SERVED: July 24, 2002

NTSB Order No. EA-4987

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 l8th day of July, 2002

JANE F. GARVEY, Administrator, Federal Aviation Administration, Complainant, v. DONALD H. McCLAIN, Respondent.	Docket SE-15942

ORDER DENYING RECONSIDERATION

Respondent has petitioned for reconsideration of Board Order No. EA-4954, served February 20, 2002. The Administrator has replied in opposition. We deny the petition.

The petition establishes no error in our original decision, presents no valid basis for reconsidering it, and offers no compelling reason to order a new hearing. To the extent that respondent seeks to raise new factual claims, he already has had the opportunity to present any and all evidence he considered probative. He may not for the first time raise such issues on petition for reconsideration without, among other things, proof that they could not have been discovered by the exercise of due diligence prior to the date the case was submitted to the Board.[1] 49 C.F.R. § 821.50.

[1]A petition based on new matter must contain affidavits of prospective witnesses and an explanation of why the information could not have been discovered earlier through the exercise of due diligence. 49 C.F.R. § 821.50(c).

ACCORDINGLY, IT IS ORDERED THAT:

Respondent’s request for reconsideration is denied.

BLAKEY, Chairman, CARMODY, Vice Chairman, and HAMMERSCHMIDT, GOGLIA, and BLACK, Members of the Board, concurred in the above order. Member GOGLIA submitted the following concurring statement.

Petitioner claims that evidence exonerating him, namely audio re-recordings and CDR data plot, was not presented until after the administrative hearing had begun and that Respondent did not have an opportunity to review and assess that information prior to the hearing. An early exchange of full information facilitates resolution of cases and affords individuals a fair hearing. Late responses preclude opportunities for settlement and ultimately waste limited resources.

I am concerned that the Administrator does not deny or offer any facts to dispute that “the audio re-recordings were unusable copies that had been edited and required special listening equipment, available only to the FAA, to replay that other evidence was illegible,” and that evidence was withheld until the hearing. The Administrator’s reliance on the arguments of “to late” and “no evidence” is disconcerting.