

SERVED: September 19, 1997

NTSB Order No. EA-4595

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 19th day of September, 1997

_____)	
JANE F. GARVEY,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-14961
v.)	
)	
CHRIS EDEN,)	
)	
Respondent.)	
_____)	

OPINION AND ORDER

The respondent has appealed from the oral initial decision Administrative Law Judge Patrick G. Geraghty rendered in this proceeding on August 22, 1997, at the conclusion of a two-day evidentiary hearing.¹ The law judge's decision affirms an emergency order of the Administrator revoking any and all pilot certificates held by respondent, including his Airline Transport Pilot certificate (No. 253719814), for alleged violations of

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

sections 91.13(a), 91.123, 91.167, 91.215(c), and 135.83(a) of the Federal Aviation Regulations ("FAR," 14 CFR Parts 91 and 135).² Although we find, for the reasons discussed below, no

²The law judge dismissed a charge under FAR section 91.103 that the respondent had not adequately familiarized himself with all available information before making one of the five flights at issue in this case. FAR sections 91.13(a), 91.123, 91.167, 91.215(c), and 135.83(a) provide, in relevant part, as follows:

§ 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.

§ 91.123 Compliance with ATC clearances and instructions.

(a) When an ATC clearance has been obtained, a pilot in command may not deviate from that 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. However, except in Class A airspace, a pilot may cancel an IFR flight plan if the operation is being conducted in VFR weather conditions. When a pilot is uncertain of an ATC clearance, that pilot must immediately request clarification from ATC.

(b) Except in an emergency, no person may operate an aircraft contrary to an ATC instruction in an area in which air traffic control is exercised.

* * * * *

§ 91.167 Fuel requirements for flight in IFR conditions.

(a) Except as provided in paragraph (b) of this section, no person may operate a civil aircraft in IFR conditions unless it carries enough fuel (considering weather reports and forecasts and weather conditions) to--

(1) Complete the flight to the first airport of intended landing;

(2) Fly from that airport to the alternate airport; and

(3) Fly after that for 45 minutes at normal cruising speed or, for helicopters, fly after that for 30 minutes at normal cruising speed.

(b) Paragraph (a)(2) of this section does not apply if--

(1) Part 97 of this chapter prescribes a standard instrument approach procedure for the first airport of

merit in any of the respondent's other objections to the law judge's disposition of the case, we agree with him that the evidence of record was not sufficient to establish a violation of section 91.167. The dismissal of that charge does not, however, given the affirmation of the remaining charges, undermine the law judge's conclusion that the revocation of respondent's pilot certificate should be sustained. The appeal from the Administrator's order will therefore be denied.

The Administrator's July 23, 1997 Amended Emergency Order of Revocation alleges, among other things, the following facts and circumstances concerning respondent's performance on three revenue flights and two flight checks:

(..continued)

intended landing; and

(2) For at least 1 hour before and 1 hour after the estimated time of arrival at the airport, the weather reports or forecasts or any combination of them indicate--

(i) The ceiling will be at least 2,000 feet above the airport elevation; and

(ii) Visibility will be at least 3 statute miles.

§ 91.215 ATC transponder and altitude reporting equipment and use.

* * * * *

(c) Transponder-on operation. While in the airspace as specified in paragraph (b) of this section or in all controlled airspace, each person operating an aircraft equipped with an operable ATC transponder maintained in accordance with § 91.413 of this part shall operate the transponder, including Mode C equipment if installed, and shall reply on the appropriate code or as assigned by ATC.

§ 135.83 Operating information required.

(a) The operator of an aircraft must provide the following materials, in current and appropriate form, accessible to the pilot at the pilot station, and the pilot shall use them:

(1) A cockpit checklist.

2. On or about May 16, 1997 you served as pilot in command of civil aircraft N627WS, a Learjet 25, carrying passengers from Grand Junction, Colorado to Coweta County Airport, Newnan, Georgia.
3. N627WS was cleared or instructed by air traffic control (ATC) to climb and maintain 14,000 feet.
 - (a) ATC also instructed you to report passing 12,000 feet.
 - (b) You acknowledged those clearances or instructions.
4. Thereafter, without receiving an amended clearance or instruction, you climbed through 14,000 feet to an altitude of 15,000 feet.
5. You failed to report passing through 12,000 feet.
6. N627WS was cleared or instructed by air traffic control to fly the JNC Two Departure.
 - (a) You acknowledged that clearance and instruction.
7. Without receiving an amended clearance, you deviated from the JNC Two Departure procedure by flying past JNC VORTAC and continuing to fly on a 240 degree heading.
8. During the flight you failed to properly pressurize the aircraft, resulting in deployment of emergency oxygen masks at or above 15,000 MSL.

