

SERVED: April 30, 2014

NTSB Order No. EA-5717

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 29th day of April, 2014

_____)	
MICHAEL P. HUERTA,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	
v.)	Dockets SE-19497 & SE-19498
)	
JOHN V. FOWLER and)	
JAMES A. SIROS,)	
)	
Respondents.)	
_____)	

ORDER DISMISSING APPEAL

The Administrator and respondents appealed the oral initial decision of Administrative Law Judge William R. Mullins, issued following an evidentiary hearing on December 3, 2013.¹ By that order, the law judge dismissed the Administrator’s orders suspending respondents’ airline transport pilot certificates; the law judge found the Administrator failed to prove by a preponderance of evidence respondents violated provisions of the Federal Aviation Regulations

¹ A copy of the law judge’s order is attached.

as alleged.² On January 14, 2014, the Administrator voluntarily withdrew his appeal of the decision. Respondents nonetheless filed a cross-appeal brief on January 17, 2014, arguing, to the extent the Board granted the Administrator's appeal, the law judge made erroneous legal conclusions and erred in excluding certain evidence favorable to respondents.

In view of the Administrator's withdrawal of his appeal, respondents' assignments of error are moot.³

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's motion to withdraw his appeal is granted;
2. Respondents' appeal is dismissed as moot; and
3. The law judge's oral initial decision is affirmed.

HART, Acting Chairman, and SUMWALT, ROSEKIND, and WEENER, Members of the Board, concurred in the above opinion and order.

² In the orders of suspension, the Administrator alleged respondents, while acting as the flight crew of a Cessna Citation airplane, violated 14 C.F.R. §§ 91.13(a) and 91.123(b) by carelessly or recklessly operating the aircraft and failing to comply with an air traffic control heading assignment.

³ Cf. Administrator v. Leahy, 7 N.T.S.B. 245 (1991) (in dismissing petition for reconsideration, explaining, "[O]ur appellate process was not intended to apply to challenges to non-adverse decisions, even though they may either contain findings or conclusions with which the ultimately successful litigant disagrees or may fail to include rulings on matters the winning party believes should have been resolved. The dismissal, therefore, of respondent's appeal from an initial decision that overturned in its entirety an order of the Administrator seeking to suspend his commercial pilot certificate was appropriate.").

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
OFFICE OF ADMINISTRATIVE LAW JUDGES

* * * * *

In the matter of:

MICHAEL P. HUERTA,
ADMINISTRATOR,
FEDERAL AVIATION ADMINISTRATION,

Complainant,

v.

JOHN V. FOWLER and
JAMES A. SIROS,

Respondents.

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* Docket Nos.: SE-19497
* SE-19498
* JUDGE MULLINS

Conference Room 301A
Eldon B. Mahon Federal Courthouse
U.S. District Court
501 West 10th Street
Fort Worth, Texas 76102

Tuesday,
December 3, 2013

The above-entitled matter came on for hearing, pursuant
to Notice, at 9:00 a.m.

BEFORE: WILLIAM R. MULLINS
Administrative Law Judge

APPEARANCES:

On behalf of the Administrator:

RENA PRICE, ESQ.
Federal Aviation Administration
Southwest Region
2601 Meacham Boulevard
Fort Worth, Texas 76137
817-222-5068

On behalf of the Respondent:

DERRICK J. HAHN, ESQ.
Hahn Law Firm, PC
900 Jackson Street, Suite 180
Dallas, Texas 75202
214-744-3200
dhahn@hahnlawfirm.com

1 ORAL INITIAL DECISION AND ORDER

2 ADMINISTRATIVE LAW JUDGE MULLINS: This has been a
3 proceeding before the National Transportation Safety Board, held
4 under the provisions of Sections 44709 of the Federal Aviation Act
5 of 1958 as amended, on the appeal of John Victor Fowler and James
6 Anthony Siros, both Respondents. There were two cases that were
7 consolidated. The SE number for Mr. Fowler is SE-19497 and
8 Mr. Siros was SE-19498. And I'll refer to them as Respondents.

