

SERVED: June 16, 1998

NTSB Order No. EA-4669

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, 1998

JANE F. GARVEY,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-14780
v.)	
)	
RICHARD RAY WILBUR,)	
)	
Respondent.)	
)	

OPINION AND ORDER

Respondent has appealed from the oral initial decision of Administrative Law Judge Patrick G. Geraghty, issued on May 8, 1997, following an evidentiary hearing.¹ The law judge affirmed an order of the Administrator, on finding that respondent had violated 14 C.F.R. 91.123(a), 91.215(c), and 91.13(a) in connection with a Western Pacific Airlines flight on May 29,

¹ The initial decision, an excerpt from the transcript, is attached.

1996.² We deny the appeal.

Respondent was the flying pilot-in-command of a Western Pacific (AKA "Komstar") Boeing 737 flight from Colorado Springs, CO to San Francisco, CA. There is no disagreement that, on departure, respondent was cleared to 17,000 feet and, within 1 minute of that clearance, was advised of traffic in the area (a Beechcraft 1900) both by the controller and by his aircraft's automated TCAS.³ Respondent admits to an altitude deviation up to 17,300 feet. Tr. at 97-99.⁴ According to respondent, the aircraft drifted upwards while he and the first officer were looking for the Beechcraft and the TCAS alarm went off in the cockpit.

Respondent also admits that he turned the transponder to the standby position after the alarm went off. The effect of this

² Section 91.123(a) prohibits deviation from clearances, with certain exceptions not argued here. Section 91.215(c) requires, in certain specified airspace, that transponders must be "on" in aircraft with operable transponders. Section 91.13(a) prohibits careless or reckless operations that would endanger the life or property of another. At the hearing, the Administrator alleged careless, not reckless, behavior.

³ Traffic Alert and Collision Avoidance System.

⁴ The Administrator introduced evidence designed to show that the aircraft deviated from the clearance by considerably more. For the purposes of our opinion and in view of the issues raised by respondent on appeal, nothing more than respondent's admission is required. We note, however, that while the last radar reading for the aircraft (at 17,600 feet) is clearly reliable and probative on this point, other evidence regarding the aircraft's position at 19,100 feet does not prove an unauthorized departure from the 17,000-foot clearance. When respondent gave this altitude to the controller, according to the transcript (Ex. A-5), it was 1 minute, 16 seconds *after* he was cleared to 26,000 feet. Thus, this cannot be evidence that he deviated from the earlier 17,000-foot clearance.

was to turn off both the altitude alert and the collision avoidance systems.

Respondent raises six questions on appeal. First, respondent challenges the law judge's admission of Exhibit A-5, which, as earlier noted, is the transcript of communications with air traffic control (ATC). Respondent claims it was error to accept a transcript limited to communications between his aircraft and ATC and excluding communications with the Beechcraft. Respondent does not argue that anything in the admitted transcript is in error, only that these omitted portions of it prejudice his case. Respondent's belief that the omitted conversation is relevant and somehow exculpatory stems from a mistaken understanding of the required proof in this case. Respondent argues that the amount of actual separation as well as the visual sighting of the Beech by respondent is relevant to the issue of potential endangerment, but they are not. The § 91.13(a) carelessness charge ("careless operations that would endanger the life or property of another") is residual and derivative of the first two charges. No further proof need be offered. See Administrator v. Pritchett, NTSB Order EA-3271 (1991) at fn. 17, and cases cited there (a violation of an operational regulation is sufficient to support a finding of a "residual" or "derivative" carelessness violation).

For the same reasons, the answer to respondent's question 3 is "yes." If an inadvertent altitude deviation results in a violation of an operational regulation, in this case § 91.123(a),

it automatically constitutes a careless or reckless act in violation of § 91.13. Similarly, respondent's question 6 is not well taken. Again, no proof substantiating careless conduct is necessary to support this residual violation.

