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NTSB Order No. EA-3497

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 29th day of January, 1992

BARRY LAMBERT HARRIS,
Acting Administrator,
Federal Aviation Administration,

Complainant,

v.

EUGENE C. RAJARATNAM,

Respondent.

Docket SE-12262

OPINION AND ORDER

Respondent has appealed from the oral initial decision Administrative Law Judge Jerrell R. Davis rendered in this proceeding on December 17, 1991, at the conclusion of an evidentiary hearing.¹ By that decision the law judge affirmed, in its entirety, an emergency order of the Administrator revoking respondent's student pilot certificate for various alleged violations of Parts 61 and 91 of the Federal Aviation Regulations ("FAR," 14 CFR), the most

¹An excerpt from the hearing transcript containing the initial decision is attached.

serious of which is the charge, under FAR section 61.89(a)(1), that he operated as pilot-in-command ("PIC") an aircraft that had a passenger aboard.² Because we find, for the reasons discussed below, that the evidence in the record establishes that respondent was not the PIC on the subject flights, we will grant his appeal and reverse the revocation order.³

The essentially uncontroverted facts disclose that on July 20, 1991, respondent, a licensed neurologist and surgeon, and another individual, a Mr. Dave Kleiman, flew in respondent's two-seat, dual control Cessna 150 aircraft first from Fox Field in Lancaster, CA to Bakersfield Municipal Airport (Skypark) and, shortly thereafter, from Skypark to another airfield in Bakersfield, CA, namely, Meadows Field, a controlled airport.⁴ Respondent testified that he had, in order to gain flight experience, flown with Mr. Kleiman, a private pilot certificate holder, on a dozen or more previous occasions, with respondent more often than not occupying the

²FAR section 61.89(a)(1) reads as follows:

"§ 61.89 General limitations.

(a) A student pilot may not act as pilot in command of an aircraft-

(1) That is carrying a passenger;"

³The Administrator has filed a reply brief opposing the appeal.

⁴Respondent did not take his pilot logbook or student pilot certificate with him on the flights. He testified that he did not think he was required to have them in his possession for non-solo flights he could not log as PIC time.

left seat and Mr. Kleiman the right, and that their first few flights together, but not the ones at issue here, involved some explicit prior understanding that Mr. Kleiman would be the pilot.⁵ The purpose of the trip to Skypark was to enable respondent and Mr. Kleiman, who is a certificated aircraft mechanic as well as a pilot, to inspect two aircraft they believed were for sale there. However, it turned out that one of the aircraft was located at Meadows Field, a circumstance that entailed an additional flight leg and that produced apparent operational errors on respondent's part that directly resulted in the initiation of this proceeding against him.

Although respondent alone operated the controls and radio communications on the two flights terminating at Meadows Field, Mr. Kleiman undertook to advise him, after consulting the relevant aeronautical chart, of the tower frequency to be used at Meadows Field. However, it appears that Mr. Kleiman in fact provided respondent the wrong frequency, and by the time respondent ascertained the correct one and contacted the tower, he was over the airport and thus within the airport traffic area. Moreover, perhaps because of his inexperience and discomfiture, his subsequent efforts to enter the traffic pattern for landing were not uneventful, in that he appears to have created a collision hazard for an

⁵Respondent testified that from time to time he flew with Mr. Kleiman and two other licensed pilots in order to acquire experience.

aircraft already on final. In any event, following investigation into the circumstances involving respondent's approach to and landing at Meadows Field, the Administrator issued his emergency revocation order.⁶

There is no significant factual dispute concerning the details of the flights, and the parties appear to be in agreement that the respondent is answerable for the charges in the Emergency Order of Revocation, issued November 18, 1991, only if he, not Mr. Kleiman, served as PIC during the operations.⁷ In other words, the Administrator's allegations that respondent entered an airport traffic area without first establishing two-way radio communications (section 91.129(b)) and that he, as a student pilot, operated the aircraft as PIC with a passenger aboard, at a time when he was not carrying (and therefore could not on request produce for inspection) his student pilot certificate, medical certificate, or logbook (sections 61.3(a), (c), and (h) and 61.51(d)(2)) and had not received an instructor's endorsement for the cross

⁶Mr. Kleiman testified at the hearing that he didn't believe he was the PIC on the subject flights. Nevertheless, he filed a report on the incident pursuant to the National Aeronautics and Space Administration's ("NASA") Aviation Safety Reporting Program. During questioning by the law judge, Mr. Kleiman suggested that he filed the report to bring attention to what he believed was a shortcoming in how the chart displayed the radio frequencies at Meadows Field, not because he wanted to obtain ASRP immunity for any accountability he might have in connection with the matter.

⁷A copy of the Emergency Order of Revocation, which served as the complaint in this proceeding, is attached.

country flight (61.93(d)(2)(i)),⁸ cannot be sustained unless

⁸FAR sections 91.129(b), 61.3(c), (h), 61.51(d) and (d)(2), and 61.93(d)(2)(i) provide as follows:

"§ 91.129 Operations at airports with operating control towers.

* * * * *

(b) *Communications with control towers operated by the United States.* No person may, within an airport traffic area, operate an aircraft to, from, or on an airport having a control tower operated by the United States unless two-way radio communications are maintained between that aircraft and the control tower. However, if the aircraft radio fails in flight, the pilot in command may operate that aircraft and land if weather conditions are at or above basic VFR weather minimums, visual contact with the tower is maintained, and a clearance to land is received. If the aircraft radio fails while in flight under IFR, the pilot must comply with § 91.185.

§ 61.3 Requirement for certificates, rating, and authorizations.

