

SERVED: September 16, 2011

NTSB Order No. EA-5598

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 14<sup>th</sup> day of September, 2011

<hr/>		)	
J. RANDOLPH BABBITT,		)	
Administrator,		)	
Federal Aviation Administration,		)	
		)	
	Complainant,	)	
		)	Docket SE-18995
	v.	)	
		)	
PAUL D. COLE,		)	
		)	
	Respondent.	)	
		)	
<hr/>		)	

**OPINION AND ORDER**

Respondent appeals the oral initial decision of Chief Administrative Law Judge William E. Fowler, Jr., issued on March 31, 2011.<sup>1</sup> By that decision, the law judge affirmed the Administrator's order suspending respondent's airline transport

<sup>1</sup> A copy of the initial decision, an excerpt from the hearing transcript, is attached.

pilot certificate and any other airman certificates respondent holds for 180 days, based on alleged violations of 14 C.F.R. §§ 91.13(a),<sup>2</sup> 91.119(b),<sup>3</sup> and 91.319(a)(1).<sup>4</sup> We remand this case to the law judge.

The Administrator's order, which served as the complaint before the law judge, alleged that on May 30, June 6, and June 27, 2009, respondent acted as pilot-in-command (PIC) of an Aero Vodochody Model L-39 (L-39) in operations at Marion Municipal Airport in Marion, Ohio.<sup>5</sup> The complaint stated that, on May 30, 2009, respondent took off and overtook a tow ship with a glider in tow before turning crosswind. Respondent then allegedly operated in close proximity to a student pilot in an airplane, at an altitude of less than 100 feet, and at a speed of approximately 250 knots. The complaint alleged that throughout

---

<sup>2</sup> Section 91.13(a) states, "[n]o person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another."

<sup>3</sup> Section 91.119(b) states, "[e]xcept when necessary for takeoff or landing, no person may operate an aircraft below the following altitudes. 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."

<sup>4</sup> Section 91.319(a)(1) prohibits operating an aircraft with an experimental certificate for any purpose other than that for which the certificate was issued.

<sup>5</sup> The L-39 held a special airworthiness certificate - experimental (for use as an exhibition aircraft). Exh. A-6.

his operations, respondent failed to make radio calls on the Unicom radio frequency and he operated below the minimum prescribed altitude for congested areas and open-air assemblies, when not necessary for takeoff or landing.

The Administrator contended that, on June 6, 2009, respondent conducted another high-speed, low altitude pass. The complaint stated respondent announced his intent to do a fly-by on the Unicom radio frequency, but gave no information regarding his location or distance from the airport. With regard to the flight on June 27, 2009, the complaint alleged respondent again made a pass at an altitude below 100 feet above the ground. During this pass, respondent allegedly operated less than 100 feet laterally from a glider on short final.

Respondent appealed the order and the case proceeded to hearing. At the hearing held on March 30-31, 2011, the Administrator presented his case through six witnesses; four of whom were present at Marion Municipal Airport and observed respondent's conduct.

#### May 30, 2009 flight

James Sayers, a certified flight instructor, testified he was monitoring a student pilot at the time of the incident. He stated respondent made a high-speed, low-altitude pass, during which the L-39's landing gear and flaps were up.

James Behrends, who was conducting towing operations for the Central Ohio Soaring Club (COSA), also saw respondent make a high speed, low-altitude pass on that day. Dr. Behrends stated approximately 15 members of COSA were gathered on the adjacent runway during the pass.

In response to the Administrator's witnesses, respondent testified on his own behalf. Regarding the allegation that he failed to yield right of way to the tow ship, respondent stated he overtook the tow ship but maintained a separation of approximately 500 feet between his L-39 and the tow ship at all times. Tr. at 230. Respondent further testified as he approached the airport intending to land, he was forced to perform a go-around when the student pilot unexpectedly turned back onto the runway.

June 6, 2009 flight

On June 6, 2009, Dr. Behrends again saw respondent make high speed, low-altitude pass. Tr. at 74-75. Respondent, on the other hand, stated he did not fly the L-39 at all on June 6, 2009. In support of his assertion, respondent noted his logbook did not have a record of any flights on June 6, 2009. See Exh. R-13.