Respondent next argues that the FAA failed to prove a necessary part of the § 91.215 violation: that the aircraft was in Class E controlled airspace. Our review of the record indicates that the Administrator proved this allegation.

Section 215(c) requires, among other things, that all aircraft operating in Class A airspace and in all "controlled" airspace use a transponder. The allegation in the complaint was that respondent operated in "controlled" airspace without the transponder working. Controlled airspace is defined at 14 CFR 1.1 as:

[A]n airspace of defined dimensions within which air traffic control service is provided to IFR flights and to VFR flights in accordance with the airspace classification.
NOTE- Controlled airspace is a generic term that covers Class A, Class B, Class C, Class D, and Class E airspace.

Class E airspace extends from 14,500 to 18,000 feet.

The Administrator's radar data easily supports a finding that respondent turned off the transponder in Class E airspace, and respondent's own testimony was that it was turned off at some point between 17,000 and 17,300 feet -- Class E airspace. Further, there was no radar beacon from his aircraft when he gave his altitude to ATC as 19,100. Exhibit A-5 at 1415:28. That altitude is in Class A airspace. Although this may be circumstantial evidence, in the absence of any other more

reasonable explanation by respondent, it stands as good, probative evidence given all the other evidence in this case for the proposition that respondent's transponder was not operating at that time.

Two of respondent's questions remain: "Is the turning off of a transponder automatically an intentional act?" and "Did the Air Traffic Controller's conduct, [sic] contribute to the loss of separation by failing to provide current altitude setting?" The first question asks more than we need decide here. In this case, the law judge found that the respondent "reached down and turned it off." Tr. at 151. The law judge went on to say

That's not unintentional. That's a deliberate action. You have to reach down and reposition the switch. That's an intentional action. Your hand doesn't just move unless you're having a seizure. And there's no indication of that here. So I find that this was an intentional act on the part of the Respondent. And, in fact, that is part of the import of the testimony, is that it was turned off to sort of relieve the cockpit of some of the noise that was taking place inside the cockpit.

Id.

By this question, respondent raises an issue related to waiver of the sanction. Respondent had timely filed an Aviation Safety Reporting Program (ASRP) report. The law judge refused to waive sanction in the circumstances. Although we do not entirely agree with the law judge's analysis suggesting that any intentional act prohibits sanction waiver, we agree with his conclusion here. For an ASRP filing to result in waiver of the sanction, respondent must establish that his actions do not approach "deliberate or intentional conduct in the sense of

reflecting a wanton disregard for the safety of others."

Ferguson v. NTSB, 678 F.2d 821, 828 (9th Cir. 1982).

Respondent's conduct in turning off the transponder reflected just such a wanton disregard.⁵

We are equally unpersuaded by respondent's last suggestion that his actions should somehow be excused or mitigated because the controller did not provide him with an altimeter setting, as he was required to do. There is absolutely no evidence to suggest that this failure in any way contributed to later events. Further, there is no suggestion that respondent asked for or felt the need for this information, or that the aircraft's altimeter was in error. In fact, the opposite was indicated by the evidence. Overall, the 60-day suspension is in our view minimal in the circumstances.

⁵ Moreover, we recently expressed the view that violations of section 91.215 directly call in question an airman's suitability for a pilot certificate. See Administrator v. Eden, NTSB Order No. EA-4595 at 11 (served September 19, 1997) ("It seems to us that an individual who, in clear derogation of rules designed to insure air safety, repeatedly turns off his aircraft's transponder to elude ATC detection of intentional altitude deviations cannot lay claim to possession of those attributes of responsibility that the Administrator rightly demands of certificate holders.").

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied; and
2. The 60-day suspension of respondent's certificates shall begin 30 days from service of this order.⁶

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

⁶ For the purpose of this order, respondent must physically surrender his certificates to a representative of the Federal Aviation Administration pursuant to 14 C.F.R. 61.19(f).