SERVED: February 27, 1992

NTSB Order No. EA-3502

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 2nd day of February, 1992

BARRY LAMBERT HARRIS,
Acting Administrator,
Federal Aviation
Administration,

Complainant,

SE-9814

v.

THEO TENUIS de MOOY,

Respondent.

OPINION AND ORDER

Respondent has appealed from the oral initial decision of Administrative Law Judge Jimmy N. Coffman rendered at the conclusion of an evidentiary hearing on October 2, 1989.[1] The law judge affirmed an order of the Administrator charging respondent with violations of sections 91.105(a), 91.115(a) and (b), and 91.9 of the Federal Aviation Regulations ("FAR,"

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

14 C.F.R. Part 91).[2] The Administrator alleged that respondent operated an aircraft in controlled airspace under conditions calling for instrument flight rules ("IFR") without air traffic control ("ATC") clearance, without having filed a flight plan, and at a distance of less than 500 feet from and into clouds. The order called for the suspension of respondent's airman certificate for 90 days.

After consideration of the briefs of the parties and the record below, the Board concludes that safety in air commerce or air transportation and the public interest require affirmation of the Administrator's order in its entirety.

The incident at issue occurred on August 4, 1987, when respondent was pilot in command of N3281T, a Beech Turbine model 18S aircraft, on a flight from Ypsilanti to Kalamazoo, Michigan for Active Aero Charter, Inc. An air traffic controller at the Cleveland Air Route Traffic Control Center

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[2]Under FAR section 91.105(a), no person may operate an aircraft within controlled airspace under visual flight rules ("VFR"), at an altitude of 1,200 feet or less at a distance of less than 500 feet below clouds.

Sections 91.115 (a) and (b), and 91.9 read as follows:

"§ 91.115 ATC clearance and flight plan required.

No person may operate an aircraft in controlled airspace under IFR unless that person has--
(a) Filed an IFR flight plan; and
(b) Received an appropriate ATC clearance."

"§ 91.9 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."

noticed a VFR 1200 Mode C Squawk proceeding westbound at 6400 feet and an IFR aircraft (identified as Simmons 2849) at 8000 feet traveling from Detroit to Kalamazoo. The controller alerted the Simmons crew that an unidentified aircraft was nearby, whereupon the Simmons crew radioed back that they saw the aircraft and it was "going in and out of the clouds."[3] Simmons 2849 requested and received permission from ATC to descend in order to read the tail number on the VFR traffic. Although he was unable to ascertain the number, the captain identified the aircraft as a Twin Beech turbine. Soon afterward, the controller received a transmission from "Twin Beech 3281 Tango" that stated its position as 30 miles east of Kalamazoo at 3000 feet. This location matched the site of the VFR traffic the controller had been tracking. Based on the aforementioned data, the controller concluded that the aircraft he was talking to was the VFR aircraft observed by the Simmons crew.

Respondent maintains that the testimony of the captain and first officer of Simmons 2849 was suspect and unreliable. Therefore, since they were the only eye witnesses to the incident, respondent asserts that insufficient evidence was produced to prove he flew his aircraft into the clouds. We disagree.

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[3]The weather at the time of the incident, according to the Simmons captain, consisted of "broken layers [of clouds] from 4,800 MSL and we didn't reach the tops at 8,000...."

We reject as wholly without merit respondent's unsubstantiated theory that the captain and first officer of Simmons 2849 embellished their testimony to avoid "prosecution" for what respondent surmises were their own FAR violations. As illustrated by the tape of communications between Simmons 2849 and ATC, the crew remarked immediately to the controller that the VFR aircraft was flying in and out of the clouds and, concerned over how unsafe that behavior was, requested permission to descend and attempt to obtain the tail number of the aircraft. Also recorded were statements illustrating the captain's and first officer's willingness to testify in any subsequent hearing on the matter.

The law judge's affirmance of the Administrator's order is supported by a preponderance of the evidence presented. He found the VFR aircraft that appeared on the controller's radar screen was the same aircraft observed by Simmons 2849 entering and exiting the clouds, and that this aircraft was piloted by respondent. To make this finding, the law judge had to credit the testimony of the Administrator's witnesses over the testimony provided by respondent. Since there was no demonstration here that the law judge's conclusions on the matter of credibility were arbitrary or clearly erroneous, his evaluation of the witnesses' demeanor as they testified is entitled to our deference and will be upheld accordingly.

