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NTSB Order No. EA-3960

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 9th day of August, 1993

JOSEPH M. DEL BALZO,)	
Acting Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-11877
v.)	
)	
JOHN J. McKENNA,)	
)	
Respondent.)	
)	

OPINION AND ORDER

The Administrator has appealed from the oral initial decision of Administrative Law Judge Jerrell R. Davis, issued on September 25, 1991, following an evidentiary hearing.¹ By that decision, the law judge affirmed an order of the Administrator on allegations that respondent violated sections 91.29(a) and(b) and 91.9 of the Federal Aviation Regulations (FAR), 14 C.F.R. Part

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

91.² The law judge did not, however, impose a sanction.³ The Administrator asserts on appeal that this was error.⁴ For the reasons that follow, we will grant the appeal.

The Administrator's amended order, which served as the complaint in this matter, alleged in pertinent part as follows:

2. On or about August 15, 1990, you acted as pilot-in-command of a Cessna A185F aircraft, N8343Q, the property of another, on a flight from Bozeman, Montana to an area approximately five miles northeast of Ovando, Montana, and then back to Bozeman, Montana.

3. During an attempted landing at a private airstrip near Ovando, N8343Q collided with a fencepost, damaging the aircraft's right stabilizer, right elevator, and tailwheel, and rendering the aircraft unairworthy.

4. Instead of discontinuing the flight, you operated N8343Q back to Bozeman, a distance of approximately 125 miles, in an unairworthy condition.

5. Your operation of N8343Q as described above was careless or reckless, endangering the lives and property of others.

²FAR §§ 91.29 and 91.9 provided at the time of the incident as follows:

" § 91.29 Civil aircraft airworthiness.

(a) No person may operate a civil aircraft unless it is in an airworthy condition.

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

§ 91.9 Careless or reckless operation.

No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another."

³The Administrator had ordered a 90-day suspension of respondent's private pilot certificate.

⁴Respondent has filed a brief in reply, urging the Board to affirm the initial decision.

By reason of the foregoing facts and circumstances, you violated the following sections of the Federal Aviation Regulations:

- a. Section 91.29(a), in that you operated a civil aircraft when it was in an unairworthy condition.
- b. Section 91.29(b), in that you failed to discontinue a flight when an unairworthy structural condition occurred.
- c. Section 91.9, in that you operated an aircraft in a careless or reckless manner so as to endanger the life or property of another.

The facts underlying the complaint are as follows.

Respondent admits that as he attempted a landing at a private airstrip in Ovando, he accidentally hit a fencepost. He heard a "loud thump," but instead of touching down he added power and climbed to 8,000 feet. In his own words, he knew he had "done something" to his aircraft, but he did not know what. He also knew that Lincoln Airport was nearby. Respondent called Lincoln's Unicom but got no reply, so he decided to pass it. After regaining his composure, respondent looked out of the cockpit window and saw that a piece of the elevator and a piece of the stabilizer were missing from the right side of the aircraft.

Respondent next called Helena Airport, and advised air traffic control that he had a "slight problem." He explained that he had a missing right rear elevator, but told the controller that he would not declare an emergency and that he intended to proceed to Bozeman. The controller advised him that Helena had good facilities. See Administrator's Exhibit C-3,

Transcript of communications. Respondent admits that he knew that the stabilizer and elevator are control surfaces, and that they are critical to safe flight, but he claims that he did not know that FAR section 91.29(b) required him to discontinue the flight because his aircraft was unairworthy.⁵ In any event, he claims that his aircraft was "flyable." Respondent also claims that he was familiar with the crash and fire facilities available at Bozeman, and that he was concerned that an approach into Helena would have required him to operate the aircraft over populated areas.⁶ He testified that he thought his decision to proceed to Bozeman Airport was a rational decision. In retrospect, he wishes he had landed at Helena.

Respondent subsequently contacted the fixed base operator at Bozeman Airport, Sunbird Aviation, on its radio frequency. Sunbird's chief pilot was airborne at the time, and he heard respondent's call. He met respondent about 17 miles outside of Bozeman Airport. He flew above, below, and to the side of respondent's aircraft, and he advised respondent of the extent of the damage. Respondent was unaware until that moment that his tailwheel mounting bracket was also broken and that the tailwheel was hanging by its cables. The chief pilot gave respondent some advice on how to land the damaged aircraft, and respondent's landing was uneventful. The chief pilot testified that if he

⁵Respondent explained to the law judge, "I don't read regulations." (TR-206).

