

SERVED: February 14, 2006

NTSB Order No. EA-5209

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 10th day of February, 2006

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MARION C. BLAKEY,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	
v.)	
)	
SCOTT ALLEN NEMETH,)	
)	
Respondent.)	
)	
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Docket SE-17235

OPINION AND ORDER

Respondent appeals the oral initial decision of Administrative Law Judge Patrick G. Geraghty, issued on March 17, 2005.¹ By that decision, the law judge upheld the Administrator's allegation that respondent violated sections 91.13(a), 91.123(a), 91.123(b), and 91.175(a) of the Federal

¹ The excerpt of the hearing transcript containing the law judge's decision is attached.

Aviation Regulations (FARs),² and affirmed a 60-day suspension of respondent's airline transport pilot certificate and any other airman certificate he holds. We deny respondent's appeal.

On the basis of respondent's admissions, the hearing was limited to the FAR section 91.175 charge and sanction, in accordance with the law judge's March 2, 2005, order.³ The Administrator presented the testimony of the percipient air traffic controller, as well as an air traffic control (ATC) quality control specialist and an aviation safety inspector who both reviewed the incident. The hearing evidence showed that respondent was the pilot-in-command (PIC) and flying-pilot of a Cessna Citation V Ultra jet destined for Jackson Hole Airport,

² FAR section 91.13(a) prohibits operation of an aircraft in a careless or reckless manner, so as to endanger the life or property of another; FAR sections 91.123(a) and (b) prohibit, respectively, deviation from an ATC clearance unless an amended clearance is obtained or an emergency exists, and operation of an aircraft contrary to an ATC instruction in an area where air traffic control is exercised; and FAR section 91.175(a) prohibits operation of an aircraft contrary to the prescribed standard instrument approach procedure when an instrument letdown to a civil airport is necessary.

³ Prior to the hearing, the law judge granted the Administrator's unopposed motion for partial decision on the pleadings as to the FAR sections 91.123 and 91.13 violations, based on respondent's admission to paragraphs 1 through 5 of the complaint. In his answer, which formed the basis for the Administrator's unopposed motion, respondent admitted, among other things, that he was the PIC of N331QS on March 7, 2003, for the flight into Jackson Hole; the flight was instructed to cross the Dunoir VOR, and then it was cleared for the ILS runway 18 approach; the aircraft was in instrument meteorological conditions during the approach; the published approach procedure required that he fly to the QUIRT intersection until localizer interception; and that he deviated from the approach heading towards the FAPMO intersection.

Wyoming, on March 7, 2003.⁴ As the aircraft approached the terminal area, ATC cleared it to cross the Dunoir VOR, and, thereafter, to commence the ILS Runway 18 approach into Jackson Hole.⁵ This procedure required the aircraft to first fly, after crossing the Dunoir VOR, to the QUIRT intersection before intercepting the ILS Runway 18 localizer course. The aircraft, however, flew instead toward the FAPMO intersection, which is the next fix inbound on the ILS localizer from the QUIRT intersection, and then through the localizer course, before initiating a climbing right-hand turn towards the QUIRT intersection. The published missed approach procedure for the ILS Runway 18 approach requires a, "Climb to 11000 [MSL] via JAC R-194 then climbing left turn to 15300 [MSL] direct JAC VOR/DME and hold." Exhibit A-5A. In addition, as the aircraft reestablished contact with the center controllers who had previously handed the aircraft off to the tower for the approach, respondent was instructed by ATC to maintain his altitude of 14,000, but radar observations (with a potential accuracy error of up to 300 feet) indicated respondent climbed to 14,600 before descending back to 14,000.

Respondent's defense consisted of his own testimony, and testimony from the first officer. Essentially, their combined

⁴ The aircraft, registration number N331QS, was managed by NetJets, and, in addition to the crew, was carrying one passenger.

