

SERVED: July 1, 2004

NTSB Order No. EA-5102

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 28th day of June, 2004

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MARION C. BLAKEY,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-16729
v.)	
)	
DAVID J. HERAS,)	
)	
Respondent.)	
)	
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OPINION AND ORDER

The respondent has appealed from the oral initial decision Administrative Law Judge Patrick G. Geraghty rendered in this proceeding on April 10, 2003, at the conclusion of an evidentiary hearing.¹ By that decision, the law judge affirmed an order of the Administrator suspending respondent's airline transport pilot certificate for 90 days for his alleged violations of sections 91.123(b) and 91.13(a) of the Federal Aviation Regulations

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

("FAR"), 14. C.F.R. Part 91.² For the reasons below, we deny the appeal.³

The Administrator's October 22, 2002 Order of Suspension, which served as the complaint in this action, alleged, among other things, the following facts and circumstances concerning the respondent:

1. You are now, and at all times mentioned herein were, the holder of Airline Transport Pilot Certificate 573905129 issued under Part 61 of the Federal Aviation Regulations (FAR).
2. On or about February 4, 2000, you acted as pilot-in-command of Skywest Airlines Flight SKW7948, in a regularly scheduled, passenger carrying operation, departing from Los Angeles, California to Ontario International Airport, Ontario, California.
3. Incident to said operation, SKW7948 was on approach to Ontario via Paradise VOR.
4. Incident to said operation, Southern California Tracon Air Traffic Control (ATC) instructed SKW7948 to reduce speed for landing sequence behind Southwest Airlines flight SWA391.

²FAR sections 91.123(b) and 91.13(a) provide as follows:

§ 91.123 Compliance with ATC clearances and instructions.

* * * * *

(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.

§ 91.13 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.

³The Administrator by counsel has filed a reply brief opposing the appeal. The brief is painstakingly thorough and true to the record and is an excellent example of cogent and balanced advocacy.

5. Incident to said operation, ATC instructed SKW7948 to "turn right heading zero eight zero."
6. You failed to follow said instructions.
7. Incident to said operation, ATC instructed SKW7948 to "climb and maintain six thousand."
8. You failed to follow said instructions.
9. Incident to said operation, without ATC clearance, and when no emergency existed, you continued a left descending turn towards Ontario International Airport.
10. The above-described actions by you caused ATC to cancel SWA391's approach clearance.
11. Incident to said operation, when no emergency existed, you did not follow ATC instructions.

The law judge found that the allegations were proved by a preponderance of the reliable, probative, and substantial evidence. After reviewing in detail all of the relevant evidence and assessing the credibility of the parties' witnesses, he concluded in effect that respondent, south of the field on a northeasterly heading, began a descending left turn toward the airport before requesting permission to do so,⁴ continued the turn despite later being denied permission to make one because of traffic, and ignored two instructions to climb issued when it became evident to ATC that respondent's unauthorized deviation put him on a conflicting course with the faster-moving, larger Southwest aircraft, heading toward the airport from the north, whose approach had already been cleared, but whose location

⁴Although the radar plots demonstrate that respondent did in fact make a descending left turn, the law judge appears to have miscited the precise time when it began. The error is unimportant, as the unapproved turn alone is sufficient to establish the deviation.

respondent had not yet discerned. The law judge expressed the view, amply supported in the record, that "looking at the communications and listening to the communications, it appears to me that Skywest was simply not happy with the idea that they were going to be sequenced second" (Transcript at 132).⁵

Consistent with that view, the law judge rejected respondent's affirmative defense, namely, his assertion that his deviations from ATC instructions were justified because he thought the moderate turbulence his aircraft was experiencing might become severe.⁶ In this connection, the law judge noted in particular the failure of respondent and his first officer to advise ATC of such a reason for the deviations,⁷ and that there

⁵When ATC advised respondent that it could not immediately approve a turn toward the airport because of traffic, respondent (who had already begun the turn) responded with "that's great, where's the traffic?" Administrator's Exhibit C-3.

