁹

⁷In connection with respondent Long's appeal, said attorney submitted an affidavit in which he explained that the matter before the Air Pilots' System Board was one of long standing and involved a number of participants, all of whom had adjusted their schedules in order to be able to participate in the October 2-6 proceedings. He also explained that he had been away from his office on business during the entire month of August 1989, and first became aware of the October 4 hearing date upon his return in early September, at which point he immediately filed his motion for a continuance. In that affidavit, it was also noted that no other attorneys associated with his office were available to represent respondent Long on October 4, 1989.

⁸See Tr. 4-5.

⁹Id. 6.

Upon reviewing the briefs of the parties and the record in its entirety, the Board believes that there was no sound basis for the law judge's denial of a continuance. In this regard, we have observed that counsel for both respondents furnished what appeared to be legitimate reasons for seeking a continuance and that they did so well in advance of the scheduled hearing date. We have also noted the Administrator's lack of opposition to respondents' motions, which suggests that he would not have been inconvenienced by a continuance.

Although the adjudication of the Administrator's allegations against respondent Fries had been pending for more than one year at the time he filed his initial motion for a continuance on July 28, 1989, he had only been informed 11 days earlier that a hearing was scheduled for October 4. In view of the fact that the hearing was less than three months away at that time, it was not to be unexpected that his counsel might have an unavoidable conflict on that date, and we believe that the law judge should have addressed that matter in considering respondent Fries' initial motion for a continuance. In our judgment, by failing to do so, the law judge acted arbitrarily. We are also of the opinion that respondent Fries raised legitimate concerns about the coordination of his case with that of respondent Long after consolidation was ordered, and we note that the law judge failed to address such concerns in denying respondent Fries' subsequent motions for a continuance. Thus, such denials also appear to be arbitrary. With respect to respondent Long, the Board notes that

the scheduled hearing was only about seven weeks away at the time of consolidation. By relating that he had an unavoidable conflict on the hearing date, respondent Long's counsel presented a valid basis for his continuance request, which should have been--but was not--considered by the law judge in ruling on his motion. Consequently, we believe that the law judge acted arbitrarily in denying respondent Long's motion for a continuance. The reference made by the law judge at the hearing to a backlog of enforcement cases is inappropriate here, for the existence of a backlog cannot serve as a legitimate justification for the disposition of such cases without regard to the rights and convenience of the parties. While we have held that the disposition of a motion for a continuance¹⁰ and the holding of a hearing in the absence of a party¹¹ are matters left to a law judge's discretion, such discretion must be exercised reasonably. In this case, we find that the law judge abused his discretion in denying respondents' motions and in proceeding with the hearing in their absence, and we must, therefore, reverse the law judge on this point and remand the case for further adjudicatory action.¹²

¹⁰Administrator v. Hawke, 1 NTSB 7, 9 (1967).

¹¹Administrator v. Shaw, 5 NTSB 1094, 1095 (1986).

¹²Although respondents have maintained that the Administrator failed to present sufficient evidence to support his allegations against them at the hearing and have suggested that the case should, therefore, be dismissed, it appears that a prima facie showing of the violations alleged was made. Accordingly, dismissal of the case is inappropriate.

With respect to respondents' claim that the law judge exhibited bias against them at the hearing, we note the criticism which the law judge directed toward their attorneys for what he perceived as their going outside "normal channels" in attempting to obtain a continuance of the hearing.¹³ However, such criticism of counsel's conduct does not demonstrate that the law judge has prejudged the case or is incapable of arriving at an impartial decision on the merits of the Administrator's allegations. Similarly, the Board does not perceive that the law judge has exhibited bias against respondents by merely observing that the expeditious disposition of certificate enforcement actions is desirable in light of the interests of air safety and that respondents continue to fly during the pendency of their appeals¹⁴

¹³See Tr. 5-6.

¹⁴See id. 4-5.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondents' appeals are granted as to their assertion that the law judge erred in denying their motions for a continuance and in holding the hearing in their absence and in the absence of their counsel;
2. Respondents' appeals are denied in all other respects;
3. The initial decision is reversed; and
4. The case is remanded to the law judge for further adjudicatory action.

COUGHLIN, Acting Chairman, LAUBER, KOLSTAD, HART, and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.