

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 93-4398

Summary Calendar

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EDWARD A. BENSON,

Petitioner,

versus

JOSEPH A. DEL BAZO, Acting Administrator  
FEDERAL AVIATION ADMINISTRATION and  
NATIONAL TRANSPORTATION SAFETY BOARD,

Respondents.

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Petition for Review of an Order of  
the National Transportation Safety Board  
(EA-3798)

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(November 9, 1993)

Before KING, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

PER CURIAM:\*

Edward A. Benson, an experienced pilot, started a private flight from Salt Lake City to Santa Fe. Prior to departure, air traffic control informed Benson that he should have no weather problems along the route. Benson, however, soon encountered a cloud bank which, to his mind, represented a substantial risk of

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\*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

ice formation. Accordingly, Salt Lake City air traffic control modified Benson's instrument flight rules clearance to allow lateral visual flight rules deviations at a fixed altitude.

A few minutes after the authorized deviation, Benson flew into a new radar sector. Air Traffic Controller Timothy Stephani now had control of his flight. Prior to the change in radar sector, Salt Lake City air traffic control informed Controller Stephani that Benson had deviated from his instrument flight rules. After Controller Stephani cleared Benson to a new altitude, Benson changed altitude four times though he had not received clearance to do so.

At Benson's hearing, a federal aviation safety inspector testified that once a pilot has received instrument flight rules clearance, any altitude assigned by an air traffic controller supersedes any previous altitude clearances. He also stated that a clearance to deviate under visual flight rules from instrument flight rules is superseded by a subsequent altitude clearance given by air traffic control. The inspector testified that a pilot who maintains a clearance given in one radar zone to the exclusion of clearances given in a contiguous zone jeopardizes air safety in the contiguous sector.

The Administrator of the Federal Aviation Administration suspended Benson's commercial pilot certificate for sixty days. He concluded that when Benson deviated from altitude and route clearances in the absence of an emergency or an amended clearance, he violated section 91.75(a) of the Federal Aviation Regulations,

14 C.F.R. § 91.75(a) (1989). In addition, the Administrator concluded that Benson violated section 91.9, 14 C.F.R. § 91.9 (1989) by operating an aircraft in a careless manner so as to endanger the life or property of another.

On review, an administrative law judge found that Benson had violated section 91.75(a), but determined that he had not violated section 91.9. The judge reduced the suspension order from sixty to twenty days. However, the National Transportation Safety Board found that Benson had violated both provisions, and increased the suspension to thirty days. We affirm the ruling and deny the petition for review.

I

Controller Stephani's initial clearance to a specified altitude superseded Benson's previous authorization to deviate from instrument flight rules. Benson never introduced testimony to refute the assertion that Controller Stephani's altitude clearance superseded the authorization to deviate. Accordingly, Benson has to provide an explanation that would excuse his altitude deviations.

Benson argues that air traffic control cancelled his instrument flight rules, but, as the Board noted, air traffic control cannot cancel a flight plan unless the pilot requests the cancellation. Benson did not cancel his flight plan. In fact, Controller Stephani repeatedly reminded Benson that he remained on instrument flight rules. In addition, Benson requested permission consistent with flight plan clearance to deviate from his assigned

altitudes. These facts suggest that, contrary to Benson's testimony, he knowingly deviated from instrument flight rules.<sup>1</sup>

## II

Next, Benson argues that he did not show carelessness so as to endanger the lives or property of others. To establish a violation of section 91.9, the Administrator had to show that the pilot did not act as a reasonable and prudent pilot. Chritton v. NTSB, 888 F.2d 854, 856 (D.C. Cir. 1989). We can presume that deviation from air traffic control clearance resulted from carelessness in the absence of evidence to the contrary. Administrator v. Haines, 1 NTSB 769, 771 (1970), aff'd, 449 F.2d 1073 (D.C. Cir. 1971).

The unauthorized altitude deviations constitute a prima facie showing of carelessness. Benson has not alleged sufficient facts to rebut the showing. The fact that Benson initially received permission to deviate from instrument flight rules cannot justify the deviation, as this argument rests on the mistaken and careless assumption that once a pilot receives permission to deviate in one radar zone, he can ignore official clearances in contiguous sectors. The altitude deviations created a real hazard of midair collision.

AFFIRMED and petition for review denied.

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<sup>1</sup>In addition, Benson argues for the first time on appeal that he deviated from instrument flight rules to avoid an emergency situation. Pursuant to 49 U.S.C. app. § 1486(a), however, "[n]o objection to an order of the Board or Administrator shall be considered by the court unless such objection shall have been urged before the Board or Administrator." At any rate, Benson produced no evidence that he encountered an emergency situation that required "immediate action." 14 C.F.R. § 91.3(b) (1989).