

SERVED: July 20, 1993

NTSB Order No. EA-3935

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 5th day of July, 1993

JOSEPH M. DEL BALZO,)	
Acting Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-11623
v.)	
)	
GEORGE E. MURPHY,)	
)	
Respondent.)	
)	

OPINION AND ORDER

Respondent has appealed from the oral initial decision issued by Administrative Law Judge Joyce Capps at the close of an evidentiary hearing held in this matter on July 8, 1991.¹ In that decision the law judge found that respondent's takeoff from an uncontrolled airport into clouds without a clearance or release from air traffic control (ATC) was not a violation of 14

¹ Attached is an excerpt from the hearing transcript containing the oral initial decision.

C.F.R. 91.155(a),² but was in violation of 14 C.F.R. 91.13(a).³ She ordered a 90-day suspension of respondent's commercial pilot certificate in lieu of the 180-day suspension sought in the Administrator's order. For the reasons discussed below, we deny respondent's appeal and affirm the initial decision.

The Administrator's complaint in this case alleged as follows:

1. You hold Commercial Pilot Certificate Number 303725970, with Airplane Single and Multi Engine Land and Instrument Ratings.
2. On or about April 16, 1990, you acted as pilot-in-

² Section 91.155(a) provides, in pertinent part, as follows:

§91.155 Basic VFR weather minimums.

(a) Except as provided in §§91.155(b) and 91.157, no person may operate an aircraft under VFR when the flight visibility is less, or at a distance from clouds that is less, than that prescribed for the corresponding altitude in the following table:

<u>Altitude</u>	<u>Flight visibility</u>	<u>Distance from clouds</u>
1,200 feet or less above the surface -- * * *		
Outside controlled airspace Day (except as provided in 91.155(b)).	1 statute mile	Clear of clouds.

³ Section 91.13(a) provides:

§ 91.13 Careless or reckless operation.

(a) Aircraft operations for the purpose of air navigation. No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

command of civil aircraft N56474, a Piper Model PA28140, the property of another, on a VFR flight from Robinson Municipal Airport, Robinson, Illinois to Indianapolis, Indiana.

3. You were carrying two passengers.
4. Robinson Municipal Airport is an uncontrolled airport.
5. You departed Robinson Municipal Airport VFR when the flight visibility was less than 1 statute mile.
6. You did not remain clear of the clouds when you departed Robinson Municipal Airport.
7. Your operation of your aircraft, in the manner and under the circumstances described above, was careless so as to endanger the life and property of others.

In dismissing the 91.155(a) charge and affirming a 90-day suspension, the law judge relied on our decision in Administrator v. Vance, 5 NTSB 1037 (1986), wherein we held that an instrument-rated pilot's takeoff -- without an ATC clearance -- into uncontrolled airspace in instrument meteorological conditions (IMC) was technically legal under the predecessor section to section 91.155(a), but was nonetheless careless, in violation of the predecessor to section 91.13(a).⁴

On appeal, respondent argues that his operation was not careless because he took several precautions: e.g., he broadcast his departure intentions on the Unicom frequency; he monitored the ATC frequency for other traffic; and he departed immediately after another aircraft which had received an ATC release and

⁴ Because the Administrator has moved to withdraw his appeal from the initial decision, the propriety of the law judge's dismissal of the section 91.155(a) charge based on the Vance rationale is not directly before us.

clearance, thus claiming to have assured himself that there would be no other IFR aircraft in the controlled airspace above the airport. Respondent notes that he met all regulatory requirements for instrument flight rules (IFR) flight in uncontrolled airspace, and suggests that if the FAA believes it is careless to enter clouds in uncontrolled airspace without an ATC clearance, the regulations should be revised to specifically prohibit that practice. The Administrator has filed a reply brief urging affirmance of the initial decision.⁵

The record in this case reveals the following facts. On April 16, 1990, respondent arrived at Robinson Municipal Airport in Robinson, Illinois (an uncontrolled airport), at 6:30 a.m., and filed an IFR flight plan with a flight service station for his intended trip that morning to Indianapolis, Indiana. (Tr. 146-7.) Respondent then called the Terre Haute approach control ATC facility -- which is authorized to issue IFR clearances to depart from Robinson airport (Tr. 21-2) -- and requested an IFR clearance to proceed to Indianapolis. (Tr. 147.) His request was denied because the Indianapolis airport was below IFR minimums and was not accepting any additional traffic. (Tr. 147.)

