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 9th day of October 1980.

LANGHORNE M. BOND,
Administrator, Federal Aviation
Administration,
Complainant,

vs.

DONALD H. BRANDY,
Respondent.

Docket SE-4587

OPINION AND ORDER

Respondent has appealed from the oral initial decision
of Administrative Law Judge John E. Faulk issued at the
conclusion of a public hearing in this docket on May 28,
1980. The law judge affirmed an order of the Administrator
suspending respondent's airline transport pilot certificate
for his failure to comply with an air traffic control
instruction and the consequent violation of sections

1/ An excerpt from the hearing transcript containing the
Initial decision is attached.
91.75(b) and 91.87(h) of the Federal Aviation Regulations (FAR). We find no error in the law judge's resolution of the issues in this case and will therefore affirm the initial decision in all respects. The findings of the

2/ Sections 91.75(b) and 91.87(h) provide, in pertinent part, as follows:

"Sec. 91.75 Compliance with ATC clearances and instructions.

(b) Except in an emergency, no person may, in an area in which air traffic control is exercised, operate an aircraft contrary to an ATC instruction.

"Sec. 91.87 Operation at airports with operating control towers.

(h) Clearances required. No person may, at any airport with an operating control tower, operate an aircraft on a runway or taxiway, or takeoff or land an aircraft, unless an appropriate clearance is received from ATC. A clearance to "taxi to" the takeoff runway assigned to the aircraft is not a clearance to cross that assigned takeoff runway, or to taxi on that runway at any point, but is a clearance to cross other runways that intersect the taxi route to that assigned takeoff runway. A clearance to "taxi to" any point other than an assigned takeoff runway is a clearance to cross all runways that intersect the taxi route to that point."

Respondent's conduct in violation of these provisions was further alleged to constitute a violation of Section 91.9, which prohibits the operation of an aircraft "in a careless or reckless manner so as to endanger the life or property of another."

3/ The law judge reduced the period of suspension ordered by the Administrator from 45 to 30 days. The Administrator has not appealed this modification of sanction.
law judge are accordingly adopted as our own.

The facts underlying the charges against respondent are relatively simple but require some recitation to demonstrate the basis for our decision on this appeal. On the morning of August 6, 1979, respondent, an air taxi pilot for Royal Hawaiian Air service, radioed the tower at the Ke-Ahole Airport (Kona, Hawaii) that he, was "taxiing out" from the ramp area (Comp. Exh. 4 at 3). He was advised to taxi to the approach end of runway 17. To follow that instruction, respondent would have to make a right turn onto taxiway Alpha, which he was then facing and just short of reaching from the ramp. Taxiway Alpha runs parallel to runway 17. Another taxiway, Echo, intersects both runway 17 and taxiway Alpha at points roughly 1/4 to 1/3 of the distance from the approach end of runway 17. It was not uncommon at this airport for pilots to be cleared to take off on runway 17 after entering the runway via taxiway Echo. When respondent received the tower instruction, he was almost directly across from, and heading toward, the point at which taxiway Echo meets taxiway Alpha. As respondent preferred to use taxiway Echo, he asked the controller whether the intersection

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4/ Taxiway Echo is curved, or doglegged, such that it meets taxiway Alpha perpendicularly and then bends midway down its length toward the departure end of runway 17 at approximately a 45 degree angle.
of taxiway Echo and runway 17 was closed. The controller responded that it was not. Respondent then transmitted that he preferred to use the intersection. The controller stated that "traffic will be landing and turning off on that intersection", and advised respondent to "turn taxi approach end" (id. at 4). Respondent continued, despite this transmission, to taxi across taxiway Alpha toward Echo. He suggested to the controller that the incoming traffic be directed to exit the runway from a taxiway further down toward the departure end, and he again stated his preference for the intersection. When the controller again refused, respondent transmitted that he was ready for take off. The controller cleared him for take off, and respondent did so, employing the intersection entry via taxiway Echo.\(^5\)

At the hearing respondent maintained, as he maintains on this appeal, that when he advised the tower that he was ready for take off he had not yet entered taxiway Echo, but had stopped short of entering it on taxiway Alpha to await a clearance. The controller on duty at the time, and another controller in the tower who was preparing to go on duty and who observed this incident, both testified that respondent had already entered taxiway Echo when he requested a take off

\(^{5}\) The entire exchange of transmissions between respondent and the controller consumed less than one minute.
clearance. The law judge clearly resolved this conflict in testimony against the respondent (see Tr. 61), and we have no reason to disturb that finding, which rests on a credibility determination within the exclusive province of the law judge.