* * * * *

(c) *Medical certificate.* Except for free balloon pilots piloting balloons and glider pilots piloting gliders, no person may act as pilot in command or in any other capacity as a required pilot flight crewmember of an aircraft under a certificate issued to him under this part, unless he has in his personal possession an appropriate current medical certificate issued under part 67 of this chapter. However, when the aircraft is operated within a foreign country with a current pilot license issued by that country, evidence of current medical qualification for that license, issued by that country, may be used. In the case of a pilot certificate issued on the basis of a foreign pilot license under § 61.75, evidence of current medical qualification accepted for the issue of that license is used in place of a medical certificate.

* * * * *

(h) *Inspection of certificate.* Each person who holds a pilot certificate, flight instructor certificate, medical certificate, authorization, or license required by this part shall present it for inspection upon the request of the Administrator, an authorized representative of the National Transportation Safety Board, or any Federal, State, or local law enforcement officer.

§ 61.51 Pilot logbooks.

* * * * *

(d) *Presentation of logbook.* (1) A pilot must present his logbook (or other record required by this section) for inspection upon reasonable request by the Administrator, an authorized representative of the National Transportation Safety Board, or any State or local law enforcement officer.

he was acting as PIC. We turn now to a discussion of our reasons for concluding that respondent cannot, as a factual matter, and arguably should not, as a matter of law, be deemed the PIC on the flights.

At the outset we should observe that the cases chiefly relied on by the parties in support of their respective positions, namely, Administrator v. Dye, 2 NTSB 1581 (1975), Administrator v. Fields, 2 NTSB 3558 (1982), Administrator v. McCormack, 4 NTSB 1503 (1984) and Administrator v. McCartney, 4 NTSB 925 (1983), are not, in our view, especially helpful to the proper resolution of the pilot-identity issue before us. In those cases, the determination of who was PIC depended heavily on inferences drawn from facts traditionally found to be indicative of responsibility for an aircraft's operation, such as, for example, actual manipulation of controls and radio, seating position, and ownership interests. Here, by contrast, those factors are of

(2) A student pilot must carry his logbook (or other record required by this section) with him on all solo cross-country flights, as evidence of the required instructor clearances and endorsements.

§ 61.93 Cross-country flight requirements (for student and recreational pilots seeking private pilot certification).

* * * * *

(d) No student pilot may operate an aircraft in solo cross-country flight, unless-

(2) The instructor has endorsed the student's logbook-

(i) For each solo cross-country flight, after reviewing the student's preflight planning and preparation, attesting that the student is prepared to make the flight safely under the known circumstances and subject to any conditions listed in the logbook by the instructor...."

little or no relevance because the Administrator does not deny that notwithstanding respondent's ownership of the plane whose controls he alone manipulated from the left seat on the subject occasion, Mr. Kleiman would have been the PIC if he and respondent had expressly so agreed, as had occurred on at least some of their prior flight dates together. In other words, the Administrator's position that respondent lacks qualifications to hold a student pilot certificate rests not so much on any judgment that respondent cannot be expected to comply with the ban against a student pilot carrying a passenger, but on the ground that he breached that prohibition on this occasion by neglecting to establish an affirmative understanding with Mr. Kleiman that he would be PIC. We do not agree that that failure dictates the conclusion that respondent was PIC under all the circumstances.

Respondent testified that he believed that so long as he flew with a pilot who possessed a higher rated certificate than he held, which of course would be a pilot with any certificate above the student level, that individual, knowing respondent was a student pilot,⁹ would automatically be the PIC because a student pilot could not lawfully serve in that

⁹Counsel for the Administrator repeatedly suggests on brief that Mr. Kleiman may not have been aware that respondent was a student pilot when the subject flights took place. It is abundantly clear from the transcript of Mr. Kleiman's testimony, however, that he entertained absolutely no doubt that respondent was still only a student, although he did not know how close respondent might be to obtaining a private pilot certificate.

capacity with a passenger aboard.¹⁰ On appeal he in effect argues, consistent with that testimony and belief, that a non-student pilot who, with full knowledge that a student pilot can not carry a passenger, flies with a student pilot has implicitly accepted PIC responsibility for the flight. Although we find considerable merit in respondent's argument, we need not determine in this case whether it is enough, for purposes of deciding who was the PIC, that Mr. Kleiman knew that respondent could not be PIC under the applicable regulations.

Mr. Kleiman asserted that he did not believe himself to be the PIC on the flights to Skypark and Meadows Field, because there had been no prior discussion with respondent to that effect. However, neither the Administrator nor the law judge appears to appreciate the self-interest reflected in Mr. Kleiman's disavowal of any belief that he was PIC of the subject flights, despite their being operationally indistinguishable from others he had flown as PIC with respondent.¹¹

In addition, he readily admitted that because he, as a pilot, outranked the respondent, he would have taken over

¹⁰There is nothing in the record to undermine the bona fides of the respondent's stated understanding of the regulations in this connection.

¹¹Moreover, we find it difficult to accept that his filing of an ASRP report was no more than an act of public spiritedness, as opposed to an act consistent with a concern that he might be held accountable for errors respondent may have committed.

command and control of the aircraft in the event they encountered an emergency situation. See Tr. at 196-197. We think this admission unequivocally proves that Mr. Kleiman was the PIC, for it establishes that while respondent may have been the pilot in charge of the physical management of the aircraft, Mr. Kleiman was the pilot who possessed the ultimate responsibility for the safety of the operation. His conceded service in that role made him the PIC, as that term is defined in the FAR.¹²

ACCORDINGLY, IT IS ORDERED THAT:

1. The respondent's appeal is granted, and
2. The initial decision and the emergency order of revocation are reversed.

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

¹²FAR section 1.1 provides that "[p]ilot in command means the pilot responsible for the operation and safety of an aircraft during flight time."