

UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

Served: July 22, 1992

FAA Order No. 92-49

In the Matter of:

WARREN R. RICHARDSON and
DAVID O. SHIMP

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) Docket Nos. CP91SO0260,
) CP91SO0261
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DECISION AND ORDER

Respondents Warren R. Richardson and David O. Shimp have appealed from the oral initial decision issued by Chief Administrative Law Judge John J. Mathias at the conclusion of the hearing held in this matter on December 10, 1991.^{1/} In his initial decision, the law judge held that Respondent Richardson violated Section 91.75(a)^{2/} of the Federal Aviation Regulations (FAR), 14 C.F.R. § 91.75(a), when he deviated from an air traffic control clearance without

^{1/} The hearing was held in Miami, Florida. A copy of the law judge's oral initial decision is attached.

^{2/} Section 91.75(a) of the FAR, 14 C.F.R. § 91.75(a) (redesignated as Section 91.123(a) of the FAR, 14 C.F.R. § 91.123(a), effective August 18, 1990) provided in part: "When an ATC clearance has been obtained, no pilot in command may deviate from that clearance, except in an emergency, unless he obtains an amended clearance."

obtaining an amended clearance. The law judge held further that both Respondents operated an aircraft in a careless manner in violation of Section 91.9^{3/} of the FAR, 14 C.F.R § 91.9. For the reasons set forth below, the law judge's decision is affirmed.^{4/}

On July 19, 1989, Respondent Richardson served as captain and pilot in command of Piedmont Airlines Flight No. 1543 enroute from Ft. Lauderdale to Tampa, Florida.^{5/} During the 50-minute flight Captain Richardson was communicating with air traffic control and working the weather radar, while his first officer, Respondent Shimp, operated the controls of the aircraft, a Fokker F-28. Both pilots were listening to air traffic control radio transmissions. As they flew northwest toward Tampa, they encountered numerous thunderstorms. They described the thunderstorms as "typical summer Florida afternoon" weather. (TR - 149, 183). Most aircraft that

^{3/} Section 91.9 of the FAR, 14 C.F.R. § 91.9 (redesignated as Section 91.13 of the FAR, 14 C.F.R. § 91.13, effective August 18, 1990) provided: "No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another." At the hearing the parties agreed to strike "or reckless" from the corresponding complaint allegation.

^{4/} Both pilots filed reports with the National Aeronautics and Space Administration (NASA) pursuant to the Aviation Safety Reporting Program (ASRP). See FAA Advisory Circular AC No. 0046C (February 4, 1985). As a result, neither pilot will be subject to a civil penalty.

^{5/} Unless otherwise noted, the facts of this case are not in dispute. In their answers Respondents admitted all of the factual allegations in the complaint except that air traffic control separation standards were lost as a result of Flight No. 1543's deviation.

afternoon, including Flight No. 1543, were deviating from their routes due to the weather.

At the Miami Air Route Traffic Control Center, air traffic control specialist Doris Dehne was handling air traffic in the Tampa - St. Petersburg area. While Flight No. 1543 was at an altitude of 20,000 feet, the following exchanges took place between Dehne (ATC) and Flight No. 1543:^{6/}

18:57:53	ATC	Piedmont fifteen forty three are you going to be able to fly the airway into St. Petersburg sir.
18:57:57	#1543	Uh we're going to try ma'am uh we just got to get around a little build up here and uh I can't see what's on the other side of it yet but we should be able to get right back around and on course.
18:58:06	ATC	Piedmont fifteen forty three roger sir cross three five miles southeast of St. Petersburg at and maintain one one thousand two five zero knots Tampa's altimeter three zero zero four advise me uh when you can turn and intercept the airway.
18:58:19	#1543	Alright uh thirty five out at eleven and uh at two fifty and uh we'll do it Piedmont fifteen forty three.

Dehne testified that her clearance at 18:58:06 instructed the pilot to descend at his discretion to 11,000 feet for the crossing thirty-five miles southeast of St. Petersburg.