June 27, 2009 flight

Patrick Roberge, a glider pilot operating at Marion Municipal Airport, testified respondent made a low-altitude pass

less than 100 feet from his glider. He noted turbulence from respondent's fly-by buffeted his glider while he was trying to land and forced him to land short.<sup>6</sup> Another glider operator in the area, Phillip Pepin, witnessed the L-39 in close proximity to Mr. Roberge's glider.

Respondent testified on June 27, 2009, he was forced to do a go-around when Mr. Roberge's glider appeared, according to respondent, without warning. Respondent claimed he maintained a distance of approximately 300 feet from the glider during the go-around. During his operations, respondent said he used the Unicom frequency to announce his intentions, and Mr. Roberge failed to use the Unicom frequency to advise others of his location. Respondent was startled and upset when the glider appeared without notice. In support of this testimony, respondent introduced into evidence the National Aeronautics and Space Administration (NASA) report he filed, which detailed the incident.<sup>7</sup>

#### Operating Limitations

The Administrator also presented evidence and opinion testimony concerning the L-39's operating limitations, through

---

<sup>6</sup> Mr. Roberge testified he used the Unicom frequency to announce his approach and intention to land on the grass runway. Tr. at 94.

<sup>7</sup> Tr. at 241; Exh. R-17.

two FAA aviation safety inspectors. Inspector Randy Poropatich stated the L-39's certificate was for "exhibition purposes only" and noted there were no air shows or exhibitions near Marion County Airport on the dates in question.<sup>8</sup> Accordingly, Inspector Poropatich opined that respondent's operation of the aircraft exceeded the applicable operating limitations.

Following the hearing, the law judge issued an oral initial decision in which he determined the Administrator fulfilled the burden of proving the alleged violations. The law judge found respondent's high speed, low-altitude operations were intentional fly-bys, rather than go-arounds. The law judge held respondent operated below the minimum prescribed altitude for open-air assemblies and congested areas. Lastly, the law judge found respondent operations violated the L-39's operating limitations.

Respondent raises three issues on appeal. He asserts the law judge's factual findings were not supported by a preponderance of evidence, the law judge's conclusions were not made in accordance with the requirements of § 91.309(a)(4),<sup>9</sup> and

---

<sup>8</sup> Tr. at 137, 146. See also testimony of Inspector Dennis Garcia, who stated it "appeared that the aircraft was being used for pleasure instead of actually being exhibited." Tr. at 194.

<sup>9</sup> Section 91.309(a)(4) states, "[i]f a control tower does not exist or is not in operation, the pilot in command must notify the FAA flight service station serving that controlled airspace before conducting any towing operations in that airspace."

the law judge committed prejudicial error by excluding testimony that would have corroborated respondent's testimony and defense.

At the hearing, respondent introduced a copy of a voluntary report he filed with NASA, pursuant to the FAA's Aviation Safety Reporting Program (ASRP),<sup>10</sup> for the June 27, 2009 flight. Respondent filed his report in a timely manner. Exh. R-17 (ASRP submission received July 2, 2009). The law judge's oral initial decision failed to address respondent's claim that he was entitled to a waiver of sanction under the ASRP. We remand the case, in part, for the law judge to evaluate the evidence regarding waiver of sanction and clearly explain whether respondent carried his burden of proof regarding the four requirements of the ASRP. In particular, we note credibility is a key element in determining whether respondent's actions were inadvertent and not deliberate. Accordingly, "the law judge must

---

<sup>10</sup> Under the ASRP, the Administrator may waive the imposition of a sanction, despite the finding of a regulatory violation, as long as certain other requirements are satisfied. Aviation Safety Reporting Program, Advisory Circular 00-46D at ¶ 9c (February 26, 1997). The Program involves filing a report with the NASA, which may obviate the imposition of a sanction where (1) the violation was inadvertent and not deliberate; (2) the violation did not involve a criminal offense, accident, or action under at 49 U.S.C. § 44709 which discloses a lack of qualification or competency; (3) the person has not been found in any prior FAA enforcement action to have committed a violation of 49 U.S.C. Subtitle VII or any regulatory violation for the past 5 years; and (4) the person completes and mails a written report of the incident to NASA within 10 days of the violation.