⁵ Instrument meteorological conditions precluded a visual approach to Jackson Hole.

testimony was that the aircraft initially flew towards the FAPMO intersection, perhaps because of an error or malfunction involving the FMS; and, when they realized the navigational error and turned towards the QUIRT intersection, it became apparent that the aircraft was flying through the localizer and wouldn't be able to complete the approach. They both testified that they were aware of the hazards posed by the high terrain on the west side of the approach course (in the direction they were flying as they flew through the localizer), and that they believed the non-prescribed climbing right turn was prudent under the circumstances in that it resulted in the most expeditious exit from the area of high terrain.⁶ Neither pilot testified that they informed ATC of their non-standard maneuvers. Regarding the deviation above the assigned altitude of 14,000, which occurred during the aforementioned maneuvering, respondent first testified that there was moderate turbulence, and, subsequently, that, "if [any deviation] happened it was because I was climbing away from the terrain ... I felt like I needed to take action, if that included pilot-in-command authority to deviate as necessary to get away from the hills ... [m]y primary focus at that time was the integrity of the flight and that meant climbing ... away from those mountains." Transcript at 145.

The law judge affirmed the violations alleged in the Administrator's complaint. The law judge did not accept

⁶ The attached copies of Exhibits A-5A and A-6B provide a graphical representation of the approach procedure, and the actual route flown by respondent.

respondent's arguments in mitigation of the seriousness of his regulatory transgressions -- an alleged FMS problem that led to navigation error, and the existence of turbulence and an alleged emergency that resulted in the altitude deviation -- and from his decision it is clear that the law judge did not credit the pilots' testimony on these points. See, e.g., Administrator v. Smith, 5 NTSB 1560, 1563 (1986) (credibility determinations are the province of the law judge, absent a showing that they are clearly erroneous). The law judge, therefore, finding nothing to justify a departure from the Administrator's choice of sanction, supported in the record by her sanction guidance table and the testimony of the Administrator's aviation safety inspector, affirmed the 60-day suspension of respondent's pilot certificates.

On appeal, respondent argues only that the 60-day suspension was, "excessive in light of the facts and circumstances showing that [he] had already caught the error caused by a malfunctioning auto-pilot system."⁷ Respondent provides no real support for his argument, however, and, instead, relies on inaccurate assertions about the nature of this incident and the record. For example, contrary to respondent's claims, this incident was not a "subtle deviation," but, as respondent's own testimony makes clear, a dangerous lapse in airmanship.⁸ More importantly, the

⁷ The Administrator filed an opposition brief.

⁸ Although not necessary for our decision, we note our agreement with the law judge's conclusion that respondent waived any claim that an equipment malfunction -- a circumstance not

Administrator's sanction guidance table prescribes a sanction ranging from a 30-day to a 90-day suspension for a deviation from an ATC clearance, and respondent provides no cognizable basis for not adhering to the Administrator's sanction choice in this instance. See 49 U.S.C. 44709(d)(3). Simply put, nothing in respondent's appeal brief demonstrates, on the basis of record evidence, any reversible error in the law judge's decision.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied; and
2. The 60-day suspension of respondent's pilot certificate(s) shall begin 30 days after the service date indicated on this opinion and order.⁹

ROSENKER, Acting Chairman, and ENGLEMAN CONNERS, HERSMAN, and HIGGINS, Members of the Board, concurred in the above opinion and order.

(..continued)

supported by the record in this case -- caused an emergency that justified his deviations on the approach or missed approach when he elected not to respond to the Administrator's discovery requests, or, even more importantly, raise it in his pleadings as an affirmative defense. See Administrator v. Sutton, NTSB Order No. EA-3434 at n.8 (1991) (a claim of emergency which would excuse a deviation from an ATC instruction or clearance must be pleaded by a respondent as an affirmative defense); see also Administrator v. Gentile, NTSB Order No. EA-2671 (1988) (failure to monitor autopilot does not excuse ATC clearance deviation).

⁹ For the purpose of this order, respondent must physically surrender his certificate(s) to a representative of the Federal Aviation Administration pursuant to 14 C.F.R. 61.19(g).