

SERVED: May 30, 2008

NTSB Order No. EA-5390

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 May, 2008

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ROBERT A. STURGELL,)	
Acting Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-17871
v.)	
)	
SCOTT FLOYD GIFFIN,)	
)	
Respondent.)	
)	
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OPINION AND ORDER

Respondent has appealed from the oral initial decision of Administrative Law Judge Patrick G. Geraghty, issued October 3, 2007, after an evidentiary hearing.¹ By that decision, the law judge upheld the Administrator's allegation that respondent violated 14 C.F.R. §§ 91.123(a) and 91.13(a) of the Federal Aviation Regulations (FAR),² but modified the 90-day suspension

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

² Section 91.123(a) provides that, when an air traffic control

of respondent's airline transport pilot (ATP) certificate to a 60-day suspension.³ We deny respondent's appeal.

The October 12, 2006 order of suspension was filed as the complaint in this case. The Administrator alleged that, on or about March 3, 2006, respondent was PIC of a Cessna Citation CE-560, on an instrument flight rules (IFR) flight, with a departure from Buchanan Field in Concord, California. Before his departure, ATC issued, and respondent acknowledged, a standard instrument departure (SID) clearance: "the Buchanan Seven Departure ... PITTS transition (Concord VOR, R-071 to PITTS INT)." The Administrator also alleged that respondent deviated from this departure clearance and "broke off from the instrument departure procedure route to proceed directly to PITTS INT, despite being advised that [his] request for such deviation was pending." The Administrator further alleged that as "a result, [respondent] entered into airspace, under IFR, at an altitude lower than the minimum vectoring altitude." Finally, the Administrator alleged that said operation was careless or reckless.

Respondent's destination was Alamogordo, New Mexico. His IFR departure clearance, a published departure (or SID), was

(..continued)

(ATC) clearance has been obtained, no pilot-in-command (PIC) may deviate from the 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. Section 91.13(a) prohibits operation of an aircraft in a careless or reckless manner so as to endanger the life or property of another.

³ Initially appealing the law judge's reduction of sanction, the Administrator subsequently withdrew his appeal.

relayed by Concord/Buchanan Field ATC from Travis Air Force Base Radar Approach Control (RAPCON). The Buchanan Seven Departure directs how a departure to the south is to be performed, requiring, after takeoff, a direct course to the Concord (CCR) VOR/DME (VHF Omni-directional Radio Range/distance measuring equipment), which is a radio navigation system ground station. From the CCR VOR/DME, depending on the transition for which the pilot is cleared, the SID directs a route on an airway via a designated radial (magnetic course). Respondent was cleared for the PITTS transition, which required him to proceed from the CCR via the R-071 (i.e., the 071 degree radial from CCR VOR/DME), to PITTS INT (PITTS intersection). The R-071 radial is also identified as V108 (Victor Airway 108). The procedure also requires a climbing turn to the CCR VOR/DME and, for the PITTS transition, a minimum climb rate of 350 feet per nautical mile up to 3,000 feet.

Before takeoff, respondent received, acknowledged, and read back the Buchanan Seven Departure SID. Within one minute after takeoff, Concord/Buchanan Field instructed him to contact Travis RAPCON. Within two minutes after takeoff, respondent contacted Travis RAPCON, which requested "ident," to achieve radar identification of respondent's aircraft through his discrete transponder squawk code. Respondent then requested a deviation. RAPCON acknowledged respondent had been located and identified by RAPCON and that his requested deviation was pending. Respondent said, in effect, that he was going there anyway, and RAPCON then alerted him regarding high terrain.

Respondent replied: "Sir, we see the terrain, but we're not going to fly in that thunderstorm over the VOR," and indicated he was "direct to PITTS intersection." The Travis controller was able to "point out" the aircraft, 17 seconds later, on radar coordination with Northern California Terminal Approach Control (NCT), confirming that respondent was already in NCT's airspace.

Travis RAPCON filed a Preliminary Pilot Deviation Report, stating that respondent's penetration into NCT's airspace without coordination, and entering a minimum vectoring altitude (MVA) area at an altitude below the limit "created an extremely unsafe flying environment."

In his answer, and during discovery, respondent admitted he was the PIC and that he received and acknowledged the "Buchanan Seven Departure, PITTS transition." The law judge found that respondent also admitted that he requested vectors from ATC, was told to stand by, and that his IFR flight plan was never cancelled. Respondent asserted four affirmative defenses in his answer. He contended that the air traffic controllers were the cause of any alleged deviation, and that he reasonably relied upon his flight management system. He also asserted that any deviation was the result of an emergency, and that he timely filed a report under the "Aviation Safety Program."⁴

⁴ Under the Aviation Safety Reporting Program (ASRP), sanction may be waived, despite the finding of a regulatory violation, if certain requirements are satisfied. Advisory Circular 00-46D at ¶ 9c. This program involves filing a report with the National Aeronautics and Space Administration (NASA) concerning a FAR violation. Such filing will obviate imposition of sanction if: (1) the violation was inadvertent and not deliberate; (2) it did not involve a criminal offense, accident, or action found at 49 U.S.C. § 44709; (3) the person has not been found in an

At the evidentiary hearing, the Administrator presented the testimony of FAA and United States Air Force personnel who were knowledgeable about respondent's deviation from his departure clearance. The Administrator introduced ATC tape recordings of the conversations with respondent; the SID chart; the departure clearance strip; the pilot deviation report; a March 3, 2006 weather report for Concord; and the sanction guidance table. Respondent testified, and presented a copy of his NASA receipt pursuant to a timely filing of the ASRP report.

The Administrator first called Kenneth Hougey, an FAA ATC specialist who was working the ground control and flight data clearance delivery positions on March 3, 2006. He identified the procedure chart and the transcripts he prepared of communications between respondent and clearance delivery, ground control, and local control. The clearance he gave respondent was: "cleared to Alamogordo via Buchanan seven departure PITTS transition victor one zero eight LODDI intersection victor five eighty five MANTECA as filed maintain four thousand expect flight level three niner zero one zero minutes after departure...." See Exh. C-2.

John Crabtree, a certified professional controller (CPC), was working the local control position at the Concord tower. He said respondent "would need to reverse course or change direction before he left ... my airspace." Mr. Crabtree also testified that he observed the aircraft depart the airport and climb out

(..continued)

enforcement action to have committed a regulatory violation in the past 5 years; and (4) the person mails a report of the incident to NASA within 10 days.

about "a mile-and-a-half to the south," and that he did not see any deviations in his airspace. He stated that, "once [respondent] commenced his turn, I switched him to Travis. He changed direction, wing-up ... started a left turn...." Although he testified at a pre-hearing deposition that respondent reversed course, Mr. Crabtree clarified at the hearing that he did not actually watch respondent completely reverse course, only that he saw him start the turn to reverse course, and that if respondent did, in fact, reverse course, then he would have been pointed toward the VOR. Mr. Crabtree confirmed that there is no minimum vectoring altitude shown on the SID, but that it required respondent to go direct to the VOR on departure, and that the only way he could get to the VOR after departing south was to make a turn to the north. See Exh. C-5.

The Administrator next called Curtis Wilson, a journeyman CPC at the Travis RAPCON. Mr. Wilson is trainer-qualified and a watch supervisor; at the time of this flight, he was monitoring a trainee in approach and departure in the south sector, which consists of working arrival, departure, and overflights of the airspace. Mr. Wilson said that, shortly after making initial contact with Travis RAPCON, respondent requested "direct to PITTS Intersection, please, and bypass weather over the VOR." The trainee told respondent his requested deviation was "on request," meaning that they had to coordinate approval with the next sector, under "NorCal" (Northern California TRACON) control (because that area is in their airspace), before Travis RAPCON could authorize the deviation request. Mr. Wilson said that

respondent replied a "couple seconds" later, "We'll just go there and work it out later." Mr. Wilson said that he then took over the position, because the trainee was inexperienced. Before Mr. Wilson was able to explain why he needed to coordinate, "I had to give a low-altitude alert because he went into it anyway." Mr. Wilson watched on his radar scope as respondent "hit the MVA" and Mr. Wilson gave him the alert, because Mt. Diablo is 4,100 feet and the MVA is 1,000 feet above the highest point, making the MVA 5,100 feet. Mr. Wilson testified that if respondent "did the climbing left turn ... back toward the VOR, he'd never enter the airspace. He'd never enter the MVA -- keeps him away from it." Mr. Wilson indicated that if respondent had stayed on the SID as cleared, he would not have violated base airspace. Mr. Wilson said he called NCT for a "point-out," explaining that he could not "point him out" to NCT until he had radar contact on him. When respondent came back into Travis's airspace, they "climbed him on up to 10,000 [feet] ... the top of my airspace," and told him that, at his destination, he needed "to contact Travis" at the telephone number they then gave him.

