

SERVED: August 15, 2011

NTSB Order No. EA-5593

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 12th day of August, 2011

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J. RANDOLPH BABBITT,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-18542RM
v.)	
)	
LANCE Z. RICOTTA,)	
)	
Respondent.)	
)	
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OPINION AND ORDER

Respondent appeals the decision and order on remand of Administrative Law Judge Patrick G. Geraghty, issued May 14, 2010, in this matter.¹ By that decision, the law judge re-

¹ Copies of the May 14, 2010 decision and order, as well as the August 18, 2009 oral initial decision, are attached.

affirmed his conclusion that respondent was not eligible for a waiver of sanction pursuant to the Aviation Safety Reporting Program (ASRP).² The law judge therefore affirmed the 45-day suspension of respondent's airline transport pilot (ATP) certificate, based on alleged violations of 14 C.F.R. §§ 91.13(a)³ and 91.123(a).⁴ We deny respondent's appeal.

The Administrator's order, issued March 3, 2009, which serves as the complaint against respondent, alleged that respondent operated an Aero Commander 1121B on an instrument flight rules (IFR) flight with one passenger on February 21, 2008, which departed from Henderson Executive Airport in

² Under the ASRP, the Administrator may waive the imposition of a sanction, despite the finding of a regulatory violation, as long as certain other requirements are satisfied. Aviation Safety Reporting Program, Advisory Circular 00-46D at ¶ 9c (Feb. 26, 1997). The Program involves filing a report with the National Aeronautics and Space Administration (NASA), which may obviate the imposition of a sanction where (1) the violation was inadvertent and not deliberate; (2) the violation did not involve a criminal offense, accident, or action found at 49 U.S.C. § 44709; (3) the person has not been found in any prior FAA enforcement action to have committed a regulatory violation for the past 5 years; and (4) the person completes and mails a written report of the incident to NASA within 10 days of the violation.

³ Section 91.13(a) provides that, "[n]o person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another."

⁴ Section 91.123(a) provides that, "[w]hen an ATC clearance has been obtained, no pilot in command may deviate from that clearance unless an amended clearance is obtained, an emergency exists, or the deviation is in response to a traffic alert and collision avoidance system resolution advisory."

Henderson, Nevada. The complaint stated that respondent received a clearance from air traffic control (ATC) with instructions to climb to and maintain an altitude of 11,000 feet mean sea level (msl). However, the complaint alleged that respondent deviated from this clearance by climbing above 11,000 feet msl.

Respondent filed a timely answer to the Administrator's complaint, in which he admitted that he operated the aircraft at issue as pilot-in-command, and that ATC issued to him a clearance, which he acknowledged, with instructions to climb to and maintain 11,000 feet altitude msl. Respondent's answer also contained multiple affirmative defenses, among which respondent alleged that he was eligible for a waiver under the ASRP, and that the air data computer (ADC) in the aircraft had failed, which resulted in his altitude not being properly reported to him during the flight.

The law judge held a hearing concerning respondent's affirmative defenses. Respondent testified on his own behalf, and called three witnesses, including the air traffic controller on duty during the flight at issue who instructed respondent to climb to and maintain 11,000 feet altitude msl. The Administrator responded to respondent's case by calling three other witnesses and presenting exhibits, such as radar data and the ATC voice recording from the flight.

At the conclusion of the hearing, the law judge determined that the Administrator proved respondent violated the regulations, as charged. The law judge acknowledged that respondent testified that he proceeded to 11,000 feet altitude msl and did not proceed above that altitude until ATC had instructed him to do so. The law judge stated, however, that the air traffic controller who handled the flight testified the aircraft continued to climb past 11,000 feet altitude msl to approximately 12,000 feet altitude msl; as a result, the controller instructed respondent to climb expeditiously to 13,000 feet altitude msl, because respondent was in conflict with a Jet Blue aircraft.

The law judge determined the Administrator successfully rebutted respondent's contention that a failure of his equipment prevented him from complying with the ATC instruction to climb to and maintain 11,000 feet altitude msl. The law judge determined that respondent filed a timely report with NASA for the ASRP, but did not carry the burden of proof to show that his violation was inadvertent. The law judge affirmed the Administrator's sanction.

Following respondent's first appeal of the law judge's decision, we remanded the case to the law judge for clarification concerning his determination that respondent was not eligible for a waiver of sanction because he failed to show

his conduct was inadvertent. We stated the law judge's decision concerning the "not deliberate and inadvertent" prong of the ASRP test lacked precision.

Following our remand, the law judge issued a written decision and order, in which he clarified the basis for his finding that respondent's actions were not inadvertent. The law judge correctly stated, concerning this prong of the ASRP test, that a respondent must establish that his or her actions were *both* not deliberate *and* inadvertent.⁵ In the case at issue, the law judge stated respondent did not prove his actions were inadvertent. The law judge stated the following evidence supports this conclusion: respondent received and acknowledged the ATC instruction; the aircraft instrumentation was functioning properly; and inattention does not excuse failure to comply with an ATC instruction, because "a reasonable and prudent pilot is expected to be continuously aware of and to utilize all relevant instrument data available." Decision and Order at 3. The law judge also reminded the parties of the statement in our original Opinion and Order that respondent did

⁵ Administrator v. Ferguson and Bastiani, 3 NTSB 3068, 3070 (1980), aff'd, Ferguson v. NTSB, 678 F.2d 821 (9th Cir. 1982); see also, e.g., Administrator v. Schwarzman, NTSB Order No. EA-5468 at 14-15 (2009); Administrator v. Blum, NTSB Order No. EA-5371 at 9-10 (2008).

not present any evidence to support his claim that inattention was the reason why he deviated from the ATC instruction.⁶

