

SERVED: February 16, 1994

NTSB Order No. EA-4078

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 3rd day of February, 1994

_____	)	
DAVID R. HINSON,	)	
Administrator,	)	
Federal Aviation Administration,	)	
	)	
Complainant,	)	
	)	
v.	)	Dockets SE-11928
	)	and SE-11930
	)	
DON C. ATKINS and	)	
DAVID B. RICHARDS,	)	
	)	
Respondents.	)	
_____	)	

**OPINION AND ORDER**

The respondents have appealed from the oral initial decision of Chief Administrative Law Judge William E. Fowler, issued on February 18, 1992, at the conclusion of an evidentiary hearing.<sup>1</sup>

By that decision, the law judge affirmed the Administrator's order which alleged violations of sections 91.75(a) and 91.9 of

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

the Federal Aviation Regulations (FAR), 14 C.F.R. Part 91, as to respondent Atkins, the pilot-in-command, and section 91.9, as to respondent Richards, the second-in-command, as a result of an altitude deviation which occurred during their operation of Piedmont Flight 1756, on April 9, 1989.<sup>2</sup> Suspensions of both respondents' airline transport pilot certificates were waived under the provisions of the Aviation Safety Reporting System (ASRP). We grant the appeal and dismiss the complaints.

The facts are essentially undisputed. Respondents had been cleared by the Atlanta Air Route Control Center to climb and maintain flight level 220. Respondents acknowledged this clearance. Respondents testified that they had already expressed to ATC their desire to climb higher than flight level 220, because of turbulence. See also Respondents' Exhibit R-1 (respondents' transcript of ATC communications). After acknowledging the clearance to flight level 220, respondent Richards went off the radio frequency, in accordance with

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<sup>2</sup>FAR §§ 91.75(a) [now recodified as § 91.123(a)] and 91.9 [now recodified as § 91.13(a)] provide in pertinent part as follows:

§ 91.75 Compliance with ATC clearances and instructions.

(a) When an ATC [air traffic control] clearance has been obtained, no pilot in command may deviate from that clearance, except in an emergency, unless he obtains an amended clearance....

§ 91.9 Careless or reckless operation.

No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

respondent Atkins' instructions, to advise the flight attendants and passengers to remain seated because of the turbulence. According to the Administrator's transcript of ATC communications (Administrator's Exhibit A-3), the following communications then took place:

<u>TIME</u>	<u>SOURCE</u>	<u>COMMUNICATIONS</u>
20:14:03	PAI 1258	Afternoon center Piedmont twelve fifty eight two four oh.
20:14:07	ATL ARTCC	Piedmont twelve fifty eight roger flight level two four zero.
20:14:11	PAI 1756	Piedmont seventeen fifty six up to two four zero now. [Thanks]. <sup>3</sup>

The controller assigned to the relevant position did not hear respondent Atkins' readback of what Atkins believed was a clearance for Piedmont 1756 to climb to flight level 240.<sup>4</sup> At the time of this incident, this controller was being recertified for the position and another controller was also monitoring the communications. The second controller also testified that he did not hear respondent Atkins' readback. Respondent Atkins' readback is clearly audible on the tape of communications

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<sup>3</sup>Respondents contend that this word was erroneously deleted from the Administrator's transcript. See Exhibit R-1.

<sup>4</sup>The transcript of communications also shows that the controller contacted Flight 1756 at 20:14:58, asking them not to exceed 280 knots in climb due to traffic slowing in front of them.

(Administrator's Exhibit A-2.)<sup>5</sup> At 20:17:47, the controller observed on his radar screen that respondents had reached flight level 226. He immediately advised respondents, instructing them to maintain flight level 220. Respondents acknowledged and complied with the instruction. As a result of a loss of separation between respondents' aircraft and another aircraft, the controller instructed respondents to make an immediate left turn.

The law judge affirmed the allegations, finding that respondents were careless because they mistook an ATC communication to another aircraft, which was not a clearance, as a clearance for their aircraft to climb to flight level 240. (Initial decision at TR-191.) The law judge also found that the air traffic controllers did not hear respondent Atkins' acknowledgment, but that they were not at fault for the deviation which followed.

Respondents contend on appeal that the initial decision should be reversed and the complaints should be dismissed, because the controllers' failure to continuously monitor the frequency was the cause of the deviation and because the evidence shows that respondents acted with due care.<sup>6</sup> For the reasons that follow, we will grant the respondents' appeal, not because

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<sup>5</sup>Both controllers testified that they would have certainly corrected the error, had they heard respondents' acknowledgment. The tape reveals that ATC was handling a number of requests for higher clearances and slower airspeeds because of the turbulence.

<sup>6</sup>The Administrator has filed a brief in reply, urging the Board to affirm the initial decision and order.

we find that the controllers were at fault in this incident, but because we believe that respondents' actions were prudent under the circumstances.

Board precedent is clear that we will not affirm the Administrator's order when ATC is the initiating or principal cause of the deviation. See, e.g., Administrator v. Snead, 2 NTSB 262 (1973); Administrator v. Nelson and Keegan, 2 NTSB 1900 (1975); Administrator v. Dunkel, 2 NTSB 2250 (1976); and Administrator v. Smith, 3 NTSB 85 (1977). In Administrator v. Frohmuth and Dworak, NTSB Order EA-3816 (1993), we clarified this precedent by explaining that even if a deviation from a clearance is initiated by an inadvertent mistake on the pilot's part, that mistake will be excused and no violation will be found if, after the mistake, the pilot takes actions that, but for ATC, would have exposed the error and allowed for it to be corrected. We found that because the respondents in Frohmuth had initiated a full readback, their misunderstanding which resulted in a deviation was not intentional, careless, or the result of a lack of professionalism, because "the readback is intended to insure that compliance with the instructions is based on an accurate understanding." Id. at 7. There is no evidence in this record that respondents misheard the clearance because of any carelessness on their part. In addition, respondent Atkins gave a full readback of the clearance to ATC, as he should have. Thus, consistent with Frohmuth, we think that respondent Atkins and his second-in-command, even though they inadvertently

misheard ATC, did all that they could do, by giving a full readback, to insure the safety of the aircraft and their passengers.

**ACCORDINGLY, IT IS ORDERED THAT:**

1. Respondents' appeal is granted; and
2. The initial decision is reversed and the Administrator's orders are dismissed.

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