Roger Zimmerman, the aviation safety inspector and principal operations inspector who investigated the alleged deviation, next testified for the Administrator. Mr. Zimmerman said that during the course of his investigation, he requested a weather report for Concord for March 3, 2006; he identified that printed report as Exhibit C-11. He concluded that respondent deviated from his clearance in violation of § 91.123(a) and that his review of the tapes and the clearance given, and review of the communications

thereafter, did not indicate any amended clearance was given. He testified that respondent's entry into NCT's airspace before achieving MVA "was clearly outside of the [SID]." Mr. Zimmerman described the weather at Concord at the time of the violation as: "winds were two-five-zero at 17, visibility surface at 10 ... sky condition ... 4,500 broken ... temperature dew point spread was 12 and two...." He admitted he did not have any data for weather at the VOR, but stated his opinion that he did not believe that weather was a factor in the deviation.

Mr. Zimmerman also opined that the operation was careless or reckless, and said he came to that opinion specifically because respondent accepted "a clearance to an area that he [respondent] had already determined he wasn't going to go to." He expounded that it was reckless because he departed "knowing he wasn't going to comply with the clearance, and then deviating, once he was airborne, going direct to PITTS Intersection without a clearance." Mr. Zimmerman said it was a violation because the clearance was the Buchanan Seven Departure, "a flight direct to the VOR, and he did not do that." Mr. Zimmerman said respondent "deviated ... by not going to the VOR, and as a result of that he also entered into an airspace that he wasn't cleared for, and minimum vectoring altitudes were compromised."

Respondent testified that he did not think he deviated from the Buchanan Seven Departure. He said his aircraft had a flight management system and that he programmed it "exactly as a Buchanan Seven SID was laid out." He confirmed that he later requested "a potential deviation for weather" to go direct to the

"LODDI Intersection," but did not change the flight management system. He emphasized that the Aeronautical Information Manual encourages the use of cockpit instrumentation to "lead turns," and "expects pilots to lead turns to avoid wasting airspace." He described "turn anticipation logic, which is programmed in there." He said, "we're taught in flight training to lead the turn by 10 percent of the ground speed.... And that's exactly what we did that day." He said he did not depart from the SID, nor did he enter airspace he didn't have authority to enter.

The law judge affirmed the suspension order, but modified the sanction from a 90 to a 60-day suspension of respondent's ATP. Respondent asserts two issues on appeal: the Administrator did not offer credible, reliable, and probative evidence of a substantial nature establishing the aircraft was flown outside of the SID; and respondent's conduct was not intentional in the sense it was a gross disregard for safety, and the Administrator and law judge should have honored the ASRP compliance. The Administrator counters respondent's arguments and urges the Board to uphold the law judge's decision.

The law judge found that the allegations were proved by a preponderance of the reliable, probative, and substantial evidence.⁵ After reviewing in detail the relevant evidence and assessing the credibility of the witnesses, the law judge concluded respondent deviated from his departure clearance without obtaining an amended clearance and that no emergency existed. Consistent with that view, the law judge rejected

⁵ See 49 C.F.R. § 821.49(a)(1).

respondent's affirmative defense that a weather emergency required him to deviate from his departure clearance. We concur with the law judge's findings and conclusions as to these issues, and adopt them as our own, specifically noting, for example, there was no objective evidence, such as pilot reports (PIREPS) or weather forecasts, to support a genuine belief that weather required respondent to violate the FAR by deviating from his departure clearance. To the contrary, there was testimony that no PIREPS were filed that day, and weather reports indicated there was no such weather as respondent alleged. Further, the prevailing evidence in the record that establishes respondent's violation belies respondent's assertion that the Administrator did not meet his burden of proving respondent's deviation and that the law judge "shifted the burden to the airman requiring him to prove he operated ... within the SID."

The law judge also found that respondent's deviation was not unintentional and did not qualify for waiver of sanction under the ASRP. Respondent, in his appeal brief at 24-25, refers to, among other cases, Administrator v. Halbert, NTSB Order No. EA-3628 (1992):

Just as the airman in Halbert believed he was making the safest choice and was not making a deliberate decision to violate an FAR, [respondent] made a decision for flight safety and did not depart[] with the intention of violating an FAR and wantonly disregarding the safety of himself, his passengers, his aircraft and other individuals. As stated in Halbert, he did not take off and conduct himself with the intention of violating a regulation.

Respondent misunderstands the case law regarding waiver of

sanction under the ASRP and the meaning of the term "inadvertent and not deliberate" within that context. First, we distinguish Halbert. There, the respondent, after his right engine oil pressure gauge began behaving erratically, proceeded to his original destination airport where, among other factors, he knew that emergency equipment was available. He ultimately was found to have operated the aircraft in an unairworthy condition, rather than landing at the nearest suitable airport. But the Board found that, although he was mistaken in the belief he was acting in compliance with the regulations, "he neither deliberately sought to circumvent [them] nor evinced reckless disregard for safety," and found that waiver of sanction was appropriate. The respondent in Halbert was found to have violated FARs regarding airworthiness and careless or reckless operation. We distinguish that fact pattern from this case, in which respondent is alleged to have, with deliberation, violated a specific ATC clearance and, as a result, the residual violation of careless or reckless operation. In the face of an acknowledged departure clearance, respondent decided to ignore that clearance without regard to whether his actions put others at risk. His transparent offering of a "big, fat thunderstorm" over the VOR is unavailing in light of the objective evidence contradicting it. We conclude that his deviation was neither unintentional nor necessitated by a weather emergency. As the law judge said, respondent "flew the path that he wanted to." As to respondent's disregard for safety, the law judge said:

The potential of the deviation is that other aircraft are being handled in expectation by

ATC that another aircraft on a clearance that's been accepted is going to operate in compliance, so that other aircraft are controlled predicated upon that understanding. Also, deviation into another sector's airspace without coordination at least holds the potential that there can be a conflict between the aircraft penetrating that airspace ... and aircraft which are already operating within that airspace. The fact that nothing catastrophic happened is fortuitous.

Oral Initial Decision at 12.

To the extent that we have not mentioned respondent's other arguments or aspects of them, we have carefully considered them, and determined they have no merit. For example, respondent's assertions regarding some of the law judge's evidentiary rulings and evaluation of the evidence are not availing, as respondent has not established that the law judge's rulings were an abuse of discretion.⁶ Our law judges have significant discretion in overseeing hearings and admitting evidence into the record.⁷ We also note that we defer to the credibility findings of our law judges absent a showing that such findings are arbitrary or capricious.⁸

After our careful review of the record and the briefs of the parties, we conclude that the law judge correctly found that the evidence demonstrated that respondent committed the regulatory violations alleged and that he is not entitled to waiver of sanction because his actions were not inadvertent. Respondent

⁶ See, e.g., Administrator v. Martz, NTSB Order No. EA-5352 (2008); Administrator v. Zink, NTSB Order No. EA-5262 (2006); Administrator v. Van Dyke, NTSB Order No. EA-4883 (2001).

⁷ See Administrator v. Bennett, NTSB Order No. EA-5258 (2006).