Captain Ronald Blaha, an airline transport rated pilot also present at the airport that morning, testified that, after

⁵ Respondent has submitted a letter in reply to the Administrator's reply brief. Because respondent neither sought nor obtained leave from the Board under 49 C.F.R. 821.48(e) for the filing of this unauthorized document, we have not considered it.

respondent was refused a release, he said "I guess I'll have to go VFR [visual flight rules]." (Tr. 29.) Captain Blaha testified that he thought respondent was kidding because, in his view, the weather conditions were not VFR. (Tr. 29.) Both Captain Blaha and his co-pilot were alarmed when they realized that respondent was indeed about to take off without an ATC clearance or release. (Tr. 33, 42-3, 61-2.)⁶

Respondent departed from Robinson airport at approximately 8:00 a.m. without an ATC clearance. Witnesses testified that the visibility at that time was anywhere from 1/4 mile to 1 mile, and the ceiling was 100-200 feet. (Tr. 16-7, 20, 30, 59.) Respondent admitted that there were clouds at about 200 feet, and that the weather was "borderline" VFR. (Tr. 147-8, 152.) Although respondent at times appeared to deny that he entered the clouds (Tr. 147-8, 152), the record as a whole supports the law judge's finding that respondent took off into clouds. According to respondent, he took off under IFR but was in VFR conditions well before he entered controlled airspace at 700 feet. (Tr. 154-6.)

According to FAA aviation safety inspector Lawrence Smith, the standard procedure for taking off from an uncontrolled airport in IMC is to seek an ATC time-limited clearance to depart from the airport and fly into controlled airspace according to a pre-filed flight plan. (Tr. 88-9.) Although ATC would be able

⁶ In fact, they were so concerned about the hazard posed by respondent's operation that they raised the incident at an airport board meeting the following week. (Tr. 35-7, 65-9.)

to insure that a departing flight cleared in this manner would not conflict with any other known aircraft, Inspector Smith pointed out that ATC would be unaware of aircraft taking off as respondent did, i.e., without communicating with ATC. (Tr. 89-90.) In his opinion, respondent should have remained on the ground at Robinson until Indianapolis had reached acceptable landing minimums and he was able obtain an ATC clearance or release. (Tr. 90-2.) FAA Inspector Michael Lynch characterized respondent's operation as "playing russian roulette," and stated that respondent endangered lives by penetrating clouds without knowing whether there were other aircraft in the vicinity. (Tr. 127-8.)

We agree with the law judge that respondent's takeoff into clouds without an ATC clearance or release was "extremely dangerous" and in violation of section 91.13(a). (Tr. 169.) As we said in Administrator v. Vance, 5 NTSB at 1039, "a pilot departing from an uncontrolled field in instrument conditions but without a clearance has no assurance that VFR conditions will prevail when he reaches controlled airspace." And furthermore, this type of takeoff "also create[s] the hazard of a collision with other aircraft. The see and avoid concept would be nullified and there would be no other means of assuring separation from other aircraft." Id. at 1040. Although respondent may have taken some precautions not taken by the pilot in Vance, his operation nonetheless created an unacceptable hazard. Even respondent acknowledged the danger:

The threat of collision [with the other departing aircraft from Robinson] never really entered my mind. I would have been more apt to hit a VFR aircraft on top of those clouds that had one mile visibility in clear clouds as you come out of clouds . . . Terre Haute approach -- radar can't pick you up at Robinson until you are about five to 600 feet above the ground. So they would have had no way of knowing if there had been another VFR aircraft there. That's what I consider a calculated risk.

(Tr. 149.)

Respondent asserts that he did not defend against the section 91.13(a) charge because he thought it was merely residual to the section 91.155(a) charge. However, we believe that the complaint provided adequate notice to respondent that the alleged 91.13(a) violation could be viewed independently of the alleged 91.155(a) violation. Indeed, the Administrator presented expert testimony at the hearing going to the elements of the 91.13(a) charge: carelessness and potential endangerment. (Tr. 102, 109, 127-8, 131-2.)⁷ It is well-established that conduct can violate section 91.13(a) even if it does not violate any other regulation. See Administrator v. Jaax, 5 NTSB 1616 (1986) (the Board rejected respondent's contention that the Administrator failed to cite a substantive violation -- respondent's failure to adhere to safe operating practices while taxiing violated 91.9 [recodified as 91.13(a)]; Administrator v. Russo, NTSB Order No. EA-3800 at 8 (1993) (no underlying violation is necessary to

⁷ Moreover, our decision in Administrator v. Vance, 5 NTSB 1037, provided constructive, if not actual, notice that a takeoff into uncontrolled airspace under IFR without an ATC clearance constitutes an independent violation of section 91.13(a).

support a 91.9 violation).⁸

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;
2. The initial decision is affirmed; and
3. The 90-day suspension of respondent's airman pilot certificate shall commence 30 days after the service of this opinion and order.⁹

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

⁸ With regard to respondent's assertion that, "[i]f anytime an aircraft enters clouds in uncontrolled airspace it is careless without a clearance then the FAR's should be changed," we note that it would be neither wise nor possible for the FAA to attempt to specifically prohibit every form of conduct that it considered careless.

⁹ For the purpose of this opinion and order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to FAR § 61.19(f).