

SERVED: January 24, 2000

NTSB Order No. EA-4814

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 13th day of January, 2000

_____)	
JANE F. GARVEY,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-14309RM
v.)	
)	
RICHARD LEE MERRELL,)	
)	
Respondent.)	
)	
_____)	

ORDER

On September 21, 1999, the Court, on an appeal by the Administrator, reversed an opinion and order of the Board¹ dismissing allegations that respondent had carelessly operated contrary to an Air Traffic Control instruction by mistakenly accepting a clearance issued to another aircraft.² The Court concluded that the Board had failed to defer to the FAA's reasonable interpretation of its own regulations and remanded the case for further proceedings consistent with that conclusion.

¹NTSB Order No. EA-4530 (served March 12, 1997), reconsideration denied, NTSB Order No. EA-4670 (served June 11, 1998). The law judge had upheld charges that respondent had violated sections 91.123(b) and (e) and 91.13(a) of the Federal Aviation Regulations, "FAR," 14 C.F.R. Part 91.

²No. 98-1365, D.C. Cir.

At the hearing before the law judge, it was evident that respondent's attempt to acknowledge receipt of the clearance not meant for his aircraft had been thwarted by the essentially simultaneous broadcast of the aircraft to which it had been directed. Our decision to dismiss the complaint held that a regulatory violation for not complying with a clearance may be excused in certain situations if the noncompliance resulted from a non-putative cause, such as an "error of perception," rather than a failure of attention or some other careless or unprofessional behavior, and all prudent procedures that would expose the inadvertent mistake had been undertaken.

Under the Administrator's interpretation of the relevant regulations, however, an error of perception does not constitute a reasonable explanation for a deviation from a clearly transmitted clearance or instruction. Rather, inattentiveness or carelessness is presumed from the occurrence of a deviation unless, as we understand it, the misperception or mistake concerning the clearance was attributable to some factor for which the airman was not responsible, such as an equipment failure. The Court's decision dictates that this approach should have been followed in this proceeding.

Inasmuch as the respondent in response to the Administrator's complaint offered no reason which would serve to excuse his mishearing of the instruction he incorrectly treated as having been directed to his aircraft, it does not appear that any further proceedings before the law judge or the Board are necessary or warranted. It is therefore our tentative judgment that the Board's order granting the respondent's appeal from the law judge's decision, as well as our order denying the Administrator's petition for reconsideration, should be vacated, and that the law judge's decision sustaining the Administrator's complaint should be affirmed. That judgment will become final without further Board order if neither party, within 30 days after service of this order, files comments seeking additional proceedings on the remand.

ACCORDINGLY, IT IS ORDERED THAT:

1. Board Orders EA-4530 and EA-4670 are vacated; and
2. The May 29, 1996 initial decision of the law judge is affirmed.

HALL, Chairman, FRANCIS, Vice Chairman, HAMMERSCHMIDT and BLACK, Members of the Board, concurred in the above order. GOGLIA, Member, did not concur. Vice Chairman FRANCIS submitted the following statement:

I reluctantly concur with the decision to vacate our prior decisions in this case, and do so because I understand we are bound by the appellate court's decision directing us to take action consistent with the court's opinion. However, I am concerned that this course of action will reduce communication between pilots and controllers and ultimately will diminish the level of aviation safety.