⁸ Administrator v. Smith, 5 NTSB 1560 (1986).

demonstrates no errors, nor do we discern any, in the law judge's decision.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;
2. The law judge's initial decision, including the modification of sanction from 90 days to 60 days, is affirmed;
and
3. The 60-day suspension of respondent's ATP certificate shall begin 30 days after the service date indicated on this opinion and order.⁹

ROSENKER, Chairman, SUMWALT, Vice Chairman, and HERSMAN, HIGGINS, and CHEALANDER, Members of the Board, concurred in the above opinion and order.

⁹ 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).

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

* * * * *

In the matter of: *

ROBERT A. STURGELL, *
ACTING ADMINISTRATOR, *
Federal Aviation Administration, *

Complainant, *

v. * Docket No.: SE-17871

SCOTT FLOYD GIFFIN *

Respondent. *

* * * * *

9th Circuit Court of Appeals
Courtroom 1, Third Floor
95 Seventh Street
San Francisco, California

Wednesday,
October 3, 2007

The above-entitled matter came on for hearing, pursuant
to Notice, at 9:30 a.m.

BEFORE: PATRICK G. GERAGHTY,
Administrative Law Judge

APPEARANCES:

On behalf of the Administrator:

LISA TOSCANO, ESQ.
Federal Aviation Administration
Western Pacific Region
P.O. Box 92007
Los Angeles, California 90009-2007
(310) 725-7100

On behalf of the Respondent:

MARLON V. YOUNG, ESQ.
Merrill, Arnono & Jones, LLP
3554 Round Bard Boulevard, Suite 303
Santa Rosa, California 95403

1 DECISION AND ORDER

2 This has been a proceeding before the National
3 Transportation Safety Board on the Appeal of Scott Floyd Giffin,
4 herein Respondent, for review of an Order of Suspension, which
5 seeks to suspend his Airline Transport Pilot Certificate for a
6 period of 90 days. The Order of Suspension, as provided by the
7 Board's rules, serves herein as the Complaint, and was filed on
8 behalf of the Administrator, Federal Aviation Administration,
9 herein the Complainant.

10 The 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 Following due notice to the parties, the matter came on
14 for trial on October 2, 2007, in San Francisco, California. The
15 Complainant was represented by one of her Staff Counsel, Lisa
16 Toscano, Esquire, of the Regional Counsel's Office, Western
17 Pacific Region, Federal Aviation Administration. The Respondent
18 was present at all times and was represented by his Counsel,
19 Marlon V. Young, Esquire, of Santa Rosa, California.

20 Parties were afforded the opportunity to call, examine,
21 and cross-examine witnesses, and to make argument in support of
22 their respective positions.

23 I have considered all of the evidence, both oral and
24 documentary, in rendering this decision. I summarize the evidence
25 that leads to the conclusion, in my view, that I reach herein.

1 Command of a Cessna Citation jet, N719RM, that he failed to comply
2 with the ATC clearance that he had received and acknowledged
3 without obtaining an amended clearance from ATC. It is further
4 alleged, therefore, that the Respondent did operate in regulatory
5 violation of the provisions of Section 91.123(a) of the Federal
6 Aviation Regulations. That Section of Part 91 of the Regulations
7 provides that when at ATC clearance has been obtained, no Pilot in
8 Command may deviate from that clearance unless an amended
9 clearance is obtained, an emergency exists, or the deviation is in
10 response to a traffic alert and collision avoidance system
11 resolution advisory.

12 It is further alleged, as a further consequence of the
13 operational violation which I've just discussed, that the
14 Respondent also was in regulatory violation on the date at issue
15 of the provisions of Section 91.13(a), which provides that no
16 person may operate an aircraft in a careless or reckless manner so
17 as to endanger the life or property of another.

18 In his Answer to the Complaint, the Respondent raised
19 several Affirmative Defenses. Of particular note is the Defense
20 that the initiating cause was the ATC from FAA or the Travis Air
21 Force Base controllers. Further, that if there was a deviation,
22 that it was required by the pilot to deviate because there was an
23 emergency, and in this case that is a weather emergency. And
24 lastly, that the Respondent filed a timely notice with the
25 Aviation Safety Reporting Program, and therefore, under the

1 provisions of the Advisory Circular, that even if there is a
2 violation, that he's entitled to a waiver of imposition of any
3 sanction.

4 With the Affirmative Defenses, of course the burden of
5 proof on proving an affirmative defense rests with the Respondent.

6 And the burden of proof imposes that each affirmative defense be
7 established by a preponderance of the reliable and probative
8 evidence. I will specifically discuss the emergency defense and
9 the NASA claim subsequently in this Decision. I simply do observe
10 here that with respect to the other two Affirmative Defenses,
11 numbered (1) and (2) in his Answer, I do not find that the
12 Respondent has sustained a burden of proof in establishing either
13 one of those two specific Affirmative Defenses.

14 Turning then to the evidence in the case, I will first
15 discuss the testimony received in summary form, and then in
16 sequence the various exhibits which I believe support the
17 conclusion reached herein.

18 The first witness called by the Complainant was Mr.
19 Kenneth Hougey. He is an Air Traffic Controller. He's been with
20 the Federal Aviation Administration 23 years, and he is a fully-
21 qualified journeyman controller. He was on duty at the Concord
22 Airport, which is Buchanan Field, on March 3, 2006, working in the
23 tower. He testified that he was in the tower, and two other
24 individuals were there, a Mr. Crabtree and a Mr. Gaspar. Mr.
25 Hougey was working as ground controller and flight data delivery

1 positions. Mr. Crabtree, on this witness's testimony, was the
2 local controller, and Mr. Gaspar was the controller in charge.

3 According to this witness, he is the one who gave the
4 clearance to Respondent for his departure from Buchanan Field, and
5 that is shown in Exhibit C-2, which is the re-recording and the
6 actual transcript of the re-recording of the voice communications.

7 And I observe here that when I do talk about the various voice
8 transmission transcripts, they are all transcripts made from the
9 re-recordings of the communications recorded between Respondent's
10 aircraft at the date and time at issue here, which was close to
11 15:00 hours local time from Buchanan Field. So all of those,
12 without repetitive, is a typed transcript of the various re-
13 recordings of different positions.

14 This witness also identified the various other exhibits,
15 particularly C-1, C-2, C-3, C-4, and C-5. And I observe here that
16 C-5 is actually a double-depiction. C-5(a) is a copy of the NOA
17 printed description of the Buchanan Seven Departure, which is the
18 departure procedure, or SID, which is at issue here. And C-5(b)
19 is the Jeppesen depiction of the same Buchanan Seven departure. I
20 probably refer most directly to C-5(a), because I believe the NOA
21 description gives more detail, which is, in my view, of
22 significance here. However, they are identical as far as the
23 requirement for performing the SID, the Buchanan Seven Departure.

24 Mr. John Crabtree was one of the controllers in the
25 tower on the date in question. He's been with the FAA 16 years.

1 He's a fully-certified controller, and been at Concord Tower for
2 seven-and-a-half years. He was working, on his testimony, which
3 agrees with the prior testimony, the local control position. He
4 was in voice communications with the Respondent, who was operating
5 on N719RM.

6 On cross-examination, the witness indicated that he, in
7 fact, did observe the aircraft to depart from Buchanan Airport.
8 The departure was from Runway one-niner-right, which is a south
9 departure out of Buchanan Field. The witness indicated he, on the
10 clearance, was of the view and stating that the pilot, to execute
11 the clearance, would need to change course, that is reverse course
12 after takeoff, and that that reversal of course had to occur
13 before the aircraft left the airspace which this controller
14 actually had authority to control. And on re-cross examination,
15 rather, the witness indicated that his airspace went to a ceiling
16 of 2,500 feet, and at that base of the airspace that he had
17 authority over, existed at approximately one or one-and-a-half
18 miles south of the airport.