On appeal, respondent argues that the law judge incorrectly analyzed the "not deliberate and inadvertent" prong of the ASRP standard of review. In particular, respondent contends the law judge's statement concerning inattention and inadvertence was erroneous, and that, in this case, the evidence shows respondent did not ignore his instruments, but simply misread them. As a result, respondent asserts the opinion of the Court of Appeals for the Ninth Circuit in Ferguson v. NTSB, 678 F.2d 821 (1982), supports his defense. In Ferguson, the Ninth Circuit opined, "a pilot acts inadvertently when he flies at an incorrect altitude because he misreads his instruments. But his actions are not inadvertent if he engages in the same conduct because he chooses not to consult his instruments to verify his altitude." Id. at 828. Respondent asserts he incorrectly read his altimeter and that of his co-pilot, and therefore his failure to comply with the ATC instruction to maintain 11,000 feet was inadvertent.

The evidence does not support respondent's contention. First, respondent only offers his own self-serving testimony as evidence that he misunderstood his instruments. Respondent does not explain how he misread both his altimeter and his copilot's

⁶ Administrator v. Ricotta, NTSB Order No. EA-5519 at 10 (2010).

altimeter, which are two separate instruments, independent of one another. Respondent also does not acknowledge or address the fact that he had access to other instruments, such as the vertical speed indicator and attitude indicator, to indicate that the aircraft was climbing or was not level at a certain altitude.⁷ Respondent argues he believed he leveled off at 11,000 feet msl, when really he was at 12,000 feet msl. The evidence, however, shows respondent was in a continuous climb, past his clearance limit of 11,000 feet msl and through 12,000 feet msl. Exhs. C-3 (ATC plot with tracking data) and C-4 (video simulation of flight based on radar data); Tr. at 82 (testimony of FAA support specialist Larry McMahon that radar data showed respondent proceeded to 12,100 feet msl). Only after respondent reached 12,100 feet msl did the air traffic controller contact respondent and re-clear him to expedite through 13,000 feet msl, to resolve a loss of separation with the Jet Blue aircraft.⁸

⁷ At the hearing, one of the Administrator's witnesses testified a pilot flying in instrument meteorological conditions on an IFR flight plan would not limit his or her instrument scan to the pilot's and copilot's altimeters for monitoring and verifying the aircraft's altitude. Tr. at 99-100. Respondent does not refute the FAA inspector's testimony that a pilot flying IFR in these conditions would be expected to perform a cross-scan of these instruments. In this regard, see Administrator v. Kooistra, NTSB Order No. EA-5588 at 12 n.12 (2011).

⁸ Respondent failed to report to ATC that he reached 11,000 feet msl, even though he had informed ATC when he reached both

We have previously held that pilots must strictly adhere to ATC instructions.⁹ We will not find that a pilot's failure to comply with such instructions as inadvertent absent compelling evidence to show that the failure occurred due to a mistake.¹⁰ Respondent did not prove such a mistake in this case; his inability to show a mechanical defect, combined with his failure to explain why he did not attempt to utilize other equipment in the aircraft to determine or estimate his altitude, indicates that he did not act inadvertently. In addition, as explained above, the evidence does not support respondent's assertion that he incorrectly perceived his altimeter.

Respondent also contends the law judge incorrectly characterized his conversation with the Administrator's attorney at the hearing concerning this prong of the ASRP test. Respondent does not explain how the law judge's characterization prejudiced his defense concerning inadvertence. We find the law judge's description of this conversation as a colloquy that was

(..continued)

5,000 feet msl and 7,000 feet msl. Exh. C-4. Respondent testified that he believed he leveled off at 11,000 feet msl for 20 to 30 seconds, which would have allowed enough time for him to report his altitude.

⁹ See, e.g., Administrator v. McCarthney, NTSB Order No. EA-5304 at 8-9 (2007) (citing several cases and stating, "[w]e have adhered to [a] standard of stringent compliance with ATC instructions in a number of cases").

¹⁰ See id. at 10.

not part of his initial decision does not constitute reversible error, as we resolve respondent's appeal based on the law judge's analysis of the "not deliberate and inadvertent" prong of the ASRP test.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;
2. The law judge's decision and order is affirmed; and
3. The 45-day suspension of respondent's ATP certificate shall begin 30 days after the service date indicated on this opinion and order.¹¹

HERSMAN, Chairman, HART, Vice Chairman, and SUMWALT, ROSEKIND, and WEENER, Members of the Board, concurred in the above opinion and order. SUMWALT, Member, joined by WEENER, Member, submitted the following concurring statement.

Member Robert L. Sumwalt III, Concurring

As someone who made a living by flying aircraft for over thirty years, this case troubled me. Pilots are taught, and the Federal Aviation Regulations (FARs) provide, that if a pilot is involved in an incident or occurrence involving a violation of FARs, a pilot may file a report under the provisions of the Aviation Safety Reporting Program (ASRP). If such a report is filed in a timely manner, "although a finding of violation may be made, neither civil penalty nor certificate suspension will be imposed if ... the violation was inadvertent and not deliberate."¹²

¹¹ For the purpose of this order, respondent must physically surrender his certificate to a representative of the Federal Aviation Administration pursuant to 14 C.F.R. § 61.19(g).

¹² Aviation Safety Reporting Program, Advisory Circular 00-46D (Feb. 26, 1997).

I served as a research consultant for NASA's Aviation Safety Reporting System (ASRS) for a decade, and in those years, I studied literally thousands of ASRS reports. I know that for the most part, a professional pilot does not intentionally deviate from his or her assigned altitude; in my opinion, the vast majority of such deviations are inadvertent and not deliberate.

