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NTSB Order No. EA-3932

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 6th day of July, 1993

JOSEPH M. DEL BALZO,)	
Acting Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-13094
v.)	
)	
CHRIS EDEN,)	
)	
Respondent.)	
)	

OPINION AND ORDER

Both respondent and the Administrator have appealed from the oral initial decision of Administrative Law Judge William E. Fowler, issued on May 26, 1993, following an evidentiary hearing.¹ The law judge affirmed an emergency order of the Administrator finding that respondent had violated 14 C.F.R.

¹The initial decision, an excerpt from the hearing transcript, is attached.

91.123(a) and (b) and 91.13(a).² The law judge, however, reduced the sanction from revocation of respondent's airline transport pilot certificate to a 270-day suspension of it. We deny the respondent's appeal and grant that of the Administrator.

On December 17, 1992, respondent flew his Beech Baron BE-58/R from Atlanta, GA to Northeast Philadelphia Airport to pick up his brother. The two then flew to North Wilkesboro, NC, again with respondent piloting the aircraft. Prior to both flights, respondent filed IFR³ flight plans, with direct routes intended to save fuel. Tr. at 225. Respondent testified to his belief that the flights were subject to 14 C.F.R. 91.167. This rule requires that, in operations under IFR conditions, the aircraft must carry enough fuel to reach the intended destination, fly to an alternate airport, and still have 45 minutes of fuel in reserve. In his preflight weather briefing for the trip north, respondent testified that he sought an alternate airport with an

²§ 91.123(a) and (b) provide:

(a) When an ATC [air traffic control] clearance has been obtained, no pilot in command may deviate from that clearance, except in an emergency, unless an amended clearance is obtained. . . .

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

§ 91.13(a) provides:

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

³Instrument Flight Rules.

800-foot ceiling and "a few miles" visibility (i.e., allegedly better weather than reported at his intended destination). Tr. at 210.⁴ Weather briefing advised that Dulles and Roanoke fit those requirements, and he chose Dulles as it was closer to his Philadelphia destination. Respondent further testified that he then calculated projected fuel use (see Exhibit R-16) under his intended flight plan north, and concluded he would have a reserve of 11.43 gallons after compliance with § 91.167.⁵ Respondent was given clearances different from the flight plans he had sought.

The events of direct concern to the Administrator began after respondent entered the Baltimore Washington International Airport (BWI) TRACON⁶ on the trip north. The controller handling respondent's aircraft testified that the aircraft was received in a handoff from Dulles approach on a direct routing, which was somewhat abnormal, flights in the northeast corridor typically being routed via victor airways.⁷ Tr. at 16, 25. BWI TRACON was having difficulty communicating with Philadelphia TRACON so as to

⁴There is considerable dispute in the record regarding the weather at the time and its relevance. We need not reach these matters.

⁵Respondent testified that he conducted the same exercise for the flight south. (Exhibits showing "reproductions" of these calculations, were offered.) Tr. at 245. Respondent had recently purchased this aircraft and he testified that this was his first long trip in it.

⁶Terminal Radar Approach Control.

⁷I.e., designated airways (routes) of various widths. Tr. at 160. See also Exhibit R-5, 14 C.F.R. 71.5, "Each Federal airway includes the airspace within parallel boundary lines 4 miles each side of the centerline."

hand off the aircraft to that sector and, while BWI was attempting to do so, the controller turned respondent back so that he did not enter Philadelphia's airspace before that TRACON had been advised. In response to the instruction to turn, respondent stated that he had "minimum fuel" and could accept little delay. Tr. at 18. Such a declaration was a very rare event, according to the controllers testifying in this case (e.g., Tr. at 53), and BWI TRACON understood it to mean that the aircraft needed to be given priority handling. BWI did so, immediately calling Philadelphia TRACON on the land line to establish communication and effecting the handoff.⁸ Philadelphia TRACON, in the person of controller Freed, told respondent that he understood that a minimum fuel situation existed, to which respondent replied: "Not yet sir we were heading the wrong direction for a while we got concerned." Exhibit A-4 transcript of communications, at 2124:34.

There is no dispute that respondent had approximately 40 gallons of fuel when he shut the aircraft down on arrival at Philadelphia. (The aircraft had a capacity of approximately 134-136 gallons of useable fuel and respondent purchased approximately 94 gallons on arrival at Philadelphia.) Tr. at

⁸The BWI controller, given her other work and her concern about respondent's fuel situation, called in her supervisor, who immediately made the phone call to Philadelphia. The supervisor testified that he treated the situation as an urgent one. Tr. at 41. All the controllers apparently had heightened awareness of fuel concerns in light of the January 25, 1990 Avianca accident, extensively discussed at the hearing, where misunderstanding and lack of full communication resulted in aircraft fuel exhaustion and a tragic crash.