Captain Richardson testified that this was a standard

^{6/} The conversations quoted in this decision are from the official transcript of the recorded communications between air traffic controller Dehne and Piedmont Flight No. 1543. The transcript was admitted as evidence at the hearing. The time shown is universal time constant (UTC).

clearance for an approach to Tampa.

Approximately one minute later at 18:59, according to Dehne, Flight No. 1543 was over five miles off course. Dehne testified that she thought that a potential conflict would develop between Flight No. 1543 and another aircraft when Flight No. 1543 began its descent. Both aircraft were deviating from their routes due to the weather. Dehne confirmed with Flight No. 1543 that it was still at 20,000 feet, and then gave it the following clearance, which the captain acknowledged.

18:59:38 ATC Piedmont fifteen forty three roger
maintain flight level one eight zero.

18:59:43 #1543 Okay we're out of two zero zero for
one eight zero Piedmont fifteen forty
three.

Dehne testified that her communication at 18:59:38 amended her prior clearance to descend to 11,000 feet at pilot's discretion, and as a result, Flight No. 1543 was instructed to maintain an altitude of 18,000 feet. She testified that she understood Flight No. 1543's acknowledgement at 18:59:43 to mean that the pilots understood that they were to maintain an altitude of 18,000 feet.

Dehne testified further that after amending the prior clearance, she explained the reason for the amendment to Respondents.

18:59:46 ATC Piedmont fifteen forty three give me a call when you can turn back to the northwest your traffic is uh eleven o'clock and one five miles southeast bound at one seven thousand.

According to Dehne, her 18:59:46 communication advised Flight No. 1543 that they had an aircraft at 11 o'clock, fifteen miles southeast bound at an altitude of 17,000 feet.

Respondent Richardson responded as follows:

18:59:54 #1543 Okay real fine uh still got a big build up here right now uh just off my (unintelligible) should be just about another minute or two.

Soon thereafter, as Dehne scanned the aircraft on her screen, she observed Flight No. 1543 at an altitude of 17,600 feet, and the conflict alert began to flash on her screen. Dehne testified that at that point, separation standards were lost because Flight No. 1543 and the other aircraft were 600 feet apart vertically and less than five miles apart laterally.^{7/} Dehne testified that under air traffic control standards, aircraft must be separated five miles laterally or 1,000 feet vertically. The following exchange then took place:

19:01:14 ATC Piedmont fifteen forty three verify level at flight level one eight zero.

19:01:25 #1543 Miami uh this is Piedmont fifteen forty three^{8/} we've made the turn back.

^{7/} At the hearing the law judge admitted into evidence a National Tracking Analysis Program (NTAP) computer printout showing the paths of Flight No. 1543 and the oncoming aircraft. George Harrell, Assistant Quality Assurance Manager at the FAA Miami Air Route Traffic Control Center, interpreted the NTAP. According to Harrell, at 19:01:08 Flight No. 1543 was northwest bound at 17,600 feet and the other aircraft was southeast bound at 17,000 feet. The two aircraft at that point were three miles apart laterally and converging. This was as close as the two aircraft would come to each other.

^{8/} The last five words in this transmission were unintelligible in the official transcript but they were understood and transcribed in a subsequent transcript.

19:01:30 ATC

Piedmont fifteen forty three roger sir
uh descend and maintain one one
thousand Tampa altimeter three zero
zero.

Dehne testified that as soon as Flight No. 1543 turned back on course the two aircraft ceased to converge. She chose to permit Flight No. 1543 to continue its descent, advising the pilots of the possible occurrence of a pilot deviation.