9 And the matter came on for -- on their appeal from
10 Orders of Suspension, as I said, consolidated, that seek to
11 suspend their air transport pilot certificate for a period of 30
12 days for alleged regulatory violation of FAR 91.13(a), which is
13 the careless and reckless operation, careless in this -- as
14 alleged here. And also FAR 91.123(b), which states that, except
15 in an emergency, no person may operate an aircraft contrary to an
16 ATC instruction in an area in which air traffic control is
17 exercised.

18 These matters were filed on behalf of the Federal
19 Aviation Administration through regional counsel of the Southwest
20 Region. The matter has been heard before me, William R. Mullins.
21 I'm an administrative law judge for the National Transportation
22 Safety Board, and as provided by the Board's Rules, I will issue a
23 bench decision at this time.

24 The matter came on pursuant to notice given to the
25 parties, and was called for trial today, this 3rd day of December

1 of 2013. The Administrator was represented throughout these
2 proceedings by counsel, Ms. Rena Price, Esquire, of regional
3 counsel's office. And Respondents were present at all times and
4 represented by Mr. Derrick Hahn, Esquire, of the Dallas area.
5 The parties were afforded a full opportunity to offer evidence, to
6 call, examine and cross-examine witnesses. In addition, the
7 parties were afforded an opportunity to make argument in support
8 of their respective positions.

9 DISCUSSION

10 Both of the Orders of Suspension issued in these cases
11 were identical. Mr. Fowler, apparently, as the evidence
12 developed, was the pilot in command, but was the non-flying pilot.
13 And Mr. Siros was the second in command and was the flying pilot
14 for this operation. And paragraph 1 of each order specifies that
15 Mr. Fowler and Mr. Siros were owner of air transport pilot
16 certificate and the numbers, and that was admitted on both cases.

17 The balance of the Orders of Suspension were denied.
18 Paragraph 2 specifies that on or about November 24th, 2010, you
19 were assigned as either the captain or whatever of civil aircraft
20 November 909LA, a Cessna, CE-560XL, the property of another, on a
21 test flight around Dallas Love Field, Dallas, Texas (KDAL).

22 Paragraph 3, incident to the above operation, when no
23 emergency was declared, November 909LA: (a) received a clearance
24 and an instruction from air traffic control (ATC) to fly to a
25 heading of 240 degrees; and 3(b), turned to a heading of 105

1 degrees instead of 240 degrees as assigned.

2 Paragraph 4, your operation, as noted above, constituted
3 a careless operation on your part in that you caused or allowed
4 the noted deviation from an ATC clearance and instruction which
5 resulted in the endangerment or the lives and property of another.

6 Paragraph 5, by reason of the foregoing, you violated
7 the following sections of the Federal Aviation Regulation: (a)
8 and it was FAR 91.13(a); and then (b) is the allegation of FAR
9 91.123(b).

10 And then, finally, based on the foregoing, the
11 Administrator has determined the safety in air commerce or air
12 transportation and the public interest requires the suspension of
13 your airline transport pilot certificate. And then both of them
14 seek, both orders seek a 30-day suspension.

15 I'll go over, just briefly, the witnesses and exhibits
16 that were called. Administrator had four witnesses. First was
17 Mr. Jerry Heit, who's a TRACON quality control person. He was
18 here very briefly for the purpose of identifying A-1, which is a
19 transcript of the tower tape, control tape that day, and then A-2
20 was a CD of that same transcript.

21 The second witness called was Mr. Kenton Sassmann.
22 Mr. Sassmann was the air traffic controller working that day. He
23 identified his witness statement as A-3, and his testimony was
24 that he had written it within the hour of that occurring. And
25 then he also identified Exhibit A-4, which was the FINGR Three

1 Arrival, which shows these points that were discussed throughout
2 the trial today, and I'll refer to them from time to time,
3 although I won't refer to this exhibit again.