make specific findings as to whether respondent's testimony was credible concerning the deliberateness of the violation."<sup>11</sup> We recently have indicated law judges should analyze this issue in light of the respondent's testimony or other evidence that may indicate either inadvertence or deliberateness.<sup>12</sup>

Respondent also asserts the law judge committed prejudicial error by excluding testimony that would have corroborated his testimony and defense. To corroborate his testimony concerning the May 30 and June 27, 2009 flights, Respondent sought to admit the depositions of two pilots who had similar encounters with COSA gliders. Respondent proffered that on separate occasions two other pilots, Michael Osborne and Wayne Sherman, experienced unannounced gliders in their flight path, which forced each of them to perform a go-around. Tr. at 275. We have long held law judges have significant discretion in overseeing testimony and evidence at hearings, and we typically review our law judges' evidentiary rulings under an abuse of discretion standard, after a party can show that such a ruling prejudiced him or her.<sup>13</sup> In

---

<sup>11</sup> Administrator v. Ustad, NTSB Order No. EA-5578 at 8 (2011).

<sup>12</sup> Administrator v. Ricotta, NTSB Order No. EA-5519 (2010).

<sup>13</sup> Administrator v. Mize, NTSB Order No. EA-5579 at 7-8 (2011); see also, Administrator v. Giffin, NTSB Order No. EA-5390 at 12 (2008) (citing Administrator v. Bennett, NTSB Order No. EA-5258 (2006)). We will not overturn a law judge's evidentiary ruling unless we determine that the ruling was an abuse of discretion. See, e.g., Administrator v. Martz, NTSB Order No. EA-5352

this case we believe the law judge's exclusion prejudiced respondent. Statements from other pilots, who were forced to perform go-arounds when unexpectedly encountering COSA gliders, could have corroborated respondent's testimony and affected the law judge's credibility determinations on this issue. We find the passage of time between the incidents detailed in the deposition transcripts and the incidents in question goes to the weight of the evidence, rather than its admissibility.

Therefore, in this instance, we find the law judge abused his discretion in excluding this evidence. On remand, the law judge should consider this excluded evidence and determine the weight to afford the evidence as it applies to respondent's defense and its applicability, if any, to the resolution of whether respondent's actions were inadvertent and not deliberate under ASRP.

Lastly, the law judge found respondent operated L-39 in a manner inconsistent with the aircraft's operating limitations. However, the law judge failed to make the necessary credibility

---

(..continued)  
(2008); Administrator v. Zink, NTSB Order No. EA-5262 (2006); Administrator v. Van Dyke, NTSB Order No. EA-4883 (2001); Lackey v. FAA, 386 Fed. Appx. 689, 2010 WL 2781583 (9th Cir. 2010). Cf. Administrator v. Ferguson, 352 Fed. Appx. 192, 2009 WL 3747426 (9th Cir. 2009) (holding that law judge erred in curtailing the cross-examination of FAA witness, because the witness was central to the Administrator's case and the ruling was therefore prejudicial).

determinations regarding this matter. Inspector Garcia opined that respondent violated the L-39's type certificate because respondent failed to exhibit the aircraft, as required by the experimental certificate for exhibition purposes. Tr. at 199–201. Respondent testified, however, that he exhibited the L-39 at three separate air shows. Tr. at 242. Respondent asserted these air shows fulfilled the requirement to exhibit the L-39. Additionally, respondent contends he was conducting proficiency flights on the dates in question, which were permissible under the aircraft's type certificate. By Inspector Garcia's own admission, respondent could have undertaken the flights at issue for the purposes of maintaining proficiency, without violating 14 C. F. R. § 91.319(a)(1). Tr. at 198, 203. Because this issue turns on conflicting testimony, we remand the case to the law judge for further explanation and clarification. The law judge should make explicit credibility determinations regarding the conflicting testimony concerning whether respondent exhibited the aircraft as required by its type certificate. Likewise, even if the law judge finds respondent did not exhibit the aircraft as he testified, the law judge should determine if respondent was conducting proficiency flights in accordance with the aircraft's type certificate.