19 With respect to departure, there was testimony given
20 here, and also testimony that he had given in a prior deposition.
21 The witness explained that in his statements what he was
22 indicating, as I observed his testimony, and I did not see any
23 direct conflict between the two versions, is that he observed the
24 start of the Respondent's left turn, and that he did observe the
25 left wing down with the aircraft into a turn, beginning the

1 reversal of course. The witness did not know what headings the
2 aircraft was assuming, but since the aircraft was in a turn, it
3 would be reasonable to assume that it was a continual change of
4 heading from the south departure of one-nine-zero back around to a
5 northerly direction. That would be a left turn out, and I'll
6 discuss more when I discuss the SID.

7 The witness was, I think, clearly of the opinion that he
8 had simply observed the start of the reversal of course, and any
9 statement in his deposition was really an error on his part, in
10 that he was describing a reversal of course that he saw, and then
11 stopped observing the aircraft, because he then was switching
12 control of the aircraft over to the controllers at Travis Air
13 Force Base.

14 He testified that he did not himself observe any
15 deviation, but what he had observed was that the Respondent had
16 started his turn or reversal of course, and at that time, after he
17 observed the start of the reversal of course, he simply became
18 engaged in switching control of Respondent's flight over to the
19 other controllers at Travis.

20 The witness, however, was clearly in the opinion, as he
21 expressed it, that the Buchanan Seven Departure, the SID, requires
22 any aircraft that has this clearance, that has been received and
23 acknowledged, to execute the SID to return to the Concord VOR, as
24 part of the SID.

25 Looking at C-5(a), it is clear from the description

1 section on the SID plate, that for the transition from over the
2 CCR VOR DME, via the CCR radial-zero-seven-one, which is V108, to
3 the PITTS Intersection. That's the SID. So clearly the SID
4 requires the aircraft execution to return from takeoff back over
5 the VOR. That is the same language that appears on the Jeppesen
6 plate, under the Departure Section, direct CCR VOR, thence by
7 assigned transition or assigned route. Well, the assigned
8 transition was the PITTS transition at issue here. So the
9 Jeppesen sort of abbreviates the departure description, which is
10 more spelled out on the NOA plate. But in any event, the C-5
11 substantiates Mr. Crabtree's description.

12 Mr. Curtis Wilson is -- was a controller at Travis
13 RAPCON. He is a fully-rated controller, and is also a trainer at
14 that facility. He indicates he's been at the RAPCON, I think, as
15 a civilian -- since about 1997. He was there in the Air Force, I
16 believe since 1993, and he was, in fact, on duty at the time of
17 this alleged incident, which was about 15:00 hours local time. At
18 that point, he was working the position, and also monitoring a
19 trainee who, on the testimony, a trainee who was engaged in the
20 first part of the voice communications, and then Mr. Wilson took
21 over the communications at a point in time which, I believe, was
22 23:05:57. And I'll be sure to refer to that when I discuss the
23 transcript.

24 Mr. Wilson substantiated the Exhibits C-6, C-7, and C-8.
25 C-6 is a transcript which he indicates that he listened to and

1 verified as being a correct transcription. C-7 is a recording of
2 different sectors, and the sectors do appear to be the south
3 sector for the Travis Northern California Approach Control, which
4 also included, I believe, the Richmond Sector, as he described it,
5 Concord Tower, and, of course, the aircraft.

6 C-8, which I'm not going to review in detail, is
7 essentially a recording between the Respondent and the Watch
8 Supervisor by telephone on a landline. I simply observed that on
9 the testimony here, the Watch Supervisor was in the tower at the
10 time of this alleged incident.

11 C-9 was identified by this witness, which is a copy of
12 the control strip, and the details of that strip were discussed by
13 this witness, and essentially they don't add anything other than
14 what has already been testified to verbally by the other
15 witnesses.

16 C-7 was, on this witness's testimony, the communications
17 he had as south controller with the aircraft, both his trainee and
18 then himself, beginning with his takeover at 23:05:57.

19 With respect to the request for deviation that was made
20 by the Respondent, which I'll discuss, Mr. Wilson then stated that
21 the request was not his to authorize, because it involved airspace
22 which he didn't have control over, and until he got authorization
23 from the next sector, which I understood was the Northern
24 California Approach Control, Richmond Sector, he could not approve
25 the Respondent's request. And I'll detail the communications when

1 I discuss the exhibit. As I indicated, at 23:05:57 this Mr.
2 Wilson then takes over the position and communications with
3 Respondent from the trainee, and at that time, as he testified,
4 the Respondent's aircraft was below the minimum vector altitude
5 for the airspace in which the Respondent was operating at the
6 time. According to Mr. Wilson, at the point he took over, the
7 Respondent, in the operation of his aircraft, had already violated
8 the Richmond Sector airspace.

9 He also testified that at the time of either prior to or
10 subsequent to that, the Travis facility RAPCON had received no
11 PIREPS, Pilot Reports, of adverse weather, and on his recollection
12 the significant weather was a broken ceiling at 4,500 feet at
13 Concord, and on cross-examination did concede that he had never
14 given any vectors to the Respondent's aircraft.

15 Mr. Roger Zimmerman is an Aviation Safety Inspector with
16 the Federal Aviation Administration, stationed at the Oakland
17 FSDO. He detailed his background and experience, which I won't do
18 here, but he does hold an Airline Transport Pilot Certificate,
19 type ratings, Commercial Privileges, Airframe and Powerplant
20 Mechanic, he's Certificated double-I, and has somewhere in excess
21 of 9,000 hours.

22 He became involved in this investigation essentially
23 because it was his turn in the office to pick up assignments.
24 There's nothing in front of me that indicates that he had any
25 prior experience with the Respondent, or that there would be any

1 indication of animosity between Mr. Zimmerman and the Respondent.
2 There's just no evidence offered on that, I just make that
3 observation.

4 Mr. Zimmerman sponsored Exhibit C-11, which is the
5 weather report, surface weather conditions, for Buchanan Field and
6 Concord, and I discuss that here just for continuity. As it
7 appears, page 1, which is stamped 00062, the closest time, as
8 testified to by the witness, to the time of the event, as shown on
9 this Surface Weather Observation, is that of 14:53 hours local
10 time. And looking at the weather, it does appear that the surface
11 visibility was 10 miles, the sky condition was as testified to by
12 Mr. Wilson, broken at 4,500 feet, and a good temperature dew point
13 spread, temp of 12, and dew point of 02.

14 The second page of the Surface Weather Observations, for
15 the same hour, also indicates over weather and obstruction to
16 vision. And I quote, "No weather duration data was reported," so
17 there's nothing of any adverse weather reported in this
18 observation.

19 Going down to "Summary of the Day," midnight to
20 midnight, it shows that the precipitation water equivalence, which
21 would include rain, thundershowers, whatever, is reported as 0.07,
22 which is essentially trace.

23 Lastly, when inquired as to opinion, based upon
24 listening to all of the evidence, his investigation review of all
25 the material which was received into evidence, he was of the

1 opinion that the Respondent had, in fact, deviated from the
2 clearance that he had received and acknowledged, and that his
3 operation was, in Mr. Zimmerman's view, reckless operation. And
4 particularly, giving various grounds for that, one of which is
5 that if there really was a weather condition over the Concord VOR,
6 on the evidence available the Respondent was, while still on the
7 ground, aware of that, and took no action to avoid operating into
8 that or putting himself in a position where he would have to
9 deviate from the clearance that he accepted. That is, that the
10 Respondent had other options before he even departed from Buchanan
11 Field.

12 Respondent testified on his own behalf. He's been a
13 pilot for 18 years, has about 9,800 hours, he holds the Airline
14 Transport Pilot Certificate, as stated, Commercial Privileges,
15 and, I believe he said, three Type Ratings, one of which is the
16 Citation that he was operating on the day in question.

17 He did testify that he had filed a NASA Report, and
18 Exhibit R-3 is a copy of the return, and it does show, and there's
19 no contrary evidence, that it was, in fact, a timely-filed NASA
20 Safety Report. I believe the return was filed, at least, within
21 four days, or maybe even filed the same day. In any event,
22 there's no dispute on that.

