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NTSB Order No. EA-4348

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 7th day of April, 1995

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DAVID R. HINSON,	)	
Administrator,	)	
Federal Aviation Administration,	)	
	)	
Complainant,	)	
	)	
v.	)	Dockets SE-13330
	)	SE-13374
	)	
ALEX ESPINAL and	)	
RUSSELL Q. JESTER, JR.	)	
	)	
Respondents.	)	
	)	

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**OPINION AND ORDER**

The Administrator and Respondent Jester have each appealed from the oral initial decision of Administrative Law Judge William A. Pope, II, rendered on March 11, 1994, at the conclusion of a four-day evidentiary hearing.<sup>1</sup> By that decision, the law judge affirmed, in part, an order of the Administrator

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

charging Respondent Jester with violations of Federal Aviation Regulations ("FAR," 14 C.F.R. Part 91) sections 91.187(a), failure to report, as soon as practical, while operating in controlled airspace under instrument flight rules (IFR), a malfunction of navigational equipment during flight, and 91.13(a), careless or reckless operation. The law judge, however, found that the Administrator had not proven by a preponderance of the evidence that Respondent Jester violated FAR sections 91.123(a) and (b), 91.183(a), 91.187(b), and 91.703(a)(1), or that Respondent Espinal had violated FAR sections 91.13(a), 91.123(b), and 91.703(a)(1).<sup>2</sup> He dismissed

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<sup>2</sup>The pertinent FAR sections state as follows:

**§ 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.

**§ 91.123 Compliance with ATC clearances and instructions.**

(a) When an ATC clearance has been obtained, no pilot in command may deviate from that clearance, except in an emergency, unless an amended clearance is obtained. A pilot in command may cancel an IFR flight plan if that pilot is operating in VFR weather conditions outside of positive controlled airspace. If a pilot is uncertain of the meaning of an ATC clearance, the pilot shall immediately request clarification from ATC.

(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.

**§ 91.183 IFR radio communications.**

The pilot in command of each aircraft operated under IFR in controlled airspace shall have a continuous watch maintained on the appropriate frequency and shall report by radio as

the complaint against Respondent Espinal and reduced the suspension of Respondent Jester's Airline Transport Pilot (ATP) certificate from 90 days to 15 days.

On appeal, the Administrator asserts that the respondents did not exercise the high degree of care that is required of holders of ATP certificates. He further argues that they could have prevented the deviation if they had diligently monitored and cross-checked the compass systems. Respondent Jester, in his appeal, contends that the law judge should also have dismissed the 91.187(a) and 91.13(a) charges against him because he was not  
(..continued)

soon as possible-

(a) The time and altitude of passing each designated reporting point, or the reporting points specified by ATC, except that while the aircraft is under radar control, only the passing of those reporting points specifically requested by ATC need to be reported.

**§ 91.187 Operation under IFR in controlled airspace:  
Malfunction reports.**

(a) The pilot in command of each aircraft operated in controlled airspace under IFR shall report as soon as practical to ATC any malfunctions of navigational, approach, or communication equipment occurring in flight.

(b) In each report required by paragraph (a) of this section, the pilot in command shall include the -

- (1) Aircraft identification;
- (2) Equipment affected;
- (3) Degree to which the capability of the pilot to operate under IFR in the ATC system is impaired; and
- (4) Nature and extent of assistance desired from ATC.

**§ 91.703 Operations of civil aircraft of U.S. registry  
outside of the United States.**

(a) Each person operating a civil aircraft of U.S. registry outside of the United States shall-

- (1) When over the high seas, comply with annex 2 (Rules of Air) to the Convention on International Civil Aviation and with §§ 91.117(c), 91.130, and 91.131.

given adequate notice of the basis for those charges.<sup>3</sup>

After consideration of the briefs of the parties and the record, the Board finds no error in the initial decision and, as such, affirms the initial decision in its entirety. We adopt the law judge's findings as our own.

The initial decision contains a thorough discussion of the facts, which we need only summarize here. On February 1, 1992, Respondents Jester and Espinal were pilot-in-command and first officer, respectively, of Carnival Airlines Flight 124, a Boeing 727, traveling from Borinquen, Puerto Rico, to Newark International Airport, New Jersey. The aircraft was equipped with a single OMEGA navigational system (ONS),<sup>4</sup> two gyro compasses, and a magnetic compass.<sup>5</sup> It is undisputed that during this flight, the aircraft deviated from Air Traffic Control (ATC)

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<sup>3</sup>He also argued that the law judge erroneously affirmed the 91.187(b) charge; however, respondent's assumption is incorrect. The law judge found that the Administrator did **not** prove that Respondent Jester violated 91.187(b). See Initial decision at 1249.

Both respondents filed a reply in opposition to the Administrator's appeal. The Administrator did not file a reply to Respondent Jester's appeal.

<sup>4</sup>As defined in the Airman's Information Manual, OMEGA is an Area Navigation system "designed for long-range navigation based upon ground based electronic navigational aid signals."