According to Dehne, at the time of the incident the Air Traffic Control Manual did not require controllers to specifically state that they were giving an amended clearance. Since then, she explained, the Manual was modified to require controllers to inform pilots that a new altitude is an amended altitude when the pilot's discretion portion of a climb or descent clearance is cancelled.^{9/}

Captain Richardson testified that he thought the "maintain flight level one eight zero" clearance at 18:59:38 meant that "we were needed down at level one eight zero and to leave two zero zero for whatever reason." He explained: "I'm not certain that she wanted me to expedite (out of 20,000 feet), but ... that she ... wanted us out of two zero zero, and at least to one eight zero." (TR 155). Captain Richardson testified, he did not hear the word "maintain" in the

^{9/} At the hearing the law judge admitted into evidence this modification of the manual, Air Traffic Control, FAA Order No. 7110.65F CHG 4, 4-45f, Altitude Information, December 13, 1990. That section provided: "When the pilot's discretion portion of a climb/descent clearance is being cancelled by assignment of a new altitude, inform the pilot that the new altitude is an amended altitude."

18:59:38 "maintain flight level one eight zero" transmission, but he did acknowledge that transmission. The captain testified that he believed that he still had discretion to descend to 11,000 feet.

First Officer Shimp testified that he heard the initial clearance to descend to 11,000 feet at pilot's discretion but not the 18:59:38 "maintain flight level one eight zero" clearance. He did hear the captain respond at 18:59:43 "... we're out of two zero zero for one eight zero." Shimp testified that he understood that they were to vacate 20,000 feet and head to 18,000 feet, with pilot's discretion to continue descent to 11,000 feet.

Dehne and FAA Aviation Safety Inspector Thomas Inglima, who investigated the incident, testified that if the controller had wanted Flight No. 1543 to expedite descent from 20,000 feet she would have said "descend immediately," "descend now," or "expedite descent." Dehne and Inglima testified that an air traffic control instruction to maintain a new altitude supersedes a prior assigned altitude.

The law judge in his oral initial decision found that the violations against Respondents were established by the admissions in Respondents' answers and the evidence introduced at the hearing. He found that the NTAP printout of the incident and Harrell's testimony established that separation standards were lost as a result of Flight No. 1543's altitude deviation. The law judge found credible that neither pilot heard the word "maintain" in the instruction "maintain flight level one eight zero."

The law judge also held that the captain had acknowledged the clearance and had the duty to seek clarification if he did not understand it. The subsequent advisory that there was traffic at eleven o'clock, fifteen miles southeast bound at 17,000 feet, according to the law judge, also should have alerted Respondents that they were not to descend below 18,000 feet. The law judge found the amendment of the Air Traffic Control Manual sixteen months after the incident not to be controlling. Consequently, he held that the controller's clearance did not excuse Respondents' failure to hear or to request an explanation, of the instructions.

Respondents on appeal renew their argument that since neither pilot heard the word "maintain" in the "maintain flight level one eight zero" clearance, they correctly concluded that they could continue to descend to 11,000 feet. The official transcript of the air traffic control tapes contains the entire "maintain flight level one eight zero" clearance. There is no evidence that the reception was garbled, muffled, or unclear. Captain Richardson heard the clearance, except for the word "maintain," and he acknowledged that clearance. Under these circumstances the presumption arises that the controller's clearance was received.^{10/} Respondents have not rebutted this presumption.

^{10/} See Administrator v. Hembree, NTSB Order No. EA-2958 (June 6, 1989); See also Administrator v. Friesen and Ashcraft, NTSB Order EA-3203 (October 30, 1990) (air traffic control transcript establishes prima facie case that a transmitted clearance was received).

Even if Respondents did not hear the word "maintain," the controller's subsequent advisory that Flight No. 1543 had traffic at 11 o'clock, 15 miles southeast bound at 17,000 feet, should have alerted them not to descend below 18,000 feet.^{11/} At a minimum, the pilots should have sought clarification from the air traffic controller. Both Respondents were listening to the air traffic control transmissions, and they should have listened attentively to them.^{12/}

On appeal, Respondents cite Administrator v. Smith, 3 NTSB 85 (1985), as requiring a decision in their favor.^{13/} However, that case is distinguishable from Respondents' case. In Smith, the flight plan clearance called for the aircraft to enter airway V244 South and operate in the

^{11/} See Administrator v. Papadakis, 2 NTSB 2311 (1976) (Captain who did not hear part of a clearance should have been alerted by two subsequent traffic advisories).

