

SERVED: April 29, 1992

NTSB Order No. EA-3541

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 16th day of April, 1992

BARRY LAMBERT HARRIS,  
Acting Administrator,  
Federal Aviation Administration,

Complainant,

v.

SE-10045 and  
SE-10079

JEFFREY K. JOHNSON and  
BRADLEY J. BERTHOLD,

Respondents.

**OPINION AND ORDER**

The respondents have appealed from the oral initial decision Administrative Law Judge Joyce Capps issued in this proceeding on December 11, 1989, at the conclusion of an evidentiary hearing.<sup>1</sup> By that decision the law judge affirmed amended orders of the Administrator suspending respondents'

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<sup>1</sup>An excerpt from the hearing transcript containing the initial decision is attached.

airline transport pilot certificates<sup>2</sup> on allegations that the pilot-in-command (respondent Johnson) violated section 91.75(a) and the second-in-command (respondent Berthold) violated section 91.75(b), and both violated section 91.9 of the Federal Aviation Regulations ("FAR"), 14 C.F.R. Part 91<sup>3</sup> by their operation of Continental Airlines Flight 237 on August 7, 1987, during which they descended to an altitude of 13,900 feet after having received and acknowledged a clearance by Air Traffic Control (ATC) to descend and maintain an altitude of 15,000 feet.<sup>4</sup>

Respondents contend on appeal that the law judge

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<sup>2</sup>With waiver of penalty in accordance with the provisions of the Aviation Safety Reporting Program (ASRP).

<sup>3</sup>FAR sections 91.75 and 91.9 provided at the time of the incident as follows:

"§91.75 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 he obtains an amended clearance. However, except in positive controlled airspace, this paragraph does not prohibit him from canceling an IFR flight plan if he is operating in VFR weather conditions. If a pilot is uncertain of the meaning of an ATC clearance, he shall immediately request clarification from ATC.

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

§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."

<sup>4</sup>The altitude deviation resulted in a loss of separation between respondents' flight and another IFR aircraft.

committed reversible error concerning a pre-hearing ruling she made on the admissibility of a tape of the recorded transmissions between ATC and Continental Airlines Flight 237 (Exhibit A-2 for Identification), and on a ruling which resulted in the admission in to the record of a flight progress strip purporting to relate to this incident (Exhibit A-4). Respondents further contend that the Administrator failed to meet his evidentiary burden of proof as to their identities. The Administrator has filed a brief in reply.

Upon consideration of the briefs of the parties, and of the entire record, the Board has determined that safety in air commerce or air transportation and the public interest require affirmation of the initial decision and the Administrator's amended order. For the reasons that follow, we will deny respondents' appeals.

In the Board's view, the Administrator presented more than sufficient evidence to establish that a deviation from an altitude clearance occurred on August 7, 1987, and that respondents were piloting the aircraft at the time of the incident. The Administrator presented the testimony of the air traffic controller who issued the clearance from which respondents' allegedly deviated. According to the controller, on August 7, 1987, he gave Continental Flight 237 an amended clearance to maintain 15,000, which the crew acknowledged. The controller subsequently noticed the aircraft's mode C at

14,600, and advised Continental Flight 237 to climb immediately to 15,000 because of traffic. The controller prepared a statement concerning the incident, within 15 or 20 minutes of its occurrence. The controller identified a transcript of his communications with Continental Flight 237, which was entered into evidence as Exhibit A-3. He testified that the transcript accurately described the communications between himself and Continental Flight 237. According to the controller, he independently recalled the incident once he heard a tape of the transmissions, about three weeks before the hearing. He also listened to a tape of the transmissions on or about the day after the incident.<sup>5</sup>

The remainder of the Administrator's case-in-chief consisted of a flight progress strip (Exhibit A-4) which indicated Continental Flight 237's beacon code was 2351, the National Track Analysis Program (NTAP) computer data which established the altitude deviation by Continental Flight 237 (whose beacon code was 2351) on August 7, 1987, and the testimony of an FAA Aviation Safety Inspector who testified that during the course of his investigation he was able to obtain identification of the pilot-in-command and second-in-command of the subject flight from Continental Airlines, and that the respondents were those pilots. Respondents

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<sup>5</sup> The controller also refreshed his memory by reviewing his written statement.

presented no evidence. The law judge found that a preponderance of the evidence established that respondents were the pilots of Continental Flight 237, and that the flight deviated from its altitude clearance on August 7, 1987.

