

SERVED: May 13, 2002

NTSB Order No. EA-4970

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 May, 2002

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JANE F. GARVEY,)	
Administrator,)	
Federal Aviation Administration,)	
)	
	Complainant,)	
)	
	v.)	Docket SE-16233
)	
STEVEN J. KROPP,)	
)	
	Respondent.)	
)	
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OPINION AND ORDER

Respondent has appealed from the oral initial decision of Administrative Law Judge William R. Mullins, issued on July 31, 2001, following an evidentiary hearing.¹ The law judge affirmed the Administrator's finding that respondent violated section 91.123(b) of the Federal Aviation Regulations ("FARs"), but suspension was waived on account of respondent's qualifying

¹ The initial decision, an excerpt from the transcript, is attached.

Aviation Safety Reporting System report.² We deny the appeal.

There is no dispute, in light of respondent's pre-hearing admissions, that on May 9, 2000, respondent was the flying pilot and first officer of TWA Flight 360, an air carrier flight between St. Louis and Atlanta. While departing the St. Louis area, Flight 360, an MD-80 series aircraft, was cleared by Air Traffic Control ("ATC") to climb and maintain 15,000 feet. Flight 360, however, climbed to 16,000 feet where it remained level for approximately 30 seconds before descending to 15,000 feet.

The only issue at the hearing was respondent's claim that an emergency justifying a deviation from an altitude clearance had occurred. According to respondent's testimony, Flight 360 was amidst thunderstorms and passing through, approximately, 13,500 feet, when the aircraft's electronic primary instruments momentarily went blank, and, among other things, the flight director began commanding an unusually-high pitch attitude and a twenty-five degree bank turn, and the auto-throttles began simultaneously retarding engine power. Respondent attributed the

² FAR section 91.123, 14 C.F.R. Part 91, provides in pertinent part that:

§91.123 Compliance with ATC clearances and instructions.

* * * * *

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

* * * * *

altitude deviation to his attention to these asserted circumstances. The Administrator, however, presented evidence that the captain did not declare an emergency or even return to St. Louis as a result of any problems encountered during the climb. The captain's only post-flight maintenance write-up stated that the "number two flight data computer commanded 180-degree turn and airspeed bug dropped to 100 knots and disarmed altitude select."³

The law judge upheld the FAR section 91.123(b) violation, determining that there had been no emergency within the meaning of the regulation. See Transcript ("Tr.") at 76 ("where there are backup systems available to the flight crew" a malfunction of a system in the cockpit "does not create an emergency situation that would alleviate those crew members from maintaining the altitude and direction that they are given"). We concur in that assessment.

On appeal, respondent argues that the law judge erred in concluding that an emergency did not exist that justified Flight 360's altitude excursion. The Administrator urges us to uphold the law judge's decision.

We find respondent's effort to attribute his inattention to altitude to the aircraft's aberrant and uncommanded behavior to

³ The captain of Flight 360 was also charged in the incident. According to respondent, the captain, who has since retired from the airline, withdrew an appeal he initially filed with the Board, and respondent apparently did not seek to submit any written statement of the captain or to call him as a corroborating witness.

be difficult to reconcile with the evidence. The data entered into evidence by the Administrator shows a steady climb to 16,000 feet and the aircraft remaining there, precisely level, for 30 seconds until a descent was initiated contemporaneously with ATC's call that the aircraft was supposed to be at 15,000 feet. We think the evidence is far more consistent with an inadvertent altitude deviation than a struggle to regain control of the aircraft.⁴ More importantly, the law judge clearly did not believe respondent's uncorroborated claims. Tr. at 74; see, e.g., Administrator v. Smith, 5 NTSB 1560, 1563 (1986) (the Board defers to credibility assessments of its law judges unless clearly erroneous). In any event, even if, assuming *arguendo*, respondent's testimony about a brief loss of primary systems were accepted as accurate, we also agree with the law judge that an emergency was not shown to exist, for the record is essentially silent as to why the standby instruments were insufficient to prevent a deviation from an acknowledged clearance. See, e.g., Administrator v. Gentile, 6 NTSB 60, 64 (1988) (rejecting contention that unnoticed disruption of autopilot was an emergency in context of an affirmative defense to a charge of deviating from an altitude clearance and stating "[i]t was respondent's duty to present evidence sufficient to establish that the autopilot tripped off *and that the descent was the*

⁴ According to respondent's testimony, the captain's attention was diverted to routine company communications when the alleged malfunctions became apparent.

inevitable result") (emphasis added). In sum, we see no basis to grant respondent's appeal.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied; and
2. The law judge's initial decision upholding the Administrator's Order is affirmed.

BLAKEY, Chairman, CARMODY, Vice Chairman, and HAMMERSCHMIDT, GOGLIA, and BLACK, Members of the Board, concurred in the above opinion and order.