122-127, 219, 223 and Exhibits R-15-16. It is also unrebutted in the record that, when respondent announced he had minimum fuel, he had at least 60 gallons available, 2 hours of fuel at normal cruising speed. Id. at 126, 133.⁹

On the return flight, as noted earlier, respondent's clearance was again different from the route he had planned. He left with all fuel tanks full. His initial flight clearance was to Modena, approximately 25 miles from the departure airport and thereafter, as pertinent here, via victor 378 to BWI. West of Modena (Exhibit R-4) and very shortly after departure, respondent asked the Philadelphia controller (coincidentally, Mr. Freed again) if he could fly direct to Armel (i.e., Dulles), rather than fly victor 378, which was a more easterly routing. Philadelphia responded: "I have your request." Exhibit A-4 transcript at 2233:41. Mr. Freed then cleared respondent to 6,000 feet, and respondent acknowledged that clearance.

What followed is disputed. Respondent contends that he repeatedly tried to contact the controller to obtain the sought routing and report radio and icing problems that warranted the change.¹⁰ The transcript does not reflect such communication, and the controller denies hearing any or hearing any squelch that

⁹Respondent also testified that the fuel gauge when he reached Baltimore on the northbound flight was in the yellow arc, indicating only 1/2 hour of fuel. Respondent acknowledged, however, that he considered the gauge unreliable. Tr. at 216.

¹⁰The transcript does show one "unintelligible" communication from the aircraft but it is before respondent received and acknowledged the 6,000-foot clearance and, therefore, does not support a finding that the radio had malfunctioned.

would indicate "stepped on" communications. Respondent also acknowledges that the tape itself fails to indicate any transmission or squelch. Tr. at 257. According to the transcript, approximately 10 minutes after Philadelphia TRACON acknowledged respondent's request, and 8 minutes after respondent acknowledged the 6,000-foot clearance, respondent spoke to Philadelphia on the radio. Respondent said ". . . we assume we've been cleared direct AMR [Armel]."

One and one-half minutes later (at 2246:58), Philadelphia advised respondent that he was showing north of his 378 victor airway course. Respondent answered: "Roger we have requested ah unfortunately ah you you must be too busy we requested direct either westminster or armel sir...and ah we cannot accept victor airways." We reproduce the subsequent conversation:

TIME	SPEAKER	TEXT
2247:14	Phila.	Okay I did not give it to you nine one romeo turn left heading two zero zero intercept victor three seventy eight resume own navigation
2247:18	Respondent	Unable to intercept ah victor three seventy eight ah we can only accept either direct armel sir or if you need to be vector us away from what ever it is but we cannot accept victor airways
2247:44	Phila.	Niner one romeo I'm going to put (unintelligible) proceed direct modena left turn direct modena enter holding at Modena
2247:54	Phila.	Seven two niner one romeo are you are you requesting priority or you lifeguard ah tonight
2247:57	Respondent	Negative we just need direct

westminster or ah armel sir I don't see what's the big deal you trying to make us hold we have a minimum fuel situation as as it is and ah we're picking up ice please we we really ah appreciate it if you could comply sir

Controller Freed treated this statement as requiring an urgent response (Tr. at 82-84) and, within 3 minutes, Philadelphia gave respondent the direct Westminster routing he had sought to the Baltimore TRACON. When respondent landed at North Wilkesboro, he had approximately the same amount of fuel as he had on arrival in Philadelphia -- in excess of 40 gallons, and admittedly over 1 hour available air time. Tr. at 272.¹¹ And, at no point in either flight did respondent declare an emergency. To the contrary, both times he was asked, he specifically disclaimed any difficulties.

The Administrator contends that respondent, in declaring minimum fuel, made false statements to ATC which, among other things, resulted in ATC having to hold up departures from Northeast Philadelphia Airport. Complaint ¶ 14. The Administrator further argues that on the return flight respondent did not fly victor 378, as directed, but flew direct, and that his later refusal to comply with Philadelphia's 2247:44 instruction to "proceed direct modena left turn direct modena enter holding at Modena" deviated from a clearance and

¹¹The reason the fuel use on both flights is so close although the mileage on the Atlanta-Philadelphia leg is considerably greater is that there was a tail wind on the northerly flight and a head wind on the return.

constituted operations contrary to ATC instructions.

Respondent asserts, in contrast, that his minimum fuel declarations were proper, and consistent with both the definition of that phrase and the fuel requirements of § 91.167. He also argues, in what appears to be a claim akin to an emergency defense (see footnote 2, emergency exception in § 91.123), that on the return trip he had other reasons to require a direct routing. That is, first, his radio malfunctioned and, he suggests that, as a result, he could not navigate via the victor airways and, second, ice began to form on the wings, requiring a different heading.