4 The third witness called was Mr. Mark Olsen, and
5 Mr. Olsen's a litigation specialist from the office of -- well,
6 are you from the Office of Chief Counsel?

7 MR. OLSEN: No, Your Honor. I'm from the litigation
8 support office for --

9 ADMINISTRATIVE LAW JUDGE MULLINS: -- Litigation Support
10 Office at FAA headquarters in Washington, D.C. He identified A-5,
11 his curriculum vitae. A-6 was the report that he made concerning
12 this action that -- concerning the events of that date. And A-7
13 was the plot made from radar data, which shows, generally, the
14 track of the aircraft, and then the second and third pages of that
15 exhibit show the times and headings and so forth of each of those
16 plots as shown on the first page.

17 The fourth witness called by the Administrator was
18 Mr. Paul D'Allura. He was the aviation safety inspector, and he's
19 out of the Lincoln, Nebraska FSDO. Apparently, the aircraft,
20 although this was a Part 91 flight, the aircraft was being
21 operated for Jet Linx, which is a 135 operator, and their
22 certificate management office is the Lincoln FSDO. And,
23 apparently, Mr. D'Allura is their 135 ops person.

24 He identified Exhibit A-8, which was the deviation
25 report; Exhibit A-9, which was his investigation of that

1 deviation; Exhibit A-10, which was a page out of General Ops
2 Manual for Jet Linx, which shows flight management system
3 enhancements, if you will.

4 And let me deviate just a little bit. A defense raised
5 by Respondent, and we've discussed it here at length today, was
6 that there was a malfunction of the flight management system in
7 the aircraft that created this deviation. That has been
8 complained of. So this referred to that.

9 The Exhibit A-11 is the airmen information, information
10 from the FAA concerning these two pilots, their ratings and type
11 certificates. Exhibit A-12 was the Operational Irregularity form
12 that was completed by Mr. Fowler, the captain, on 11/29, some 5
13 days after the incident. And Exhibit A-13 was the Operational
14 Irregularity form filled out by Mr. Siros on 11/30, 6 days after
15 the incident. And then Exhibit A-14 was the Sanction Guidance
16 Table, the section out of the Sanction Guidance Table, which shows
17 that the range of sanction for this deviation, I believe, was
18 either 30 to 60 days or 30 to 90 days. In any event, the
19 Administrator is seeking a 30-day suspension.

20 Respondents' first witness was Captain Fowler,
21 Mr. Fowler, and he identified R-5, which was his NASA report. And
22 the Administrator acknowledged that there was a NASA report, and
23 there was never any indication here today that -- and both pilots
24 filed NASA reports, reports under the Aviation Safety Reporting
25 Program, which, if accepted, would waive sanction in these cases

1 unless they were shown that their conduct that day was deliberate
2 or not inadvertent. And that has not been established, so I think
3 that the NASA report would be valid in this case.

4 The next witness called by Respondent was Mr. Siros, and
5 he identified his NASA report as R-4. R-12, he identified as a
6 FMS malfunction report that he had filed in reference to another
7 aircraft on a subsequent flight, but it involved the same FMS
8 function.

9 Witness 3 was Mr. Kari Johnson, who is now the director
10 of safety for Jet Linx; however, he, at the time of this incident,
11 he was the director of operation. He indicated that he was the
12 person responsible for writing Exhibit A-10, which was that page
13 out of the manual concerning FMS. And in that regard -- let me
14 back up.

15 Mr. Fowler's testimony was that he very specifically
16 remembered setting the FMS to go direct to the SLANT intersection.
17 And then Mr. Siros, in his testimony, testified that he confirmed
18 that verbally, which is consistent with the requirement for the
19 flight crew in Exhibit A-10, which requires that both crew members
20 verify this FMS setting. And, also, Mr. Johnson identified R-9,
21 which is a aircraft maintenance repair form on this particular
22 aircraft, where the number one flight management system, a loaner
23 unit was taken out and the original one installed. And then he
24 also identified and there was admitted R-10, which is a repair
25 station repair that was made on this. And the testimony was that

1 it's Universal Avionics in Tucson and that -- the testimony of the
2 last witness was that Universal was the manufacturer of this FMS
3 systems.

