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

Served: MAY 14, 1991

FAA Order No. 91-12

In the Matter of: RONALD C. TERRY and CHRISTOPHER J. MENNE	Docket Nos. CP89SO0491 CP89SO0490

ORDER
(ERRATA)

Please note the following corrections to the Decision and Order in this case which was served on April 12, 1991:

1. Page 2, line 1 - "91.87(b)" should read "91.87(h)".
2. Page 10, line 6 - insert "D.C. Cir." immediately before "1971".
3. Page 10, line 11 - substitute "the takeoff clearance issued by the local controller" for "tower control's take off clearance".

This Order should be attached to the previously-issued Decision and Order.

JAMES B. BUSEY, ADMINISTRATOR
Federal Aviation Administration

by: JAMES S. DILLMAN*
Assistant Chief Counsel

Issued this 13th day of May, 1991.

* Issued under authority delegated to the Chief Counsel and the Assistant Chief Counsel for Litigation by Memorandum dated January 29, 1990, pursuant to 49 U.S.C. § 322(b) and 14 C.F.R. § 13.202.

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FAA Order No. 91-12

In the Matter of:	
RONALD C. TERRY and CHRISTOPHER J. MENNE	Docket Nos. CP89SO0491 CP89SO0490

DECISION AND ORDER

Complainant has appealed from the oral initial decision issued by Administrative Law Judge Joel R. Williams at the conclusion of the hearing held in this matter on April 4, 1990, in Charlotte, North Carolina.[1/] In his initial decision, the law judge held that Respondents, Captain Ronald C. Terry and First Officer Christopher J. Menne, did not violate Sections

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1/ A copy of the law judge's oral initial decision is attached.

91.75(b),[2/] 91.87(b),[3/] and 91.9[4/] of the Federal Aviation Regulations (FAR), as alleged in the Complaint. (14 C.F.R. §§ 91.75(b), 91.87(h), and 91.9.)[5/]

Complainant argues on appeal that the law judge incorrectly applied a criminal burden of proof (beyond a reasonable doubt) in a civil proceeding. In addition, Complainant challenges several of the law judge's findings. In response, Respondents

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2/ 14 C.F.R. § 91.75(b) provides:

Compliance with ATC clearances and instructions.

(b) Except in an emergency, no person may, in an area in which air traffic control is exercised, operate an aircraft contrary to an ATC instruction.

3/ 14 C.F.R. § 91.87(h) provides in pertinent part:

Operation at airports with operating control towers.

(h) Clearances required. No person may, at any airport with an operating control tower, operate an aircraft on a runway or taxiway, or takeoff or land an aircraft, unless an appropriate clearance is received from ATC.

4/ 14 C.F.R. § 91.9 provides:

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.

5/ Part 91 of the FAR was recodified as of August 18, 1990. The citations in this opinion and order are to the former Part 91 sections, since both the incident in question and the hearing occurred prior to the recodification. The corresponding sections in the recodified Part 91 are as follows: § 91.9 is now § 91.13, § 91.75 is now § 91.123, and § 91.87 is now § 91.129. The substance of the sections in question was not changed by the recodification.

acknowledge that the law judge should not have applied a criminal burden of proof, but maintain that the violations alleged by Complainant were not established by a preponderance of evidence, the evidentiary standard that should have been applied. In addition, Respondents argue that any error that may have been committed by them was contributed to by air traffic control (ATC) error which, they assert, therefore exonerates them from fault.6/

The relevant facts of this case are as follows. On May 30, 1988, Respondent Terry was the pilot in command, and Respondent Menne was the first officer, of Piedmont Airlines Flight 966, enroute from Charlotte, North Carolina to Baltimore, Maryland. The ground controller instructed Respondents to taxi to and hold short of Runway 36R. There was no traffic ahead of them or at the end of the runway. At the same time, the local controller responsible for Runway 36R was responsible for CC Air flight 5469 on final approach to land and a general aviation aircraft (Cessna 738ZH) cleared onto the runway from an intersecting taxiway approximately 3000 feet from the approach end.