Respondent's arguments on appeal raise no matters that were not raised at the hearing. The law judge, in rejecting respondent's explanations, determined that he had used bad judgment: "If he felt that he was in trouble, then he should have either sought an alternative airport to land to acquire additional fuel, or barring that, in the last resort, he should have declared an emergency." We agree. Respondent's various, alternative arguments strain credulity.

Respondent claims that, because there was the possibility that he would use up all his fuel and therefore be in a true minimum fuel situation violating § 91.167, his conduct was reasonable and not a violation of the regulations. The difficulty with this argument is that it fails to reflect any common sense meaning of "minimum fuel."¹²

¹²See Tr. at 340, where the law judge found that respondent's

The AIM provision in minimum fuel effective at the time of the incident reads as follows:

5-85 MINIMUM FUEL ADVISORY

a. Pilot -

1. Advise ATC of your minimum fuel status when your fuel supply has reached a state where, upon reaching destination, you cannot accept any undue delay.

2. Be aware this is not an emergency situation, but merely an advisory that indicates an emergency situation is possible should any undue delay occur.

3. Be aware a minimum fuel advisory does not imply a need for traffic priority.

4. If the remaining usable fuel supply suggests the need for traffic priority to ensure a safe landing, you should declare an emergency account low fuel and report fuel remaining in minutes. [References omitted.]

b. Controller -

1. When an aircraft declares a state of minimum fuel, relay this information to the facility to whom control jurisdiction is transferred.

2. Be alert for any occurrence which might delay the aircraft.¹³

The logical thrust of this information is that pilots are to advise ATC when they are low on fuel, as a stage of advice before the point at which they would declare a fuel emergency. Under respondent's proffered definition, the minimum fuel declaration under IFR flight could depend entirely on the remote location of a chosen alternate airport and could be required immediately after takeoff. That produces an illogical, useless, and, as seen, detrimental result. ATC Supervisor Freed testified:

(..continued)

minimum fuel declaration on the return flight was "blatantly" false.

¹³ This October 15, 1992 version contains all the same information as in the documents in the record, albeit organized somewhat differently. We use this version for convenience because the documents introduced by the parties were not complete versions of the available information. See Exhibits R-2 and A-2.

If he's not going to have the fuel to make it, he should land someplace else and fuel up. . . . Let's put it this way, you don't declare minimum fuel because you're not going to have enough fuel four hours later. . . . But even if he did have enough fuel to make the trip, you don't declare minimum fuel on the departure, you declare minimum fuel arriving at your destination.

Tr. at 146. While we need not and do not go so far as to say there is no point prior to arrival at the destination that minimum fuel should be declared (as the Administrator seems to argue), respondent knew or should have known that he made the declarations far too early in both flights.

Our conclusion does not, as respondent alleges, discount safety and encourage unsafe operations. What it does is recognize that because, enroute, circumstances may change -- just as they did here -- and because pilots may often have other options (such as landing for refueling), declarations of minimum fuel in the instances here are premature and under the AIM are not to be made until there is a legitimate, actual concern about fuel levels.

Respondent's declaration allowed him to obtain priority treatment, and led to his obtaining the direct routings he had originally sought for his flight and been denied. See, e.g., Tr. at 206. This represents an abuse of the ATC system and the services available from controllers. Although the Administrator did not prove that respondent's declarations resulted in ATC having to hold up departures from Northeast Philadelphia Airport

(Complaint ¶ 14),¹⁴ the record leaves no doubt that they created difficulties for the controllers during busy periods and, generally, interfered with ATC's normal operations.¹⁵ Moreover, respondent's behavior (notably his "blatantly" false statement, Tr. at 340) shows a disregard for the complexities of the ATC system. Seeking preferential treatment as he did also showed a disregard for other users of the ATC system. It is not difficult to imagine the chaos that would ensue if respondent's proffered view prevailed.

There is also substantial evidence in the record to support the law judge's factual finding that respondent deviated from a clearance and operated contrary to an ATC instruction. Respondent argues that the Administrator failed to prove that respondent actually was outside the airway. Respondent ignores, however, other probative evidence evidently found compelling by the law judge: his own statement (at 2244:55) indicating his assumption that he had been cleared to the direct route he had requested (a wholly unwarranted assumption), thus suggesting that he was flying the direct route, and his statement (at 2247:02) acknowledging that he was north of his cleared course.¹⁶

¹⁴See Tr. at 106 (operations were held up but not because of respondent).

¹⁵See Tr. at 116 (respondent's declaration of minimum fuel was disruptive to the flow of traffic). We amend the initial decision's finding (Tr. at 343) in this regard.

