

SERVED: September 9, 1992

NTSB Order No. EA-3671

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 August, 1992

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THOMAS C. RICHARDS,	)	
Administrator,	)	
Federal Aviation Administration,	)	
	)	
Complainant,	)	
	)	Docket SE-8748
v.	)	
	)	
JOHN F. BOARDMAN,	)	
	)	
Respondent.	)	
	)	

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**ORDER DENYING RECONSIDERATION**

Respondent seeks reconsideration of our decision in this proceeding, NTSB Order EA-3523, served April 6, 1992. In that decision, we affirmed both the Administrator's order and the law judge's initial decision, finding that respondent violated 14 C.F.R. 91.89(a) in his use of a right-hand, rather than a left-hand, approach to Ralph Wien Memorial Airport, Kotzebue, AK. We rejected respondent's argument that, rather than a right-hand approach, he had performed an authorized straight-in approach.<sup>1</sup>

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<sup>1</sup>In our decision, we also denied respondent's requests that we consider new evidence he offered, and that we hold oral argument. At that time, the proffered new evidence consisted of what is now introduced as Exhibit B to respondent's petition for reconsideration (see infra), and an internal FAA memo (with attachments and related documentation) to the Director, Office of Flight Standards, discussing revision of 14 C.F.R. 91.89(a). The revision, basically, defined a straight-in approach as one that

We deny the petition. Initially, however, we address respondent's related, alternative requests that we consider newly discovered evidence in reaching our decision on his petition, or that we remand the proceeding for consideration of that evidence.

The alleged new evidence consists of 5 documents. Exhibit A is an affidavit from Daniel Beaudette, Deputy Director of the FAA Office of Flight Standards that responds to the earlier memo to that office described in footnote 1. Exhibit B is a 2-page excerpt of an initial decision issued July 1, 1988 by administrative law judge Reilly in Administrator v. Ranstead, SE-8763. Exhibit C is a page from Alaska Airlines' B-737 flight handbook. The exhibit describes aspects of circling and normal landing. Exhibit D is a copy of law judge Mullins' June 20, 1990 initial decision in Administrator v. Davis, SE-10546. Exhibit E is a page from Alaska Airlines' flight operations manual, containing a section entitled "Straight-in Approaches at Uncontrolled Airport."

Respondent continues to argue that the regulation, as written, is so vague that the Board was required to invent a standard to apply, and that this is demonstrated by the Exhibit B and D initial decisions. He considers Exhibit A as correcting the problem, by offering a new interpretation of the rule by the FAA, and Exhibit E reflects a recent change in the company manual, approved by the FAA, to incorporate this information. Exhibit C is intended to respond to the finding in this case that, because respondent's right-hand turn was made between 1 and 2 miles from the runway, it could not be considered a straight-in approach. NTSB Order EA-3523, at 7-9. It is introduced to show that: 1) a B-737 can "easily be established on a straight-in approach" within that distance (Petition at 9); and 2) that distance is consistent with B-737 requirements for circling approaches.

We need not decide whether these exhibits constitute new evidence acceptable under 49 C.F.R. 821.50 because, even assuming they were, our conclusions would not change. Exhibit A, the keystone of respondent's submission, is not, as he argues, a new standard. Not only does Mr. Beaudette reject the suggestion that  
(..continued)  
is "stabilized and tracking the extended runway centerline" not less than 1 nautical mile from the runway. Allegedly, this would correct an existing ambiguity in the rules. Although we noted that requests to consider new evidence did not lie at that stage of the proceeding, we nevertheless addressed it on the merits and found that the new evidence would not have produced a different result, even if considered. It is the same issue -- what qualifies as a straight-in, rather than a right-turn, approach -- that respondent again raises in the instant petition.

the rule be changed to allow straight-in approaches from shorter distances, his discussion of § 91.89(a) does little more than rephrase the explanation of the rule contained in Administrator v. Dibble, 5 NTSB 352 (1985).<sup>2</sup>

Under the established interpretation noted in Dibble, any turn into a straight-in approach must be made sufficiently far from the runway that it does not interfere with the normal traffic pattern. This naturally requires consideration of the aircraft using that airport. Respondent complains that the approach distances required by the Board are too great,<sup>3</sup> yet he fails to prove the critical point he identifies -- that right-hand turns into final at the 1-2 miles found here would not interfere with the normal traffic pattern.<sup>4</sup> In fact, in Administrator v. Davis, *supra*, at 222, the law judge found that 1½ miles was within the normal traffic pattern at Kotzebue.

The remaining exhibits in support of Exhibit A, are of no assistance. The two initial decisions (Exhibits B and D) have no precedential value.<sup>5</sup> And, the FAA's failure to appeal Administrator v. Davis, *supra* (Exhibit D), a case with different facts, may not be read as FAA agreement that, in this case, respondent did not violate the rule. As noted above, the Exhibit E revision to the company manual simply restates the rule. It offers nothing to indicate that it was complied with in this instance. Finally, and as the Administrator points out in his reply, the Exhibit D B-737 handbook information, in demonstrating circling and landing, uses left-hand turns with approaches of 1-1½ miles.

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<sup>2</sup>There, we stated that "straight-in approaches were acceptable if the approach did not interfere with aircraft executing a normal left-hand pattern and if the straight-in approach did not deviate more than 30 degrees from the center of the runway as measured from the threshold of the runway." Id. As noted in our prior decision at fn. 9, this case disproves respondent's claim that § 91.89(a) is void for vagueness.

<sup>3</sup>See Exhibit D, which indicates that the turn into final can be made 1-1½ miles from the runway.

<sup>4</sup>Once the Administrator made a prima facie case that respondent made a right-hand turn, the burden shifted to respondent, who raised as an affirmative defense that he had made a straight-in approach. It is therefore up to him to prove the requirements of that approach.

<sup>5</sup>See 49 C.F.R. 821.43.

**ACCORDINGLY, IT IS ORDERED THAT:**

Respondent's petition for reconsideration and the acceptance and consideration of new evidence is denied.

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