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NTSB Order No. EA-4591

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 5th day of September, 1997

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| JANE F. GARVEY,<br>Administrator,<br>Federal Aviation Administration,<br><br>Complainant,<br><br>v.<br><br>ALAN G. LARSON,<br><br>Respondent. | ) | Docket SE-14405 |

**OPINION AND ORDER**

Both the Administrator and respondent appeal the oral initial decision of Administrative Law Judge William R. Mullins, rendered at the conclusion of an evidentiary hearing held on June 6, 1996.[1] By that decision, the law judge found that respondent violated sections 135.229(b)(2)(i), 91.13(b), and 91.103 of the

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

Federal Aviation Regulations ("FAR"), and imposed a 120-day suspension -- a reduction of the 240-day suspension sought by the Administrator -- of respondent's airline transport pilot ("ATP") certificate.[2] We grant the Administrator's appeal and deny respondent's appeal.

The Administrator's complaint alleged that FAR violations

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[2] FAR §§ 135.229, 91.13 and 91.103 (14 C.F.R. Parts 135 and 91) provide, in relevant part, as follows:

**§ 135.229 Airport requirements.**

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(b) No pilot of an aircraft carrying passengers at night may takeoff from, or land on, an airport unless --

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(2) The limits of the area to be used for landing or takeoff are clearly shown --

(i) For airplanes, by boundary or runway marker lights;

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**§ 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.

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**§ 91.103 Preflight action.**

Each pilot in command shall, before beginning a flight, become familiar with all available information concerning that flight . . . .

occurred on two separate occasions, the facts of which are not seriously disputed. The first occasion was April 9, 1995, when respondent was pilot-in-command of N9825F, a Beech 65-90 ("King Air") operating as an air ambulance on a round-trip flight from Kotzebue to Noatak, Alaska. Respondent did not review the Notices to Airmen ("NOTAMs") for Noatak prior to departure and he was thus unaware that the runway lights there were out of service. Respondent nonetheless landed at Noatak at 5:05 AM, and subsequently departed at 5:31 AM with two passengers on board.[3] The Administrator's complaint alleged that respondent's failure to obtain the pertinent NOTAMs for his flight violated section 91.103, that respondent's takeoff from Noatak violated section 135.229(b)(2)(i),[4] and that both the landing and the takeoff at Noatak violated section 91.13(a). At the conclusion of the hearing, the law judge ruled that respondent violated sections 91.103 and 135.229(b)(2)(i), but that neither respondent's landing nor takeoff at Noatak was in violation of section 91.13(a).

[3] It was established at the hearing that on April 9, 1995, civil twilight began at Noatak, Alaska, at approximately 6:28 AM. Administrator's Exhibit C-5. Accordingly, the takeoff and landing at Noatak occurred at night. See 14 C.F.R. § 1.1.

[4] The presence of commercial passengers -- the patient and the patient's mother -- aboard the King Air for the return trip to Kotzebue renders that leg subject to the requirements of 14 C.F.R. Part 135. This is not disputed by respondent.

The second occasion cited in the Administrator's complaint was June 28, 1995, when respondent was pilot-in-command of N9825F, a Cessna C-208 ("Caravan") performing aerial survey work near Talkeetna, Alaska. The Caravan struck trees while maneuvering. Respondent, who heard a "thump" and was aware of the fact that the aircraft had struck trees, observed some green marks on the left wing strut but nonetheless continued the flight for, approximately, another four-and-one-half hours.[5] Tr. at 180-181. Upon landing, it was learned that the skin and leading edge of the outboard section of the right wing, which was not visible from inside the aircraft due to a radar pod mounted on the right wing, had been damaged. The Administrator's complaint alleged that the tree strike violated section 91.13(a), and that respondent's decision to continue the flight after the tree strike violated sections 91.7(b) and 91.13(a).[6] At the conclusion of the hearing, the law judge ruled that respondent

[5] Respondent and his passengers were sufficiently concerned by the tree strike that they examined as much of the aircraft as they could from within the aircraft. Tr. at 181-182.

[6] FAR § 91.7 provides, in relevant part, as follows:

**§ 91.7 Civil aircraft airworthiness.**

* * * * *

(b) The pilot in command of a civil aircraft is responsible for determining whether that aircraft is in condition for safe flight. The pilot in command shall discontinue the flight when unairworthy mechanical, electrical, or structural conditions occur.

violated section 91.13(a) by striking the trees, but that respondent did not violate sections 91.7(b) or 91.13(a) by continuing the flight after striking trees.

