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NTSB Order No. EA-4929

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 14th day of December, 2001

JANE F. GARVEY, Administrator, Federal Aviation Administration, Complainant, v. TED RAY MOORE, Respondent.	Docket SE-15329

OPINION AND ORDER

Respondent has appealed from the written initial decision of Administrative Law Judge William A. Pope, II, issued on December 6, 1999, following a lengthy evidentiary hearing.[1] The law judge modified the Administrator's suspension order, finding that respondent had violated 14 C.F.R. § 121.535(f) but had not violated § 91.123(a).[2] We grant the appeal and dismiss the

[1] The initial decision is attached.

[2] The Administrator initially had sought a suspension of 30 days, but sanction was waived due to respondent's Aviation Safety
(continued…)

complaint.

Respondent was the pilot-in-command (PIC) of Hawaiian Airlines flight 939 from Anchorage to Honolulu on November 22, 1997. While taxiing from the gate, ATC (Air Traffic Control) directed respondent to use a different runway -- a runway that had specialized procedures (the "Standard Instrument Departure," or SID) -- namely, to climb as quickly as practical, to turn to a right 190 degree heading at either 9 DME (Distance Measuring Equipment) or 2,000 feet, whichever came first, to be established on that heading by 10 DME, and to notify ATC before takeoff if unable to do so. Respondent failed to make the notification or to make the turn as required.

As noted earlier, the Administrator's complaint charged him with violations of 14 C.F.R. 91.123(a) and 121.535(f). Section 123(a) requires the PIC to obey ATC clearances and instructions. The only exception relevant here (the parties addressed none other) is for emergencies, when the PIC may deviate from the clearance given. Section 535(f) prohibits careless or reckless operations; the Administrator here charged respondent with carelessness.

The Administrator claims that respondent did not follow the SID, and therefore deviated from the clearance. It is suggested that he failed to familiarize himself with the procedures for this runway, and failed to brief his crew, because he was in a

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Reporting System report.

rush to take off.[3] She presented evidence designed to show that respondent could not realistically fly the SID with the aircraft, as she believed it was loaded, and in the weather at the time, and that he did not climb the aircraft as quickly as practical. The Administrator offered the eyewitness testimony of an airworthiness inspector who was observing on the flight. He testified that there was no pre-takeoff briefing for the new runway, and that the turn was made at 11 or 12 DME, only after ATC queried the crew as to their intention to turn.

Respondent claims, to the contrary, that he knew the SID requirements, that he briefed the crew on them, that he climbed as quickly as practical in the circumstances (icing and heavy snow), that he had calculated in his pre-flight preparation that he could comply with the turning requirement, and that he had legitimate, unforeseen reasons for not doing so. Specifically, the weather once aloft caused him to amend his rate of bank from 30 to 15 degrees and, after he had started to make the turn at 9 DME (although he would no longer be able to complete it in the area required), his first officer had interrupted him, telling him not to turn, thus causing him to deviate from the requirement to turn at 9 DME. Respondent rolled out of the turn, returning to his prior climbout course, reviewed the SID, discussed it with the crew, and determined that the first officer had misunderstood the instructions. By the time he had started the turn again,

[3] There had been a delay after de-icing, and the aircraft would soon have to be de-iced again.

they were well past 9 DME and ATC had asked them whether they were going to turn. Respondent stated that he declared an emergency due to the conflict in the cockpit.

Respondent's first officer and flight engineer both testified, confirming his version of events. The first officer testified that he had made a mistake, having thought that they were not to turn until they had reached an altitude of 2,000 feet (which they had not).[4]

In dismissing the section 123(a) charge, the law judge made specific credibility findings in favor of respondent noting, among other things, that he doubted that respondent would take off on a different runway than planned without having done any preparation and that the weather aloft led him, reasonably, to change his plan. I.D. at 12. He also accepted that there was a conflict in the cockpit regarding when to turn. As to the inspector's testimony, the law judge concluded that he may not have heard conversations among the crew, and may have misunderstood or misread instruments, perhaps not being familiar enough with the aircraft and its instruments because he had only a private pilot's certificate.

