

UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

Served: October 20, 1993

FAA Order No. 93-29

In the Matter of:
MARK L. SWEENEY

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) Docket No. CP91NM0430
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DECISION AND ORDER

Respondent Mark L. Sweeney has appealed from the written initial decision of Administrative Law Judge Burton S. Kolko.^{1/} The law judge found that Respondent operated an aircraft in a careless or reckless manner when he created a collision hazard and failed to see and avoid another aircraft, in violation of Sections 91.9, 91.65(a) and 91.67(a) of the Federal Aviation Regulations (FAR), 14 C.F.R. §§ 91.9, 91.65(a) and 91.67(a).^{2/} The law judge assessed the \$2,500

^{1/} A copy of the law judge's written initial decision is attached.

^{2/} Section 91.9, 14 C.F.R. § 91.9, redesignated as Section 91.13(a), 14 C.F.R. § 91.13(a), provided in part: "[n]o person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another."

(Footnote 2 continued on the next page.)

civil penalty sought in the complaint. For the reasons that follow, the decision of the law judge is affirmed.

On June 17, 1990, two float-equipped Cessna 206 aircraft, each carrying a full load of five passengers, were involved in a mid-air collision near Juneau, Alaska. The aircraft were operated by Taku Glacier Air, Inc., on sightseeing flights. William S. Post was the pilot in command of the Cessna 206 that took off first from the Gastineau Channel at approximately 10 A.M.^{3/} Respondent was the pilot in command of the other Cessna 206 that took off from the Gastineau Channel approximately 3 to 4 minutes later.

The pilots reported excellent visibility, in excess of 10 miles, and light winds of less than 10 knots. The ceiling was at 3,500 feet. The pilots stated that at the time of the

(Footnote 2 continued from previous page.)

Section 91.65(a), 14 C.F.R. § 91.65(a), redesignated as Section 91.111(a), 14 C.F.R. § 91.111(a), provided in part: "[n]o person may operate an aircraft so close to another aircraft as to create a collision hazard."

Section 91.67(a), 14 C.F.R. § 91.67(a), redesignated as 91.113(b), 14 C.F.R. § 91.113(b), provided in part:

When weather conditions permit, regardless of whether an operation is conducted under Instrument Flight Rules or Visual Flight Rules, vigilance shall be maintained by each person operating an aircraft so as to see and avoid other aircraft in compliance with this section. When a rule of this section gives another aircraft the right of way, he shall give way to that aircraft and may not pass over, under, or ahead of it, unless well clear.

^{3/} The law judge found that Complainant had not established the allegations against Post, and dismissed the complaint against him. Complainant did not file an appeal.

collision, they were both flying at altitudes of approximately 2,800 feet. Due to a different float configuration, Respondent's aircraft was approximately 10 knots per hour slower than Post's aircraft. Both pilots indicated that their aircraft were flying at similar cruise power settings at the time of the collision.

Both pilots flew north up Taku Inlet towards Taku Lodge, which was their destination. Respondent's route, however, was more direct than the route followed by Post. Post flew northwest by Norris Glacier and then northeast toward Twin Glacier Lake. As Respondent was exiting Sockeye Canyon, he saw Post at his 12 o'clock one mile ahead. Post's aircraft was passing from right to left on a 90-degree course to Respondent's aircraft. Respondent radioed Post that he had him in sight. Post lifted his aircraft's left wing and looked in Respondent's direction. Post radioed Respondent that he could not see his aircraft and continued flying towards Twin Glacier Lake.

Respondent stated that he continued on the same course for at least one minute, and then made a 90-degree left turn toward Twin Glacier Lake in the same direction taken by Post. Two to three miles later, Respondent's aircraft struck Post's aircraft from the rear, removing the top of Post's rudder and bending part of Post's vertical stabilizer to the side. Respondent's aircraft lost most of its walk-across cable, and sustained damage to the the tip of its left forward float and to the leading edge and mid-wing section of the left wing.

After impact, Respondent dove to the right and landed without incident at Taku Lodge. Post reported "controllability" problems with his aircraft and landed on a nearby river without further incident. Neither pilot saw the other aircraft before the collision.^{4/} Post saw Respondent's aircraft diving towards the right immediately after impact. Both pilots acknowledged that no other aircraft were in the area. Both said that the impact felt like a "birdstrike."

James McCoy, Principal Operations Inspector for the FAA Flight Standards District Office in Juneau, Alaska, and another FAA inspector examined the two aircraft on the day of the collision. McCoy testified that the damage to the aircraft indicated that immediately before the collision, Respondent was flying to the left of, and slightly above Post, who was flying to Respondent's right. Upon impact, McCoy testified, Respondent's walk-across cable severed part of Post's rudder, and Respondent's left float bent part of Post's vertical stabilizer to the side. McCoy testified that scuff marks and dents on the tip of Respondent's left float matched the paint color and dents on Post's vertical stabilizer.^{5/}

^{4/} Respondent stated that one of his passengers seated in the right rear seat of the aircraft saw Post's aircraft immediately before the collision and yelled "what's he doing." Complainant's Exhibit 9, at 10-14; Hearing Transcript at 232. The record contains no written statements prepared by the passengers.

