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NTSB Order No. EA-3991

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 27th day of September, 1993

DAVID R. HINSON,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-11858
v.)	
)	
RICHARD A. ROLUND,)	
)	
Respondent.)	
)	

OPINION AND ORDER

Respondent has appealed from the oral initial decision of Administrative Law Judge Patrick G. Geraghty, issued on October 16, 1991, following an evidentiary hearing.¹ The law judge affirmed an order of the Administrator suspending respondent's airline transport pilot (ATP) certificate for 90 days, after finding that respondent violated 14 C.F.R. 91.75(b),

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

91.105(d)(1), and 91.9.² We grant the appeal and dismiss the complaint.

Respondent was pilot-in-command of Wings West Airlines' March 16, 1990 Flight #5184 between Visalia and Fresno, CA. According to the Administrator's complaint and the law judge's initial decision, respondent departed Visalia, under VFR, when the control zone was below the VFR weather minimum of ground visibility of 3 statute miles.³ The Administrator also charged that respondent deviated from ATC instructions in his approach to Fresno. Specifically, the Administrator alleged and the law judge also found that respondent deviated from instructions to remain at or above 2500 feet while entering the Fresno Air

²§ 91.75(b) (now 91.123(b)) provided:

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

§ 91.105(d)(1) (now 91.155(d)(1)) provided:

(d) Except as provided in § 91.157, no person may take off or land an aircraft, or enter the traffic pattern of an airport, under VFR [visual flight rules], within a control zone -

(1) Unless ground visibility at that airport is at least 3 statute miles

§ 91.9 (now 91.13(a)) provided:

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

The § 91.9 allegation is residual (Reply at 20) and, therefore, is not independently analyzed.

³There is no dispute that, at the time of departure, Visalia was a control zone.

Terminal Airport traffic pattern.⁴ We address respondent's challenges to the law judge's decision separately, in the context of each incident.

1. Departure from Visalia. Respondent arrived at the airport at approximately 5:40 A.M. At about 5:45 A.M. (Tr. at 51), he obtained weather information from American Airlines' Sabre computer system. The report contained no current Visalia weather; only a forecast was provided for Visalia. Respondent neither sought nor obtained current weather information for Visalia, but relied on the Sabre report and his own observations. Respondent took off a few minutes after 6:20 A.M.

At 5:52 A.M. (see Tr. at 24-25⁵), a certified weather observer located at the Visalia airport had reported visibility of 1 1/2 miles with drifting fog. Exhibit C-3. At 6:48 A.M., he reported ground visibility at 3 miles. Id. At the hearing, this witness acknowledged that the weather had cleared up at some unknown time between the two observations. Respondent testified to his belief that, at departure, there was 3 miles ground visibility.

The Administrator offered no other percipient witness to testify regarding the weather at Visalia. He relies, instead, on the official weather report. As seen, the official report at the time of departure (i.e., 1 1/2 miles visibility) did not permit a

⁴According to the record, the directions from ATC were "instructions," rather than a clearance.

⁵There are references in the record to 5:42, but the weather observer testified that 5:52 was correct.

VFR takeoff; § 91.105(d)(1) required that, for a VFR takeoff, respondent have 3 miles ground visibility.

Respondent's defense relies primarily on 14 C.F.R. 135.213.⁶

In his initial decision, and with an extended discussion of 135.213, the law judge appeared to accept the theory that the official weather report controls, see Tr. at 85, and rejected respondent's argument, under § 135.213, that current weather information was "unavailable." We disagree with this approach to the case.

Section 91.105(d)(1), as pertinent, states only that visibility must be 3 miles. It does not direct how that weather determination is to be made, and makes no reference to use of official weather information. Of course, official weather reports are important evidence. They are not, however, necessarily controlling. See Administrator v. Gaub, 5 NTSB 1653, 1656 (1986) (weather reports may be the best evidence in a case; but they are not conclusive).

Section 135.213 does not provide otherwise. Its applicability is limited to "whenever a person operating an

⁶That rule provides, as pertinent, that a weather report is to be from approved sources except that, if such a report is unavailable, pilots in VFR operations may use their own weather observations or observations from others competent to supply them. At the hearing, respondent argued that, through the Sabre system, he had obtained all available weather information; in other words, that no other weather information was available, and that he was, therefore, authorized to apply his own weather observations. Respondent argued, further, that other weather information was "unavailable" because common and company procedure is to keep the aircraft frequency turned to the Unicom and he therefore was unable, once in the aircraft, to communicate in an attempt to obtain other weather information.

aircraft under this part is required to use a weather report or a forecast." 14 C.F.R. 135.213(a). Thus, for example, it would apply to 135.211, VFR:Over-the-top carrying passengers: Operating limitations, which prohibits such operations when weather reports or forecasts indicate certain defined weather conditions. As noted, § 91.105(d)(1) contains no similar reference to use of weather reports or forecasts.⁷