23 Respondent in his testimony stated that he does not
24 believe that he had ever deviated from his clearance, that he in
25 fact had requested to go to LODDI Intersection, and that was in

1 order to bypass what he perceived as a strong thunder cell over or
2 in the immediate vicinity of the Concord VOR. He testified that
3 he was using the flight management system in his aircraft, that it
4 had been programmed, and there's no evidence that it was
5 programmed incorrectly. He simply says it was programmed, and
6 that the aircraft flew the flight path as programmed into the
7 flight management system. Any avoidance of the Concord VOR was
8 because of the weather, that he never changed the flight
9 management system, it was flown as published, and he also
10 referenced the Airman's Information Manual, which indicates that
11 one as a pilot is expected to lead turns, and that would be turns
12 not only over a VOR but over intersections or intersections of
13 radials, to conserve airspace.

14 And I would agree with that. One in a relatively high-
15 performance aircraft should lead on an intersect. You can't pivot
16 exactly over the intersection or over the VOR, unless maybe you're
17 flying a Piper Cub or an Aronca 7AC, you know, at 60 miles an hour.
18 So you're going to lead. The question is how much do you lead?
19 And I'll discuss that subsequently. So it's not a question of
20 whether you should lead, but really whether you have complied
21 substantially with the clearance.

22 In any event, he testified that his flight management
23 system directed the turn to be inside the VOR -- that is prior to
24 actually passing over the VOR -- and that he had programmed it
25 this way, and then followed the flight director in his aircraft

1 mainly to avoid the weather, which he testified involved the
2 strong thunderstorm cell in the vicinity of the Concord VOR.

3 He stated in his testimony that it was his belief and
4 his feeling that he had never operated his aircraft in either a
5 careless or reckless manner, as I've already indicated, nor that
6 he had ever deviated, and that if any deviation did occur it was
7 because of weather avoidance requirements, essentially the
8 emergency, which I mentioned as his Affirmative Defense, and
9 ultimately, therefore, that he never really departed from the
10 requirements of SID, the clearance that he had received, and he
11 denied that he ever entered any unauthorized airspace.

12 Two other witnesses were essentially proposed by the
13 Respondent. One was a Mr. Robert Woods, and the other a Mr. Ray
14 Evans. However, both of these individuals were at one time
15 employees of the Federal Aviation Administration, and on the
16 objection of Complainant's Counsel, and reliance on the provisions
17 of 49 CFR Part 9, Section 9.7 and 9.3, the Administrator exercised
18 her right of prohibiting former employees from testifying in a
19 proceeding without the permission of the Administrator, as given
20 through her counsel. So those gentlemen really never testified as
21 to any details in this proceeding.

22 I then turn to a brief discussion of the various voice
23 communications. C-2 is the Clearance Delivery Position, which was
24 testified to by the first of the Complainant's Witnesses. On page
25 00030 of Exhibit C-2 is the clearance delivery given to

1 Respondent, who was operating as Twilight seven-one-niner. And
2 without reading the whole thing, maybe I should, the clearance
3 clearly is, "a clearance to Alamagordo in New Mexico via the
4 Buchanan Seven PITTS transition, V108, LODDI Intersection, V585,
5 Manteca, as filed, maintain 4,000 and expect flight level three-
6 niner-zero," one-zero minutes after departure, and then frequency
7 and a squawk on transponder of three-three-three-six. And there's
8 the read-back from Twilight-719 of that clearance. So clearly,
9 the clearance that was given to the Respondent was essentially
10 that as he filed with the Buchanan Seven Departure PITTS
11 transition, and that was acknowledged as received. And by that
12 acknowledgment, it was an agreement on the part of the Respondent
13 with ATC that he was going to execute the clearance as he
14 acknowledged it.

15 C-3 is the ground control position. It was Mr.
16 Crabtree, as I've already indicated. Page 32, and I'm dropping
17 the three zeroes that appear on this, this controller is in
18 contact with Travis Approach Radar Assist, and there was some
19 attempt at coordination to comply with the request of the
20 Respondent, who had made the request known that he wanted to
21 possibly proceed to LODDI Intersection without going to the VOR.
22 The ground controller was in contact with Travis and indicating
23 that Twilight-719 would be off Runway one-niner-right, which is,
24 as I've indicated, the south departure out of Buchanan, and, "he
25 will be making a left turn to the VOR after departure."

1 So the understanding, still, at this point, was that the
2 Respondent was expected to make a left climbing turn out of the
3 airport back to the VOR after the departure. And on page 33,
4 ground control is alerting Travis that, "He would also, possibly,
5 might be asking for deviations because of weather, so you can
6 radar him better. We'll switch him early if he wants to go around
7 some weather." So it does appear that the controllers were
8 attempting, at least, to accommodate the request that had been
9 made known to them by the Respondent. And as I've indicated,
10 there's nothing in here that indicates to me that anything that
11 happened in this incident was either initiated by controllers or
12 aggravated, or would be the principal cause of any alleged
13 deviation. And so I, as indicated, rejected that Affirmative
14 Defense.

15 C-4 is the local control position from Concord. This
16 picks up at page stamp 34, and it shows that on this that
17 Respondent is still on the ground of Buchanan Field, they're ready
18 to go on one-nine-right, and that they're saying they would like a
19 left turn out for weather. So it is clear here, and on the
20 testimony, that the Respondent, prior to departing, as Mr.
21 Zimmerman had testified to, was, on his statements, fully aware
22 that there was some weather out over Concord VOR or near in the
23 vicinity, that he was saying that he wanted to deviate around.

24 And the comeback on the local controller is, "Hold
25 short, and then on the runway left turn will be approved." And it

1 does appear in the transcript that the controllers do make
2 statements, as I've already indicated, concerning both a left-hand
3 turn and then a right-hand turn. On page 35, Twilight-719, in
4 contact with the controller, states that they were cleared for
5 takeoff, which had been given, and with a left-hand turn Twilight-
6 719 toward LODDI Intersection. So the statement that the
7 Respondent is making there is that he wants to go not to PITTS,
8 but the LODDI, which is further along V108, which is almost to the
9 point where the further right-hand turn would be made to intercept
10 V585, which would take him down to Manteca, and then ultimately to
11 Alamagordo. But on here, it wasn't PITTS that he wanted to go to,
12 but to LODDI, which was further to the east. I believe it looks
13 here about 49 nautical miles.

14 In any event, the local controller comes back, and I
15 quote here, because this is to me significant. "Well, I don't
16 know, let's see. You're gonna to go to the VOR, sir." So the
17 controller is restating his expectation that, in accordance with
18 the SID, the Respondent is required to go to the VOR. "You're
19 gonna head out there, it'll be a left turn to the VOR. And then
20 you're gonna do a right turn of V108 towards PITTS Intersection,
21 and then 108," which would be V108, "to LODDI, and then down to
22 Manteca as filed."

23 So yes, the controller does say left and right-hand
24 turn, but essentially all he's doing here is verbalizing the
25 depiction of the Buchanan Seven Departure with the PITTS

1 transition, which, if one looks at the NOA plate, Exhibit C-5, a
2 departure from one-nine-right to the south requires a left-hand
3 turn, a climbing left-hand turn because there's climb restriction,
4 rates of climb -- which is a left-hand turn back to the VOR, and
5 then a right-hand turn to pick up the zero-seven-one radial, which
6 is V108 out of the Concord VOR to PITTS, and then LODDI further
7 down the road, where you would pick up V585 to make another right-
8 hand turn down to Manteca. So there wasn't any amendment by this,
9 it was simply a statement in verbal form of what is depicted on
10 the departure plate for the transition.

11 Twilight-719 comes back, "We understand that there's
12 weather there. We'll just negotiate down the road." By this, I
13 understand the Respondent is indicating, "Well, regardless of what
14 you say, there's weather there, and we're going to do something,"
15 negotiating, I guess, with ATC, "down the road." That is after
16 he's in the air.