<sup>5</sup>It was brought up for the first time at the hearing that, according to the Carnival Airlines operations specifications, the type of OMEGA system installed in the aircraft may not have been the kind approved for that aircraft, and that single OMEGA use was not approved outside the range of VOR or DME navigational aids. (Transcript (Tr.) at 730-35.) These allegations were not included in the Administrator's complaints and, consequently, the law judge did not allow them to be explored for the first time at trial. We, therefore, need not discuss them here.

clearance without receiving an amended clearance. Specifically, Flight 124 had been cleared from Puerto Rico to Newark via airway AMBER 300, a route that took the aircraft over the Atlantic Ocean beyond radar coverage and out of range of VOR stations.<sup>6</sup> Soon after reporting that they had just passed CATCH (a mandatory reporting point), respondents' aircraft was observed by Bermuda ATC to be approximately 140 NM northwest of Bermuda, which was at least 150 NM from CATCH.

The Administrator alleged that Captain Jester, as the pilot-in-command of an aircraft operated under IFR in controlled airspace, failed to report by radio as soon as possible the time and altitude of passing each designated reporting point, specifically that he "transmitted an incorrect position report to ATC by reporting the CATCH intersection when [the aircraft was] about 150 nautical miles off course," and "failed to report as soon as practical to ATC, any malfunctions of navigational, approach or communication equipment occurring in flight. Specifically, [failing] to report that your Omega Navigation System was malfunctioning." Complaint at 2.

Respondents admit that they were off course, but claim the affirmative defense of equipment malfunction. They assert that the number one directional gyro compass provided erroneous information to the OMEGA system, which did not indicate that the

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<sup>6</sup>Amber 300 is 45 nautical miles (NM) wide on either side of its center line.

VHF omnidirectional range (VOR) is a ground-based navaid that transmits VHF navigational signals.

aircraft was off course. Respondent Jester stated that they accomplished the normal checks of the OMEGA system before takeoff, entered the mandatory waypoints into the computer, and performed a gateway check at waypoint LENNT, where the OMEGA was found to be functioning properly. They maintain that they performed all the necessary checks and are not responsible for the aircraft's deviation from the flight plan.

About 30 minutes after passing LENNT, the compass heading comparator light illuminated, meaning that there was at least an eight-degree difference between the two gyro compasses. The number two compass had a sync indicator showing a full positive deflection. This led respondents to believe that the number two compass was inaccurate. (Tr. at 647.) Respondent Jester compared the gyro compasses to the magnetic compass (which he claimed was erratic due to light to moderate turbulence), "resynced" the number two compass, and the light went out. In the next five minutes, the comparator light illuminated again and Captain Jester repeated the procedure. The third time, he switched both compasses to receive their input from the number one gyro.<sup>7</sup> Captain Jester testified that he was not required to report the compass malfunction to ATC. (Tr. at 652-53.) He further stated that the difference between the magnetic compass and the number one compass was not greater than ten degrees, an

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<sup>7</sup>The FAA's expert witness stated that Captain Jester's response was not inappropriate. (Tr. at 333-34.)

amount that was permitted under the Carnival Flight Manual.<sup>8</sup> (Tr. at 659-60.) Respondents also encountered higher wind readouts on the OMEGA than forecast and, at one point, an obviously erroneous reading of a 282-knot wind.<sup>9</sup> Respondents maintain that they had no reason to question the accuracy of their equipment, as it is common for actual winds to differ from forecast winds.

When contacted by Bermuda ATC, Respondent Jester reported that he "obviously" had a navigational system failure. He reactivated the number two compass, assumed that both the OMEGA and the number one compass were in error, and used the number two compass, in conjunction with VOR and DME (distance measuring equipment) to set the aircraft on the 350 radial to the next waypoint, 180 miles away. (Tr. at 689-91.) He then utilized dead reckoning until he came within radar control.

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<sup>8</sup>The Administrator argues in his appeal that allowing a ten-degree error to persist is not consistent with the exercise of the highest degree of care required of an ATP. However, as respondents argue, it was not a ten-degree error, but a differential of not greater than 10 degrees that Respondent Jester testified was permissible. Respondents now request that the Board take judicial notice of the section in the Carnival Operations Manual which states that this is an allowable difference. We need not do so, as respondent testified to the standard, the testimony was not rebutted, and the law judge found all the witnesses credible.

<sup>9</sup>At 15:05z, forecast winds at waypoint KRAFT at flight level (FL) 310 were 54 knots, while respondents received an OMEGA reading of 109 knots at FL 350. (Tr. at 678.) At about 15:30z, United 870 reported winds at FL 390 at 139 knots. About a half hour later, the OMEGA recorded a 282-knot wind, a reading that lasted only a few minutes. At 16:30z over waypoint CATCH, the OMEGA winds were 359 degrees at 109 knots, while the forecast winds were 270 degrees at 91 knots. (Exhibit (Ex.) A-19.) About 15 minutes later, respondents were contacted by Bermuda ATC.