⁶The Administrator presented evidence rebutting this contention.

had met with respondent at McDonald Pass (when respondent first radioed Helena Airport), he would have told respondent to land at Helena Airport, which was less than 50 miles from the place of the accident.

According to the testimony of an FAA Aviation Safety Inspector, the reasonable and prudent pilot would have landed an aircraft in respondent's aircraft's condition as soon as possible.⁷ In response to respondent's counsel's question, "If he had proceeded to land at Lincoln, would you have considered that his operation [was] contrary to federal aviation regulations," the inspector replied, "I may have not. The fact that he hit the fence to begin with could be construed to be a careless operation; but there's always extenuating circumstances, as far as once he initiated his go around, the fact that he would have elected to go to Lincoln, which was relatively close with a hard surface runway, versus trying to put it back down in a pasture or on a road or whatever, I may have not taken any action against him." (TR-123). Asked if respondent had landed at Helena would the inspector consider that act to be reasonably prudent, the inspector replied, "I may have." (TR-127). Respondent's counsel concluded his cross-examination by then asking, "In other words, the biggest mistake he made, in your opinion, was not striking the fencepost and causing the damage;

⁷The standard to be followed when an aircraft becomes unairworthy in flight is to discontinue the flight at the first available point consistent with the safe operation of that aircraft. Administrator v. Genereaux, 4 NTSB 1245, 1247 reconsideration denied, 4 NTSB 1258 (1984).

the biggest mistake he made, in your opinion, is that he did not put the aircraft down on another runway as quickly as [a] reasonably prudent pilot should have?" The inspector replied, "That is correct." "And indeed," respondent's counsel continued, "if he had put the aircraft down at Helena, we probably wouldn't be here today?" The inspector replied, "We probably wouldn't." (TR-131).

Prior to the taking of evidence, respondent's counsel argued that the Administrator should not be permitted to proceed on the issue of whether respondent's careless attempted landing at Ovando was a violation of section 91.9. Counsel for respondent claimed that he had been advised by an FAA attorney at the informal conference that a Section 609 reexamination which respondent had been required to undergo was for the "accident" portion of the complaint, and that respondent's carelessness in hitting the fencepost was not a basis for the FAR violations alleged in the complaint. The law judge rejected the argument, noting that the Administrator's order clearly alleged on its face two acts of carelessness, including the attempted landing at Ovando.⁸ The law judge agreed, over the FAA counsel's objection,

⁸We think this ruling was correct. In our view, once respondent's counsel identified what he believed was a conflict between the allegations contained in the complaint and the Administrator's counsel's theory of the case, it was incumbent on him to obtain clarification. See 49 CFR section 821.18. Having failed to do so, and absent any actual evidence of detrimental reliance, he was in no position to argue that the Administrator should not be permitted to proceed on this allegation.

to admit respondent's counsel's affidavits⁹ in support of his claim, because they might be relevant on the issue of whether respondent was entitled to a waiver of sanction under the provisions of the Aviation Safety Reporting Program.¹⁰

In his initial decision, the law judge found that the undisputed evidence established that pilot error was the cause of respondent's impact with the fencepost at Ovando, and that this impact caused substantial damage to the aircraft, rendering it unairworthy. Because this event was an accident, he ruled that the provisions of the ASRP did not apply to this portion of the complaint.

Nonetheless, the law judge ruled, "in light of the fact that respondent passed a subsequent 609 reexamination on landing and take-off procedures, my acceptance of affidavits (Exhibits R-1 and R-2) that the alleged FAR violations were in connection with events occurring after the impact, and the inspector's statement that no charges against respondent would have been recommended had the aircraft landed in Helena instead of Bozeman, I feel that no sanction under section 91.9 should be imposed with respect to

⁹Affidavits were offered by respondent's trial counsel and his co-counsel.

¹⁰The Aviation Safety Reporting Program (ASRP), provides for the waiver of sanction where a pilot timely reports to NASA an incident or occurrence involving a violation of the Federal Aviation Act or the FAR, but only if, among several factors, the violation is inadvertent and not deliberate, and does not involve an accident. See FAA Advisory Circular 00-46C (Respondent's Exhibit R-5). The Administrator does not dispute the fact that respondent made a timely report to NASA, but does dispute the applicability of the ASRP here.

the impact." (Initial Decision at 226-227). With respect to respondent's continued operation of the unairworthy aircraft to Bozeman, the law judge ruled that respondent's violation of FAR section 91.29 was inadvertent and not deliberate, and therefore sanction as to that portion of the complaint should be waived under the provisions of the ASRP. We agree with the Administrator that the law judge's failure to impose a sanction as to both portions of the complaint was error.

