

SERVED: May 6, 2004

NTSB Order No. EA-5089

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 5th day of May, 2004

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MARION C. BLAKEY,	)	
Administrator,	)	
Federal Aviation Administration,	)	
	)	
Complainant,	)	
	)	Docket SE-17061
v.	)	
	)	
Air East Management, Ltd.	)	
d/b/a/ Air East,	)	
	)	
Respondent.	)	
_____	)	

**OPINION AND ORDER**

Respondent Air East has appealed from the oral initial decision of Administrative Law Judge William E. Fowler, Jr., issued on April 8, 2004, following an evidentiary hearing.<sup>1</sup> Respondent has replied in opposition. We deny the appeal.

Respondent is a small Part 135 operator with its principal place of business in New York. Following the crash of its Lear 35 in August 2003, a crash that resulted in the death of both

<sup>1</sup> The initial decision, an excerpt from the transcript, is attached.

pilots, the FAA undertook a special inspection of Air East's compliance with the Federal Aviation Regulations (FAR). A team of three inspectors visited Air East's office for two days and continued to study the records gathered there and produced later.<sup>2</sup> The inspection resulted in an emergency order of revocation, issued March 8, 2004.

Briefly summarized, at the hearing before the law judge the Administrator offered the testimony of various Air East employees (mostly former employees) to the effect that the *modus operandi* at Air East was not to log aircraft discrepancies, but to report them verbally to the Chief Pilot and owner, Mike Tarascio, and/or Kent Peterson, the Director of Maintenance, and that pilots were told directly not to log discrepancies. A number of witnesses testified to defects in aircraft that went uncorrected for long periods of time, including an oxygen leak in a jet aircraft alluded to by the law judge in his initial decision, and to the absolute lack of logbooks in aircraft.

The FAA inspection team testified to an unorganized and noncompliant system of aircraft and pilot records and an overburdened management where, despite ostensibly three managers, Mike Tarascio performed all functions and maintained total control over all aspects of the operation. The Administrator

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<sup>2</sup> We reject respondent's continuing allegation that the FAA's evidence and inspectors may not be trusted because they were only at the location for two days. It is obvious from the record and testimony that they have spent considerably more time on this investigation than the two days they spent at Air East's headquarters.

adduced testimony that respondent maintained a computerized system of records, but without thorough paper back up and without the required FAA approval for the computerized system. The Administrator also adduced evidence that the paper records did not comply with the format set forth in respondent's General Operations Manual.

Respondent's defense, generally, was designed to show that Mike Tarascio and Air East had a good reputation, all aircraft were properly maintained, and that none were operated in an unairworthy or unsafe condition. Respondent claimed that the former employee witnesses were unreliable, incredible, and had other agendas, and that any failures on the pilots' part to log discrepancies could not be laid at Air East's doorstep. Two of Air East's regularly assigned FAA inspectors testified that they had never found a violation of the cited regulations at Air East.

The law judge affirmed in most part the Administrator's emergency order of revocation. The law judge found that respondent had violated FAR sections 135.25(a)(2),<sup>3</sup> 135.63(a)(4)(iii), (iv), and (vii),<sup>4</sup> 39.7,<sup>5</sup>

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<sup>3</sup> This section requires that certificate holders ensure that aircraft they operate are in airworthy condition.

<sup>4</sup> These sections require that certificate holders maintain and make available for inspection certain specified pilot records.

<sup>5</sup> This section requires operations consistent with Airworthiness Directives. By motion filed April 10, 2004, respondent requests correction of what it sees as an inconsistency in the law judge's decision. Specifically, respondent notes that the law judge found insufficient evidence to support those aspects of count IV of the complaint relating to compliance with Airworthiness Directives (that is, paragraphs c, d, e, f, h, and i (paragraph g (continued...))

91.13(a),<sup>6</sup> 91.403(c),<sup>7</sup> 91.417(a)(2)(i), 91.417(a)(2)(v),<sup>8</sup> and 91.7(a).<sup>9</sup> Finally, the law judge dismissed allegations that respondent violated FAR sections 119.5(1), 119.69(a), and 91.417(a)(2)(ii).<sup>10</sup>

On appeal, respondent raises three (styled as two) issues: did the content of the law judge's initial decision comport with the requirements of the Board's rules; did the Administrator prove her allegations by a preponderance of the reliable, probative, and substantial evidence; and did the law judge err in declining to admit documents offered by respondent.<sup>11</sup> Respondent

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having been withdrawn by the Administrator)). The law judge found that the allegations in those paragraphs had not been substantiated. However, at the conclusion of his ruling he affirmed the § 39.7 allegation, which was based solely on the count IV claims. The Administrator has not replied and, despite the law judge's ruling of April 16, 2004, it appears respondent is correct. We will modify the decision accordingly and dismiss the § 39.7 charge. But see note 12 infra.

<sup>6</sup> This section prohibits careless and reckless operations that may endanger the life or property of others. Carelessness, not recklessness, was found here.

<sup>7</sup> This section requires compliance with manufacturers' instructions and limitations regarding parts replacement times and inspection intervals, among other things.

<sup>8</sup> This section requires that certain records be kept regarding Airworthiness Directives.

<sup>9</sup> This section states that no person may operate an aircraft that is in an unairworthy condition.

<sup>10</sup> We take no position here regarding these rulings. The Administrator has not appealed these dismissals and, pursuant to our rules of practice, they have no precedential effect.

<sup>11</sup> Respondent's appeal includes discussion of and challenge to the Administrator's claim that respondent's Director of Operations did not perform his functions and, therefore, respondent violated section 119.69(a). However, that is one of

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has failed to demonstrate that any of these matters warrants reversal of the law judge's decision and dismissal of the emergency order of revocation. We find any error in the law judge's decision to be harmless.