^{5/} On appeal, Respondent questions McCoy's expertise and qualifications in the "science of accident reconstruction."

(Footnote 5 continued on the next page.)

McCoy testified that Post's aircraft had the right-of-way under Section 91.67 of the FAR because it was being overtaken by Respondent's aircraft, which approached from the left side.

None of the witnesses could explain definitively how the two aircraft came to converge from the point that Respondent made his last visual and radio contact with Post's aircraft to the point of collision, two to three miles later. McCoy testified that Respondent's slower aircraft could not have caught up to Post's aircraft if both pilots had actually flown straight and level as they claimed, on the courses they had indicated.^{6/}

On appeal, Respondent argues unconvincingly that Complainant had no jurisdiction to bring this civil penalty action because the collision occurred on June 17, 1990, while the applicable Rules of Practice in Civil Penalty Actions, 14 C.F.R. § 13.16 and Part 13 Subpart G, did not become

(Footnote 5 continued from previous page.)

McCoy testified that his duties and training as an FAA inspector included accident investigation. In this case, he was also investigating the cause of the collision for the National Transportation Safety Board. The law judge found McCoy's testimony persuasive. McCoy testified as to what he saw when he inspected the aircraft on the day of the collision. McCoy's testimony and conclusions are supported by photographs of the two aircraft after the collision and by the pilots' own statements.

^{6/} Several theories were advanced by the parties to explain how Respondent caught up with Post: Post did not fly straight and level but made turns; Respondent flew at a higher altitude and picked up speed descending; Respondent increased speed, or Respondent's aircraft turned left towards Post's aircraft sooner and at a different angle than reported.

effective until August 2, 1990.^{7/}

Since the enactment of the Airport and Airway Safety and Capacity Expansion Act of 1987, the FAA has had the authority to assess civil penalties not exceeding \$50,000 for violations of the Federal Aviation Act of 1958, (FA Act), as amended, and the FAR.^{8/} Complainant, thus, had the authority to initiate this civil penalty action against Respondent based upon violations occurring in June 1990. Moreover, the Rules of Practice in Civil Penalty Actions were applicable to Respondent's case because the action against Respondent was commenced after August 2, 1990, the effective date of the regulations. See In the Matter of Continental Airlines, FAA Order No. 90-12 (April 25, 1990), citing Chilicott v. Orr, 747 F.2d 29, 34 (1st Cir. 1984) (the procedural regulations

^{7/} The Rules of Practice in Civil Penalty Actions, 14 C.F.R. § 13.16 and Part 13, Subpart G, became effective on September 7, 1988. They were repromulgated effective August 2, 1990, pursuant to the decision in Air Transport Association v. Department of Transportation, 900 F.2d 369 (D.C. Cir. 1990), vacated as moot and remanded, 111 S.Ct. 944 (1991), vacated as moot, 933 F.2d 1043 (D.C. Cir. 1991).

^{8/} P.L. 100-223, 101 Stat. 1520, signed by the President on December 30, 1987, created a demonstration program, in which the FAA had the authority to assess civil penalties not exceeding \$50,000 for violations of the Federal Aviation Act of 1958, as amended (FA Act) and the FAR. The demonstration program, provided for in Section 905 of the FA Act, originally was to have expired on December 30, 1989. The civil penalty demonstration program was extended three times. See P.L. No. 101-236, 103 Stat. 2060 (1989) (extending the program until April 30, 1990); P.L. No. 101-281, 104 Stat. 164 (1990) (extending the program until July 31, 1990); and P.L. No. 101-370, 104 Stat. 451 (1990) (extending the program through August 1, 1992). The FAA Civil Penalty Administrative Assessment Act of 1992, P.L. No. 102-345, 106 Stat. 923, gave the FAA permanent civil penalty authority.

in force at the time administrative proceedings occurred are the ones that govern, rather than the procedural regulations in effect at the time the alleged violation occurred). The Final Notice of Proposed Civil Penalty was issued to Respondent on July 15, 1991.

Respondent argues on appeal that the law judge erred in finding that Complainant met its burden of proof. The law judge held that Complainant proved with circumstantial evidence that Respondent violated the three regulations.^{9/} The evidence, the law judge ruled, showed that Respondent's carelessness was the only reasonable explanation for the collision.^{10/} The law judge concluded that the crash would not have occurred if Respondent had not created a collision hazard, and if he had properly seen and avoided Post's aircraft.

Complainant had to prove the allegations in the complaint by a preponderance of the reliable, probative, and substantial evidence. See 14 C.F.R. § 13.223; In the Matter of Giuffrida, FAA Order No. 92-72 (December 21, 1992).

Complainant could use circumstantial evidence to sustain its

^{9/} The law judge summarized that evidence as follows: Respondent was trailing Post in the slower aircraft, no other aircraft was in the vicinity, and no weather or mechanical problem occurred. Respondent saw Post and Post's direction two to three miles before impact, and he knew Post's destination. Post maintained his course, altitude and speed until Respondent hit him from behind.

