

SERVED: December 6, 2007

NTSB Order No. EA-5345

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 4<sup>th</sup> day of December, 2007

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ROBERT A. STURGELL,		)	
Acting Administrator,		)	
Federal Aviation Administration,		)	
		)	
Complainant,		)	
		)	Docket SE-17957
v.		)	
		)	
DÍAZ AVIATION CORPORATION/		)	
AIR PUERTO RICO, INC.		)	
d/b/a BORINQUEN AIR,		)	
		)	
Respondent.		)	
		)	
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**OPINION AND ORDER**

Respondent<sup>1</sup> has appealed from the oral initial decision of Administrative Law Judge William A. Pope, II, issued in this proceeding on August 2, 2007.<sup>2</sup> By that decision, the law judge

<sup>1</sup> The owner of Díaz Aviation is Sixto Díaz Saldaña, an attorney. Along with his daughter, who also is an attorney, he represented himself in this matter.

<sup>2</sup> A copy of the initial decision, an excerpt from the hearing transcript, is attached.

affirmed the Administrator's emergency suspension of respondent's air carrier certificate, said suspension being in effect until a training program is approved and respondent's pilots receive the required training, testing, and check rides.<sup>3</sup> We deny respondent's appeal.

The February 12, 2007 emergency order of suspension alleged that:

1. At all times material herein Air Puerto Rico, Inc., (hereafter Air Puerto Rico, "you" or "your") was and is now the holder of Air Carrier Certificate No. FITA906D.
2. Your application was approved for and your operations specifications provided for an operation utilizing two or more pilots.
3. On or about March 21, 2006, you rescinded your approved pilot training program.
4. You have not conducted any pilot training pursuant to an approved pilot training program subsequent to March 21, 2006.
5. No check rides conducted pursuant to Federal Aviation Regulation (FAR) sections 135.293, 135.297, or 135.299 were given to any of your pilots pursuant to an approved training manual for your company subsequent to March 21, 2006.
6. No one qualified to act as a pilot for Air Puerto Rico has received a proficiency or currency check ride in accordance with FAR sections 135.293, 135.297, or 135.299 subsequent to March 21, 2006.
7. Your Chief Pilot was not qualified to serve as pilot in command of any of your aircraft in that he has not received proficiency and currency testing and check rides in accordance with Federal Aviation Regulation sections 135.293, 135.297, and 135.299 subsequent to July 29, 2004, his currency having, then, expired on July 30, 2005.

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<sup>3</sup> Respondent waived the expedited procedures applicable to emergency suspension proceedings under the Board's rules.

8. You presently do not have a person qualified to be your Chief Pilot.

9. You presently do not have an approved training program.

10. As a result, you violated the following Federal Aviation Regulations:

a. Section 135.341(a) in that each certificate holder, other than one who uses only one pilot in the certificate holder's operations, shall establish and maintain an approved pilot training program ... that is appropriate to the operations to which each pilot ... is to be assigned, and will ensure that they are adequately trained to meet the applicable knowledge and practical testing requirements of 135.293 through 135.301.

b. Section 119.69(a)(2) in that each certificate holder must have sufficient qualified management and technical persons to ensure the safety of its operations. Except for a certificate holder using only one pilot in its operations, the certificate holder must have qualified personnel serving in the following or equivalent positions: chief pilot.

c. Section 119.71(d) in that to serve as Chief Pilot under § 119.69(a) for a certificate holder that only conducts operations for which the pilot in command is required to hold a commercial pilot certificate, a person must hold at least a commercial pilot certificate. If an instrument rating is required for any pilot in command for that certificate holder, the Chief Pilot must also hold an instrument rating. The Chief Pilot must be qualified to serve as pilot in command in at least one aircraft used in the certificate holder's operation. In addition, the Chief Pilot must: (1) In the case of a person becoming a Chief Pilot for the first time ever, have at least 3 years experience, within the past 6 years, as pilot in command of an aircraft operated under part 121 or part 135 of this chapter. (2) In the case of a person with previous experience as a Chief Pilot, have at least 3 years experience as pilot in command of an aircraft operated under part 121 or part 135 of this chapter.

After a 2-day evidentiary hearing, the law judge issued a well-reasoned oral initial decision, in which he addressed each

of the allegations in the complaint and summarized the relevant evidence introduced by each party in support of their positions. We adopt that discussion as our own and thus need not repeat it here. The law judge found that the Administrator proved the factual allegations. The law judge affirmed all of the alleged regulatory violations and found that these violations established a lack of qualifications warranting suspension of respondent's air carrier certificate.

At the hearing, the Administrator presented eight exhibits and one witness, Ariel Alvarez, an FAA aviation safety inspector, who was respondent's principal operations inspector. Respondent presented ten exhibits and two witnesses: Mr. Díaz and Arnaldo González Rivera, a pilot who worked for Díaz Aviation.

On appeal, respondent argues that the law judge "erred when he did not give sufficient credit to the testimony of" Mr. Díaz. Respondent's Appeal Br. at 2. Respondent also contends the law judge erred when he determined that Mr. Alvarez was a credible witness. Id. at 3. The Board has long held that law judges are in the best position to evaluate witnesses' credibility.<sup>4</sup> We have also held that credibility determinations are "within the exclusive province of the law judge," unless the law judge has made the determinations "in an arbitrary or capricious manner."<sup>5</sup>

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<sup>4</sup> See Administrator v. Hodges, NTSB Order No. EA-5303 at 11 (2007), citing Administrator v. Taylor, NTSB Order No. EA-4509 (1996).