**ACCORDINGLY, IT IS ORDERED THAT:**

This case is remanded to the law judge for further proceedings consistent with this opinion and order.

HERSMAN, Chairman, HART, Vice Chairman, and SUMWALT, ROSEKIND, and WEENER, Members of the Board, concurred in the above opinion and order.

UNITED STATES OF AMERICA  
NATIONAL TRANSPORTATION SAFETY BOARD  
OFFICE OF ADMINISTRATIVE LAW JUDGES

\* \* \* \* \*

In the matter of: \*

J. RANDOLPH BABBITT, \*  
ADMINISTRATOR, \*  
Federal Aviation Administration, \*

Complainant, \*

v. \*

Docket No.: SE-18995  
JUDGE FOWLER

PAUL D. COLE, \*

Respondent. \*

\* \* \* \* \*

Ohio Court of Appeals  
Franklin County Courthouse  
Courtroom 23-A  
373 S. High Street  
Columbus, Ohio 43215

Thursday,  
March 31, 2011

The above-entitled matter came on for hearing, pursuant  
to Notice, at 9:48 a.m.

BEFORE: WILLIAM E. FOWLER, JR.,  
Chief Administrative Law Judge

## APPEARANCES:

On behalf of the Administrator:

KATE BARBER, Esq.  
Federal Aviation Administration  
Great Lakes Region  
Office of the Chief Counsel  
2300 East Devon Avenue  
Des Plaines, Illinois 60018  
(847) 294-7862

On behalf of the Respondent:

BRIAN S. SULLIVAN, Esq.  
Dinsmore & Shohl  
1900 Chemed Center  
255 East Fifth Street  
Cincinnati, Ohio 45202  
(513) 977-8233

I N D E X

<u>ITEM</u>	<u>PAGE</u>
Oral Initial Decision and Order	314
Order	326

<u>WITNESSES</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
(None.)				

E X H I B I T SEXHIBIT NUMBERMARKEDRECEIVED

(None.)



1 complainant in a proceeding of this type, was also very ably  
2 represented by Kate Barber, Esquire of the Regional Counsel's  
3 Office, Great Lakes Region, of the Federal Aviation  
4 Administration.

5 Both parties have been afforded the opportunity to offer  
6 evidence, to call, examine and cross-examine witnesses in behalf  
7 of their respective clients. In addition, the parties were  
8 afforded the opportunity to make final argument in support of  
9 their respective positions.

10 I have reviewed the testimony and evidence that's been  
11 adduced during the course of this proceeding. On review, I have  
12 taken due notice of the fact the Administrator has come forth with  
13 6 witnesses, and upwards of 8 exhibits. The Respondent has had 2  
14 witnesses, including the Respondent himself, and has adduced in  
15 the neighborhood of 18 documentary exhibits, all duly admitted  
16 into the hearing record as it is presently constituted.

17 We are here in this proceeding because of flights  
18 Respondent Cole made on May 30th, June 6th, and June 27th in the  
19 vicinity of the Marion County Municipal Airport. The  
20 Administrator has come forth with a substantial complaint here of  
21 25 numbered paragraphs setting forth the allegations, facts and  
22 charges pertaining to Respondent Cole.

23 As you all remembered, he acquired a very attractive  
24 high-speed aircraft, which we have a picture of in the record,  
25 recently. Mr. Cole is a very experienced ATP-rated pilot, he

1 formerly ran an aviation business, and has thousands of hours, in  
2 excess of 18,000 hours -- been flying since the early '70s, I  
3 believe his testimony was -- and he has been classified, by  
4 several witnesses here, as truly a professional pilot in all  
5 respects. And it makes you wonder, why what occurred on the dates  
6 of May 30th, June 6th, June 27th where Respondent's operation of  
7 his L-39 aircraft was concerned.