What, then, makes the instant case different? When determining this from a legal perspective, the pilot has the opportunity and the obligation to explain the circumstances. Although offering an affirmative defense, the respondent before us did not attempt to prove that his altitude deviation was inadvertent and not deliberate, but instead continued to assert an unproven claim that an instrument malfunction led to the altitude deviation.

In an affirmative defense, the burden shifts to the respondent to prove his or her case. By continuing to insist that his instruments failed to provide accurate information - something that the ALJ and the majority find to be incredible based on the evidence before us - the respondent failed to meet this burden.

There is an old saying that "'Tis a poor carpenter that blames his tools." By blaming his equipment in this case, the respondent missed an opportunity to learn from his error. According to FAA Advisory Circular AC-00-46D, the FAA considers the filing of an ASRS report "to be indicative of a constructive attitude. Such an attitude will tend to prevent future violations."¹³ Here, however, the respondent's attitude was less constructive than evasive; in an attempt to cite faulty equipment, he failed to focus on what was necessary to prove from a legal perspective - showing that his actions were inadvertent and not deliberate.

ASRS is a critical program born from an accident investigated by the NTSB. It is there to encourage those in aviation to report problems so systemic issues can be identified. In return for using this program, if the FAA does pursue an enforcement action, it is incumbent on an individual to be forthright and to focus on proving that the actions were inadvertent and not deliberate. The respondent in this case failed to do either.

¹³ Id.

SERVED MAY 14, 2010

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
OFFICE OF ADMINISTRATIVE LAW JUDGES

J. RANDOLPH BABBITT, *
Administrator *
Federal Aviation Administration, *
Complainant, *
*

v. * Docket No.: SE-18542RM

JUDGE GERAGHTY

LANCE Z. RICOTTA *
Respondent. *
*

SERVICE: BY FAX & REGULAR MAIL

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DECISION AND ORDER ON REMAND

By its Opinion and Order, EA-5519, of April 19, 2010, the Board remanded this matter back to the Judge with direction to further clarify and explain the basis for the conclusion reached in the Oral Initial Decision of August 18, 2009, wherein the Respondent's Affirmative Defense of entitlement to a waiver of sanction under ASRP¹ was denied for his failure to sustain his burden of proof to establish that the found FAR² violation was "inadvertent and not deliberate."

In his Answer to the Complaint, Defendant pled 10 Affirmative Defenses

¹ Aviation Safety Reporting Program, AC-00-460 (Feb. 26, 1997).

² Federal Aviation Regulations.

and, specifically, as the "Fifth Defense," stated:

"Respondent affirmatively pleads that he is entitled to a waiver of any penalty...based upon his timely and proper submission of an Aviation Safety Reporting System (ASRS or NASA) report entitling him to a waiver of any penalty."

Therein, it was further averred that his ASRP/NASA Report was in full compliance with all Program reporting requirements and that "...the alleged altitude deviation, if any, was not intentional..." As an Affirmative Defense, it was Respondent's burden of proof to establish by a sufficient weight of evidence his compliance with all requirements of the Program and as is pertinent herein, that the charged deviation violation was inadvertent and not a result of deliberate action or inaction.

In its Opinion and Order, the Board refers to two areas of the Oral Initial Decision for clarification. The first referenced in its Opinion³ concerns what is plainly a colloquy between the Law Judge and FAA Counsel during Counsel's Rebuttal Argument and is to be read in the context of that entire exchange as appears in Trial Transcript 134-138 (TR. 134-138). In context, it is plain that the statements are not intended as decisional findings or conclusions, but rather as means of drawing out FAA Counsel's view on discriminating between inadvertent or deliberate actions. That the entire exchange or sections thereof are not to be taken as dispositive determination is buttressed when noted that at the close of the exchange, the Law Judge restates the evidentiary requirement for Respondent's Affirmative Defense, "... the burden of proof is on the person (herein the Respondent) claiming the NASA (Report), to show inadvertent and not deliberate, two separate things...." (TR. 137-138)

The second area requiring clarification occurs in the Oral Initial Decision (TR. 158), wherein I failed to clearly express my basis for concluding that Respondent had failed to carry his burden of proof on the issue of inadvertent action.

I note first that, although Respondent offered no evidence on the issue of deliberate action—thus, no requirement for FAA rebuttal—upon the evidence record made and observation of the witnesses, I inferred Respondent had not made a conscious

³ Opinion and Order, EA-5519 at 10 and n.7.

decision to act contrary to the ATC instruction he had received and, thus, had not acted in deliberate violation.

However, as was stated, the Respondent also had to carry the burden of establishing that his failure to comply was inadvertent. I concluded upon the weight of the reliable evidence that Respondent failed to sustain his burden of proof on the inadvertent requirement of the ASRP standard. That conclusion is supported on the evidence that: Respondent received and acknowledged the ATC instruction; the aircraft instrumentation was properly functioning (evidence did not sustain the defense of an instrument or mechanical malfunction); failure to utilize the instrument data available or inattention to data so presented, i.e., inattention is not excusable action—a reasonable and prudent pilot is expected to be continuously aware of and to utilize all relevant instrument data available. And, lastly, as observed by the Board, the Respondent failed to present any evidence to support his claim that if a violation had occurred that such occurrence was the result of inattention or inadvertence.⁴

Upon the rationale reviewed herein, it was and is found that Respondent was not entitled to a waiver of sanction under the ASRP/NASA Program for failure to sustain his burden of proof to establish that the FAR violations charged in the Complaint were the result of inadvertence, thus failing to satisfy the ASRP/NASA Program conditions for grant of a waiver.

ENTERED this 14th day of May 2010 at Denver, Colorado.


