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NTSB Order No. EA-4530

**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 26th day of February, 1997

BARRY L. VALENTINE,)
Acting Administrator,)
Federal Aviation Administration,)
)
Complainant,)
)
v.) Docket SE-14309
)
RICHARD LEE MERRELL,)
)
Respondent.)
_____)

OPINION AND ORDER

Respondent has appealed from the oral initial decision issued by Administrative Law Judge William R. Mullins on May 29, 1996.¹ The law judge affirmed the Administrator's order, on finding that respondent had violated 14 C.F.R. 91.123(b) and (e) and 91.13(a).² Sanction was waived pursuant to the Aviation

¹A copy of the initial decision, an excerpt from the transcript, is attached.

²Sections 91.123(b) and (e) prohibit operating an aircraft
(continued...)

Safety Reporting Program. We grant the appeal.

Respondent was the non-flying, pilot-in-command of Northwest Flight 1024 on June 19, 1994. As the non-flying pilot, one of his responsibilities was communication with ATC. The transcript of communications (Exhibit A-2) establishes, and the law judge found, that at 1525:48, ATC cleared the aircraft to 17,000 feet, and that respondent (at 1525:52) acknowledged that clearance. Approximately 1 and 1/2 minutes later, ATC cleared American Airlines Flight 94 to 23,000 feet. The American Airlines pilot acknowledged that instruction and, when he did so, the tape of the transcript exhibits certain background noise.³ The controller at the time considered it nothing out of the ordinary, but the record establishes, and the Administrator does not contest, that the noise was respondent's simultaneous acknowledgment of the clearance meant for the other aircraft. Respondent's transmission was "stepped on," because it occurred at the same time as that of Flight 94.⁴ As a result, the controller did not hear respondent's mistaken acknowledgment of

(...continued)

contrary to an air traffic control (ATC) instruction in an area in which air traffic control is exercised and prohibit operating an aircraft according to a clearance or instruction issued to another aircraft. Section 91.13(a) prohibits operating an aircraft in a careless or reckless manner so as to endanger the life or property of another.

³There is no such noise on any other portion of the tape.

⁴See Exhibit A-8. FAA's pilot deviation report, page 3 ("AAL94 clearly acknowledged the clearance and an undistinguishable noise accompanied the readback. Believed to be NWA1024 acknowledging for climb at the same time.").

the clearance meant for Flight 94. In such circumstances, the pilots of the Northwest flight had no way of knowing that their transmission had not been received.

Respondent testified that, at the time, he believed that he was responding to ATC instructions to his aircraft to climb to 23,000 feet.

The issue before us is whether that mistake warrants affirmance of the Administrator's order and a finding that respondent violated the cited regulations. We agree with respondent that, in the circumstances, dismissal is the more appropriate result.

In Administrator v. Frohmuth and Dworak, NTSB Order No. EA-3816 (1993), respondents accepted a clearance intended for another aircraft. We found that ATC's instructions to the two aircraft had not been clearly separated and it was reasonable for respondents to misunderstand them. Respondents read back the clearance they thought they had received. ATC heard a "squeal," followed by a repeat of the last of the information transmitted by the controller, the weather. We concluded:

[T]he crew, albeit having misheard a clearance, followed prudent procedure in giving a complete readback of the clearance it believed to have been directed to them, at which point ... only the controller [in light of the squeal and the receipt of what could have been only a partial transmission] was in a position to suspect that a misreading had occurred, but instead of seeking confirmation, the controller acknowledged only a partial transmission. We do not by any means intend that our decision here affirming the law judge be read to minimize the importance of careful attention to tower transmissions, or to suggest that pilots will, as a general rule, not be held accountable when they mistakenly believe that a particular clearance has been given to them. Nevertheless, airmen cannot be held to a

strict liability standard for ATC deviations when their mistaken behavior is apparently induced and then ratified by ATC's actions.

The law judge apparently was of the view that, absent ATC contribution to the deviation, a respondent will not be excused such a mistake.⁵ However, that was not our intent, and does not give full meaning to our refusal to impose a strict liability standard.

Respondent here made an error of perception: he truly thought he heard the clearance addressed to his aircraft. There is no evidence in the record on which to conclude that respondent had any reason to question a 23,000-foot clearance, or that respondent in any way during this time was performing his duties in a careless or otherwise unprofessional manner. In this case, and based on the law judge's favorable credibility assessment of both pilots, respondent's acceptance of a clearance meant for another aircraft was simply a perception mistake; it was not due to a failure of attention. The Administrator's argument that the error was caused by careless inattention is not supported in the record in this case and will not be automatically assumed in every case. The particular facts in each are relevant. See Administrator v. McIntosh and Spriggs, NTSB Order No. EA-4174 (1994) (speaking to passenger not an excuse for altitude deviation); and Administrator v. Croasdale and Burke, NTSB Order

⁵Although we do not and need not decide the case on this basis, we are concerned that ATC did not recognize the new background noise as a potential warning that something might be wrong.

No. EA-4317 (1995) (distraction from nearby B-52s not a defense). Nor was the error a failure of procedure, as respondent made a full readback so that the opportunity was there, absent the squelched transmission, for ATC to correct his error. Compare Fromuth and Dworak with Administrator v. Fox, NTSB Order No. EA-4076 (1994) (sanction appropriate when respondent tuned in the incorrect frequency (with the result that ATC did not hear him), did not seek or obtain ATC acknowledgment of his sign-on on the frequency, and then took a clearance meant for another aircraft).

No purpose would be served by attaching a penalty in the circumstances set forth on this record.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is granted; and
2. The Administrator's order is dismissed.

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