SERVED: March 18, 1997

NTSB Order No. EA-4533

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 5th day of March, 1997

BARRY L. VALENTINE, Acting Administrator, Federal Aviation Administration, Complainant, v. DAVID L. NELSON, Respondent.	Docket SE-14235

OPINION AND ORDER

Respondent has appealed from the oral initial decision issued by Administrative Law Judge William R. Mullins on February 21, 1996.[1] The law judge affirmed the Administrator's order suspending respondent's airline transport pilot certificate for 120 days, upon finding that respondent had violated 14 C.F.R.

[1]A copy of the initial decision, an excerpt from the transcript, is attached.

91.119(a)-(c), and 91.13(a).[2] We deny the appeal.

Respondent admits that, on September 18, 1994, he flew his yellow antique Piper aircraft in the vicinity of Sturdevant, WI. Respondent has explained that he was assisting a local model airplane club recover a lost model glider. The model flying field is approximately 1.2 miles from Racine Correctional Institution (RCI). According to six eyewitnesses who testified on behalf of the Administrator, respondent on that day flew his aircraft at an altitude of 250 feet or less over and around RCI. The witnesses estimated respondent's altitude by comparison to the facility's light poles, each from 100-120 feet in height. Prison officials were so concerned that the tower guards were put

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[2]Sections 91.119(a)-(c) read:

Except where necessary for takeoff or landing, no person may operate an aircraft below the following altitudes:

(a) Anywhere. An altitude allowing, if a power unit fails, an emergency landing without undue hazard to persons or property on the surface.

(b) Over congested areas. Over any congested area of a city, town, or settlement, or over any open air assembly of persons, an altitude of 1,000 feet above the highest obstacle within a horizontal radius of 2,000 feet of the aircraft.

(c) Over other than congested areas. An altitude of 500 feet above the surface, except over open water or sparsely populated areas. In those cases, the aircraft may not be operated closer than 500 feet to any person, vessel, vehicle, or structure.

on alert and directed to shoulder their rifles.[3]

Respondent, in contrast, testified that, although he flew near RCI, he was never more than 1/2 mile near it, and always at least 1000 feet above the ground. Confirming his testimony was a member of the ground crew searching for the model airplane.

In explaining his decision, the law judge noted the importance credibility played in the matter. He said:

> ... I do think somebody was mistaken, and I think the bottom line for me is it's more probably true that you [respondent] were mistaken than those six people were mistaken ....

Tr. at 148.

Respondent's challenge to the law judge's reliance on the eyewitness testimony can only succeed if he demonstrates that it was clear error. See, e.g., Chirino v. NTSB, 849 F.2d 1525, 1530 (D.C. Cir. 1988) (Board will reverse law judge's finding when witness' testimony is "inherently incredible"); Administrator v. Jones, 3 NTSB 3649, 3651 (1981) (that law judge accepted the testimony of the accident investigator, rather than accounts of those more directly involved, is not error, unless the law judge's credibility determinations were arbitrary and capricious); and Administrator v. Smith, 5 NTSB 1560, 1563 (1987), and cases cited there (resolution of credibility issues, unless made in an arbitrary or capricious manner, is within the exclusive province of the law judge).

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[3]The Deputy Warden testified that, in light of the low flying plane, they needed to be prepared, for example, for a bomb, an escape attempt, or a weapons or drug drop.

Under this standard, respondent's challenge cannot succeed. Regardless of respondent's belief, there is more than sufficient evidence on which to find that respondent violated sections 91.119(a), (b), and (c). That one of the eyewitnesses, a police officer, did not follow the aircraft is not convincing evidence that she lied in testifying that she saw the aircraft over RCI. Similarly, that various of the correctional officer witnesses discussed using binoculars to read the N number of the aircraft does not prove that the aircraft had to have been higher than they said.[4]

The testimony, with the law judge's credibility finding, supports a conclusion that respondent was operating the aircraft at altitudes between 200-250 feet. This violated subsection (b), to the extent the overflight area is defined to be congested, and violated subsection (c), as he was closer than 500 feet to vehicles, persons, and structures.

Although respondent may disagree with the Administrator's (and law judge's) assessment that a safe emergency landing could not have been performed without undue hazard (subsection (a)), respondent offers no real evidence to counter that of the Administrator that the prison was surrounded by high density highways and an armed forces facility (apparently under

[4]The testimony supports a conclusion that the angles of view from the various towers, and the location of the N number on the aircraft made it difficult to view the number.

construction).[5] Further, it is not unreasonable to presume a violation of subsection (a), given the low altitude and limited maneuvering room 200-250 feet of altitude provides. The situation is aggravated to the extent that respondent's low flight took him over a congested area. (Respondent does not argue that the prison is not congested within the meaning of subsection (b).)

Respondent also claims the evidence does not support a carelessness charge. However, the violation of sections 91.119(a)-(c) is sufficient to support a "residual" or "derivative" section 91.13(a) carelessness finding. Administrator v. Pritchett, NTSB Order EA-3271 (1991) at fn. 17, and cases cited there.

Respondent raises two other new issues. First, he argues that he should receive the benefit of a sanction waiver under the Aviation Safety Reporting System. However, even leaving aside whether that claim can be raised now, a basic requirement of that program is that respondent prove he timely filed a report. Respondent has failed to introduce any evidence in this regard. Second, respondent argues that the 120-day suspension is too long. Although he cites two cases with lesser suspensions, the Administrator, in reply, has demonstrated that 120 days is within the range of precedent, and we cannot say that it is not appropriate here.

[5]Variously in the transcript termed an Army Reserve Center, an Armory Reserve Center, and a National Guard facility.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied; and

2. The 120-day suspension of respondent's pilot certificate shall begin 30 days from the service of this order.[6]

HALL, Chairman, FRANCIS, Vice Chairman, HAMMERSCHMIDT, GOGLIA, and BLACK, Members of the Board, concurred in the above opinion and order. Member GOGLIA submitted the following concurring statement:

[6]For purposes of this order, respondent must physically surrender his certificate to an appropriate representative of the Federal Aviation Administration pursuant to 14 C.F.R. 61.19(f).

Administrator v. Nelson, Docket SE-14235. Notation 6770

I concur with the decision in this case to suspend the Respondent's airline transport certificate. Judge Mullins competently performed the difficult task of weighing the conflicting evidence at trial on February 21, 1996. He found that Respondent was below the required altitude and so he upheld the Administrator's Order of Suspension for 120 days.

Judge Mullins did not specifically find violation of each subsection of 91.113, nor did he make any specific findings of careless flying or careless conduct. There is no evidence in the record of careless conduct. On the other hand the record indicates that Respondent is a responsible pilot with an impressive background including 37 years as a United Airlines pilot and numerous type ratings. Respondent represented himself at the hearing.

Under these circumstances it is unnecessary and illogical to find a violation of 91.13(a). There is NOT always a "residual" violation of carelessness. A fight can be perfectly safe and violation can nevertheless occur. There is no justification for the language in this opinion which states that "the situation is aggravated to the extent that respondent's low flight took him over a congested area." That is the essence of the regulation which he violated. The mere fact that he did not comply with the regulation does not mean that the noncompliance was "aggravated". Characterizing the event as aggravated does not make it so. Calling it aggravated does not in itself justify a violation of 91.13(a). There must be some evidence of carelessness separate and apart from a violation of some other regulation in order to substantiate a violation of 91.13(a). There was no such evidence in this case, and there was no finding of any facts supporting carelessness. I would delete from the opinion the language quoted above, and I would omit the violation of 91.13(a).