

SERVED: February 11, 1993

NTSB Order No. EA-3791

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, 1993

_____	)	
JOSEPH M. DEL BALZO,	)	
Acting Administrator,	)	
Federal Aviation Administration,	)	
	)	
Complainant,	)	
	)	Docket SE-11887
v.	)	
	)	
JOHN O. WHITE,	)	
	)	
Respondent.	)	
_____	)	

**OPINION AND ORDER**

The respondent, appearing pro se, has appealed from the oral initial decision of Administrative Law Judge William R. Mullins, issued on November 20, 1991, following an evidentiary hearing.<sup>1</sup> By that decision, the law judge affirmed an order of the Administrator suspending respondent's private pilot certificate for 120 days for violations of sections 91.24(c), 91.90(a)(1),

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

and 91.9 (now recodified as 91.131(a)(1), 91.215, and 91.13, respectively) of the Federal Aviation Regulations (FAR), 14 C.F.R. Part 91, and FAR section 61.3(e)(1), 14 C.F.R. Part 61.<sup>2</sup> Respondent was granted immunity from sanction, however, as he had

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<sup>2</sup>FAR sections 91.24(c), 91.90(a)(1), and 91.9 provide as follows:

"§ 91.24 **ATC transponder and altitude reporting equipment and use.**

\* \* \* \*

(c) Transponder-on operation. While in the airspace as specified in paragraph (b) of this section or in all controlled airspace, each person operating an aircraft equipped with an operable ATC transponder maintained in accordance with § 91.172 of this part shall operate the transponder, including Mode C equipment if installed, and shall reply on the appropriate code or as assigned by ATC."

"§ 91.90 **Terminal control areas.**

(a) Operating rules. No person may operate an aircraft within a terminal control area designated in Part 71 of this chapter except in compliance with the following rules:

(1) No person may operate an aircraft within a terminal control area unless that person has received an appropriate authorization from ATC prior to operation of that aircraft in that area."

"§ 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."

Section 61.3(e)(1) states:

"§ 61.3 **Requirement for certificates, rating, and authorizations.**

\* \* \* \*

(e) Instrument rating. No person may act as pilot in command of a civil aircraft under instrument flight rules, or in weather conditions less than the minimums prescribed for VFR flight unless-

(1) In the case of an airplane, he holds an instrument rating or an airline transport pilot certificate with an airplane category rating on it."

timely filed an incident report with the National Aeronautics and Space Administration (NASA), as authorized by the Aviation Safety Reporting Program (ASRP).

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. For reasons set forth below, we deny the appeal.<sup>3</sup>

The order of suspension, which served as the complaint, states, in pertinent part:

- "1. You are now, and at all times mentioned herein were, the holder of Private Pilot Certificate No. 547725257.
2. On May 10, 1990, you acted as pilot-in-command of a Cessna Aircraft Model P206E, Identification Number N54ME, with a passenger, from Brown Field, San Diego, California, to Camarillo, California.
3. Incident to said flight, you operated N54ME within the San Diego Terminal Control Area (TCA) when you did not have authorization to do so.
4. Incident to said flight, you operated said aircraft in airspace within 30 nautical miles of the primary airport of the San Diego TCA below 10,000 feet MSL and did not operate your transponder.
5. Your operation as described above was careless so as to endanger the life or property of another.
6. Incident to said flight, you operated said aircraft

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<sup>3</sup>In his appeal brief, respondent referred to the 1988 Airman's Information Manual and an FAA "Flight Training Handbook." He also appended portions of these documents to the brief. The Administrator filed a motion to strike these materials since they are not part of the record and no extenuating circumstances exist to justify their omission from the evidence made part of the record at the hearing.

The motion to strike will be granted; the Board has not considered these materials in evaluating the instant case.

under Instrument Flight Rules when you did not hold an Instrument Rating."