^{12/} See In the Matter of Watkins, FAA Order No. 92-8 (January 31, 1992) (failure to listen attentively to air traffic control clearances is careless or reckless conduct); See also Administrator v. McCament and Carmen, NTSB Order No. EA-2864 (February 2, 1989) (captain communicating with air traffic control and first officer flying aircraft, both listening to air traffic control transmissions, both responsible for understanding them); Administrator v. Hembree, NTSB Order No. EA-2958, at 6, n.5 (June 6, 1989) (even if electro-magnetic interference or noise interfered with respondent pilot's reception, it would still not obviate her duty to ask ATC for clarification).

^{13/} Respondents incorrectly state on appeal that the Administrator must follow the precedent of the National Transportation Safety Board (NTSB). The Administrator may decide to follow persuasive NTSB precedent but is not required to do so. In the Matter of Terry and Menne, FAA Order No. 91-12 (April 12, 1991), petition for reconsideration denied, FAA Order No. 91-31 (August 2, 1991), appeal docketed, No. 91-1414 (D.C. Cir. August 26, 1991).

second segment of the airway. After the aircraft took off, the controller instructed the pilots to operate in the first segment of the airway. The pilots interpreted the amended instruction differently. The Board held that the pilots' interpretation of the amended instruction was reasonable, and that more precise terminology by the controller could have clarified the amended instruction. In Respondents' case, in contrast, Respondents claim that they did not hear Dehne's amended clearance to maintain flight level one eight zero, not that they misinterpreted the clearance. The clearance in Respondents' case to maintain flight level one eight zero was clear on its face, unlike the clearance in the Smith case, which was subject to different interpretations.


Respondents claim that had the controller stated that she was amending or cancelling the prior clearance to descend to 11,000 feet, the incident would have been avoided. Respondents argue further that the subsequent amendment of the Air Traffic Control Manual to require that controllers inform pilots of an amended altitude shows that the FAA knew that such misunderstandings could occur. The fact, however, that the controller could have given Respondents a different instruction does not excuse Respondents' deviation from a valid clearance in a non-emergency situation.^{14/} The controller's instruction conformed to the Air Traffic Control

^{14/} See Administrator v. Van Valkenberg, NTSB Order No. EA-3281 (April 26, 1991) (fact that air traffic control could have given a different instruction that would have avoided loss of separation, is not controlling. Deviation would not have occurred had the pilot stayed on his designated route).

Manual's guidance on amended clearances in effect at the time of the incident.

Respondents' admissions and the hearing evidence support the law judge's finding that Flight No. 1543 deviated from the "maintain flight level one eight zero" clearance when the flight crew descended below 18,000 feet without an amended clearance. Respondent Richardson, as pilot in command, was responsible for the altitude deviation in violation of Section 91.75(a) of the FAR, 14 C.F.R. § 91.75(a). Both Respondents, Richardson, as pilot in command of the aircraft, and Shimp, as the flying pilot, operated Flight No. 1543 in a careless manner.^{15/}

Accordingly, the initial decision of the administrative law judge is affirmed.^{16/}


THOMAS C. RICHARDS, ADMINISTRATOR
Federal Aviation Administration

Issued this 20th day of July, 1992.

^{15/} See Haines v. Department of Transportation, 449 F.2d. 1073, 1076 (D.C. Cir. 1971) (flying below prescribed altitude presented potential danger to passengers and the aircraft, and was inherently careless or reckless); Administrator v. Friesen and Ashcraft, NTSB Order No. EA-3203 (October 30, 1990) (pilots cleared to climb to 3,000 feet, who climbed above 3,000 feet without obtaining an amended clearance, operated the aircraft in a careless or reckless manner in violation of Section 91.9 of the FAR, 14 C.F.R. §91.9.)

^{16/} 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).