Thus, with the official weather not controlling, we must weigh respondent's testimony, the weather observer's admission, and reports by other aircraft.⁸ We cannot find that a preponderance of the evidence supports the § 91.105(d)(1) allegation. Stated differently, in a case where the official

⁷Although we decide the case on different grounds, we must express our disagreement with respondent's interpretation of § 135.213. It is no answer that the weather observation had not yet made its way into the computerized data base. Further, we also caution against respondent's broad reading of Gaub. Respondent relies too heavily on dicta there, in which we suggested that official weather reports need not be followed. In Administrator v. Howard, NTSB Order EA-3328 (1991), we later stated Gaub's limits as "some narrow circumstances, such as where reported observations are 'stale' because of rapidly changing conditions." Howard at footnote 1.

⁸The Administrator introduced evidence to show that another aircraft, N33T, the airplane that departed before respondent, did so IFR. This offers, in our view, no support to the Administrator's case. There is no showing that it did so because of the weather. Further, that aircraft's communication, "it may burn off here real shortly vfr that's uh there ain't no tops to it," is ambiguous, and can be read to support respondent's position as well, as "no tops to it" could refer to haze, and the aircraft immediately cancelled its IFR clearance.

Respondent, in contrast, introduced evidence that another aircraft passing through the sector at 1429:12 (6:29:12 A.M. local time), a time relatively close to respondent's departure, reported that it looked clear all around Visalia.

weather reports indicate that the conditions changed from IFR to VFR in the space of an hour, the evidence that respondent would not have had sufficient visibility for takeoff at or about the time the first surface weather report was taken does not warrant a finding that the visibility would not have been sufficient for takeoff a half hour later.

2. Arrival at Fresno. The transcript of the communications between respondent and Fresno TRACON⁹ indicates that Fresno instructed respondent:

wings west fifty one eighty four runway one one in use at fresno wind one niner zero at five altimeter three zero one three maintain v-f-r conditions at or above two thousand five hundred enter right down wind for one one right.

Exhibit C-1 at 1428:51. Respondent replied:

okay right downwind for one one right wings fifty one eighty four.

Id. at 1429:02. The record establishes and respondent does not disagree that he descended to 2100 feet, rather than the instructed 2500, thus prompting the Administrator's § 91.75(b) charge.

Respondent answers, however, that he did not hear the instruction to maintain 2500 feet and that, pursuant to FAA Manual 7110.65F, Air Traffic Control, his response to ATC shifted the burden to the controller to eliminate any possible confusion.¹⁰ Further, he argues, the instruction to "maintain

⁹Terminal Radar Approach Control.

¹⁰This regulation provides "If altitude, heading, or other

v-f-r [sic] conditions at or above 2500 feet" was met and could not reasonably be interpreted as an instruction not to descend below 2500 feet.

By abbreviating his response to ATC, respondent may not relieve his obligation as a pilot. But, by the same token, he need not repeat wind and altimeter information. Assuming he did not hear the instruction to maintain 2500 feet, and such an assumption is, we think, valid as there was no reason suggested that respondent would purposely disregard it, respondent's readback was a reasonable one. And, although 2500 feet was the "normal" pattern for landing in Fresno (initial decision at 87), the Administrator admits that it was not the normal pattern altitude for this turboprop Sweringen SA-227AC. See Tr. at 12; Reply at 5. Indeed, when respondent was queried by Fresno ATC regarding his 2100-foot altitude, he stated (at 1432:25): "ah we're descending to pattern altitude. . . ". In the circumstances, we do not think a violation of § 91.75(b) should be found. Accord Administrator v. Hinkle and Foster, 5 NTSB 2423, 2426 (1987).¹¹

(..continued)

items are read back by the pilot, ensure the readback is correct. If incorrect or incomplete, make corrections as appropriate."

¹¹Although respondent urges that Hinkle be abandoned, that case supports dismissal here. In Hinkle, the clearance was to "turn left the second taxiway ahead and hold short of one eight left." The aircraft offered no read back, simply replying with its call sign. We stated that, had the crew read back only the first part of the instruction, it would be ATC's obligation to recognize the apparent non-receipt of the latter half of the clearance and restate it. In Hinkle, we found, however, that the crew should not have crossed an active runway without hearing an instruction to do so. Here, respondent had insufficient reason

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is granted;
2. The complaint is dismissed.

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

(..continued)

to question non-receipt of an altitude clearance because he knew the pattern altitude for his aircraft was 1800 feet. The best course would have been for Fresno, in the absence of respondent's readback of the unusual 2500-foot altitude instruction, to have clarified the matter.