PATRICK G. GERAGHTY
ADMINISTRATIVE LAW JUDGE

⁴ Opinion and Order, EA-5519 at 10.

APPEAL (DISPOSITIONAL ORDER)

Any party to this proceeding may appeal this order by filing a written notice of appeal within 10 days after the date on which it was served (the service date appears on the first page of this order). An original and 3 copies of the notice of appeal must be filed with the:

National Transportation Safety Board
Office of Administrative Law Judges
Room 4704
490 L'Enfant Plaza East, S.W.
Washington D.C. 20594
Telephone: (202) 314-6150 or (800) 854-8758

That party must also perfect the appeal by filing a brief in support of the appeal within 30 days after the date of service of this order. An original and one copy of the brief must be filed directly with the:

National Transportation Safety Board
Office of General Counsel
Room 6401
490 L'Enfant Plaza East, S.W.
Washington, D.C. 20594
Telephone: (202) 314-6080
FAX: (202) 314-6090

The Board may dismiss appeals on its own motion, or the motion of another party, when a party who has filed a notice of appeal fails to perfect the appeal by filing a timely appeal brief.

A brief in reply to the appeal brief may be filed by any other party within 30 days after that party was served with the appeal brief. An original and one copy of the reply brief must be filed directly with the Office of General Counsel in Room 6401.

NOTE: Copies of the notice of appeal and briefs must also be served on all other parties to this proceeding.

An original and one copy of all papers, including motions and replies, submitted thereafter should be filed directly with the Office of General Counsel in Room 6401. Copies of such documents must also be served on the other parties.

The Board directs your attention to Rules 7, 43, 47, 48 and 49 of its Rules of Practice in Air Safety Proceedings (codified at 49 C.F.R. §§ 821.7, 821.43, 821.47, 821.48 and 821.49) for further information regarding appeals.

ABSENT A SHOWING OF GOOD CAUSE, THE BOARD WILL NOT ACCEPT LATE APPEALS OR APPEAL BRIEFS.

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
OFFICE OF ADMINISTRATIVE LAW JUDGES

* * * * *

In the matter of:	*	
	*	
J. RANDOLPH BABBIT,	*	
ADMINISTRATOR,	*	
Federal Aviation Administration,	*	
	*	
Complainant,	*	
v.	*	Docket No.: SE-18542
	*	JUDGE GERAGHTY
LANCE Z. RICOTTA,	*	
	*	
Respondent.	*	

* * * * *

U.S. Tax Court
Allan Bible Federal Building
600 Las Vegas Boulevard
Las Vegas, Nevada 89101

Tuesday,
August 18, 2009

The above-entitled matter came on for hearing, pursuant to notice, at 9:35 a.m.

BEFORE: PATRICK G. GERAGHTY
Administrative Law Judge

APPEARANCES:

On behalf of the Administrator:

LISA TOSCANO, Esquire
Federal Aviation Administration
Western Pacific Region
P.O. Box 92007
Los Angeles, CA 90009

On behalf of the Respondent:

JOSEPH MARIDON, Esquire
228 South 4th Street, Third Floor
Las Vegas, Nevada 89101

1 ORAL INITIAL DECISION

2 ADMINISTRATIVE LAW JUDGE GERAGHTY: This has been a
3 proceeding before the National Transportation Safety Board on the
4 Appeal of Lance Z. Ricotta, herein the Respondent, from an Order
5 of Suspension which seeks to suspend his Airline Transport Pilot
6 Certificate for a period of 45 days. The Order of Suspension
7 serves herein as the Complaint and was filed on behalf of the
8 Administrator, Federal Aviation Administration, herein the
9 Complainant.

10 This matter has been heard before this judge and, as
11 provided by the Board's rules, I am issuing a bench decision in
12 the proceeding.

13 Pursuant to Amended Notice, this matter came on for
14 trial on August 18th, 2009, in Las Vegas, Nevada, pursuant to the
15 amended Notice of Hearing, which was issued the 26th day of May
16 2009. The Complainant was represented by one of his Staff
17 Counsel, Ms. Lisa Toscano, Esquire, of the Federal Aviation
18 Administration, Western Pacific Region. The Respondent was
19 present at all times and was represented by his Counsel,
20 Mr. Joseph Maridon of Las Vegas, Nevada.

21 Parties were afforded the opportunity to call, examine
22 and cross-examine witnesses and to make argument in support of
23 their respective positions. In discussing the evidence, I
24 summarize. However, it is noted that I've considered all the
25 evidence, both oral and documented and that evidence that I do not

1 specifically mention is viewed by me as being essentially
2 corroborative or not materially affecting the outcome of the
3 decision.

4 AGREEMENT

5 By pleading, it was established that there was no
6 dispute as to the allegations in Paragraphs 1, 2, 3 of the
7 complaint and also no dispute as to that portion of Paragraph 4 of
8 the complaint, that the aircraft did, in fact, climb above 1,100
9 feet in altitude. It was disputed as far as that portion of
10 Paragraph 4, that there had been a deviation, however. The
11 matters taken as established by admission are, of course, taken as
12 confirmed and established for purposes of resolution of this
13 proceeding.

14 DISCUSSION

15 As noted, the Complaint seeks to suspend the
16 Respondent's Airline Transport Pilot Certificate for 45 days, and
17 that is predicated upon the admitted operation by the Respondent
18 as pilot-in-command of Aero Commander, designated November 134
19 November, on an IFR flight that occurred on February 21st, 2008 on
20 a departure from Henderson Executive Airport, Henderson, Nevada.