Respondent Jester argues in his appeal that the law judge erred by finding that he should have contacted ATC when it was determined that he had a problem with one of his two gyro compasses. He claims that the complaint specifically stated only that he should have reported a problem in his ONS system, not that he should have reported a problem with the gyro compass. We find this argument bordering on the frivolous. The complaint stated that he failed to report as soon as practical a malfunction of navigational equipment occurring in flight, as required by FAR section 91.187(a). This charge was certainly specific enough to place him on notice in order to prepare a defense. In addition, not only did testimony at trial reveal that the OMEGA system utilizes the information from the number one gyro compass, Respondent Jester, clearly acknowledging the connection between the two systems, in his written account of the flight prepared the same day that it occurred, described the course deviation as having been due to "compass degradation of Omega Nav. System." (Ex. A-8.)

The Administrator argues that the respondents' failure to perform proper cross checks prevented them from detecting the OMEGA system failure; namely, that they did not use a plotting chart as required by the Carnival flight manual and did not perform position checks every 10 minutes. The Administrator, however, has not identified with any specificity an error in the law judge's decision that respondents performed all cross checks

required by the Carnival flight operations manual.<sup>10</sup> While precedent supports the premise that a reasonable and prudent pilot is required to cross check the instruments available to him, see Administrator v. Frederick and Ferkin, NTSB Order No. EA-3600 (1992), evidence presented in the instant case supports the law judge's decision that the required cross checks were performed.<sup>11</sup>

We agree with the law judge's determination that Respondent Jester failed to report, as soon as practical, a malfunction of his navigational equipment. The loss of the number two compass, combined with the high and unusual wind readouts and the fact that the aircraft was navigating over the open water with only one OMEGA system, beyond radar and VOR range, should have prompted respondent to notify ATC that his navigational

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<sup>10</sup>Evidence was introduced to show that the plotting charts were not required on this flight and Respondent Jester testified that he performed all 10-minute checks. The Administrator did not adequately rebut this evidence.

<sup>11</sup>In Frederick and Ferkin, an altitude deviation case, respondents asserted an affirmative defense of autopilot malfunction. The Board found that even given the malfunction, respondents still were under a duty to monitor altitude. By failing to do so, they exercised less than the highest degree of care required of a reasonable, prudent pilot. See also Administrator v. Jensen, NTSB Order No. EA-4036 (1993) (Board upheld law judge's determination that respondent was responsible for course deviation, despite malfunction of flight management computer, because he did not know the flight plan sufficiently. Respondent still had access to instruments that could tell him his heading). Compare Administrator v. Anderson, 4 NTSB 1069 (1983) (flight deviation due to malfunction to both INS units and dead reckoning could not be accomplished because there was no accurate last known position. The Administrator did not present sufficient evidence to show that respondent acted negligently or failed to exercise due care).

capabilities were compromised.<sup>12</sup> The evidence supports a finding of a FAR section 91.187(a) violation and the consequent residual 91.13(a) violation.

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<sup>12</sup>The Carnival Airlines General Operations Manual, OMEGA Policy Manual (Ex. R-3), clearly was written to address dual OMEGA systems and, in fact, does not address navigation using a single OMEGA except in "ACTION TO BE TAKEN FOLLOWING ONE SYSTEM FAILURE," i.e., when there is only one working OMEGA system, a situation that can be analogized to the instant case. This section states:

Notify ATC. If the failed system can be identified with a high degree of confidence and the other system appears normal, fly the normal system and carefully monitor its performance using the procedures in "ACTION TO BE TAKEN FOLLOWING A DIVERGENCE BETWEEN SYSTEMS."  
(Ex. R-3 at 13.)

Included in the referenced "ACTION TO BE TAKEN FOLLOWING A DIVERGENCE BETWEEN SYSTEMS," is a directive to "[i]f possible, use VOR, ADF, DR [dead reckoning], airborne radar or other navigation aids to obtain a position fix." It appears that a colorable argument could have been made by the Administrator that respondents, in the exercise of the highest degree of care, judgment and responsibility required of holders of ATP certificates, should have been cross checking using dead reckoning from the time of their gateway check, since they only had one working OMEGA system on board. Such a precaution presumably could have alerted them to the navigational problem before they drifted more than 150 NM off course.

**ACCORDINGLY, IT IS ORDERED THAT:**

1. The appeals of the Administrator and Respondent Jester are denied;
2. The initial decision is affirmed; and
3. The 15-day suspension of Respondent Jester's ATP certificate, as well as any other airman certificates he holds, shall begin 30 days after service of this order.<sup>13</sup>

HALL, Chairman, FRANCIS, Vice Chairman, and HAMMERSCHMIDT, Member of the Board, concurred in the above opinion and order.

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<sup>13</sup>For the purpose of this order, respondent must physically surrender his certificate to a representative of the Federal Aviation Administration pursuant to FAR § 61.19(f).