* * * * *
11. On shutdown at Newnan, the fuel remaining on the aircraft was only about 700 pounds.
12. During the flight you used a co-pilot with no Lear 25 experience, or did not otherwise meet the requirements of FAR 61.55 for qualification to act as second-in-command on the flight.
13. On or about May 14, 1997 you were administered a 6 month proficiency check pursuant to FAR Section 135.293 ("293 check") in a King Air 90 for operations under the Part 135 air carrier operating certificate held by Execjet, Inc.
14. The May 1[4], 1997, 293 check consisted of maneuvers described in the Practical Test Guide for Commercial Pilot Certification.
15. The Practical Test Guide sets forth the following tolerances:
 - (a) Airspeed, plus or minus 10 knots.
 - (b) Altitude, plus or minus 100 feet.
16. During the flight test, you deviated from your desired airspeed by at least 20 knots.
17. During the flight test, you deviated from your desired altitude by at least 200 feet.
18. Because of your performance, you were graded as "unsatisfactory" on the May 14, 1997, 293 check.
19. On or about June 6, 1997, you were administered a retest of the Section 135.293 six month proficiency check.
20. During the retest, while attempting to perform steep turns:
 - (a) You deviated from your desired altitude by at least 150 feet.

(b) You deviated from your desired airspeed by at least 20 knots.

21. During the retest, on at least one occasion, in attempting to maintain level flight, you climbed 700 feet above your target altitude, dove the aircraft back down, then climbed back up about 500 feet above the target altitude.

22. During the retest, while attempting to recover from an approach to landing stall:

(a) You failed to advance the propeller levers to obtain maximum power.

(b) You failed to comply with appropriate procedure for flap retraction.

23. During the retest, you were cleared for an NDB approach to Newnan Coweta County airport and you were instructed to maintain 3,000 feet until established on the approach.

(a) You descended below 3,000 feet well before you were established on the approach.

(b) While below 3,000 feet before being established on approach, you entered instrument meteorological conditions.

(c) The applicable minimum safe altitude for the NDB approach within 25 miles of the airport was 3,500 feet.

24. On or about March 17, 1997, you operated civil aircraft N96PS, a Beech King Air model E-90, on a passenger-carrying flight for compensation or hire departing from Columbus, Georgia.

(a) At the time of the flight neither you, Execjet Charter and Management, Inc., Total Flight, or any other entity operating the flight had operations specifications authorizing use of a Beech King Air model E-90 in air carrier operations.

(b) During the flight you failed to properly use checklists before and after takeoff, during climb, and before landing.

(c) For takeoff, you positioned the engine condition levels to "high idle," while the aircraft flight manual requires the condition levers to be set in "low idle," for takeoff.

* * * * *

(e) During the flight you intentionally deviated by as much as 900 feet from the altitude assigned to you by ATC.

(f) When intentionally deviating from the ATC assigned altitude, you turned off the aircraft's encoding transponder.

25. On or about March 18, 1997, you operated N26PS as pilot in command on a passenger-carrying return flight to Columbus, Georgia.

* * * * *

(c) You failed to use appropriate checklists after takeoff.

(d) During the flight, you failed to turn on the aircraft weather avoidance radar when flying in the vicinity of known

thunderstorms.

(e) During the flight another pilot observing your operation of the aircraft from the right seat activated the weather avoidance radar, which detected a cell about 2 1/2 miles in front of your aircraft.

* * * * *

In affirming revocation for the violations charged by the Administrator in his order (the complaint here),³ the law judge noted that the respondent's enforcement history includes another emergency revocation for similar violations relating to compliance with ATC instructions and clearances. See Administrator v. Eden, NTSB Order No. EA-3932 (1993), aff'd No. 93-8959 (11th Cir. 1994). We turn now to respondent's specific challenges to the law judge's decision.

Respondent contends, with respect to the FAR section 91.167 allegation, that the law judge's conclusion that he began the Grand Junction, Colorado--Newnan, Georgia flight⁴ without the quantity of fuel aboard required for an IFR operation is flawed because it is based on the amount of fuel the flight actually consumed, rather than on the amount of fuel the flight was predicted to consume. We find merit in the contention.

³The law judge rejected allegations that respondent had, with respect to the May 16 flight, either allowed the aircraft's airspeed to drop to 138 knots or that he had landed the Learjet with excess speed, that he had not performed a weight and balance calculation prior to the March 17 flight, and that he had not performed a preflight or obtained a weather briefing before the March 18 flight. In addition, he struck an allegation that respondent appeared not to appreciate the significance of the information depicted when the weather avoidance radar was turned on for him.

⁴See Complaint, paragraphs 2 through 8, 11, and 12.

The law judge determined, essentially, that if the aircraft had only about 700 pounds of fuel remaining after a three-hour flight, then it could not have started off with the required 45-minute reserve, since the aircraft, using the fuel consumption rates in respondent's calculations, would have burned some 5,300 of its initial quantity, with full tanks, of 6,020 pounds of fuel (2,000 pounds the first hour, 1,800 the second hour, and 1,500 pounds the third hour).⁵ However, if the respondent correctly estimated a flight time of two hours and forty minutes for the trip, and the flight had only taken that much time, then the aircraft would have consumed only 4,790 pounds of fuel and landed with roughly 1,230 pounds of fuel, more than enough to satisfy the requirement for a 45-minute reserve ($3/4$ hour times 1,500 pounds equals 1,125 pounds).⁶ Inasmuch as the Administrator did not establish that respondent's planned flight time was invalid or unreasonable, it is of no consequence, for purposes of determining whether respondent began the flight with the fuel reserves required by FAR section 91.167, that the flight took longer than was anticipated and, as a result, the aircraft landed with less fuel than had been estimated.⁷

⁵Others testified that the fuel burn during the third hour would be 1,700 pounds.