On appeal, the Administrator argues that the law judge erred in ruling that respondent did not violate section 91.13(a) when he took off before twilight from Noatak, and in ruling that respondent did not violate sections 91.7(b) and 91.13(a) when he continued his flight after the Caravan struck trees.[7] Administrator's Brief at 21. The Administrator also urges us to reinstate the 240-day suspension sought in his complaint. Administrator's Brief at 25. Respondent argues that there was insufficient evidence for the law judge to find that respondent was careless in allowing the Caravan to strike trees, and that the sanction imposed by the law judge was excessive. Respondent's Brief at 7, 9.

We agree with the Administrator that respondent's night takeoff from Noatak, in violation of section 135.229(b)(2)(i) because the runway was not clearly shown by boundary or runway marker lights, was also a violation of section 91.13(a). It is well settled that "a violation of an operational FAR provision . . . is sufficient to support a 'residual' [section 91.13(a)] violation." Administrator v. Thompson, 7 NTSB 714, 716 at note 7

[7] The Administrator has not appealed the law judge's finding that respondent's landing at Noatak was not careless or reckless.

(1991); see, e.g., Administrator v. Vogt, NTSB Order No. EA-4143 at 11 (1994). In any event, we think taking off with less light available than the regulation specifically specified may fairly be deemed an unsafe practice.

We also think that respondent violated sections 91.7(b) and 91.13(a) when he continued the flight after the Caravan struck trees.[8] In Administrator v. Campbell, NTSB Order No. EA-3573 (1992), we addressed a similar set of circumstances. There a Boeing 727 struck a deer during takeoff, but the respondent nonetheless elected to proceed to his scheduled destination. We found that the respondent had violated sections 91.7(b) and 91.13(a).[9] Id. at 5-7. Moreover, in connection with section

[8] Respondent argues that "[t]he only testimony offered to establish by a preponderance of the evidence" that respondent's tree strike was careless was the opinion of Mr. Gene Cordle, an aviation safety inspector with the Federal Aviation Administration, who stated that to "strike something stationary on the ground [is a] very careless maneuver." Respondent's brief at 7; Tr. at 100-101. Aside from the fact that Mr. Cordle's opinion was sufficient proof on the issue, we note that respondent testified that as he was maneuvering to establish the aircraft on the survey course, and while the aircraft was being flown at only 80 knots and at a relatively low altitude, he allowed his attention to be "diverted down into the cockpit as we were setting power settings and proceeding to make sure that the [Global Positioning System] was functioning correctly and . . . those sorts of things." Tr. at 179-180. Respondent's essentially admitted inattention to the task of flying the aircraft is itself evidence of his carelessness. Cf. Administrator v. Nixon, NTSB Order No. EA-4249 at 7 (1994) (stating that the burden is on the respondent to show that he could not reasonably be expected to have known of a structure's presence prior to striking it).

[9] Although our opinion in Campbell refers, inter alia, to

(continued …)

91.7(b), we said in Campbell that it is not enough, after a known collision with an object, to merely assume that any unsafe flight condition will be discernible from the flight instruments. Id. at 5. This is equally applicable to in-flight visual checks for damages, for, as the evidence in this case makes clear, unsafe conditions cannot always be discovered from within the aircraft. Finally, in Campbell we said, essentially, that a pilot who cannot adequately determine the extent of any damage should land "so that his decision [pursuant to section 91.7(b)] on whether to continue the flight [is] an informed one." Id. at 5, note 6.

Turning to sanction, we think the 240-day suspension sought in the Administrator's complaint should be reinstated. It is clear from the law judge's decision that not all of respondent's violations were considered in calculating sanction.[10] Specifically, the carelessness exhibited at Noatak, in taking off without adequate runway lighting, the recklessness exhibited in continuing the flight near Talkeetna for more than four hours after it was known that the aircraft struck trees, and the failure to take adequate steps to accurately assess the

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sections 91.29(b) and 91.9, these sections have since been renumbered, respectively, as sections 91.7(b) and 91.13(a). The substance of both regulations, at least for purposes of this opinion, have remained essentially unchanged.

[10] The law judge arrived at a 120-day suspension by imposing a 30-day suspension for the violation of sections 91.103 and 135.229(b)(2)(i), and a 90-day suspension for the violation of section 91.13(a) on account of the tree strike.

airworthiness of the aircraft after it had struck trees are all factors which were not considered by the law judge in calculating sanction. If due consideration is given to these factors, the sanction sought by the Administrator is reasonable.

**ACCORDINGLY, IT IS ORDERED THAT**:

1. Respondent's appeal is denied;

2. The Administrator's appeal is granted; and

3. The 240-day suspension of respondent's ATP certificate shall begin 30 days after service of this order.[11]

HALL, Chairman, FRANCIS, Vice Chairman, HAMMERSCHMIDT, GOGLIA, and BLACK, Members of the Board, concurred in the above opinion and order.

[11] For the purpose of this order, respondent must physically surrender his certificate to a representative of the Federal Aviation Administration in accordance with FAR § 61.19(f).