To dismiss the section 123(a) charge, the law judge had to find either that there was no clearance deviation or that a legitimate emergency, not of respondent's own making, excused the

[4] The Administrator stipulated that if, in fact, the first officer had told respondent not to turn, respondent exercised appropriate crew resource management in responding as he did.

deviation. The law judge found that the Administrator failed to prove the alleged deviations from the SID. I.D. at 8.[5] This conclusion ignores the facts. Leaving aside other issues, respondent failed to make the turn and complete it as required. That is a fact, and it compels a conclusion that respondent deviated from the clearance. If he had a legitimate excuse for doing so, that would invoke the emergency defense; it would not void the finding of fact. Nevertheless, we need not remand for further analysis of the emergency defense because the law judge made sufficient findings that we can use. The law judge's credibility findings, and his findings of fact regarding what occurred in the cockpit -- findings we have no basis to overturn -- compel a conclusion, the reasons for which are addressed below, that a legitimate emergency existed and that respondent reacted reasonably to it. Accordingly, the section 123(a) charge should be dismissed, but for reasons different from those set forth by the law judge.

As noted, section 123(a), as pertinent, prohibits deviation from clearances absent an emergency. Thus, the existence of an emergency, or lack thereof, should have been a major focus of the hearing. Instead, the parties spent literally days debating and disputing the operating characteristics of the aircraft and

[5] The law judge recited the requirements as: (1) to climb as quickly as practical; (2) to turn to a right 190 degree heading at either 9 DME or 2,000 feet, whichever came first; and (3) to notify ATC before takeoff if unable to complete the turn by 10 DME. This is incomplete. In addition to beginning the turn at 9 DME or 2,000 feet, the turn was to be completed by 10 DME.

whether or not respondent complied with the SID when, obviously, he had not.[6] What needed to be addressed was whether the first

[6] Much of the Administrator's difficulty in presenting evidence of respondent's actions was due to the lack of direct evidence. She did not offer proof of the aircraft's actual weight or other flight characteristics, nor did she have any data regarding the aircraft's actual flight path. The transcript of ATC communications lacked times. As a result of the lack of direct evidence of the clearance deviation and respondent's refusal to admit even the most basic and obvious facts, counsel for the Administrator put on a case-in-chief in which she attempted, in advance, to disprove numerous possibilities that might later be argued by respondent. She might have been better served to focus her case-in-chief on the elements of the violation, using the evidence she had, reserving rebuttal to challenge what respondent might then present. Counsel for both parties would be well served to remember that the focus of the trial should be the specific facts needed to prove the charged violations, with counsel's responsibility the straightforward relating of the particular elements of those violations to the facts of the case. In any case, the procedural and evidentiary muddles in which the parties and the law judge found themselves were not only of the Administrator's making. While non-lawyers are permitted to appear before us, they are held to the same standards and legal knowledge. At best, respondent's personal representative, Mr. Robert C. Konop, can be considered an overzealous advocate who leaves no stone unturned and no argument unmade. At worst, he can be accused of churning, misstatements, and exaggeration. In this case, he filed 146 requests to admit and almost every conceivable motion. (His motion for summary judgment having been denied -– properly -- twice by the law judge, he simply makes it again here, apparently without considering whether it is useful to do so at this stage.) His relations with counsel for the Administrator started badly and got worse. Hundreds of hours likely were expended resolving the conflict involving respondent's deposition. One can only believe that many matters could have been handled amicably, had the parties stopped name calling. On appeal, counsel for respondent has continued to ignore our rules and good practice by including in his brief material that is clearly not a part of the record, and he should well know that new evidence will not be accepted at this juncture absent special showings. The Administrator then responds to the impropriety. We agree with the Administrator that the disparaging cartoons are not appropriate and we find them particularly offensive. The record in this case is an example of how not to proceed before the Safety Board and is an example of over-litigiousness that helps no one and merely adds tremendous unnecessary costs to the proceeding in particular and government

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officer's statement and respondent's reaction to it reasonably constituted an emergency and whether, if so, the emergency was of respondent's own making, so as to disallow the exception. Limited attention to these core questions was given at the hearing by either party.

In Administrator v. Scott, NTSB Order No. EA-4003 (1993), we reviewed what constitutes an emergency and what a respondent is required to do in response. We considered an emergency as a situation that could jeopardize the safety of a flight, and recognized the responsibility of the PIC to make such a determination. The facts here fit this test.

And, using the law judge's credibility conclusions and findings of fact, we must conclude that the emergency was not of respondent's making. It might have been demonstrated that the weather on the ground was so problematic that respondent should have known he would have difficulties in the air that would preclude his completing his plan for complying with the SID, but the Administrator did not effectively develop the weather evidence to make that argument. The law judge's conclusions overall were to the effect that the Administrator had failed to prove respondent had behaved unreasonably at any point. See, e.g., I.D. at fn. 38. And, as discussed above and at the hearing, without evidence of the aircraft's weight, one cannot

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in general. In the future, we will be prepared to sanction counsel or other representative for abuse of process.

conclude that the aircraft was operationally unable to perform as respondent testified he intended.

