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NTSB Order No.. EA-4207

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 1st day of July, 1994

DAVID R. HINSON,
Administrator,
Federal Aviation Administration,

Complainant,

Docket SE-12621

v.

WARREN R. BECKMAN,

Respondent.

OPINION AND ORDER

Respondent has appealed from the oral initial decision issued by Administrative Law Judge William R. Mullins at the conclusion of an evidentiary hearing held in this case on January 27, 1993.¹ In that decision, the law judge affirmed an order suspending respondent's airline transport pilot certificate based on his acceptance and execution of a visual approach into Agana,

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

Guam when weather conditions allegedly did not meet the minimum standards for flight under visual flight rules (VFR), as required by Continental Airlines' operations specifications.² Respondent was charged with violating 14 C.F.R. 121.3.³ In light of respondent's timely filing of a report under the Aviation Safety Reporting Program (ASRP), the law judge waived the 30-day suspension sought by the Administrator.⁴ As discussed below, respondent's appeal is denied and the initial decision is affirmed.

Respondent was the flying pilot-in-command of a DC-10 which was being operated as Continental Airlines Flight 3 from Honolulu, Hawaii to Agana, Guam. On approach to Guam, after the flight had been cleared by air traffic control (ATC) to descend

² Continental Airlines' operations specifications provide that on flights operated under instrument flight rules (IFR) "the flightcrew may accept a visual approach or a Charted Visual Flight Procedure (CVFP) provided [among other requirements] . . . [t]he flight remains in weather conditions equal to or better than the minimum required for flight under VFR." (Exhibit A-4, Continental Airlines' operations specifications, B33.a. (4) .)

³ Section 121.3(c) provides:

§ 121.3 Certification requirements: General.

(c) Except as provided in paragraphs (d) and (h) of this section no person may engage in scheduled air transportation, other than that described in paragraph (a) of this section, without, or in violation of, a flag air carrier operating certificate and appropriate operations specifications issued under this part. An air carrier holding such a certificate is hereafter in this part referred to as a **flag air carrier**.

⁴ The Administrator has not appealed from the waiver of sanction.

to 2,300 feet MSL⁵, respondent accepted and executed a visual approach into Guam. According to Continental Airlines' operations specifications, a flightcrew may accept a visual approach only so long as the flight remains in weather conditions meeting basic VFR weather minimums. As relevant to this case, those minimums (set forth in 14 C.F.R. 91.155) required that the flight maintain three miles visibility and a distance from clouds of at least 500 feet below, 1,000 feet above, and 2,000 feet horizontally. Official weather observations at about the time of the approach indicated that there was 15 miles visibility, a broken cloud layer beginning 1,700 feet above ground level (about 2,000 feet MSL) which covered six tenths of the sky, and towering cumulus clouds in all quadrants.

The Administrator's only witness was an FAA inspector (David Bitonti) who conducted an en route inspection of this flight, during which he observed the approach and landing from an observers seat in the rear of the cockpit. Inspector Bitonti acknowledged that when respondent accepted the visual approach there were breaks in the cloud layer through which the airport could be seen, but indicated that it was "obvious" to him at that time that the flight would not be able to maintain the required cloud clearances throughout the descent. (Tr. 27.) Indeed, he testified that the aircraft entered the base of the clouds during its descending right-hand turn to the airport. He estimated that the aircraft remained in the clouds for two or three seconds.

⁵ Mean sea level.

All three members of the flightcrew (respondent, the first officer, and the second officer) conceded that there were clouds in the area, but denied that the aircraft entered the clouds at any time after acceptance of the visual approach. Respondent testified that he never lost sight of the airport during his visual approach, and maintained that he did not violate any federal aviation regulations. The first officer, whose right-hand position in the cockpit provided the most comprehensive outside view at the time of the alleged cloud entry, testified that there were "puffy buildups" of clouds on both sides of the aircraft, but that he could see the runway through breaks in those clouds. He estimated that the spaces between the clouds were "maybe a mile, half a mile sometimes." (Tr. 93.) However, he testified that VFR conditions were maintained during the entire descent.