A controller on duty at Lindbergh Field when the alleged violations occurred testified that, according to his radar screen, an aircraft flying about one half mile south of Lindbergh Field, headed west, did not have its transponder on and was not communicating with ATC. For safety reasons, the controller halted departure traffic while the unidentified aircraft was in the area. He tagged the aircraft on the radar screen and handed it off to the controller on duty at the San Diego Approach Control (TRACON) who continued to track it. Subsequently, N54ME contacted San Diego TRACON requesting "clearance to poke through some clouds" and climb from 2,400 to 5,500 feet. The controller testified that he understood this to be a request for an IFR clearance. N54ME was then identified on the radar screen at the same position and, ultimately, as the same aircraft that had previously been tagged. In his appeal, respondent argues that the law judge should not have relied on the evidence and testimony regarding radar readings since the Administrator did not prove that the equipment functioned properly and was accurate. This position is unavailing, as we have held that the Administrator has no affirmative duty to prove radar equipment was not faulty. Administrator v. Hodges, NTSB Order No. EA-3546 (1992). Radar equipment may be relied on unless evidence to the contrary is introduced. Respondent advanced no evidence that would support a finding that the equipment was not working properly.

Additionally, respondent claims that the Administrator did not respond in sufficient detail to his discovery questions regarding the state of the radar equipment. This argument, too, is unpersuasive. The Administrator's response in Complainant's Supplemental Answer to Motion to Produce, namely, that periodic maintenance had been performed on the equipment and no problems were reported, was adequate. While it is true, as respondent asserts, that the controllers could not testify to the mechanical specifics of the maintenance and functioning of the radar equipment, they did testify that they knew of no malfunction. The Administrator is not required to provide expert witnesses for the respondent.

Another basis upon which respondent claims the law judge erred is that the aeronautical chart offered into evidence at the hearing was not the current chart at the time the incident occurred. This issue, however, was specifically addressed by the law judge when he stated that the differences in the charts did not impact on the case. Respondent has not shown that the law judge's decision was based on incorrect information or that the difference between the charts could have changed the outcome of the case.<sup>4</sup>

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<sup>4</sup>At the hearing, respondent objected to the use of the outdated map during the testimony of the controller from Lindbergh Field. When asked by the law judge what the difference was between the charts, respondent stated,

"The TCA is structured slightly different in that - Let's see, to the left of Mount Soledad the lower limit is 1,800 feet instead of 1,500 feet. And, I believe, the area around Mount Soledad may have a slightly different configuration."

Discrepancies in the testimony required the law judge to, of necessity, make a credibility assessment. For example, respondent and his two passengers<sup>5</sup> testified that the transponder was on during the entire flight; yet, the controllers testified that they tracked respondent's aircraft on radar and the transponder was not on. Respondent claims his aircraft never entered the TCA; the controllers testified that they tracked the aircraft within the TCA. Respondent claims that he never sought IFR clearance; the controller, however, stated that he interpreted a request for "clearance to poke through some clouds" as a request for IFR clearance.<sup>6</sup>

After considering all the evidence, the law judge decided that the Administrator proved the violations by a preponderance.

Absent "arbitrariness, capriciousness or other compelling reasons" we will not disturb such a determination. Administrator v. Pullaro, NTSB Order No. EA-3495 at 3 (1992), and cases cited therein. See also Administrator v. Miller, NTSB Order No. EA-3455 at 6 (1991).

(..continued)

Transcript (Tr.) at 48-49.

The law judge ruled, and respondent agreed, that the testimony of the witness did not relate to the area around Mount Soledad. The law judge further instructed respondent that if, later in the proceeding, specific differences between the charts became apparent, he could introduce his chart into evidence. Respondent never did.

<sup>5</sup>The passengers were respondent's father and cousin.

<sup>6</sup>Transcript of communications between San Diego Approach Control (TRACON) and N54ME, Complainant's Exhibit 4.

**ACCORDINGLY, IT IS ORDERED THAT:**

1. Respondent's appeal is denied;
2. The Administrator's order and the initial decision are affirmed.

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