

U.S. DEPARTMENT OF TRANSPORTATION  
FEDERAL AVIATION ADMINISTRATION  
WASHINGTON, DC

Served: August 2, 1991

FAA Order No. 91-31

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In the Matter of: )

RONALD C. TERRY and )  
CHRISTOPHER J. MENNE )

) Docket Nos. CP89S00491  
) CP89S00490  
)

ORDER DENYING PETITION FOR RECONSIDERATION

Respondents seek reconsideration of FAA Order No. 91-12, in which I reversed the law judge's initial decision, and held that Respondents had violated Sections 91.75(b), 91.87(h) and 91.9 of the Federal Aviation Regulations (FAR), 14 C.F.R. §§ 91.75(b), 91.87(h), and 91.9. Respondents now argue that the case should have been remanded to the law judge to provide him with an opportunity to evaluate the evidence under the preponderance of the evidence test, which is the proper standard of review. Respondents assert that "[i]n the decision and order . . . the Administrator, who should have acted as an appellate review, essentially substituted his factual findings and conclusions for that of the administrative law judge." Complainant replies that only the law judge's legal conclusions, and not his findings of fact, were disturbed by FAA Order No. 91-12. As explained below, Respondents' petition for reconsideration is denied.

In FAA Order No. 91-12, I held that "it was error for the law judge to require Complainant to establish its case beyond

a reasonable doubt." FAA Order No. 91-12 at 6. Section 13.223 of the Rules of Practice, 14 C.F.R. § 13.223, provides that the party with the burden of proof shall prove its case by a preponderance of reliable, probative, and substantial evidence.

Contrary to Respondents' argument, I was not required to remand the case to the law judge for re-evaluation of the evidence under the correct standard of proof. Pursuant to the Rules of Practice, I am permitted to reweigh the evidence. Section 13.233(b)(1) of the Rules of Practice, 14 C.F.R. § 13.233(b)(1), provides that a party may appeal to the Administrator whether each of the law judge's findings of fact is supported by a preponderance of reliable, probative and substantial evidence. In determining whether a law judge's findings of fact are supported by the preponderance of the evidence, some deference will be accorded to the law judge's credibility determinations. Administrator v. Carroll, FAA Order No. 90-21, at 12-13 (August 16, 1990).

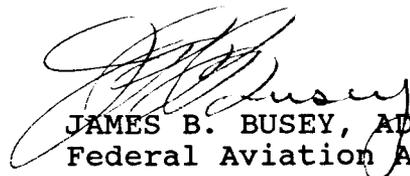
Furthermore, my reversal of the law judge's initial decision in this case was not based upon a rejection of his factual findings, but upon my findings that his conclusions of law were not made in accordance with applicable law, precedent, and public policy.<sup>1/</sup> Specifically, the law judge

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<sup>1/</sup> "A party may appeal . . . whether each conclusion of law is made in accordance with applicable law, precedent, and public policy." 14 C.F.R. § 13.233(b)(2).

held that Respondents had not acted carelessly or recklessly because their actions did not result in an accident. As I pointed out in FAA Order No. 91-12, it has been established that proof of an operation which is inherently dangerous will establish a violation of Section 91.9. See, e.g., Haines v. Department of Transportation, 449 F.2d 1073, 1076 (D.C. Cir. 1971). I found that it is inherently dangerous for a pilot to accept a takeoff clearance directed to another aircraft. The law judge also held that Respondents did not violate Section 91.75(b) because the local controller failed to clarify that the clearance was not intended for them. I held that while this defense did not exonerate Respondents, it would constitute a mitigating factor justifying a reduction in an otherwise appropriate sanction. Finally, I held that the law judge's definition of "operate," as the term is used in 14 C.F.R. § 91.87(h), was contrary to that term's broad definition in 14 C.F.R. § 1.1, and to Federal and NTSB case law. See Daily v. Bond, 623 F.2d 624 (9th Cir. 1980); Administrator v. Pauley, 2 NTSB 1369 (1975).

THEREFORE, IT IS ORDERED that Respondent's petition for reconsideration is denied.

  
JAMES B. BUSEY, ADMINISTRATOR  
Federal Aviation Administration

Issued this 1st day of August, 1991.