The Board's rules of practice, as general administrative law demands, require that the law judge include in his decision findings and conclusions on all material issues of fact, of law, and witness credibility. Surely, administrative law intends the law judge to create a thorough record of the reasons for his rulings. It is especially valuable and important for him to explain his credibility judgments. However, the fact that a law judge may not always do so, and that the reviewing entity may be required to fill in the interstices, does not require either reversing the law judge or, as respondent suggests, ignoring the law judge's decision.<sup>12</sup>

While in some cases what respondent suggests might be the best recourse, here we do not find it necessary or appropriate. These emergency proceedings provide scant time for Board adjudication. Discovery, a hearing before a law judge, an initial decision, appeal(s) to the Board, a decision by the

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(continued...)

the charges that the law judge dismissed and we will not discuss it further.

<sup>12</sup> Air East "submits that this case be decided by the Board, de novo, as the ultimate finder of fact." Appeal at unnumbered page 6. Later, respondent states that the Board should "review the record without being bound by the law judge's generalized findings." Appeal at footnote 5, unnumbered page 7. As discussed *infra*, we see no reason or basis to ignore the law

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Board, and service of that decision must all be completed within 60 days. Surely it would have been preferable for him to have thoroughly discussed on the record all two days of evidence, and provided his reasons for accepting or rejecting each piece of evidence and for believing or disbelieving each witness. Nevertheless, respondent does not point to any particularized or specific harm it has suffered as a result of the law judge's use of the Administrator's order/complaint as the basis for his decision, or his generalized findings, other than that respondent disagrees with them.

The law judge's findings of fact, albeit brief, clearly reflect his conclusions regarding the evidence, and his credibility findings as to the witnesses are implicit in those findings. As he specifically noted, he found overwhelming evidence both in quality and quantity to support those instances where he affirmed the Administrator's charges.

We agree.<sup>13</sup> The record shows a pattern of regulatory noncompliance that should not be tolerated. Regardless of whether Air East was flouting the regulations to save money or simply thought it had other/better/faster/easier ways of doing things -- ways different from those set forth in its manuals -- the Administrator is entitled to insist on strict adherence to

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judge's decision.

<sup>13</sup> Again, this is not to say that, had we considered the evidence *de novo*, we would not have found it sufficient to support all the Administrator's charges.

her regulations and company procedures approved by the FAA. Certificate holders are not authorized to depart from approved procedures, even if the certificate holders believe the changes are an improvement.<sup>14</sup>

We are unconvinced that we should substitute our judgment for that of the law judge on the matter of witness credibility. It is a very difficult burden to demonstrate that testimony is incredible. Here, while there are concerns that various of the Administrator's witnesses may have been biased against respondent, the law judge observed those witnesses and nonetheless accepted their testimony as truthful. Moreover, documentary evidence in the record supports testimonial evidence that flight crews were told, obviously improperly and with serious safety implications, not to log aircraft discrepancies. See Exhibits A-48 and A-35 (one aircraft had only two logged discrepancies over a considerable period of time), and Exhibit A-44 (as only one example of the many flight logs introduced that had no discrepancies listed despite the space on them for discrepancies to be listed and corrective action to be indicated).

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<sup>14</sup> As an example, it may be that respondent's computerized tracking systems are better than paper records, but the FAA requires that computer systems be preapproved, which respondent's was not, and requires complete paper backup, which respondent did not have. Proper record keeping is the heart of FAA safety compliance, and the Administrator is entitled to insist on strict attention to record keeping details. Respondent's suggestion that it had no obligation to use the forms included in its manual is frivolous.

Lest there be any question: failing to log discrepancies and directing pilots not to do so are such serious violations that this pattern of conduct alone would be sufficient in our view to justify emergency revocation. Not only is there no record, over time, of the airworthiness of the aircraft, but follow-on crews have no way of knowing if prior discrepancies have been corrected. In the case of Air East, it appears that the situation may have been even worse. Airworthiness items were often not fixed, respondent substituting its judgment for that of the FAA as to what was safe and what was not.<sup>15</sup>

We reject respondent's contention that the testimony of the Administrator's inspection team, whose experience was with Part 121 operations, should not be relied upon. We also reject the suggestion that we should place more weight on the testimony of respondent's regular Principal Avionics Inspector and Principal Operations Inspector whose testimony respondent repeatedly cites in its appeal, than on that of the special inspection team. Both testified that, while they had some concerns with respondent's operations, they had found no regulatory violations. As noted above, the evidence in this case is straightforward and overwhelming that respondent was in serious noncompliance with much of the Administrator's record keeping program.

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<sup>15</sup> We hold the same opinion regarding pilot and time in service records. For example, the pilot record keeping system approved in the operations manual allows immediate determination of a pilot's qualifications and status, a critical requirement for a passenger-carrying operation.

Finally, respondent claims that it was error for the law judge to decline to accept into the record Exhibit R-46. We find no error. The Administrator objected to the exhibit on the grounds that it contained newly created pilot records -- records that had not been made available to the inspection team when they were at Air East, despite their repeated requests for all pilot records. On appeal, respondent does not address these claims, which clearly are critical both to procedural due process and credibility issues.

**ACCORDINGLY, IT IS ORDERED THAT:**

1. Respondent's appeal is denied; and
2. The initial decision and the emergency order of revocation are affirmed.

ENGLEMAN CONNERS, Chairman, ROSENKER, Vice Chairman, and GOGLIA, CARMODY, and HEALING, Members of the Board, concurred in the above opinion and order.