The thrust of respondent's appeal is that the controller's refusal to allow him to use the intersection constituted either unnecessary conservatism in spacing departures and approaches or unreasonable conduct evidencing a purpose to inconvenience air taxi pilots such as respondent by forcing them without safety justification to take a more time-consuming course to the runway. In any event, respondent contends that the take off clearance he did receive represented a tacit approval of his use of taxiway Echo. We reject respondent's position.

When the controller cleared respondent for take off, he had already twice instructed respondent to use the approach end of runway 17 and had twice refused his requests to use taxiway Echo. Respondent made no indication, either through his radio transmissions or through the positioning of his aircraft, that he intended to comply with the controller's instructions. In these circumstances, the controller had ample justification for believing, as he testified, that respondent would disregard any further instruction that did not serve his preference for the intersection. The controller had incoming traffic which he wanted to exit from the runway
on the taxiway respondent was blocking. That he decided under these conditions to clear respondent for takeoff, and thereby avoid further discussion which could easily have become a confrontation, and, at the same time, free taxiway Echo for the incoming traffic, did not excuse respondent's prior disregard of the instructions to proceed to the approach end of the runway. Having willfully created a situation which the controller apparently, and justifiably, believed could be resolved only through acceding to respondent's insistent desire to use the intersection, respondent cannot now reasonably argue that the controller nevertheless could have expected him to comply with a third instruction to proceed to the approach end. It is also immaterial that adequate time did exist for respondent to take off from the intersection and for the incoming traffic to land without incident behind him. The issue before us here is not whether the air traffic controller exercised good or bad judgment in denying respondent the use of the intersection. It is not the pilot's prerogative to second-guess the tower on traffic control decisions, and, short of exigent circumstances not present here, pilots must comply with them. 6/ This is not to say that pilots cannot request different instructions or clearances when they believe them to be warranted or desirable. However, where the controller does not grant

6/ A pilot should undertake to have any grievance or disagreement he may have with air traffic control resolved through appropriate channels before or after a flight.
a change, a pilot would need a safety related justification for not complying with the instruction or clearance.

ACCORDINGLY, IT IS ORDERED THAT:

1. The respondent's appeal is denied;

2. The Administrator's order, as modified by the initial decision, and the initial decision are affirmed; and

3. The 30-day suspension of respondent's ATP certificate shall commence 30 days after service of this order.7/

KING, Chairman, DRIVER, Vice Chairman, McADAMS, GOLDMAN, and BURSLEY, Members of the Board, concurred in the above opinion and order.

7/ For purposes of this order, respondent must physically surrender his certificate to an appropriate representative of the Federal Aviation Administration, pursuant to section 61.19(f), FAR.
UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
Washington, D.C.

LANGHORE M. BOND, ADMINISTRATOR, FEDERAL AVIATION ADMINISTRATION, Complainant,

vs.

DONALD BRANDY, Respondent.

Docket No. SE-4587
Honolulu, Hawaii
First Circuit

JOSEPH R. STANDELL, ESQ., for the Administrator.
DONALD BRANDY, Pro Se.

INITIAL DECISION AND ORDER
John E. Faulk, Senior Judge, First Circuit.

As a result of an appeal filed by Mr. Donald H. Brandy, referred to hereinafter as the respondent, this matter came before the National Transportation Safety Board for hearing to determine whether or not the order of suspension dated February 25, 1980 issued on behalf of the Administrator of the Federal Aviation Administration by the Regional Counsel of the Pacific-Asia Region, whether or not the charges stated therein should be affirmed, modified or reversed.

In the complaint it is alleged that the respondent, on August 6, 1979, as pilot in command of civil aircraft
N3245 Quebec in an air taxi operation for Royal Hawaiian Air Service, did at Kona, Hawaii violate Sections 91.75(b), 91.87(h) and 91.9 of the Federal Aviation regulations by taxiing onto a taxiway without approval, operating contrary to instructions of ATC, and it is alleged that this is a careless act. The administrator seeks a 45-day suspension of all airman certificate now held by respondent.

Testimony was taken today, and the two controllers involved in the incident testified, as well as Mr. Brandy himself. There were several exhibits presented, Respondent's 1 and 2, and Administrator's 1 through 5. Respondent's 3 was not received since the matters herein were already part of the record, having been forwarded to the Board at an earlier time by the respondent. Administrator's 4 is a transcript of a tape of the ATC communications made during the course of this hearing.

Now, the issue involved here is whether or not the respondent was given permission to use a particular taxiway and whether or not he violated the instruction issued to him by ATC. The transcript shows at 1805.18 hours that the respondent was denied use of the intersection taxiway, that is to say taxiway Echo, for the purpose of take off.