17 Then there's further communications back and forth
18 advising that the controllers here have attempted to coordinate
19 with Travis that Respondent had requested the deviation, and that
20 he is then handed over to contact Travis. "Departure left turn,
21 your discretion. Good day." That's the end of the transcript.

22 C-5, I've already discussed in some detail, and again it
23 does show and support the testimony as given by the controllers
24 who testified on behalf of the Complainant, and does support the
25 right and left-hand turns. But again, that is simply what's

1 depicted on the departure. There were no amendments.

2 C-6 includes communications between Travis, Concord
3 Tower, Twilight-719, and Richmond Sector, the Northern California
4 Approach Control. Travis is made aware of the fact that there was
5 some expectation, and Clearance Delivery says, "Let me give you
6 the full route real quick, and then if we can we'll amend it."

7 Going to page 00004, at 23:07:30, the contact between
8 Travis back to the aircraft, which had already checked in, and
9 Travis is telling them, "I could not let you go direct. You could
10 have went about 360 degrees to avoid the VOR." And then Twilight
11 comes back and says, "There's a big, fat thunderstorm out there,
12 and I'm not going to take this jet plane through the weather."
13 Then there's a discussion about making a ground call with a
14 telephone number.

15 And then Travis comes back explaining, after the
16 Respondent states that, "You guys said stand by. We're out in the
17 weather. It doesn't quite hack it. We need a heading left or
18 right, or some tools to use." Travis comes back and says, "I
19 understand that. Buy the time," and it's here b-u-y, but "by," b-
20 y, "at the time you were right at 5,100 MVA," minimum vectoring
21 altitude, "I cannot give you a turn referencing the minimum
22 vectoring altitude."

23 There's further discussion, and controller again
24 explaining, "Well, you're still IFR," and it's admitted that IFR
25 was never canceled by the Respondent. "IFR is a minimum vectoring

1 altitude, I cannot vector you below the minimum vector altitude."

2

3 And then, further down on page 05 and 06, there's
4 discussion between Travis and Concord concerning weather. Travis
5 inquires, "Are you showing a thundercloud over the VOR?" Tower
6 comes back and says, "Not over the VOR. There's some clouds, but
7 I don't see any precipitation. I see precipitation in other
8 directions, but not there." Travis says, "Twilight decided he was
9 going to violate the bays," that is Richmond airspace, "and go
10 through 5,100 MVA because of a thundercloud that's over the VOR."

11

12 Concord comes back, "Well, we don't see that, and we
13 didn't give him permission to deviate, yeah." Travis: "I didn't
14 either. I told him we'd come back this way, I could get him past
15 2,100. And he goes, 'Well, I'm in VMC, and I'm going direct to
16 PITTS, and did it anyway.' I'm inquiring, because I was
17 wondering, we're not showing any weather or anything over there."
18 And Tower comes back and says, "Well, over east of the VOR, some a
19 little east of the VOR, there might be some."

20 C-7 is further recordings out of the Travis RAPCON. And
21 on page 09 there is coordination, again, between Concord Tower and
22 Travis, indicating that Respondent is going to be off Runway-one-
23 niner-right, and it will be a left turn to the VOR after
24 departure. So that is clearly what Concord is expecting and what
25 Travis was expecting. And Travis comes back and says, "All right,

1 Twilight-719 is released." Concord comes back and indicates that
2 possibly they're going to be asking for deviations due to weather.
3 Travis says, "Okay."

4 At 23:05:32, 719 checks in with Travis, and he indicates
5 that he's with Travis at 2,000 for 4,000, as cleared, and as shown
6 on the clearance strip as testified to by Mr. Wilson.

7 At 23:05:36, in response to a communication from Travis,
8 which was also at 23:05:36, they give him, "I checked in with
9 Travis Approach, the altimeter at Travis," and a request for ident
10 on the transponder. Apparently there was the ident, because the
11 response at 36 comes back from Travis, "Present position, direct
12 to PITTS Intersection, please, and bypass the weather over the
13 VOR." That's the request from 719.

14 At 23:05:48, which is a lapse of only 12 seconds, Travis
15 comes back and tells Respondent, "Radar contact three miles
16 southeast of Buchanan Field." The deviation was on request. So
17 we have, then, on this ident at 23:05:36, so there's a return
18 sometime in that 12-second period.

19 At that point Respondent's aircraft is three miles
20 southeast of Buchanan Field, so he's three miles south of the
21 field. The field itself, according to the departure plate, C-5,
22 is itself three nautical miles southeast, or maybe a little more
23 to the southwest, of the Concord VOR. So at the point on this
24 radar return, Respondent's aircraft is essentially six nautical
25 miles south of the VOR.

1 And then Twilight comes back with a response at 55
2 seconds, "Well, we'll just dwell," I don't know what that means,
3 "and work it out later." And Travis comes right back, and this is
4 where Mr. Wilson takes over at 23:05:57, "Unable to on that
5 request for deviation. Low altitude alert. Check your altitude
6 immediately. The MVA in your area is 5,100." And Twilight starts
7 negotiating, "We see the terrain, we're not going to fly in the
8 thunderstorm over the VOR. Were," w-e-r-e, "direct to PITTS
9 Intersection." And I guess that means "we are" direct to PITTS
10 Intersection. I mean, he's going to direct to PITTS.

11 And then there's conversation, and again at 23:06:19,
12 "Concord, four miles to the south," and he's pointing out to NCT,
13 which is the Northern California Approach Control, he's pointing
14 out the Respondent's position as being four miles to the
15 southeast, and indicating that the aircraft was not going to go
16 over the Concord VOR, and will not do what he's supposed to be
17 doing.

18 Then there's further discussion on page 11 between
19 Travis and Respondent, in which Travis indicates to the Respondent
20 that he has to call Center or Travis after he gets on the ground,
21 repeats the phone number, because of the weather, and states, "You
22 went through the Class-Bravo and violated the minimum vectoring
23 altitude that I had. At that moment, I couldn't let you go
24 direct. You could have went 360 degrees to avoid the VOR."
25 Respondent comes back and says, "There's a big, fat thunderstorm

1 out there, and I'm not going to take the jet airplane through
2 that." And then Travis says, "You contact the Travis Watch
3 Supervisor."

4 Further in this transcript there's communication between
5 Travis and Concord, as appears on pages 12 and 13 thereof, and
6 they're inquiring of each other as to any weather being there.
7 Travis asks, "Are you showing a thundercloud over your VOR?"
8 Concord comes back and says, "Not over the VOR, there's some
9 clouds there, but I don't see any precipitation in the vicinity.
10 I see it in other directions, but not there." "We don't see
11 anything, either." "I told him to stand by because I was waiting
12 for him to get past the 5,100 MVA, and he goes, 'Well, I'm in VMC
13 conditions, I'm going direct PITTS, and didn't anyways.'"

14 Again, there's inquiry as to, "Do you have any clouds
15 over there?" And then he says, "East of the VOR. I'm maybe
16 showing a little east of the VOR, but not over the VOR." And
17 there was also discussion on page 12 between Travis and the
18 Respondent concerning the 5,100 MVA, Travis explaining that
19 because he was IFR that he couldn't give a deviation because of
20 the minimum vectoring altitude. As long as the Respondent was
21 still on an IFR clearance, it's a minimum vectoring altitude, and
22 he could not give any vectors below that altitude.

23 That, to me, is the evidence in the case.

24 There is no question but that the Respondent in fact did
25 receive the clearance as admitted in Paragraphs 2 and 3 of the

1 Complaint, which was the Buchanan Seven Departure with the PITTS
2 transition. This was accepted clearly by the Respondent. If
3 there was any weather over the VOR, as testified to by Mr.
4 Zimmerman, and is indicated in the voice communications, the
5 Respondent, while in his -- he was still on the ground, was aware
6 that if, in fact, there was weather at the VOR, he was aware of
7 that.