21 It is alleged that, in the course of the operation of
22 that flight, that the Respondent deviated from the requirements of
23 Section 91.123(a) of the Federal Aviation Regulations, which
24 requires that an individual that has received an ATC clearance,
25 may not deviate from that clearance unless an amended clearance

1 has been obtained or an emergency exists for a deviation required
2 by response to collision avoidance system. It is also alleged as
3 a consequence of the aforesaid regulatory violation that the
4 Respondent also operated in regulatory violation of Section
5 91.13(a) of the Regulations, which prohibits operation of an
6 aircraft in either a careless or reckless manner so as to endanger
7 the life or property of another.

8 Turning to the evidence, based upon the admission, the
9 case of course, started with a prima facie case on the part of the
10 Complainant, and therefore, the Respondent's case was received
11 first. The Respondent testified on his own behalf.

12 He testified essentially as to leaving Henderson Airport
13 on a departure with a clearance first to 7,000 feet, then a
14 handover to Las Vegas Center, then a call in and initial climb to
15 1,100 feet. As to the weather on the date in question, the
16 Respondent indicated it was stormy, clouds and ice, but he
17 maintained, in compliance with the clearance that he received to
18 climb and maintain 11,000, that he, in fact, did that and was
19 level at 11,000 feet for about 20 to 30 seconds, after which he
20 then, as I understand 20 seconds later, reported in at 12,300 feet
21 and then was told to expedite to 13,000 feet, and ultimately
22 climbing, I believe, up to 19,000 feet.

23 Respondent maintained that his altitude and his
24 altimeter, co-checking it with the co-pilot's altimeter that he,
25 in fact, was at 11,000 feet and had remained at that altitude for

1 approximately 20 to 30 seconds.

2 As to the aircraft itself, the testimony in front of me,
3 and it's not contradicted, is that the aircraft has had several
4 problems in the past. And, in fact, the records do show that
5 repairs have been made to the avionics in this aircraft on several
6 occasions. And, as pointed out by one of the Complainant's
7 witnesses, Mr. Arland, I believe, indicating that it was a fairly
8 old aircraft, the late 1970s or somewhere around there, but
9 anyway, an older aircraft.

10 R-2 was received in evidence, and R-2 is significant in
11 that it shows that this aircraft was into Advantage Avionics on
12 the date of February 15, 2008, which is just six days prior to the
13 incident in this case. It was in for, as a discrepancy indicates
14 on Page 2 of Exhibit R-2, pitot static certification. The action
15 is stated by the mechanic who did this work.

16 And quoting from it, it says all systems appear to be
17 working. They hooked up the test set to the aircraft. Due to two
18 ADC units providing separate encoding altitude for the pilot's
19 panel and co-pilot panel, he ran each panel up separately. And it
20 says altimeters, encoders and transponders checked good. So six
21 days prior to this incident, this comes out of the avionics shop,
22 indicating that altimeters, encoders and transponders were all
23 operative. And, at the bottom of this particular page, there is a
24 release back to service, and it's a certification by the
25 individual who did the work; it looks like a Mr. Flores, who

1 certifies that the encoder, altimeter and static systems, as
2 required by the FARs, tested to 30,000 feet.

3 The unit was tested also for ATC transponder test and
4 inspection and the units are found to comply with the requirements
5 of the FARs and also the appropriate Appendix, which is Appendix
6 F, Foxtrot. So based on this release, it does appear that six
7 days prior to the incident that all the avionics at issue in this
8 proceeding were in operative order when the aircraft returned to
9 service per the release at the bottom of that page.

10 Again, returning to the Respondent's testimony, he
11 indicates that when the aircraft reached 11,000, they never went
12 above that prior to obtaining the amended clearance, which was, as
13 I gathered from the testimony, the expedited climb to 13,000 feet.

14 There was also reference to repairs that were done
15 subsequently in July, and it does show that there was a problem
16 found with the antenna with soaking, and I will discuss that in
17 more detail subsequently in here.

18 However, I do note that there is no connection shown
19 between that discrepancy in that there is no showing when the
20 soaking occurred and it's several months after. So we don't know
21 anything about the operation of the aircraft, where it was based,
22 how it was stored, sitting on a ramp, hangared, whatever.

23 But the burden to show a connection rests with the
24 Respondent, and on the evidence in front of me, that was not done.
25 The Respondent on redirect testimony indicated that air traffic

1 control, ATC, had not inquired of him about aircraft altitude at
2 any time prior the clearance to climb to 13,000 feet. And bear
3 that in mind as I discuss the testimony in the case.

4 Mr. Kurt Belcher was the Second Officer on this
5 particular flight. He, according to his testimony, was
6 essentially doing all the radio work on the flight and testified
7 he had flown with the Respondent about five or six times in the
8 past years.

9 As to prior problems with this aircraft avionics, he
10 confirmed the Respondent's testimony, indicating that the aircraft
11 had experienced altitude and encoder systems problems, as he
12 termed it, quite often. However, he did concede that the time it
13 came out of the avionics shop and, again, he did not mention a
14 date, but it would appear to be February 15th, that he agreed that
15 the aircraft was returned to service out of maintenance and
16 appeared, as he said, 'good to go'.

17 As to the actual incident itself, he confirmed that the
18 aircraft had been cleared to 11,000 feet and that he did that and
19 that the Respondent and the aircraft all did that. He states that
20 he recalls reaching 11,000 feet. However, he then stated that he
21 did not read his altimeter above that until they had climbed
22 higher, and at that point, the aircraft continued its climb. He
23 also mentioned the problem that appears for Page 9 on the July 31,
24 2008 repairs with the antenna.

25 Mr. Kiernan McArdle was called by the Respondent

1 although Mr. McArdle was an FAA employee. He was the air traffic
2 controller that was actually handling the flight at the time of
3 this alleged incident. Mr. McArdle indicated that he got the
4 aircraft on a handoff to him from Henderson departure and that the
5 instruction was for this flight to climb and maintain 11,000 feet.