8           The Administrator has come forth with a very well and  
9 validly premised case. As I stated, I have reviewed the testimony  
10 and the documentary exhibits and -- it is my conclusion and final  
11 determination that the Administrator has proven very validly, by  
12 reliable, probative and substantial evidence, everything that the  
13 Administrator has set forth in his 25 numbered paragraphs, which  
14 contain and set forth the Administrator's Order of Suspension.

15           Of the six witnesses the Administrator has had testify, they  
16 all testified very voluminously and in depth. Four of these  
17 witnesses were eyewitnesses that saw what occurred on May 30th,  
18 June 6th, and June 27th, 2009, they saw and they have testified  
19 accordingly.

20           There are overtones here, of friction between the  
21 Respondent and the Central Ohio Soaring Club, which operated in,  
22 on or about the Marion, Ohio, Marion Municipal Airport. And as  
23 one of the Administrator's witnesses said -- I believe it was  
24 Dr. Behrends, who is a dentist by occupation, but also a pilot and  
25 an eyewitness as to what occurred on May 30th, he said this flight

1 on May 30th was a harassment. I asked him what harassment and  
2 why, and he went into in depth as to the friction, Dr. Behrends,  
3 being president of the Central Ohio Soaring Club, the friction  
4 that existed during this time between the Respondent and his  
5 flights and the glider operations of the Soaring Club.  
6 Respondent's position was that the FAA or the club didn't give due  
7 notice in advance that there were going to be glider operations,  
8 so that other pilots in the area would be forewarned, so to speak,  
9 about these glider operations. According to Dr. Behrends, the  
10 situation has improved somewhat, recently, but he gave this reason  
11 for some of the flights of Respondent, which you all know by these  
12 four eyewitnesses of the Administrator: Witness Sayers, Witness  
13 Behrends, that I just mentioned, Witness Roberge, Witness Pepin,  
14 all of these witnesses testified to the nature of these flights of  
15 the Respondent during this period of time and as to why we are  
16 here in this proceeding. All of them testified to the high speed,  
17 low altitude there were -- many occasions of altitudes of  
18 Respondent's plane below 100 feet over Runway 25, or over the  
19 general terrain of the Marion Municipal Airport.

20 I cannot reject the vivid and very illustrative  
21 testimony of these four eyewitnesses -- Sayers, Behrends, Pepin,  
22 and Roberge -- as to what they saw and what they testified so  
23 profusely about on the aforesaid date of May 30, 2009.

24 So what I am saying, ladies and gentlemen, I believe the  
25 Administrator certainly was very validly premised in bringing this

1 Order of Suspension, which contains 25 numbered paragraphs. It is  
2 my determination and final conclusion that the Administrator has  
3 proven, by a reasonable amount of the reliable and probative and  
4 substantial evidence, all of these allegations set forth.

5           The one section here, I believe it is paragraph 17,  
6 which encompassed the testimony, of Dr. Behrends, that he could  
7 not positively identify or say that on June 6th that Respondent  
8 Cole was the pilot of this aircraft that was engaging in these  
9 reckless maneuvers, but he was very familiar with the plane. He  
10 identified the plane very clearly while he was on the stand under  
11 oath he said he could not remember clearly if Respondent Cole was  
12 the pilot, but by the plane, which he knew -- he was well  
13 acquainted with the plane and its appearance, its red and white  
14 colors, and he had seen it on innumerable occasions before, as had  
15 all the other Administrator's witnesses -- he had no doubt that  
16 the Respondent was the pilot on June 6th when the plane made a low  
17 pass approximately 100 feet over the surface of Runway 25 of the  
18 airport.

19           So that, ladies and gentlemen, there can be no doubt,  
20 based on the evidence and testimony here, about the validity of  
21 the Administrator's case. The Administrator's witnesses and  
22 documentary exhibits have exhibited that accordingly.

23           Respondent has come forth with his own testimony and the  
24 testimony of the only other witness besides the Respondent  
25 himself, Richard Hess, who is an exceedingly experienced pilot,

1 with an international reputation. To deem that he had a wealth of  
2 expertise where aviation is concerned in aviation operations, I  
3 think would be an understatement. This was the counterbalance I  
4 would deem to the Administrator's case.