When Respondents reached the approach end of Runway 36R, they switched their radio frequency from ground control to

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6/ Both parties cite National Transportation Safety Board (NTSB) case law to support their arguments. Although I am not bound by NTSB precedent, I have taken the cases cited into consideration in making my decision in this case.

local control. (Ground control is responsible for providing an aircraft with taxiing instructions, but only the local controller can clear an aircraft onto an active runway for takeoff or landing.) The first transmission Respondents heard on the local control frequency was what they believed to be a clearance for their aircraft to make an immediate takeoff. What the local controller actually transmitted was, "Cessna eight Zulu Hotel fly runway heading runway three six right cleared for immediate take off." See Respondent's Exhibit 2. (Respondents had not contacted local control prior to hearing this transmission, but several individuals, including Respondents, testified that it is not unusual to have the local controller make initial contact with an aircraft.) Although the clearance was issued to the Cessna, First Officer Menne acknowledged it, stating, "Nine sixty-six for immediate takeoff three six right."[7/] The Cessna did not acknowledge the clearance, and the local controller did not notice that the acknowledgment came from the wrong aircraft. Respondents completed their takeoff check list and moved onto Runway 36R in

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7/ At the hearing, an FAA Aviation Safety Inspector testified for Complainant that, in his opinion, First Officer Menne did not make a "proper initial call on tower frequency," in that he should have identified himself as "Piedmont, nine sixty-six." The air traffic expert who testified on behalf of Respondents also acknowledged that it was not "the best technique" for Respondents to have failed to use "Piedmont" in the call back, although Respondents' call back was, in his view, "appropriate."

preparation for takeoff. At that time, they saw the Cessna on the runway and stopped the aircraft.

As Respondents moved onto the runway, the local controller noticed their aircraft for the first time.[8/] She immediately instructed the Cessna to taxi off the runway, CC Air flight 5469 to go around, and Respondents to hold their position. Eventually, Respondents and the Cessna both executed uneventful takeoffs, and CC Air flight 5469 landed, also without incident.

Based upon review of the entire record in this case, including the briefs submitted on appeal, the law judge's initial decision, dismissing the violations against Respondents, is reversed.[9/]

[8/] The local controller who was responsible for Runway 36R, Pamela Brynarsky, testified that each aircraft that a controller handles is represented by a strip of paper (flight strip) with information about the aircraft on it. Ms. Brynarsky testified that she did not receive the strip for Respondents' aircraft from the ground controller until she noticed the aircraft moving onto the runway. Consequently, prior to that time, she was unaware of the presence of Respondents' aircraft because her primary concern was the incoming CC Air flight 5469 and the Cessna she had cleared for immediate takeoff.

[9/] Neither pilot will be subject to a civil penalty for the violations described herein. Both pilots timely filed reports with the National Aeronautics and Space Administration (NASA) pursuant to the Aviation Safety Reporting Program (ASRP). See FAA Advisory Circular AC No. 00-46C (February 4, 1985). In accordance with the terms of the ASRP, Captain Terry and First Officer Menne are eligible for, and will receive, a waiver of sanction for the violations found herein.

As both parties agree, it was error for the law judge to require Complainant to establish its case beyond a reasonable doubt. The Rules of Practice for Civil Penalty Actions provide that the party with the burden of proof shall prove its case by a preponderance of reliable, probative, and substantial evidence. 14 C.F.R. § 13.223 (1990).

The law judge held that Respondents did not violate Section 91.75(b) (operation of an aircraft contrary to ATC instruction) because Respondents attempted to clarify the takeoff clearance "at least by acknowledgment [of the takeoff clearance they thought they heard]." In other words, the law judge dismissed the alleged violation because Respondents were not advised by the local controller that their understanding of the clearance was incorrect. In its appeal, Complainant acknowledges that the local controller should have caught Respondents' error and stopped them from acting on another aircraft's takeoff clearance. Complainant argues, however, that this error does not excuse Respondents from their responsibility to have listened attentively to the instructions given by the local controller. To the extent the ATC error is considered at all, Complainant argues, it should be considered as a mitigating factor, rather than as an exonerating factor. Respondents argue in reply that ATC error exonerates pilot

error where, as in this case, that error was the "primary initiating factor" of the alleged violation.

There is no dispute that Respondents' operation of the aircraft onto Runway 36R was contrary to the ATC instruction given.[10/] I find that Respondents did violate Section 91.75(b) because to the extent that the local controller should have corrected Respondents' acknowledgment, that ATC failure only serves to mitigate an otherwise appropriate sanction.[11/] I do not agree with Respondents' contention that the local

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10/ In their reply brief, Respondents acknowledge that the transcript of the communications from the tower does not contain a takeoff clearance for their aircraft. Respondents, however, do not acknowledge that they misheard the tower transmission. Instead, they offer possible explanations to account for the discrepancy between what they believe they heard and what the controller said. In his decision, the law judge stated that he was not "convinced" by the various theories Respondents offered regarding the misunderstood transmission. The NTSB has held that an ATC tape creates a rebuttable presumption that a message is received as transmitted. Administrator v. Hembree, NTSB Order EA-2958 (July 17, 1989). I agree with the law judge that Respondents have not successfully rebutted that presumption in this case. Although the pilot of the Cessna aircraft testified that the transmission in question was garbled on his radio, his testimony does not alter the fact that Respondents repeatedly contend that the transmission they heard was clear. Testimony that the Cessna pilot received a garbled transmission is insufficient to rebut the presumption that the transmission was received by Respondents as it was sent. Respondents contend in their reply brief that the facts of this case "provide substantial support for overcoming any presumption normally afforded to an ATC transcript." I do not agree.