6 According to Mr. McArdle, the aircraft did not comply
7 with that instruction and that the aircraft continued to climb
8 past the 11,000 feet to somewhere around 12,000 feet, and getting
9 that information, according to the witness, indicated to him from
10 his display and from the transponder mode C equipment in the
11 aircraft itself.

12 He also stated, contradicting the prior testimony of the
13 Respondent, that the Respondent, in fact, had confirmed with ATC
14 the comparison between the altitude, being reported and that
15 actually the aircraft was at, indicating that at 7,000 feet, the
16 Respondent had been requested to confirm his altitude, and I
17 believe that's with Henderson before the handoff.

18 Mr. McArdle indicated that the response at that point
19 was that the aircraft was indicating at 6,900, and that was with
20 the controller before Mr. McArdle. And, according to Mr. McArdle,
21 that it was verified, through that mode C information being sent
22 back to ATC, and was, in fact, within legal limits. It was only
23 100-foot discrepancy. So that is a contradiction.

24 With respect to the climb that Mr. McArdle gave to the
25 Respondent to climb expeditiously to 13,000 feet, Mr. McArdle

1 indicated that he did this because there was a conflict with a Jet
2 Blue aircraft and that in his view as a controller, that since the
3 Respondent's aircraft was already in a climbing mode that it was
4 better to have the Respondent expedite a further climb above the
5 conflict in altitudes, which was, I believe, at 12,000 feet than
6 to ask the Respondent to essentially reverse course and descend
7 back down to 11,000 feet.

8 However, the ^{Witness} witness did affirm that in his view, there
9 was a conflict between the Respondent's aircraft and the Jet Blue
10 aircraft, explaining that, in his view, he took the best
11 corrective action available in the situation.

12 As to what he was observing on his radar scope, he
13 indicated that he saw no mode C returns from the aircraft after
14 what appears as time 22:17:19, which was when the aircraft above
15 the last reported altitude of 12,100 feet. And so he,
16 Mr. McArdle, asked Respondent to verify that the Respondent was
17 still in the climb and to report his altitude to which Mr. McArdle
18 testified that in response, the Respondent verified that the
19 aircraft was, in fact, climbing and was passing through 12,300
20 feet. And at that point, Mr. McArdle issued again the amended
21 clearance to expedite the climb to 13,000 feet.

22 The witness also indicated that there was a period of
23 time in which the Respondent's aircraft ceased to transmit mode C
24 information, and it does appear on Exhibit C-3 that, at the time
25 which I said, 22:17:19, that the mode C goes off the line. And

1 it's unknown on altitude to 22:18:49, when the mode C returned,
2 comes back, which shows the aircraft at that point being at 16,300
3 feet. So the aircraft for some reason ceased to report mode C for
4 a period of time as it continued its climb from the last reported
5 altitude of 12,100 to 16,300 feet.

6 And frankly, although there shows two unknowns prior to
7 that, there's really no explanation given in the evidence in front
8 of me as to why this transponder suddenly stopped reporting and
9 then comes back online and continues to report to the end of this
10 printout, which is at 22:19:39. And I would observe, also, that
11 if this was a mechanical malfunction, there is no evidence in
12 front of me that there was ever a discrepancy written up to
13 correct this.

14 This occurred as a discrepancy rather than just simply
15 turning off the transponder; there's no evidence of that. This
16 would be a serious thing. A transponder suddenly stops working
17 and then goes back online and you're in IFR conditions? We think
18 there would be some immediately back into maintenance, and there
19 is no such indication.

20 Mr. Sean Dickerson was called. However, he had no
21 testimony really to offer since he had only flown with the
22 Respondent, on his testimony, three or four times in May to
23 November of 2007. So there is nothing to discuss.

24 Turning to the Complainant's case, Mr. Larry McMahon, is
25 a Support Specialist and Quality control. He has a long history

1 in aviation, and he is the one that prepared several of the
2 Exhibits. C-1 is the data strip, which does show the transponder
3 code. There was a problem with the original transponder code, and
4 according to this witness, the Respondent apparently put in the
5 wrong code to begin with, which was 7373, which was then corrected
6 to transponder code 7372, which was the assigned code and which is
7 the code that appears on C-1, the data strip.

8 Mr. McMahon testified extensively as to the preparation
9 of the material from various radar returns and also the
10 preparation of Exhibit C-4, which was a video disc and voice put
11 together. And significantly, listening to the voice
12 communications, it is clear that it was transmitted to the
13 Respondent a clearance to climb and maintain 11,000 feet and that
14 that clearance was, in fact, acknowledged by the Respondent's
15 aircraft.

16 Whether that was the Respondent directly or Mr. Belcher
17 as the Second Officer, it was an acknowledgement, and therefore,
18 the evidence is clearly that there was a transmission of the
19 clearance and an acknowledgement and acceptance of that clearance,
20 which of course requires that it be complied with until amended
21 unless other emergencies exist which are not shown on the evidence
22 in front of me.

23 Ms. Terri Jones was called to testify. And essentially,
24 her testimony was that there were other cues available to the
25 Respondent, indicating altimeter, possible outside cues, vertical

1 speed indicator, that the Respondent could have used in addition
2 to all his other instrumentation. And I simply observed that it
3 is the Board's position that pilots should be using all the
4 instrumentation available to them, scanning it regularly,
5 importing it into their awareness of the situation around them,
6 and adding to that any visual cues that may be available.

7 Of course, if you're in IMC, you're not going to have
8 much visual cues. I don't know on the evidence in front of me,
9 other than it was icy and stormy, whether the Respondent was at
10 the time of this incident in IMC or not. There's just really no
11 evidence either way. So I take that as just general testimony.