Turning first to the law judge's ruling regarding the careless attempted landing, we think that his reasons for not imposing sanction are unpersuasive. It appears that, notwithstanding his previous ruling that this act was alleged in the complaint, the law judge concluded that the Administrator did not intend to impose a sanction for that part of the operation. Although the law judge admitted counsel's affidavits concerning the Administrator's purported pre-trial position for the limited purpose of considering them as to the applicability of the ASRP, he then inexplicably relied on them, even after finding the ASRP inapplicable, to support that conclusion. Regardless of whether these discussions were inadmissible because they took place during settlement negotiations,¹¹ having made his prior ruling, they should not have been considered during his sanction deliberations. Furthermore, the law judge cites in addition to the affidavits the fact that respondent had already been

¹¹ Administrator v. Alaska Island Air, Inc., NTSB Order No. EA-3633 at 3 (1992).

subjected to a section 609 reexamination, as a reason for not imposing sanction. The Board has previously considered the issue of whether the Administrator's request to a pilot to undergo a recertification check under the provisions of Section 609 of the Federal Aviation Act precludes the issuance of an order of suspension stemming from the same incident. Precedent is clear that it does not, since reexamination is not a sanction.

Administrator v. Smith, 2 NTSB 2527, 2530 (1976). Finally, the law judge misconstrues the testimony of the FAA inspector, who responded to respondent's counsel's questions by speculating that, had respondent landed at Helena, he might not have been charged with a violation of FAR section 91.29. This testimony had no relevance whatsoever to the determination of an appropriate sanction for respondent's actions before impact. We conclude that the law judge should have imposed an appropriate sanction.

Next, we turn to the question concerning the applicability of the ASRP to respondent's continued operation of an unairworthy aircraft. The Administrator's argument is two-fold. First, he asserts, the continued operation of the unairworthy aircraft is not a segregable event from the attempted landing, and therefore it is a part of the "accident" and by the terms of the ASRP, excluded from its coverage. While we agree that the attempted landing was the proximate cause of the aircraft's unairworthy condition, the Administrator's own witness, the Aviation Safety Inspector, took a different view, apparently agreeing with the

law judge that the continued operation of the aircraft was nonetheless not a part of the accident. (TR 136-138). See also Administrator v. Booher, NTSB Order No. EA-3901 at 5 (1993), where the Administrator took the position that violations arising before and after an emergency landing should be treated separately, for purposes of the ASRP.

In any event, we agree with the Administrator that the provisions of the ASRP are inapplicable because respondent's decision to bypass Helena and operate an unairworthy aircraft for 115 miles was a deliberate choice, and as such, this conduct is excluded by the terms of the ASRP. We recognize that in Administrator v. Halbert, NTSB Order No. EA-3628 (1992), we found otherwise, when faced with similar facts, but the dissimilarities make that case distinguishable. In Halbert, the pilot did not claim that he was unaware of the FAR requirements to discontinue flight in an unairworthy aircraft, but believed, albeit mistakenly, that he was acting in compliance with the regulations by landing at what he viewed was the best airport, under the circumstances. Thus, Halbert neither deliberately sought to circumvent section 91.29(b) nor evinced reckless disregard for safety, and the ASRP was applied in his favor. Id. at 8. Here, respondent claims ignorance of the regulations, and we have stated repeatedly that such ignorance is no excuse. While perhaps respondent did not purposefully violate the FAR, neither did he make any attempt to comply with it. Finally, respondent knew that Helena Airport had crash facilities available, and it

was even suggested to him by air traffic control that he should consider declaring an emergency. Under these circumstances, and in light of his knowledge that his aircraft had sustained major structural damage to its control surfaces, his decision to nonetheless operate the aircraft for another 115 miles was deliberate, and evidences a disregard for safety, which precludes respondent from taking advantage of the provisions of the ASRP. Accord Administrator v. Heil, 5 NTSB 1221, 1222 (1986)(Statement of Acting Chairman Goldman and Member Burnett).

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's appeal is granted;
2. The Administrator's order and the initial decision, as modified herein, are affirmed; and
3. The 90-day suspension of respondent's private pilot certificate shall commence 30 days after service of this order.¹²

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

¹²For purposes of this order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to FAR § 61.19(f).