Regarding the admissibility of Exhibit A-4, the law judge ruled that she would not consider the fact that the date, August 7, 1987, which was handwritten on the flight progress strip, was evidence of the date of the incident because the handwriting was unclear and the person who wrote the date did not testify at the hearing. She nonetheless admitted the strip for the limited purpose of establishing Continental Flight 237's beacon code as 2351. An FAA inspector testified that the flight progress strip was part of the package of documents transmitted through FAA channels in support of the allegations occurring on August 7th, although he admitted on cross-examination that it was conceivable that another Continental Flight 237 had been assigned the same beacon code on another day. Respondents contend that the law judge erred by admitting the flight progress strip for any purpose, since it was not proven that it was the strip for Continental Flight 237 on August 7th, and because it was the evidentiary foundation allowed for the admission into evidence of the NTAP computer data which established the deviation and loss of separation. We disagree. We think that the fact that the flight progress

strip was contained in the package of documents gathered during the course of the investigation into this particular incident adequately establishes that it is the progress strip relating to this incident, and that it is reasonable to infer that Continental Flight 237 was assigned beacon code 2351 on August 7th. Certainly the likelihood that this progress strip related to another altitude deviation by a different Continental Flight 237 on a different day is not so great as to defeat this inference. Moreover, the flight progress strip shows the deviation occurred between Liberty radial at 2049 UTC, Gordonsville VOR at 2106 UTC, and Casanova at 2111 UTC. These times and locations correlate with the times and locations contained in the transcript of radio communications, the written statement of the controller, and his testimony that the deviation occurred right around the Gordonsville VOR and just southwest of Casanova. (TR-24). In any event, we have examined the exhibit, and we find that the date August 7th is sufficiently clear.

As to the law judge's rulings with regard to the tape of the transmissions between the aircraft and ATC, respondents object to this evidence because when the transmissions were re-recorded and certified by an FAA Quality Assurance Specialist, he apparently misspoke at the beginning of the tape and certified that it pertained to an incident which occurred on August 8, rather than August 7, 1987. At the end of the tape

he states that the incident occurred on August 7th. When the error was discovered the tape was re-certified with the correct date, August 7. Respondent moved for the suppression of the tape (Exhibit A-2 for Identification) prior to the hearing, and the law judge denied the motion.

At the hearing respondent produced another copy of the tape (Exhibit R-1) which contained the erroneous date. The controller involved in the incident listened to that copy and testified that, notwithstanding the erroneous date, it was a recording of the incident occurring on August 7, and that it correlated with the recording he heard the day after the incident and with the transcript of the recording which was received into evidence without objection.<sup>6</sup> We think there is no question but that both re-recordings (Exhibits R-1 and A-2) are of the incident which occurred on August 7, and respondents' claim that the tape was "altered" so as to deny them due process, borders on the frivolous. In any event, the entire matter is moot because the law judge found that the re-certified tape (Exhibit A-2 for Identification) was inaudible, and refused to admit it into evidence.<sup>7</sup>

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<sup>6</sup> The transcript indicates the incident occurred on August 7.

<sup>7</sup> Respondents' claim that the controller's testimony is somehow tainted because he listened to the re-certified tape before the hearing is unsupported. The controller testified that he had an independent recollection of the incident, and that he merely used his written statement as well as the tape to refresh his recollection before giving testimony.

Finally, respondents assert that the orders should be reversed because the Administrator failed to prove their identities as the crew of the aircraft, by a preponderance of the evidence. We disagree. The Administrator produced a letter from Continental Airlines which identified respondents as the crew of the subject flight. The FAA inspector to whom this letter is addressed testified at the hearing and neither his testimony nor the letter were rebutted by respondents. In the Board's view, this evidence is more than adequate to establish the pilots' identities.<sup>8</sup>

**ACCORDINGLY, IT IS ORDERED THAT:**

1. Respondents' appeals are denied; and
2. The Administrator's amended orders and the initial decision are affirmed.<sup>9</sup>

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

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<sup>8</sup>Both respondents also admitted in their answers that they filed timely reports of this incident under the ASRP.

<sup>9</sup>Sanction is waived in accordance with the terms of the ASRP.