Respondent also asserts that he was not afforded timely

notice of the alleged violations, as he did not receive notification from the FAA that there had been a problem with his flight of August 4, 1987, until some time in mid-September, 1987. He claims that this delay prejudiced his case, a factor he believes should serve to mitigate the sanction. The Administrator, in turn, argues that "[t]he Board's Rules of Practice require only that he receive a Notice of Proposed Certificate Action within 6 months of the alleged incident...."[4]

Clearly, less than 6 months elapsed between the incident and the notification of respondent, yet this fact alone is

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[4]The Board may dismiss a stale complaint under 14 C.F.R. § 821.33, which provides in pertinent part:

"§ 821.33 Motion to dismiss stale complaint.

Where the complaint states allegations of offenses which occurred more than 6 months prior to the Administrator's advising respondent as to reasons for proposed action under section 609 of the Act, respondent may move to dismiss such allegations pursuant to the following provisions:

(a) In those cases where a complaint does not allege lack of qualification of the certificate holder:

(1) The Administrator shall be required to show by answer filed within 15 days of service of the motion that good cause existed for the delay, or that the imposition of a sanction is warranted in the public interest, notwithstanding the delay or the reasons therefor.

(2) If the Administrator does not establish good cause for the delay or for imposition of a sanction notwithstanding the delay, the law judge shall dismiss the stale allegations and proceed to adjudicate only the remaining portion, if any, of the complaint.

(3) If the law judge wishes some clarification as to the Administrator's factual assertions of good cause, he shall obtain this from the Administrator in writing, with due service made upon the respondent, and proceed to an informal determination of the good cause issue without a hearing. A hearing to develop facts as to good cause shall be held only where the respondent raises an issue of fact in respect of the Administrator's good cause issue allegations...."

not dispositive of the issue. We addressed the question of a stale complaint in Administrator v. Wells, NTSB Order No. EA-3424 (1991), where we said, "notwithstanding the fact that a complaint may survive dismissal under the stale complaint rule, it might still be subject to attack if an airman could establish actual prejudice in his defense which is attributable to the Administrator's delay." Id. at 7.

In the instant case, respondent asserts that he was denied the opportunity to immediately respond to the charges and to locate potential witnesses. However, he does not indicate that there were any passengers aboard his aircraft or any other persons in the vicinity that could have served as potential witnesses. Respondent further suggests that his recollection of the flight would have been more precise if he had been informed immediately of the allegations against him, though he does not demonstrate in any concrete manner how his case would have been bolstered by more expeditious notification. We have stated before that such general charges are too speculative to constitute a showing of actual prejudice.[5] While we do not espouse the Administrator's

[5] See e.g., Administrator v. Shrader, NTSB Order No. EA-3018 at 7 (1989), where we explained that, in both emergency and non-emergency cases, the Board may consider "dismissal for demonstrated prejudice caused by delay...." We further stated,

> "It is not sufficient... simply to claim... that the passage of time has or may have affected the availability of documents or witnesses or the strength of the latters' memories. We rejected such a speculative approach in Peterson, [NTSB Order No. EA-2989 at 5, n. 8 (1989)]:

interpretation of Rule 33, we nevertheless find that the respondent failed to demonstrate that the delay resulted in actual prejudice to his case. Consequently, we reject respondent's argument.

Lastly, respondent claims that the law judge's refusal to admit into evidence a closure rate chart found in Advisory Circular (AC) 90-48C resulted in prejudicial error. This document depicted the apparent size of an aircraft as seen from various distances. Although the law judge allowed photographs that represented what a Twin Beech aircraft would look like from varying distances to be admitted into evidence, he concluded that the illustration in AC 90-48C was irrelevant to the disposition of the case.

It is long-standing Board policy that "all relevant, noncumulative evidence should be admissible in our adjudicatory proceedings unless there is a legal basis, or a compelling policy reason, for excluding such evidence." Administrator v. Moore, 3 NTSB 3216, 3217 (1981). The information respondent sought to have admitted, however, was irrelevant and therefore properly excluded. Illustrated in

(..continued)

> `conclusory allegations, such as respondent has advanced here, that delay has adversely affected an airman's ability to locate witnesses or produce evidence are insufficient to establish that an airman has in fact been prejudiced in defending against a charge.'"

Id. at 8.

the advisory circular was the silhouette of an aircraft of unknown dimensions as it might appear traveling head-on toward the reader. No correlation was established between the VFR aircraft observed by Simmons 2849 and the drawing in the circular, either in size or traveling direction. We conclude that the law judge properly refused to admit AC 90-48C into evidence.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;
2. The Administrator's order and the initial decision are affirmed; and
3. The 90-day suspension of respondent's airman certificate shall begin 30 days after service of this order.[6]

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

[6]For the purpose of this order, respondent must physically surrender his certificate to a representative of the Federal Aviation Administration pursuant to FAR § 61.19(f).