11/ See Administrator v. Ryan, 1 NTSB 1439 (1972), and Administrator v. Alvord, 1 NTSB 1657 (1972). But see Administrator v. Holstein, EA-2782 (August 31, 1989), in which the NTSB held that because the call signs of the two aircraft were so similar, the controller should have used abbreviated

[Footnote continues on next page]

controller's error in this case was the "primary initiating factor." The local controller would not have had to correct the acknowledgment if Respondents had not taken the wrong clearance.

With regard to Section 91.87(h) (operating an aircraft on a runway without appropriate ATC clearance), the law judge dismissed the alleged violation because he found that Respondents did not operate the aircraft. He based this conclusion on the fact that Respondents did not continue their takeoff roll once they saw the Cessna on the runway. Complainant contends that Respondents need only have moved onto the runway in preparation for takeoff in order to have violated Section 91.87(h). Respondents argue in reply that to find that they violated Section 91.87(h) would be a "wooden and overly strict interpretation of the wording of the Federal Aviation Regulations."

"Operate" is broadly defined in 14 C.F.R. § 1.1 as follows:

> 'Operate,' with respect to aircraft, means use, cause to use or authorize to use aircraft, for the purpose . . . of air navigation including the piloting of aircraft, with or

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[Footnote continued from previous page]

11/ call signs, and, as a result, the controller's failure to do so was the initiating factor, thereby exonerating the pilot's acceptance of a clearance directed to another aircraft.

> without the right of legal control (as owner, lessee, or otherwise).

The law judge's interpretation of aircraft operation in this case is clearly contrary to established case law. The United States Court of Appeals for the Ninth Circuit has held that operation of an aircraft includes those movements of an aircraft in preparation for flight. See Daily v. Bond, 623 F.2d 624 (9th Cir. 1980), in which a pilot's attempt to start an aircraft constituted operation for purposes of finding a violation of Section 91.9. See also Administrator v. Pauley, 2 NTSB 1369 (1975), in which a pilot's attempt to jump start an aircraft constituted operation for purposes of finding a violation of Section 91.9.

Respondents emphasize that they "acted in accordance with the applicable standard of care." This is essentially the same argument Respondents put forth with regard to Section 91.75(b), in that they urge that their actions be excused due to ATC error. For the same reasons I articulated above, this argument is unpersuasive, in that it does not serve to exonerate Respondents from the alleged violation.

Finally, with regard to Section 91.9 (careless and reckless operation) the law judge held, "I don't think [Respondents] were very careless in their operation, or careless at all once they got on the runway and saw what was there." He further stated that, although the situation was potentially dangerous,

"everything worked out all right." It has been established that "[p]roof of actual danger is unnecessary [to establish a violation of Section 91.9], for the regulation prohibits any careless or reckless practice in which danger is inherent." Haines v. Department of Transportation, 449 F.2d 1073, 1076 (1971). See also Administrator v. Haney, NTSB Order EA-3202 (October 30, 1990). While I agree with the law judge that Respondents acted properly in stopping their aircraft once they saw the Cessna further down Runway 36R, they nontheless acted in a careless or reckless manner by failing to listen attentively to tower control's take off clearance. It goes without saying that it is inherently dangerous for a pilot to accept a takeoff clearance directed to another aircraft.

Accordingly, the law judge's dismissal of the alleged violations was improper.

The issue of whether, and to what extent, Respondents' actions would have mitigated the civil penalty originally proposed by Complainant due to controller error need not be addressed in this decision since, as noted above, both Respondents filed timely ASRP reports with NASA.

THEREFORE, in light of the foregoing, the decision of the law judge is reversed, and Respondents are hereby found to have violated Sections 91.75(b), 91.87(h), and 91.9.[12/]

JAMES B. BUSEY, ADMINISTRATOR
Federal Aviation Administration

Issued this 10th day of April 1991.

12/ Unless Respondents file a petition for reconsideration within 30 days of service of this decision, or a petition for judicial review within 60 days of service of this decision (pursuant to 49 U.S.C. App. § 1486), this decision shall be considered an order assessing civil penalty. See 55 Fed. Reg. 27574 and 27585 (July 3, 1990) (to be codified at 14 C.F.R. §§ 13.16(b)(4) and 13.233(j)(2)).