^{10/} The law judge cited Gordon H. Lindstam, 41 CAB 841 (1964) and Administrator v. Faber, NTSB Order No. EA-3477 (January 23, 1992), which hold that a prima facie case of carelessness may be established by circumstantial evidence, and if unrebutted, will permit the Administrator to prevail.

burden of proof. See In the Matter of Continental Airlines, Inc., FAA Order 90-12 (April 25, 1990).

Respondent argues further on appeal that it was impossible for him to have seen Post's aircraft because of blind spots in his aircraft.^{11/} Respondent testified that he operated his aircraft in a prudent manner with his landing lights on, reporting points reached on the radio, and trying to locate other aircraft.^{12/}

McCoy testified that there were obstructions in the float-equipped Cessna 206 which could block visibility. He added, however, that the pilot must change his position in his seat or maneuver his aircraft, to see around these obstacles.

Section 91.67(a), 14 C.F.R. § 91.67(a),^{13/} requires pilots, when weather permits, to maintain vigilance so as to see and avoid other aircraft. See Rodriguez v. U.S., 823 F.2d

^{11/} The mid-air collision cases cited by Respondent in his appeal brief in support of this argument are not on point. In two of the cases the courts held that the pilots of aircraft struck from behind, as was Post's aircraft, were not contributorily negligent. See Mackey v. Miller, 16 Avi 17,300 (Va. 1981); Bernard v. Sheppard, 15 Avi 18,135 (5th Cir. 1980). In Alleghany Airlines, Inc. v. United States, 504 F.2d 104 (7th Cir. 1974), the court remanded the case to determine whether the smaller aircraft was in the clouds and could have been seen. In Respondent's case both aircraft were operating well below the cloud ceiling in clear skies. In Bibler v. Young, 492 F.2d 1351 (6th Cir. 1974), the pilot of the front aircraft was found negligent for failing to maintain two-way radio contact with the tower, and in Allen v. United States, 370 F. Supp. 992 (E.D. Mo. 1973), the DC-9 crew failed to maintain a proper lookout for the Cessna which was in front of the DC-9.

^{12/} Respondent did not explain what he did to try to locate other aircraft.

^{13/} See footnote 2.

735, 742 (3rd Cir. 1987). Respondent had a continuing duty to maintain his awareness of Post's aircraft because he knew it was in the vicinity. Id. at 744, citing In re N-500L Cases, 691 F.2d 15, 32 (1st Cir. 1982). Respondent's duty required manipulation of his head or of the aircraft to eliminate blindspots. Id. at 744, citing Rudelson v. United States, 602 F.2d 1326, 1330 (9th Cir. 1979). See also Administrator v. Ferguson, 1 NTSB 328 (1968) (responsibility to maintain proper lookout is not avoided because of limited cockpit vision; pilot must take measures to compensate for restricted vision).^{14/}

Respondent testified that he could not explain how the collision occurred. He did not testify as to any specific measures that he took to see and avoid Post's aircraft after his last contact with Post's aircraft before the collision. Measures to see and avoid Post's aircraft would have been especially appropriate after Respondent turned left toward Twin Glacier Lake, in the same direction that he had seen Post take one minute before. Respondent knew that Post's aircraft was directly ahead of his and that both aircraft were heading to Taku Lodge, which was nearby. Respondent's expert witness, Delmar Randels, a former FAA Operations Inspector, conceded that in a similar situation he would turn, or try to find or contact the the other aircraft. McCoy testified that

^{14/} In Ferguson, the NTSB found that the Respondent had taken reasonable precautions to insure a safe descent, and that the Navy aircraft had been out of Respondent's line of vision until seconds before the near miss. In that case, unlike the present case, the Respondent was not aware of the presence of any aircraft in the vicinity.

Respondent could have radioed Post for his position if he could not see his aircraft.^{15/}

Respondent may have grown complacent because Post had the faster aircraft, or distracted by his running commentary on the sights for his passengers. He operated too close to Post's aircraft, thereby creating a collision hazard. He did not make sufficient effort to locate and avoid Post's aircraft. Respondent's operation of his aircraft was careless or reckless.

The law judge correctly ruled that Complainant met its burden of proof. Accordingly, the decision of the law judge is affirmed.^{16/} A civil penalty of \$2,500 is hereby assessed.^{17/}



DAVID R. HINSON, ADMINISTRATOR
Federal Aviation Administration

Issued this 19th day of October, 1993.

^{15/} The law judge found that there were no radio communication problems between the aircraft on the day of the collision.

^{16/} At the end of his appeal brief, Respondent states that he submitted a timely report with the National Aeronautics and Space Administration (NASA) for a waiver of civil penalties under the Aviation Safety Reporting Program (ASRP). The record contains no prior mention of Respondent's submission of a report to NASA for a waiver under the ASRP.

^{17/} Unless Respondent files a petition for review with a Court of Appeals of the United States within 60 days of service of this decision (under 49 U.S.C. App. § 1486), this decision shall be considered an order assessing civil penalty. See 14 C.F.R. §§ 13.16(b)(4) and 13.233(j)(2) (1992).