There's no question about the fact that the respondent did depart that area, the ramp area, did communicate to ATC, to the tower, did request use of the intersection, but was
denied that request, and the reasons for that denial are
given by the controller as having aircraft coming in to land
who wanted to make a short-field landing and taxi off onto
runway Echo. It is also clear it is not unusual for an air
taxi or other aircraft to request an intersection take off
such as here, as requested by the respondent. It is also
equally clear that the permission to use that taxiway to
proceed as respondent did was not given. That's abundantly
clear from Administrator's 4, as well as the controller's
testimony, and I don't think the respondent contests that in
one sense, which I'll cover in a moment.

It is clear that the respondent was told by air
traffic control to use or to taxi down to the approach end
of the runway. That is, taxi down runway Alpha to the
approach end of one seven for take off. Now, respondent
contends that the approach flight or flights were some six
miles out, and that it was not necessary for ATC to give him
that instruction. He also contends through his testimony
and argument that he did not disobey an instruction and that
he never taxied out onto taxiway Echo until he was cleared
for take off.

It is true that respondent was -- and no question
about this -- clear for take off by the same controller after
he was given a denial or a negative to use the intersection
for take off. Respondent contends he never went onto taxiway
Echo.

Now, both controllers have testified, and looking at Administrator's 1 and 2, and particularly 2, you can get one view or idea of the view the controller could see. Well, there's no question it's not a complete panoramic view, it is a view of the area in question.

Both of these gentlemen in the tower are certainly in a position to observe and watch the progress of 45 Quebec, and their testimony is that to the effect that the respondent had taxied to the arm or a southwesterly bend in taxiway Echo at the time the critical transmissions were made. When cleared for take off, for example at 1805.30, these controllers testified they were in the bend of that particular taxiway, that is to say taxiway Echo. Respondent contends he was never on Echo until he was cleared for take off.

I make all credibility findings in favor of the administrator witness against the respondent. It's clear from the evidence, or I'm convinced from the evidence that the respondent intended to use the intersection take off. From his argument or his submissions, from the information he has furnished heretofore, and looking at Administrator's Exhibit No. 5, Paragraph 7, it's clear that the respondent because of the press of business, that is to say from his own statement that Royal Hawaiian Air Service is a scheduled air taxi service and makes many flights during the day and prefers
to use intersections, obviously to save time and fuel and
maintain schedules, the fact that respondent could see no
clear reason, and the fact whether or not the aircraft
approaching was six miles out or two to four, two to three
miles, as testified to by the controller, is really immaterial.

This operation was contrary to instructions given to
the respondent throughout this entire procedure. He proceeded
notwithstanding instructions to the contrary, therefore I do
make a finding of violation of 91.75(b), 91.87(h), and these
two constitute a careless act under 91.9 of the Federal
Aviation Regulations.

Now, turning to the question of sanction, the
administrator seeks a 45-day suspension of an ATP, and looking
at precedent in this area I'll be guided by the case of
Administrator versus Rosensweet, NTSB Order EA-1368 in which
an airline captain, depart 121 captain, who not deliberately
but through I guess I can characterize inadvertence, did
taxi across active runways contrary to instructions of ATC.
In that case the Board firmed a suspension of 20 days of ATP
certificate.

In this particular case, since these appear to me to
be deliberate acts, I will order a 30-day suspension of the
respondent's certificates.
ORDER

Now, it is therefore ordered that the respondent's airmen certificates are hereby suspended for a period of 30 days. Such certificate shall be surrendered to the Regional Counsel of the Pacific-Asia Region or his designee.

It is further ordered that unless stayed by the Board on its own initiative or the time to file an appeal of a notice of appeal, this order shall become effective immediately.

This order is dated this 28th day of May, 1980 in Honolulu, Hawaii.

Now, Mr. Brandy, you have certain appeal rights, and rather than reading them to you I'm going to hand you a statement which tells you how many days in which you must file your appeal, if you so desire to appeal. I might add the administrator's counsel can also appeal my decision, but they're familiar with these rules of appeals, and I'm going to give you a copy of this document, this sheet of paper so you know your rights of appeal. If you'll come forward I'll hand this to you.

All right. The public hearing in this matter is now closed.

(Whereupon, at 11:30 a.m., the hearing was closed.)
SERVICE:

Donald H. Brandy
P. O. Box 536
Holualoa, Hawaii  96725

Joseph R. Standell, Esq.
Office of Regional Counsel
Federal Aviation Administration
P. O. Box 50109
Honolulu, Hawaii  96850