In his initial decision, the law judge credited the crewmembers' testimony that the aircraft did not pass through a cloud. Nonetheless, he concluded that the preponderance of the evidence established that the flight "was probably closer than 500 feet below the clouds or 1,000 feet above them or 2,000 feet separate from them as it descended through this cloud layer," and that respondent thus violated the applicable VFR weather minimums incorporated in Continental Airlines' operations specifications. (Tr. 144-45.) Accordingly, he affirmed the charged violation of section 121.3(c). The law judge also expressed concern that ATC had issued the clearance for a visual approach before the flight

had penetrated the cloud "ceiling," and noted his belief that the flight was probably in violation of the VFR restrictions as soon as it was cleared for a visual approach.⁶ (Tr. 146.)

On appeal, respondent contests the law judge's finding that he violated the VFR weather minimums, arguing that there is insufficient evidence in the record to support such a finding. Rather, he contends that the preponderance of the evidence establishes that he maintained the appropriate clearance from clouds. He also notes the law judge's finding of ATC culpability, and asserts that if there was a violation, he should not be held responsible. Finally, he asserts that the complaint and the evidence in this case focused only on the charge that he flew through a cloud, and argues that the law judge improperly affirmed the violation on a basis not alleged in the complaint (failure to maintain required distances from clouds). Respondent claims that he was denied an opportunity to respond to the charge that he failed to maintain required distances from clouds.

We disagree with respondent's contention that he was not on notice that the distance-from-clouds requirements of section 91.155 would be at issue in this proceeding. Although it is true that the complaint alleged that his violation occurred when he flew through a cloud, the complaint also made clear that

⁶ Though noting that this perceived ATC error did not excuse respondent's violation in this case, the law judge commented that if the sanction had not already been waived pursuant to the ASRP, he would have considered what he viewed as ATC'S improper issuance of the clearance as a factor warranting a reduction in sanction. (Tr. 146.)

respondent was being charged with violating "the basic VFR weather minimums prescribed by FAR section 91.155(a) ."

(Complaint at 1.) Moreover, the law judge noted at the beginning of the hearing, and again during Inspector Bitonti's testimony, that this case involved an alleged violation of section 91.155(a) . (Tr. 3, 64.) We agree with the Administrator that the complaint can fairly be read as charging respondent with failing to maintain the distance-from-clouds required by that regulation, and that respondent had an opportunity at the hearing to present evidence on that issue.

Further, we agree that there is sufficient evidence in this record to support the law judge's finding that respondent violated the distance-from-clouds requirements in section 91.155(a). Respondent casts the law judge's initial decision as relying almost entirely on the mistaken assumption that, because the broken cloud layer in this case was technically defined as a cloud "ceiling," respondent could not have passed through it without violating the clearances in section 91.155(a) . He emphasizes that, according to the official weather report, this cloud "ceiling" covered only six tenths of the sky. Thus , respondent reasons, it was entirely possible to conduct a visual . approach through the four tenths of the sky which remained clear.

While we do not take issue with respondent's observations, we disagree with his interpretation of the initial decision. Although the law judge may have misunderstood the implication of the term "ceiling" in the context of this case, we are satisfied

that his finding of violation was based on the preponderance of the factual evidence in this case -- which consisted primarily of eyewitness testimony -- and not on a misguided belief that it was impossible to penetrate the 1,700-foot cloud "ceiling" without violating the applicable clearance minimums. Specifically, his finding is supported by Inspector Bitonti's testimony that it was "obvious" to him at the time respondent accepted the visual approach that the flight would not be able to maintain adequate cloud clearances, and that the aircraft subsequently flew through the clouds. Although the law judge ultimately concluded that the aircraft did not fly through clouds, thus implicitly rejecting this aspect of the inspector's testimony, he could still rely on that testimony to the extent that it also indicated an unlawful proximity to clouds.'

Finally, we must reject respondent's claim that ATC's alleged role in causing this incident exonerates him from any violation. In our judgment, this record contains insufficient information to reach any conclusion regarding the propriety of ATC's issuance of the visual approach in this case.

⁷ See Administrator v. Crowe, 5 NTSB 1372 (1986), where the law judge rejected testimony that the respondent's aircraft came within 3 to 5 feet of the witness, finding that, because he believed the witness would have attempted to take evasive action if the aircraft had flown that close, it was more likely the aircraft passed within 20 feet of him. The Board concluded that the Administrator's evidence did not lose its substantial, probative and reliable character simply because the law judge found it inaccurate to some extent.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied; and
2. The initial decision is affirmed.