4 And, again, the last witness was Mr. Paul Gardner, who's
5 an avionics expert, and his report and his CV were both stipulated
6 to and admitted into evidence. His testimony was that even though
7 this FMS system that went back to Universal for a low battery or a
8 bad battery, the work that was done, in his opinion, was that
9 based on the work that was done by Universal on this FMS system,
10 would indicate that the FMS systems had some real problems. And
11 based on that, and his opinion, based on his expertise, he
12 believed that this FMS system probably malfunctioned on the date
13 in question, which created this deviation.

14 All right. That's the witnesses and exhibits. Let me
15 say, in general, although contrary to what counsel said, this is
16 not a credibility case. Everybody that testified, I think, was
17 quite believable in what they were talking about.

18 The Respondents have suggested that there was an
19 emergency that allowed them to make the deviation that they made,
20 and I would point back to Exhibits A-12 and A-13, the reports of
21 irregularity. That's a two-part form, and you can either report a
22 irregularity or you can report an emergency. Mr. Fowler, 5 days
23 after the incident, and Mr. Siros, 6 days after the accident,
24 didn't mention there was an emergency. And I'm not convinced and
25 I don't think the evidence has shown that there was any emergency

1 here.

2 Normally, I think, given the evidence, that this case
3 would probably go by way of a 30-day suspension of both of the
4 alleged regulatory violations and an acknowledgment of the NASA
5 report, which would waive the sanction being imposed. But there's
6 a problem here, folks, and I'm going to finish up by discussing it
7 with you. The Administrator is charged with alleging and proving
8 regulatory violations by a preponderance of the reliable and
9 probative evidence. And I'll go back and I'll read paragraph 3 of
10 both Orders of Suspension: Incident to the above operation, when
11 no emergency was declared, November-909-Lima-Alpha (a) received a
12 clearance and instruction from air traffic control to fly to a
13 heading of 240 degrees.

14 There was no evidence that air traffic control ever
15 instructed these pilots to fly to a heading of 240 degrees. And,
16 in fact, the Administrator's first exhibit, which is this
17 transcript, the transcript clearly shows that the air traffic
18 control instruction was, depart SLANT intersection on a heading of
19 240, descend and maintain 5,000. That was the last ATC
20 instruction prior to the deviation.

21 And if you look at Exhibit A-7, the next ATC instruction
22 to this aircraft was at 2135:57. And it says Heartland 909, turn
23 right. Turn, turn right, heading 220. At that time, the aircraft
24 had never arrived at SLANT intersection. So there's an amended
25 instruction prior to it ever getting to SLANT.

1 And the matter is further complicated -- not
2 complicated, but it's clear under paragraph 4 that your operation,
3 as noted above, constituted careless operation, i.e., you deviated
4 from this clearance that told you to fly to 240 degrees. They
5 didn't do that because there was not an instruction to fly to a
6 heading of 240 degrees, except after SLANT intersection, and they
7 never got to SLANT intersection.

8 And if you look at Exhibit A-7, it shows the FINGR
9 checkpoint or FINGR arrival there almost in the center of that
10 exhibit, and the SLANT intersection is clear down off the left
11 side of that exhibit, and it wasn't -- and a point at 21 minutes
12 and 36 -- 2136:59, at that time, the controller again told them
13 this time to proceed direct to SLANT and depart SLANT heading 240
14 and maintain 5,000 feet.

15 The way this is alleged, there was no violation because
16 there was no ATC instruction to fly at a heading of 240 degrees.
17 The instruction given was to do something at SLANT intersection,
18 which they never arrived at, as far as I can tell, through this
19 whole transcript of these proceedings.