12 Mr. Dan Allard [sic] also testified. He's an Aviation
13 Safety Inspector who is from Van Nuys FSDO, Flight Service [sic]
14 District Office. He has a long history in avionics. He's been
15 with the FAA 14 years. He has an engineering degree. He was a
16 DER prior to coming with the Federal Aviation Administration, has
17 worked in repair stations, worked on this particular type of
18 aircraft, and the type of avionics in this aircraft, on his
19 testimony, and apparently even worked with this particular
20 aircraft years and years ago.

21 He testified with respect to R-2. And without
22 belaboring the point, Mr. McArland [sic] simply pointed out that
23 the repair station had signed off and returned to service this
24 aircraft after having tested and certified the altimeters,
25 encoders and transponders as being in acceptable, serviceable

1 condition. He also indicates that the ADC unit would have been
2 checked as part of the certification and indicted that, while not
3 specifically mentioned, the Regulations that are cited to cover
4 that.

5 With respect to R-4, Mr. McArland also indicated that,
6 based upon his review of the write-up on Page 3 of R-4, that in
7 his opinion, the avionics was operating within the legal limits,
8 and there was nothing shown here in this report of maintenance
9 which would explain or cause the type of error that the Respondent
10 was testifying to in his case-in-chief.

11 And looking at the Exhibit itself, it does indicate that
12 while the number two transponder was inoperative, when it swapped
13 positions with the number one, it was operative. But as to the
14 overall indication of the equipment, the co-pilot system checked
15 good on both altimeter and encoder and the number one transponder
16 checked good with respect to mode A and mode C transponder. And
17 again, this is a little over two months subsequent to the
18 incident, May 8th of 2008.

19 That, to me, is the pertinent evidence in the case. The
20 burden of proof in the case, of course, rests with the Complainant
21 at all times and must sustain that by a clear preponderance of the
22 reliable and probative evidence. The Respondent's position in
23 this case, of course, is an affirmative defense that there was a
24 mechanical malfunction. On that type of affirmative defense, the
25 burden of proof rests with the Respondent to show the same thing

1 by a preponderance of the evidence, because it is clear on the
2 evidence in front of me that there was a clearance issue and it
3 was not amended until the aircraft had passed through 11,000 feet.
4 And in my view, it is established that the Respondent did not
5 climb to and maintain 11,000 feet.

6 If you look at C-3, on Page 3 thereof, at time 22:16:54,
7 and I'll drop off the hour and just say 16:54, the aircraft is
8 giving an altitude return of 10,900 feet. Two seconds later,
9 16:56, the aircraft is reporting at 11,100 feet. Then two seconds
10 after that, 16:58, the aircraft is at 11,200 feet. In a space of
11 four seconds, the aircraft has gone from 10-9 to 11-2. There is
12 no twenty seconds level off in there. The aircraft is climbing.

13 If one goes down, then, to 17:03, the aircraft is
14 reporting at 11,500 feet. That's still a climb. And at 17:12,
15 which is 20 seconds, the aircraft is at 12,000 feet. And then
16 after several returns where the aircraft is reporting at 12,100
17 feet, the mode C goes offline. And again, as I've indicated,
18 there is no explanation of why the mode C, after just coming out
19 of the shop six days earlier, would go offline and remain offline
20 until 18:49, which appears on Page 4, when the aircraft is at
21 16,300.

22 And compounding that is that there is no indication of
23 any write-up of this kind of discrepancy or immediate repair.
24 This aircraft was not sent back into the shop on any of the
25 documentation in front of me until over two months later. There

1 is no evidence as to what ever happened -- this kind of repair --
2 transponder going in and out for this period of time, there should
3 have been some action taken. There is nothing showing.

4 In my view, therefore, on the credible, probative and
5 reliable evidence, it is showing that the Respondent did, in fact,
6 receive a clearance to climb and maintain 11,000 feet and that he
7 failed to do so and that the aircraft continued to climb until
8 such time as the controller had to inquire as to the altitude and
9 then issue an expedited clearance because of the potential
10 conflict with a Jet Blue aircraft, expediting the Respondent's
11 aircraft to climb to 13,000.

12 And it is shown on the evidence in front of me that
13 prior to this, the aircraft was being handed off from Henderson to
14 Mr. McArdle, the ATC controller that actually handled the aircraft
15 during this incident, that the pilot had confirmed that the mode C
16 was reporting accurately back to the controllers. He was
17 requested to say his altitude, and on uncontradicted testimony,
18 ATC showed 7,000. The Respondent was reporting 6,900. So I find
19 that it is established that the Respondent did, in fact, operate
20 in regulatory violation of Section 91.123(a) of the Federal
21 Aviation Regulations.

22 I discuss here some of the affirmative defenses so that
23 the record is clear. In the original answer filed by the
24 Respondent's prior counsel, there were 11 affirmative defenses
25 raised, and so I will run through those briefly.

1 First affirmative defense is denied.

2 Second affirmative defense, on the evidence in front of
3 me, must be denied.

4 The third affirmative defense, there is no indication of
5 one person or persons the Respondent was referring to or what
6 actions or inactions, so that affirmative defense fails. And the
7 burden of proof on the affirmative defense to show a factual basis
8 and a legal basis for each one rests, of course with the
9 Respondent. And it's just not shown here.

10 Fourth affirmative defense, for the same reason, is
11 denied.

12 I will discuss the NASA reports separately. I'm
13 skipping over affirmative defense five.

14 Sixth affirmative defense, alleging impaired
15 communications, on the evidence in front of me, there is no
16 impairment in the communications. Therefore, that's denied.