⁶Respondent asserts on appeal that the law judge's decision will inhibit a pilot-in-command's willingness to exercise his authority to deviate where he perceives imminent danger to his flight. We disagree. The law judge concluded that the evidence did not support respondent's claim that his aircraft had been in conditions that could be deemed an emergency or suggested they were on the brink of one. We note, in this regard, that the testimony of the flight crew did not mention any effects the alleged "moderate turbulence steadily increasing in intensity" was having on them, the passengers, or the aircraft that would lead a reasonable and prudent pilot to believe that his aircraft was or might soon be in extremis, such as airspeed fluctuations, pressure against seatbelts or shoulder straps, movement of unsecured objects, difficulty walking, or other indications of the aircraft's passing through bumpy air and being buffeted around.

⁷The law judge's discussion concerning the flight crew's failure to advise ATC of the reason for the deviation and refusal to comply with instructions clearly was not an attempt to establish that respondent violated a regulation not charged; namely, the requirement to notify ATC about a deviation under

was no legitimate basis for believing that complying with the instruction to turn right to 0-8-0 would have any bearing on the level of turbulence respondent said his aircraft was experiencing.⁸ In the context of this case, at least, where there was no objective evidence, such as pilot reports or weather forecasts, to support a genuine belief that worse turbulence requiring immediate action more likely than not lay ahead, we agree with the law judge's essential conclusion that the possibility of encountering more than moderate turbulence is not an emergency.⁹

We also concur in the law judge's determination that respondent's actions were reckless, not careless, within the meaning of section 91.13(a), in that he made deliberate choices that negatively affected the safety of operations at Ontario International Airport by, among other things, forcing ATC to

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section 91.123(c), but, rather, an effort to analyze the bona fides of the claimed emergency. The law judge adduced that respondent had more than enough time to explain his situation to ATC if he had wanted to, and that his failure to do so undermined the claim that concern about turbulence justified his actions.

⁸There is no indication that the flight crew gave their passengers any advice or warning about turbulence at any point during the flight.

⁹Respondent's asserted concern that the level of turbulence might increase because of the "rising terrain" between his aircraft and the airport does not help his case. There is no reason to believe that respondent's aircraft was not already experiencing whatever turbulence the rising terrain might produce, nor any showing that the terrain his aircraft would have to pass over would be any different if he turned toward the airport prematurely or if he waited until ATC authorized him to do so. A pilot who truly believed that an approach to an airport would take him through turbulence that might make control of his aircraft difficult could, of course, request an alternate

cancel another aircraft's approach clearance to eliminate the traffic conflict the deviations caused.¹⁰ It follows that the law judge correctly ruled that respondent was not eligible for waiver of sanction under NASA's Aviation Safety Reporting Program, as it does not apply to intentional conduct.¹¹

Because we find that nothing in respondent's appeal brief demonstrates reversible error in the law judge's resolution of all relevant issues, the appeal will be denied.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;
2. The initial decision is affirmed; and
3. The 90-day suspension of respondent's airman

certificate shall begin 30 days after the service date indicated on this opinion and order.¹²

ENGLEMAN CONNERS, Chairman, ROSENKER, Vice Chairman, and GOGLIA, CARMODY, and HEALING, Members of the Board, concurred in the above opinion and order.

(..continued)
approach for landing.

¹⁰By turning toward the airport instead of extending his downwind, as ATC tried unsuccessfully to get him to do, respondent placed his aircraft on a head-on collision course with the Southwest 737 aircraft. An airman whose compliance with ATC efforts to manage air traffic is uncertain creates a tension in the system corrosive to aviation safety.

¹¹Although counsel for respondent neglected to introduce into evidence the documents establishing that respondent had in fact filed a NASA report, the law judge, consistent with information referenced by the parties during the hearing, analyzed the issue as though one had been.

¹²For the purposes of this order, respondent must physically surrender his certificate to a representative of the Federal Aviation Administration pursuant to FAR section 61.19(g).