20 Bottom line here is that the Administrator has not
21 established by a preponderance of reliable and probative evidence
22 the allegation of the air traffic control instruction. In fact,
23 their evidence at A-1 is that that's not what the air traffic
24 control instruction was. And, therefore, there's not a violation
25 of a failure to comply with an air traffic control instruction,

1 but there's not a violation of 91.13 because paragraph 4 ties it
2 directly to this misquoted instruction. And, therefore, my
3 finding today will be in favor of both Respondents and deny the
4 Order of Suspension.

5 ORDER

6 IT IS THEREFORE ORDERED that safety in air commerce and
7 safety in air transportation does not require an affirmation of
8 the Administrator's Orders of Suspension. Specifically, I find
9 that there has not been established by reliable and probative
10 evidence that there was an air traffic control instruction to fly
11 to a heading of 240 degrees and that, therefore, a failure to show
12 that would indicate that both of these Orders of Suspension should
13 be and, therefore, will be, overruled.

14

15

16 WILLIAM R. MULLINS

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18 Administrative Law Judge

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21 APPEAL

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23 ADMINISTRATIVE LAW JUDGE MULLINS: Ms. Price, you have
24 the right to appeal this order today --

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MS. PRICE: We know, judge.

26

27 ADMINISTRATIVE LAW JUDGE MULLINS: -- and you may do so
28 by filing a notice of appeal with the National Transportation
29 Safety Board.

1 Let's go off the record for second.

2 (Off the record.)

3 (On the record.)

4 ADMINISTRATIVE LAW JUDGE MULLINS: We're back on the
5 record.

6 And you may file your Notice of Appeal within 10 days of
7 this date. The Notice of Appeal goes to -- the original, three
8 copies to the National Transportation Safety Board, Office of
9 Administrative Law Judges at Room 4704 at 490 L'Enfant Plaza East,
10 S.W., Washington, D.C. 20594. And if you do file a Notice of
11 Appeal, then you will be required to file a brief in support of
12 that appeal within 50 days of this date, and that brief goes to
13 the office of -- goes to the National Transportation Safety Board,
14 same street address, but to Room 6401, which is the Office of
15 General Counsel.

16 And I have a copy of this if you would like. I'm sure
17 you have a whole pile of those --

18 MS. PRICE: Oh, we have a copy.

19 ADMINISTRATIVE LAW JUDGE MULLINS: -- in your office.

20 MS. PRICE: Yes, we do.

21 ADMINISTRATIVE LAW JUDGE MULLINS: But I have it
22 available. And if there is an appeal, there's an indication here
23 that -- well, obviously, the failure to file an appeal within that
24 10-day frame will negate any right to appeal. And the failure to
25 file a brief within the 50 days after today, if you do file an

1 appeal, would also result in a dismissal.

2 And, Mr. Hahn, I'll hand you a copy of this. I don't
3 know. You probably have some of those, too. But in case they do
4 file an appeal, that'll give you those addresses.

5 Now, does the Administrator have any question about the
6 Order today?

7 MS. PRICE: No, Your Honor.

8 ADMINISTRATIVE LAW JUDGE MULLINS: Any question from
9 Respondents?

10 MR. HAHN: No, Your Honor.

11 ADMINISTRATIVE LAW JUDGE MULLINS: Okay. Thank you,
12 folks. We'll be in recess.

13 (Whereupon, at 4:28 p.m., the hearing in the above-
14 entitled matter was adjourned.)

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CERTIFICATE

This is to certify that the attached proceeding before the

NATIONAL TRANSPORTATION SAFETY BOARD

IN THE MATTER OF: James A. Siros and John V. Fowler

DOCKET NUMBER: SE-19497 and SE-19498

PLACE: Fort Worth, Texas

DATE: December 3, 2014

was held according to the record, and that this is the original,
complete, true and accurate transcript which has been compared to
the recording accomplished at the hearing.

Terri Garcia
Official Reporter