17 The evidence also in front of me does not indicate there
18 was any unanticipated failure of the air data computer or any of
19 the other systems. It shows this aircraft was returned to service
20 simply six days prior to this incident, with all systems being
21 operative. And anything that happened subsequently, particularly
22 in July of that year, is too far removed, and there is no
23 connective tissue shown between this incident and the findings in
24 July, several months later.

25 The eighth affirmative defense is denied based upon the

1 testimony of Complainant's witness as to the fact that there was a
2 conflict that required the controller to issue an expedited climb.

3 The ninth affirmative defense, I will not discuss. I
4 will discuss it as part of the discussion of the NASA report. The
5 reference to the Equal Access to Justice Act is premature. And of
6 course, that is simply noted as being premature.

7 The tenth affirmative defense is denied. Scierter is
8 not an element of the offense in this case. An intentional
9 violation is more serious, but one does not have to intend to
10 commit a violation. It can be simply a result of inattention or
11 carelessness.

12 And the eleventh affirmative defense is denied. It's
13 simply a failure of carrying of the burden of proof with respect
14 to that paragraph.

15 Turning back, then, to the charged violation of Section
16 91.13 of the Regulations, which prohibits careless or reckless
17 operation, in here, the Administrator, the Complainant, has not
18 shown to me reckless operation. So therefore, we deal with, at
19 best, carelessness.

20 The testimony of the controller, which is not
21 contradicted, is that there was a potential conflict, an actual
22 conflict, between Respondent's aircraft and the Jet Blue aircraft,
23 which required the controller to take action and expedite the
24 Respondent, who was already in a climb past his assigned altitude,
25 to simply climb to 13,000 to get out of the way.

1 Aside from that, however, it is sufficient on Board
2 precedent and numerous cases from various United States Court of
3 Appeals sustaining the proposition that potential endangerment is
4 sufficient for a violation. We don't have to wait until there is
5 a catastrophic occurrence. If there is a reasonable nexus between
6 the action and the potential for endangerment to life or property
7 of others, that is sufficient. Of course, a conflict between two
8 aircraft, possibly, mid-air, is potential endangerment. And that,
9 on the evidence, is shown to me. And so, there was an actual
10 endangerment in this case and also it would be potential
11 endangerment.

12 In any event, since I've also found that there is a
13 violation of the operational regulation, that is, failure to
14 comply with the clearance, then Section 91.13(a) would be included
15 as a residual offense under Board precedent. However, in this
16 case, on the evidence in front of me, I do find that it stands as
17 a separate violation.

18 So specifically, I find the Respondent did operate in a
19 careless manner so as to actually and potentially endanger the
20 life or property of others; that is, the passengers in his
21 aircraft and those individuals on the Jet Blue aircraft and the
22 Jet Blue aircraft itself.

23 Turning then to the NASA report; that is Exhibit R-3.
24 There is a valid copy of a NASA report that was timely filed by
25 the Respondent. There is no question that the Respondent does not

1 fall within any of the other exceptions listed in the advisory
2 circular other than the burden on him to show that his actions
3 were inadvertent and not deliberate.

4 So here, under Board precedent, the burden of proof is
5 on the individual claiming the benefit of the NASA report to show
6 that the incident itself was, in fact, inadvertent and also that
7 it was not deliberate.

8 On the evidence in front of me, I don't find deliberate.
9 I mean, there's just no showing of that. Yes, the aircraft did go
10 through its altitude and continued climbing, but that could be
11 mere inattention, which is inadvertence. The burden is on the
12 Respondent to show that it was inadvertent. The defense here has
13 been that he never did it and that any deviation that did occur
14 was a result of mechanical, using that term broadly. As I've
15 already found, that was not sustained on the preponderance of
16 evidence in front of me.

17 I'm also therefore forced to conclude that the
18 Respondent has not carried the burden of proof to show that his
19 action was inadvertent. Mere inattention is not an excuse. The
20 information is available on the instrumentation on the aircraft.
21 There are dual panels. And on the evidence in front of me, the
22 instrumentation was working correctly. So it's simply a case
23 where the Respondent, for whatever reason, did not stop at his
24 assigned altitude.

25 It would be inadvertent, for example, if you have unruly

1 passengers and you have to deal with people who maybe got a little
2 tipsy in the back, or whatever. That would be inadvertent, but
3 here, it is simply not shown. So therefore, on the evidence in
4 front of me, the burden of proof not being carried, I must reject
5 the timely filing of the NASA report.

6 Turning then to the issue of sanction, by statute, the
7 Board is required to give deference to the Complainant's choice of
8 sanction absent a demonstration that such choice is arbitrary,
9 capricious or not in accord with Board precedent. The burden of
10 proof on that, of course, rests with the opposing party.

11 The party has not shown that the choice of sanction is
12 arbitrary. In fact, the sanction guidance table shows a sanction
13 in the middle of the sanction proposed for this type of violation,
14 30 to 90 days. Similarly, Board precedent is the same range. And
15 therefore, I must, by Statute, give deference to the
16 Administrator, the Complainant's choice of sanction in this case.

17 It'll also, in my view, be an adequate sanction to
18 address any further action on the part of the Respondent and to
19 act as a deterrent to any others who may be similarly disposed and
20 to satisfy the public interest and their safety in air commerce
21 and transportation.

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ORDER

IT IS THEREFORE ORDERED THAT:

1. The Order of Suspension, the Complaint herein, and the same hereby is affirmed as issued.

2. That the Respondent's Airline Transport Pilot Certificate be and the same hereby is suspended for a period of 45 days.

Entered this 18th day of August 2009 at Las Vegas, Nevada.



EDITED ON

SEPTEMBER 14, 2009

Patrick G. Geraghty

Administrative Law Judge