

SERVED: February 12, 1992

NTSB Order No. EA-3493

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 January, 1992

BARRY LAMBERT HARRIS,
Acting Administrator,
Federal Aviation Administration,

Complainant,

SE-9621, SE-9626

v.

ROBERT W. HAHN and
WILLIAM C. BOURKE,

Respondents.

OPINION AND ORDER

The Administrator has appealed from the initial decision of Administrative Law Judge John E. Faulk, issued orally at the conclusion of an evidentiary hearing held on June 28, 1989.¹ The law judge did not sustain the Administrator's allegations, contained in separate orders, that Respondent Bourke violated §§ 91.75(a) and 91.9 of the Federal Aviation Regulations ("FAR," 14

¹An excerpt from the hearing transcript containing the initial decision is attached.

C.F.R. Part 91) and that Respondent Hahn violated FAR § 91.9.²

On appeal, the Administrator contends that the law judge erred in reversing the orders and requests that we reinstate the finding that the respondents, as alleged, violated the aforementioned sections of the FAR.³ For reasons set forth below, we will grant the Administrator's appeal.

The infractions allegedly occurred on November 9, 1987, when Respondent Bourke was pilot in command and Respondent Hahn was first officer of United Airlines Flight ("UAL") 379 en route from Dayton, Ohio to Chicago O'Hare Airport via Fort Wayne, Indiana. The first officer was piloting the aircraft and the captain was responsible for operating the communication and navigation radios. After takeoff, UAL 379 leveled at 11,000 feet. The only controverted facts in this case occurred in the moments that immediately followed. The captain claims that Air Traffic Control ("ATC"), without being requested, cleared the aircraft to

²The cases were consolidated for the purpose of appeal.

FAR § 91.75(a) reads in pertinent part:

"Compliance with ATC clearances and instructions.

(a) When an ATC clearance has been obtained, no pilot in command may deviate from that clearance, except in an emergency, unless an amended clearance is obtained. ... If a pilot is uncertain of the meaning of an ATC clearance, the pilot shall immediately request clarification from ATC."

FAR § 91.9 states:

"Careless or reckless operation.

No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another."

³The Administrator did not seek to impose sanctions because respondents timely filed an incident report with NASA, as authorized by the Aviation Safety Reporting Program (ASRP).

12,000 feet. The Administrator, however, maintains that the controller merely issued a traffic advisory to inform UAL 379 that other traffic was nearby at 12,000 feet and told them, "You'll have higher when I get my five miles." The Administrator thus asserts that respondents climbed to the higher flight level without having received an amended clearance.

Through his testimony, the captain described the United Airlines policy of acknowledging all transmissions from ATC, as outlined in the United Airlines Flight Operations Manual, and stated that he complied with this policy on November 9, 1987. Testimony from crew members corroborated this assertion. Nevertheless, the controller insisted that he heard no clearance acknowledgement, and none was recorded on the tape of communications between ATC and UAL 379. Respondents theorize that the transmissions were "stepped on" by other aircraft in the area, and further assert that the controller should not have used the figure "12,000" in the advisory. They argue that numbers used in an advisory can be easily misinterpreted as an amended clearance and it is understandable how they thought the transmission was a new clearance.⁴ In addition, the first

⁴The law judge understood the controller to have testified that "had he had to do it again, or today ... I would not have said 12,000, 120, flight level 120, but I would say, 'Higher clearing traffic,' with that advisory." Based on our reading of the record, we disagree with that characterization of the controller's testimony.

The following exchange took place between the attorney for respondents and the controller during cross examination:

"Q. [D]o you have any concern that in combining that language that your transmission to the aircraft was --

officer testified that when the alleged amended clearance was issued, the captain looked at him to confirm what he heard and asked, "Did you get to 12,000?" The second officer testified that the captain turned to him and asked, "Was that for us?" This testimony indicates that the captain may not have been completely confident in the clearance he allegedly heard.

Respondents admitted that they climbed to an altitude of 11,900 feet. In addition, it is clear from the tape that no clearance to exceed 11,000 was given to UAL 379. Thus, the dispositive issue is whether the transmission received by UAL 379 could reasonably be interpreted as an amended clearance. The law judge made several crucial findings of fact. He determined that: 1) no amended clearance was given; 2) UAL 379 deviated from its clearance without permission;⁵ 3) the captain

had the potential for a misinterpretation?

A. No, none. It's issued hundreds of times a day by each Controller, the same scenario as that.

Q. So you have no concern about the use of that language in that kind of a transmission?

A. Now, I would have said, 'Higher clearing traffic.'

Q. Higher clearing traffic, and not use the term -- use the words 12,000 or 1-2000?

A. No, I would not have said, 'Higher, when I get my five mile[s].' I would have said, Higher clearing traffic."

Transcript at 25, emphasis added. Based on the preceding excerpt, it cannot be said definitively that the controller would not use a number in an advisory today.

⁵The law judge found that climbing past 11,000 feet was "clearly a mistake made by the Captain and the crew... in taking the wrong clearance."

made a readback, but the transmission somehow was blocked; and 4) the entire incident resulted from a series of misunderstandings, but would never have occurred had the controller waited for a response after issuing the advisory instead of immediately establishing radio contact with another aircraft. Based on the last of these conclusions, the law judge reversed the Administrator's order.

We agree with the law judge that UAL 379 had no clearance to change altitude. We do not agree, however, that respondents were justified in proceeding to 12,000 feet when they were unsure whether they had been so cleared.⁶ If the captain was uncertain about the precise content or nature of the transmission, he should have asked ATC for clarification.⁷ Under these circumstances, we cannot agree with the law judge that the respondents should be excused for their deviation from the only altitude clearance they were in fact given. Therefore, the Board finds by a preponderance of the evidence that the pilot in command deviated from his clearance, in violation of FAR § 91.75(a). Moreover, by assuming that a transmission that was not

⁶The law judge stated that he listened to the tape of communications between ATC and UAL 379 and determined that the controller spoke in a precise, yet rapid manner. The captain testified that when he heard the transmission there was "other activity" and "slight overlap." He then looked to the other crew members to confirm that the 12,000 clearance was indeed for UAL 379.

⁷In Administrator v. Woodward, NTSB Order No. EA-2274 (1986), we found that a pilot in command who heard an initial clearance but was unsure whether an amended clearance had been issued should have sought and obtained verification before climbing through his clearance. Confirming the amended clearance with the first officer

completely clear to them was an amended clearance, respondents carelessly created a potentially dangerous situation, in violation of FAR § 91.9.

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's appeal is granted; and
2. The Administrator's order is affirmed.⁸

KOLSTAD, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART, and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

was not enough.

⁸Sanctions are waived in accordance with the ASRP.