⁶The Administrator does not maintain here that respondent also needed enough fuel reserve to fly from his intended destination to an alternate airport.

⁷It would appear that more than 20 minutes was spent by respondent at the outset of the flight, and before, apparently, the aircraft was put on an easterly heading, attempting to diagnose and resolve a pressurization problem.

Respondent next argues that the law judge erred by excluding evidence concerning his successful completion of checkrides (one in a Learjet simulator, one in a Learjet, and one in a King Air E-90 simulator) that were taken after the failed checkrides described in the complaint. He maintains that such evidence was relevant because the Administrator's complaint had put respondent's qualifications at issue. We find no reversible error in the law judge's treatment of the matter.⁸

Like the law judge, we recognize that there are enforcement contexts in which an airman's successful performance of a flight test after a failure either could be taken into account, see Administrator v. Mikesell, 6 NTSB 602 (1988)(subsequent checkride could be a factor bearing on proper length of non-remedial sanction), or should be, see Mendenhall v. NTSB, 92 F.3d 871 (1996)(subsequent successful checkride is relevant to propriety of remedial sanction where no operational violations are at issue). But this case does not present such a context because the Administrator's allegations, while raising some doubt as to respondent's technical competence to safely control an aircraft, primarily placed in issue respondent's qualification to hold an airman certificate in terms of his capacity or willingness to fulfil regulatory obligations imposed on all airmen. Where an

⁸Respondent's argument is inaccurately broad. The law judge did not totally exclude respondent's evidence in this connection, as respondent's brief asserts; he, for the most part, simply limited the testimony of respondent's witnesses to their ultimate conclusions concerning the subsequent checkrides, believing that the details of the checks were not relevant.

airman's care, judgment, and responsibility are shown to be lacking, revocation is warranted notwithstanding subsequent efforts to demonstrate a regained or re-established ability to succeed on a proficiency check. In these circumstances, we are not persuaded that the law judge was obligated to let in more evidence than he did concerning flight checks respondent took after the operations which are the subject of this proceeding.

The respondent also objects to credibility assessments the law judge made, in favor of the testimony of two of the Administrator's witnesses over the testimony of respondent and his witnesses, on the ground that the law judge improperly excluded evidence that should have been considered in determining whose witnesses to believe. We find no merit in respondent's position as to either of the Administrator's witnesses.

Specifically, we find no abuse of discretion in the law judge's refusal to admit into evidence a document purporting to reflect that the witness called by the Administrator who was a passenger on the May 16 Colorado-Georgia flight, Mr. Robert Morris, had a criminal record. In this connection it is sufficient to observe that the respondent has demonstrated no error in the law judge's conclusion that the document would not be admissible to impeach the witness in a federal court under the Federal Rules of Evidence.⁹ We note, nevertheless, that the law judge found this witness credible with full knowledge of the

⁹As a general matter, the federal rule seeks to exclude criminal records of minor offenses that do not involve mendacity.

conflicting testimony in the record as to whether the respondent had determined not to hire Mr. Morris as Director of Operations for his Part 135 operation because of his alleged criminal record or Mr. Morris had determined not to accept employment with respondent because of his lax compliance attitude as a Part 135 operator.

Second, we find no abuse of discretion in the law judge's refusal to order the Administrator to produce in discovery any enforcement investigative reports ("EIRs") for either Mr. Ronnie S. Velez, a Part 135 pilot who was a passenger on the March 17 and 18 flights to and from Columbus, Georgia,¹⁰ or for Mr. Velez's employer, Total Flight, Inc. Respondent made no showing that any such records, if they existed, contained any information relevant to the charges against him, and respondent's suspicion that any EIRs as might exist would reveal information bearing on Mr. Velez's credibility as a witness for the Administrator is not a sufficient reason to order production of records that we have previously acknowledged contain privileged material. See Administrator v. Chapparral, Inc., et al., NTSB Order No. EA-4372 (1995). In these circumstances, we see no basis for concluding that the availability of cross examination of Mr. Velez was not an adequate vehicle for testing his truthfulness on the stand.

Although we agree with the law judge's summary of the circumstances that demonstrate the appropriateness of revocation in this case, see I.D. at 506, a few additional comments are in

¹⁰See Complaint paragraphs 24 and 25.

order. Without minimizing in any way the seriousness of the respondent's multiple failures, as shown in this and his previous case, to comply with ATC instructions and clearances, we think the conduct established in this proceeding that more directly attests to his unsuitability for continued certification is the violation of FAR section 91.215. 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.¹¹

ACCORDINGLY, IT IS ORDERED THAT:

1. The respondent's appeal is denied, and
2. The initial decision, with the exception of its finding of a violation of FAR section 91.167, is affirmed.

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

¹¹Testimony establishes that the respondent turned off the transponder several times during the March 17 flight.