8 However, he accepted the clearance. At the time he did
9 that, he knew the weather, according to him, was there. He did
10 not have to accept that clearance. The pilot can always refuse
11 the clearance or ask for an amendment to the clearance, or re-
12 file. And in this case, the broken clouds at 4,500, the evidence
13 is that he was operating in VMC, at least at 2,000 feet, could
14 have departed as he wanted and arranged to pick up an IFR
15 clearance in the air somewhere else, LODDI, or when he intercepted
16 that intersection on V585. Instead, he chose to depart with a
17 departure that required him, as indicated on C-5 and in the
18 testimony, to return to the VOR. Not that he had to pivot exactly
19 over the VOR, but he had to return to the VOR and intercept the
20 zero-seven-one-radial to proceed to PITTS.

21 On the communications, it is clear from the ident, as
22 I've already discussed, that the aircraft, when it identified with
23 Travis, was six nautical miles south of the VOR when he decided
24 not to go to the VOR, but to head towards LODDI, which is
25 apparently what he really intended to do on his initial

1 transmissions with the controllers. This placed him even further
2 from the Victor Airway-108, which is the zero-seven-one-radial,
3 because the zero-seven-one radial essentially bears slightly to
4 the east-northeast. So while he was six nautical miles south of
5 the VOR, he would be necessarily somewhat even further from the
6 center line of V108.

7 So on the evidence in front of me, he was never within
8 the airway which is four nautical miles east-side of the center
9 line of the Victor airway. He was never there.

10 On the evidence in front of me, he clearly did not
11 comply with the departure clearance which he had accepted, and he
12 in fact deviated from it. And on the evidence, which is not in
13 any way contested, other than by the Respondent's own statement
14 that he didn't penetrate any other airspace, but the controller's
15 testimony, and the evidence as to what was actually performed,
16 does show that the Respondent, which I do find, in fact penetrated
17 another sector's airspace, I believe Richmond Sector's airspace,
18 before there was any coordination between Travis and that other
19 sector. That was part of the deviation.

20 The Respondent also then attempted to negotiate or query
21 ATC as to why they wouldn't accede to his request. And it's clear
22 on the preponderance of the evidence that the Respondent in fact
23 did, as charged in Paragraph 5 of the complaint, enter into
24 airspace, as I've already discussed, under IFR, since it was never
25 canceled, and that was an altitude less than the minimum vectoring

1 altitude. To me, it is established on a preponderance of the
2 reliable and probative evidence.

3 As to the weather, the only statements as to a big
4 thunderstorm or thunderstorm cell being over the Concord VOR is
5 the Respondent's testimony, and his statements made to the
6 controllers in the voice communications. However, against that is
7 Exhibit C-11, which I already have reviewed, which shows no report
8 of any adverse weather at Buchanan Field, which was only three
9 nautical miles south of the Concord VOR. That would be clearly
10 visible from the tower, and if it was being painted on the in-
11 flight radar in Respondent's aircraft and visible to him while he
12 was still on the ground, it certainly should have been visible to
13 the controllers at Buchanan Field and on their radar scopes, and
14 also on the Travis controller's scopes. They had no indication of
15 any type of weather other than some clouds or possibly
16 precipitation somewhere to the east.

17 C-11 also indicates that there's only trace
18 precipitation in a 12-hour period, 0.07, and broken clouds at
19 4,500. There's no indication at anytime, either several hours
20 before or several hours after, of any type of severe weather, a
21 big thunderstorm cell. On the evidence in front of me, I do not
22 find the Affirmative Defense claimed by the Respondent established
23 by the preponderance of the reliable and probative evidence.

24 Comment on the use of the flight management system: I
25 would agree that this is a system that is in the aircraft, it is

1 to be used the pilot, and if it is programmed correctly is a very
2 useful tool. But a pilot cannot simply give control of the
3 aircraft over to the flight management system, or to any other
4 instrumentation on the aircraft, such as the autopilot, if you're
5 using that, and claim that the autopilot caused a deviation from
6 an altitude hold or a turn-in. The pilot is expected to supervise
7 the instrumentation and make sure that the flight path taken by
8 the aircraft is in compliance with the clearances received. And I
9 would agree, as I've already indicated, that you can lead the
10 turn, and in this case, you know, turn somewhat south of the VOR.
11 But you at least have to proceed towards the VOR and get close to
12 the VOR before you turn on course.

13 On the evidence here, the Respondent began his deviation
14 at least six nautical miles south of the VOR, and by doing that,
15 heading off to the right, he was even further south of V108,
16 because that veers off to the northeast slightly, and caused him
17 to penetrate the other airspace, Richmond airspace, without
18 coordination, and be operating below the minimum vectoring
19 altitude. That is not leading the turn-in. That is deviating
20 from the requirements of the clearance, which clearly required the
21 aircraft to return to the Concord VOR and proceed out on the zero-
22 seven-one-radial.

23 I find, therefore, that on the preponderance of the
24 reliable and probative evidence, that the Respondent in fact
25 deviated from the clearance given to him by ATC without having

1 received an amended clearance.

2 I further find, on the preponderance of the reliable and
3 probative evidence, that there was no emergency as would excuse
4 the Respondent from complying with the clearance without having
5 obtained an amended clearance as provided by the emergency
6 provisions, both in Sections 91.123(a) and 91.3 of the
7 Regulations, which does allow for deviation from FARs if there is
8 a bona fide emergency.

9 However, the establishment of an emergency is on the
10 party claiming it. They must establish that by a preponderance of
11 the reliable and probative evidence, which is not done here.

12 I would further observe that on the evidence in front of
13 me, that it appears that the Respondent, accepting his testimony
14 at face value, was aware that there was weather out at the VOR,
15 and accepted this clearance knowing that. As the Board has
16 repeatedly held, if a Respondent puts himself in the position
17 where he finds himself in a difficult situation, a developing
18 emergency situation, which he could have avoided by actions
19 beforehand, that is not an excuse in accordance with 91.3.

20 For example, if one is flying alone and you observe a
21 wall of thunderstorms in front of you, and you don't turn around
22 and do a 180, you claim an emergency after you penetrate. You
23 have an opportunity to take other action. Here, as testified to
24 by Mr. Zimmerman, there were other options available to the
25 Respondent which I've already had reference to. So I do not find

1 that the Respondent has established any affirmative defense on a
2 claim of an emergency.

3 As far as credibility in this case, I simply observe
4 that I do find on the weight of the evidence that the evidence
5 offered by the Complainant is the more credible on the issues of
6 the deviation: the non-existence of a severe thunderstorm cell
7 over the Concord VOR, or the existence of an emergency that would
8 have been unavoidable by other action taken prior to the departure
9 from Buchanan Field.

10 The last Affirmative Defense I wish to mention is the
11 NASA report. There is no question that there was a timely filing
12 of a NASA report. However, the filing of a timely NASA report is
13 not in and of itself sufficient. The situation must also be in
14 conformity with the requirements of the Advisory Circular
15 pertaining to the Aviation Safety Reporting Program, which is the
16 Advisory Circular 00-46-D, which is an amendment of 1997. And as
17 of significance here, to obviate the imposition of a sanction, the
18 violation, as provided in the first condition, must be inadvertent
19 and not deliberate.

20 Here, on the evidence in front of me, this is not an
21 unintentional deviation. The actions taken by the Respondent
22 were, in fact, intentional. He flew the path that he wanted to.
23 The aircraft did not wander off by itself, so it cannot be
24 unintentional. So I find that on the evidence in front of me,
25 although there was a timely report, that the facts and

1 circumstances do not comply with the conditions imposed upon the
2 acceptance of the NASA report for obviation of imposition of a
3 sanction, in that the action by the Respondent in deviating from
4 his clearance without an amended clearance was, on all of the
5 evidence, particularly that established on the testimony and the
6 voice communications, was a deliberate choice on the part of the
7 Respondent, and not excusable.