<sup>5</sup> See Administrator v. Smith, 5 NTSB 1560, 1563 (1986); Hodges, supra at 11; Administrator v. Sanders, 4 NTSB 1062 (1983).

The Board is free to reject testimony that a law judge has accepted when the Board finds that the testimony is inherently incredible or inconsistent with the overwhelming weight of the evidence.<sup>6</sup> Where parties challenge a law judge's credibility determinations, the Board will not reverse the determinations unless they are arbitrary, capricious, or clearly erroneous. Smith, supra at 1563. Respondent has not established that the law judge's credibility assessments were arbitrary or capricious. We affirm the law judge's credibility findings, and find that respondent's contentions regarding Mr. Díaz's testimony and Mr. Alvarez's testimony are without merit.

Next, respondent contends that the law judge "erred when he determined that Mr. Iván Figueroa Jiménez could not testify." Respondent's Appeal Br. at 2. The Administrator argues that the law judge "correctly ruled that the witness's testimony would be redundant and repetitive" and that, given "the proffer of evidence," the law judge's "only recourse was to limit the length of the hearing by excluding this witness." Administrator's Reply Br. at 5. Mr. Díaz apparently represented Mr. Figueroa in another enforcement action. See Tr. at 164-65. Respondent wanted to present testimony from Mr. Figueroa to show Mr. Alvarez's "bad faith" in the other case. See Tr. at 165. Respondent's entire argument on this assignment of error is that "Mr. Figueroa was to testify about Mr. Alvarez [sic] acts under

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<sup>6</sup> See Administrator v. Blossom, 7 NTSB 76, 77 (1990).

color of authority, contrary to many laws and the very [sic] FAA's regulations, against DAC [Díaz Aviation Corporation] and against himself; he was not able to give testimony against Mr. Alvarez' credibility or about his illegal acts."

Respondent's Appeal Br. at 2. The law judge ruled that Mr. Figueroa's testimony was:

too remote and too collateral for me to draw any conclusions as to what may have happened with respect to some animosity that I think you're saying that Inspector Alvarez has towards your father. I'm simply exercising my discretion in saying it's too remote to warrant the expenditure of the time in this proceeding to go into.

Tr. at 168. Our review of the record leads us to conclude that respondent has not shown that the law judge abused his discretion in exercising his legitimate control over the admissibility of relevant evidence, scope of questioning, or confining argument to issues that were germane to the complaint. Determinations of relevance and admissibility of proffered evidence rest in the sound discretion of the law judge.<sup>7</sup>

Similarly, respondent alleges the law judge erred when he excluded respondent's 1981 training program. Respondent's Appeal Br. at 3. The Administrator argues that the law judge found that respondent's 1981 training program had been superceded and was, therefore, immaterial and properly excluded. Administrator's Reply Br. at 5. Furthermore, as the Administrator noted, the

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<sup>7</sup> See Administrator v. Exousia, Inc., NTSB Order No. EA-5319 at n.9 (2007), citing Administrator v. Santana, NTSB Order No. EA-5152 at 3 (2005); and 49 C.F.R. § 821.35(b).

1981 training program was:

in a shambles, with certain pages marked as 'approved' and others not having any markings. Inspector Alvarez opined that [respondent] may have substituted pages without having them approved by the FAA. This all pointed to the need for a revised, current training manual.

Id. Again, determinations of relevance and admissibility of evidence are in the discretion of the law judge. Respondent has failed to show that the law judge abused his discretion in exercising control over admissibility of relevant evidence or the scope of questioning to issues he considered relevant.<sup>8</sup>

Respondent appears<sup>9</sup> to argue that the law judge erred by not finding that respondent had a chief pilot who was current in respondent's aircraft. The Administrator, apparently in reply to this alleged error, pointed out that respondent offered no evidence that respondent had a chief pilot who was current in its aircraft. Administrator's Reply Br. at 4. We have reviewed the record, and we find no evidence that any pilot in respondent's employ was current in any of its aircraft.

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<sup>8</sup> See Exousia, supra, and 49 C.F.R. § 821.35(b).

<sup>9</sup> Respondent's claim is not clear. Respondent states that the law judge:

erred by not accepting that other persons in the employ of Respondent, witness Mr. Arnaldo González among them, who had been appointed Deputy Chief Pilot to act in lieu of witness Mr. Sixto Díaz Saldaña, titular Chief Pilot, who was aware of his own shortcomings by not having been able to comply with 14 CFR 135.293 and 14 CFR 135.299 due to Mr. Alvarez's refusal to give his due check rides.

Respondent's Appeal Br. at 4.

Finally, respondent argues that the law judge erred in that he "did not consider our position that the" suspension was a "vindictive reply" to a lawsuit filed by respondent "against FAA Inspectors Ariel Alvarez and Eliecer Nieves and the Federal Aviation Administration." Respondent's Appeal Br. at 4. As the Administrator states in his reply, respondent "did not ... develop any testimony at the hearing to support this position." Administrator's Reply Br. at 6. We find no evidence supporting respondent's contention.

Thus, none of respondent's arguments provides any reason to overturn the law judge's decision upholding the suspension of respondent's certificate.

**ACCORDINGLY, IT IS ORDERED THAT:**

1. Respondent's appeal is denied; and
2. The law judge's decision, affirming the Administrator's emergency order of suspension, is affirmed.

ROSENKER, Chairman, SUMWALT, Vice Chairman, and HERSMAN, HIGGINS, and CHEALANDER, Members of the Board, concurred in the above opinion and order.