Further, in Scott, we specifically held that, to find an emergency existed, we need not find that a respondent notified ATC of the fact. Instead, we recognized that respondent need not do so when ATC may already know. In this case, we think the record establishes both that respondent had more pressing issues in the cockpit at the time than contacting ATC or directing someone else to do it, and that ATC knew what was happening, as it was tracking his flight path, and took action it considered appropriate in contacting the aircraft. Finally, there is no probative evidence that respondent failed to comply with other regulatory requirements engendered by the emergency.[7] His uncontroverted testimony was that he submitted a timely report of the emergency to Hawaiian Airlines, which then was responsible under the regulations for forwarding it to the Administrator. Testimony by others at Hawaiian Airlines tended to confirm that a report was filed at some time relatively proximate to the event. I.D. at fn. 27. That the Administrator did not receive it for some time is not compelling proof that respondent failed in his duty, and, given the law judge's credibility assessment, we

[7] The Administrator appears to suggest that he filed no report within the required 10 days because there had been no emergency declared, the emergency argument being an after-the-fact creation for defense purposes. Moreover, the issue of whether respondent declared an emergency by notifying ATC is different from whether respondent was required to report his deviation to ATC immediately. He was not charged with the latter violation (of section 123(c)).

decline to conclude either that no report was filed or that the lack of a report proves there was no emergency.

The law judge, although he dismissed the section 123(a) charge, did find that respondent had violated section 535(f), having been careless in failing to advise ATC when he knew he was not going to be able to complete the turn as required. It is this conclusion that respondent has appealed, claiming he was given no notice of this charge.

It is well established that a carelessness charge (i.e., the section 535(f) allegation) can be brought in one of two forms: either as an independent claim, proven by the facts, that a respondent was careless (or reckless); or as a so-called "residual" or "derivative" violation. In this latter case, the charge need not be separately proven; instead, it flows automatically from a finding that respondent committed an operational violation. See Administrator v. Pritchett, NTSB Order No. EA-3271 (1991) at fn. 17, and cases cited there. The vast majority of cases prosecuted before the Board involve carelessness or recklessness being argued as residual violations.

In this case, as best as we can determine, the Administrator never directly addressed how she was using the carelessness charge. In fact, the closest we can come to a statement of her intent is her December 1998 opposition to respondent's motion for summary judgment, where at page 6 she states, "once the Administrator proves or it is admitted that respondent deviated from the clearance, such facts constitute a prima facie case of

carelessness." This statement clearly indicates an intent to charge a residual carelessness violation.

Neither did the law judge indicate his reasoning on this point. We must assume that he viewed it as an independent claim, as he had dismissed the only operational violation that had been claimed. But he offered no explanation for that conclusion.

In her reply to respondent's appeal, the Administrator argues that the complaint adequately put respondent on notice that the carelessness charge was an independent claim. She relies on paragraph 8 of the complaint which reads, "[y]ou did not advise ATC at anytime that you could not comply with the requirements of the … SID," and she argues that the words "at anytime" clearly indicated an independent charge of carelessness. (The law judge relied on that paragraph in his finding.) But when even we cannot read this language to impart so much, we cannot expect more of respondents. Further, the expert testimony she cites in her brief as evidence that the carelessness charge was prosecuted as an independent violation is not convincing, as the witness was speaking specifically about the clearance deviation. Whether respondent was careless and whether he was on notice that he was being charged with being careless independent of the clearance deviation are two separate questions. It may well be that respondent acted carelessly in failing to notify ATC when he knew he could not make the turn (there were mountains and other traffic ahead), but such a charge was never clearly set forth.

Finally, we must comment on respondent's continuing claims that the Administrator failed to perform a proper or complete investigation and, if she had, the complaint would not have been brought. We fail to see how respondent would have us remedy this perceived error. The Board has no direct authority over the FAA's prosecutorial discretion or the quality of its investigations. See, e.g., Administrator v. Kaolian, 5 NTSB 2193, 2194 (1987), and Administrator v. Crist, NTSB Order No. EA-4512 at 5-6 (1996).

ACCORDINGLY, IT IS ORDERED THAT:

1. The Affidavit of Kevin Daisey attached to respondent's appeal brief and the cartoons in the brief are stricken;

2. Respondent's appeal is granted; and

3. The initial decision and the order of suspension are reversed.

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