8 Turning then to the deviation itself, the most recent
9 case on this, and I think it includes a good summary of the
10 Board's historical position, is the very recent case of
11 Administrator versus McCartney, which is Board Order EA-5304,
12 which was adopted August 2007. On pages 8 and 9 of that Decision
13 the Board states, and I quote, "We have long held that, given the
14 time-sensitive nature of ATC communication and aviation
15 operations, combined with the fact that Air Traffic Controllers
16 must communicate with multiple aircraft within a short period of
17 time, ATC instructions are not subject to negotiation." And they
18 cite Administrator versus McGuire at 4-NTSB-1824 in 1984 case.

19 They go on to state they reiterated this principle in
20 Administrator versus Jesch, J-e-s-c-h, 7-NTSB-1256, 1257, a 1991
21 case, and observing further that, "We, the Board, have adhered to
22 this stringent standard of compliance with ATC instructions in a
23 number of cases." And they go on to cite four or five additional
24 cases on that principle. So the Board's position has been
25 consistent, that strict compliance with ATC instructions is what

1 is expected of a pilot.

2 That was not done here. The Respondent essentially told
3 them, "I'm going to dwell out here, we'll negotiate it down the
4 road." That is not in compliance with Board precedent.

5 In the McCartney case, in that particular case, the
6 Administrator sought to suspend that individual's Commercial Pilot
7 certificate for 90 days. But I observe the facts in that case
8 were, Mr. McCartney refused to comply with ATC instructions more
9 than once. He refused both of two instructions, which was, I
10 guess, one, to maintain a flight level, and then another one to
11 descend and turn. He refused to comply with either one, for
12 whatever reason.

13 In that case the Board, after considering the facts and
14 the allegation of the violations, which are similar here; that is,
15 a violation of Section 91.123(a) and 91.13(a), but also included
16 in the McCartney case a charge violation of 91.123(b). So there
17 was an additional violation charged in McCartney.

18 And the Board in this case, while observing that
19 deference is usually to be shown to the Administrator's choice of
20 sanction as required by Statute, and that, as indicated here in
21 the Sanction Guidance Table, which was, I believe, Exhibit C-13,
22 does propose a suspension period of 30 to 90 days. But in this
23 case, although there were at least three separate Sections of the
24 FARs, Federal Aviation Regulations, charged in McCartney, the
25 Board affirmed a 60-day suspension.

1 "Deference is to be shown to the Administrator's choice
2 of sanction, as long as it is not arbitrary or capricious, and is
3 in accord with Board precedent." Taking into account that the
4 charge or violation in this case is not as severe as that in the
5 McCartney case, which charged violation of 91.123(a) and (b), as
6 it is in this case, which is only 91.123(a). I take that into
7 account, and McCartney being the latest expression of Board
8 precedent, I will consider that as controlling in this case.

9 To summarize, therefore, I find upon the clear
10 preponderance of the reliable and probative evidence, that the
11 Respondent in fact did operate in regulatory violation of
12 provisions of Section 91.123(a), in that he obtained and
13 acknowledged a clearance, and that he subsequently deviated from
14 that clearance without having obtained an amended clearance, and
15 that no bona fide emergency existed which would have excused a
16 deviation from his original acknowledged clearance without having
17 obtained an amended clearance.

18 I further find, as provided by Board precedent, that
19 there is an established violation of Section 91.13(a), and that
20 the Respondent did operate his aircraft in a careless manner, so
21 as to potentially endanger the life or property of another.

22 Contrary to the discussions that the Respondent had with
23 the Watch Supervisor, the fact that nothing untoward happened is
24 not the be-all and end-all. Clear Board precedent, affirmed in
25 numerous cases that have gone to various United States Courts of

1 Appeal, potential endangerment is sufficient to establish a
2 violation of this Section, as long as there is a reasonable nexus
3 between the circumstances of the particular incident and the
4 potential for endangerment to life or property of others.

5 Here, the Respondent deviated from his clearance. The
6 potential of the deviation is that other aircraft are being
7 handled in expectation by ATC that another aircraft on a clearance
8 that's been accepted is going to operate in compliance, so that
9 other aircraft are controlled predicated upon that understanding.

10 Also, deviation into another sector's airspace without
11 coordination at least holds the potential that there can be a
12 conflict between the aircraft penetrating that airspace without
13 that coordination and aircraft which are already operating within
14 that airspace. The fact that nothing catastrophic happened is
15 fortuitous. However, the potential reasonably exists.

16 I therefore find that, on consideration of all the facts
17 and circumstances, that the Respondent did operate in a careless
18 manner so as to potentially endanger the life and property of
19 another, and that that violation of that Section is clearly
20 established.

21 Turning then to the issue of sanction, as I've already
22 indicated, I believe that the Board's decision in Administrator
23 versus McCartney, the most recent case involving ATC, the Board
24 with similar violations and, in fact, one additional charge,
25 deviated from the sought sanction of 90 days in that case and

1 affirmed a 60-day suspension. The 60-day suspension is well-
2 within the guidelines, and considering herein that the Respondent
3 is simply charged with a violation of Sections 91.123(a) and
4 91.13(a), and not the additional one as in McCartney, I believe
5 that a reduction in the period of suspension sought by the
6 Administrator to that of 60 days would be sufficient to act as a
7 deterrent to the Respondent, to any others similarly situated, and
8 to assuage the public interest in air commerce and air
9 transportation and the safety thereof.

10 Therefore, with that modification, I will affirm the
11 Administrator's Order of Suspension, the charging paragraphs,
12 which in my view have been fully established upon a preponderance
13 of the evidence.

14 IT IS THEREFORE ADJUDGED AND ORDERED:

15 One, that the Order of Suspension, the Complaint herein,
16 in be, the same hereby is modified to provide for a period of
17 suspension of 60 days rather than 90 days.

18 Two, that the Order of Suspension, the Complaint herein,
19 as modified, be, the same hereby is affirmed.

20 Entered this 3rd day of October, 2007, at San Francisco,
21 California.

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DATED & EDITED ON
OCTOBER 30, 2007

PATRICK G. GERAGHTY
Administrative Law Judge

APPEAL

Either party from this Decision and Order may appeal from this Decision and Order by filing with the Board within 10 days from this date a Notice of Appeal. The appealing party must further, within 50 days from this date, file with the Board a brief in support of that appeal. Those documents must be filed with the Docket Section, Office of Administrative Law Judges, National Transportation Safety Board, 20594, with copies of each document served upon the opposing party.

Parties are specifically cautioned that the Board takes a very strict view of the time limitations imposed by the Board's rules of practice concerning appeals, which the parties are referred to in the Board's Rules of Practice. The Board may, upon its own motion or the motion of an opposing party, dismiss an appeal for the missing of a filing date by even one day, unless good cause is shown. If an extension of time is necessary, it must be requested from the Office of the General Counsel, National Transportation Safety Board in Washington, D.C., prior to the expiration of any of the time limits imposed upon appeals.

If no appeal is taken within the time provided, or the

1 Board does not elect to review upon its own motion, the Decision
2 and Order rendered herein shall become final as provided by the
3 Board's Rules of Practice.

4 However, the timely filing of a Notice of Appeal,
5 supporting brief, or election by the Board to review upon its own
6 motion, shall stay the Decision and Order during the pendency of
7 the full Board's review.

8 ADMINISTRATIVE LAW JUDGE GERAGHTY: Anything else for
9 the record from Complainant?

10 MS. TOSCANO: Yes, Your Honor. I was not provided a
11 copy of R-1 from the Respondent.

12 ADMINISTRATIVE LAW JUDGE GERAGHTY: Of what?

13 MS. TOSCANO: R-1.

14 ADMINISTRATIVE LAW JUDGE GERAGHTY: Well, you work it
15 out with him, okay?

16 That's not for the Decision. Anything else in this, Mr.
17 Young?

18 MR. YOUNG: No, Your Honor.

19 ADMINISTRATIVE LAW JUDGE GERAGHTY: No?

20 Nothing further, the proceeding is adjourned. Thank you
21 very much, Counsel.

22 MS. TOSCANO: Thank you.

23 (Whereupon, at 3:50 p.m, the hearing in the above-
24 captioned matter was adjourned.)

25