¹⁶See also Tr. at 258 and 260, where respondent failed to answer the Administrator's question directed to whether he had asked ATC for clarification. Respondent should have been well aware that, until he could confirm an amended clearance, his

Respondent also acted contrary to an ATC instruction when he repeatedly rejected (at 2247:18 and thereafter) the controller's specific instructions, even refused to comply with an instruction (at 2247:44) that was intended ultimately to meet his needs.¹⁷

We also find no basis to reverse the law judge's refusal to dismiss the complaint based on respondent's apparent, alternative claim that radio failure and icing were emergencies that justified his action.¹⁸ We cannot find the law judge's failure to consider these factors as exculpatory to be in error. Indeed, the testimony raises considerable doubt that altering his heading, as opposed to the aircraft's altitude, would have corrected an icing problem or that flying direct would be preferable or safer if a radio failed.¹⁹

(..continued)

clearance remained as earlier given. He should not have assumed that his request has been granted.

¹⁷The controller's action to turn respondent back was intended to give the controller time to determine if respondent's request could be accommodated while, at the same time, avoiding ATC problems that would have occurred if respondent simply continued on an unapproved course.

¹⁸Respondent suggests that the Administrator should be penalized for failing to preserve radar data that would have shown respondent's exact position. We disagree. This argument ignores the FAA's standard policy of erasing tapes after 15 days, and ignores the fact that respondents may also request that data be preserved. See, e.g., Administrator v. Benson, NTSB Order EA-3798 (1993) at 3-4. The discussion in the transcript regarding respondent's unavailing ASRP report (Tr. at 313) establishes that respondent was aware there might be a problem with his behavior within the time in which he could have requested radar data.

¹⁹Moreover, although we therefore need not reach the issue, we note our concern with the accuracy of the law judge's apparent findings, in his mitigation of sanction analysis, that the radio malfunctioned and icing occurred. Tr. at 340. For example, although respondent implies that a mechanic identified a

Finally, respondent argues that the 270-day suspension imposed by the law judge is inappropriate for a number of reasons. Because the Administrator's appeal challenges the law judge's sanction reduction, we address these issues concurrently.

Respondent first argues that the 270-day suspension is inconsistent with 49 U.S.C. App. 1429(a), as amended. Respondent correctly notes that Section 609(a) of the Federal Aviation Act (49 U.S.C. App. 1429(a))²⁰ provides, in part:

During the conduct of its hearings under this subsection, the Board shall not be bound by any findings of fact of the Administrator but shall be bound by all validly adopted interpretations of laws and regulations administered by the Federal Aviation Administrator and of written policy guidance available to the public relating to sanctions to be imposed by this subsection unless the Board finds that any such interpretation is arbitrary, capricious, or not otherwise in accordance with law.

Respondent argues that revocation is not consistent with the FAA's published, written policy guidance available to the public relating to sanctions, and he introduces excerpts from the FAA's "Enforcement Sanction Guidance Table." We have rejected, in Administrator v. Stricklen, NTSB Order EA-3814 (1993), at 11-12, the identical argument, and adopt our reasoning there. In brief, sanction guidance applicable for one violation of one regulation does not, per the terms of the FAA document, control sanction analysis in the case of multiple violations of the same or

(..continued)
malfunction in the radio, there is no evidence that a mechanic even looked at the radio after these flights. See, e.g., Tr. at 259.

²⁰As amended by P.L. No 102-345, the FAA Civil Penalty Administrative Assessment Act of 1992.

different regulations.²¹

We agree with the Administrator that revocation is the appropriate sanction here. Respondent is a holder of an airline transport pilot certificate and, as such, is held to the highest degree of care, judgment and responsibility. We cannot find that the Administrator erred when he concluded that respondent's behavior failed to show the care, judgment and responsibility required of a certificate holder. Administrator v. Wingo, 4 NTSB 1304 (1984) (disregard for regulations or lack of compliance disposition may justify finding of lack of qualification and consequent revocation of certificate); and Administrator v. Erickson, NTSB Order EA-3735 (1992) at 6 (deliberate defiance of regulations indicate that respondent cannot be trusted to conform to FAA requirements).²²

²¹These conclusions should not be interpreted to intimate a Board opinion regarding whether the Table will satisfy the 1992 amendments requiring written and publicly available sanction policy and, therefore the extent, if any, to which the Board is bound by this FAA document. Those issues have not been presented.

²²Moreover, where lack of qualification has been established, mitigating factors are not relevant. Administrator v. Stanberry, NTSB Order EA-3308 (1991). Even if they were, we have not in the past considered as mitigating various factors incorporated by the law judge into his sanction analysis, such as respondent's previous record, and future. See Administrator v. Mohamed, NTSB EA-2834 (1988) at 11; and Administrator v. Williams, NTSB Order EA-3588 (1992) at 7.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;
2. The Administrator's appeal is granted; and
3. The initial decision is modified as set forth in this decision.

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