5           Witness Hess, who as I just mentioned is probably the  
6 most experienced witness, and we've had a number of them here on  
7 both sides of this case, but Richard Hess is probably, aviation-  
8 wise, the most experienced. He could find very little wrong, if  
9 anything in these flights on May 30th, June 6th, and June 27th,  
10 2009. In fact, as Witness Sayers, the first witness on behalf of  
11 the Administrator, testified, that he was involved in a towing  
12 operation and Respondent flew over the aircraft being towed and a  
13 student pilot was in the vicinity of the runway -- I may have  
14 misspoke myself. It was Witness Sayers who testified that he was  
15 with a student pilot in the vicinity of the runway landing. The  
16 student was involved in touch-and-go landings, that the  
17 Respondent, Paul D. Cole's aircraft came dangerously close, below  
18 100 feet of the student pilot.

19           The other eyewitnesses of the Administrator have  
20 similarly testified about different aspects of operations. It was  
21 Dr. Behrends who was involved in a towing operation where there  
22 was a Cessna 150 airplane that was involved in this towing  
23 operation and he is one of the eyewitnesses, and his testimony was  
24 that he heard the L-39 aircraft announce his approach to the  
25 airport. The time there were at least, the witness's testimony

1 was, 15 people out on the ground here at the airport. And the  
2 Administrator's position is that this constituted an open-air  
3 assembly and Respondent flew dangerously close to these people.  
4 About 100 feet altitude the Respondent flew his L-39 aircraft over  
5 Runway 25. It was another high-speed pass as the Respondent had  
6 done on June 5th and June 6th.

7           You may recall Witness Roberge testify voluminously that  
8 he was flying a glider on June 27, 2009, and Respondent's aircraft  
9 made one of these high-speed low passes, so close to him, his  
10 testimony was Witness Roberge's aircraft was buffeted, jarred by  
11 the turbulence from Respondent's aircraft as it passed and made  
12 this high-speed low pass.

13           We've had an amount of testimony concerning the  
14 certification of the L-39 aircraft recently acquired by the  
15 Respondent, and its certification, the Administrator has certainly  
16 proven during the course of this proceeding. The operation of  
17 this L-39 aircraft was only supposed to be for exhibition  
18 purposes. Respondent has testified and put on evidence that he  
19 did utilize the aircraft for exhibition purposes, but it was prior  
20 to May 30, 2009, and one time his testimony was, in Lakeland,  
21 Florida, and another time it was in Mansfield, which is in the  
22 overall vicinity of the Marion County Municipal Airport. The  
23 certification of this airplane, L-39, was to be deployed for  
24 exhibition purposes only. There's no way these flights that I  
25 keep going over, May 30th, June 6th, and June 27th, could be

1 deemed to be exhibition purposes. There is an allegation here by  
2 one of the Administrator's eyewitnesses that before he landed, the  
3 Respondent made a go around, in the manner of an acrobatic  
4 maneuver.

5           Witness Hess disputes this on behalf of the Respondent,  
6 Witness Hess said he reviewed all of these flights, and he could  
7 find nothing out of order, so to speak, or violative of any of the  
8 Federal Aviation Regulations. To sum his testimony up, he could  
9 find no fault with Respondent's operations.

10           While I was impressed by his testimony, I do not think  
11 it overweighed or overshadowed, based on the weight of the  
12 evidence, of the Administrator's case. The Administrator's case  
13 in totality, as I stated at the outset, the Administrator has  
14 successfully proven, by a fair and reasonable preponderance of the  
15 evidence all of the allegations set forth in these 25 relevant  
16 paragraphs in the Order of Suspension.

17           So that to continue, ladies and gentlemen, to continue  
18 here, you obviously get the drift of my determination and final  
19 conclusions. Where the Administrator is concerned, I will now  
20 make the specific findings of fact and conclusions of law based on  
21 the evidence that we have had before us here on this 2-day  
22 proceeding.

23                           FINDINGS OF FACT AND CONCLUSIONS OF LAW

24           Where the Order of Suspension is concerned, the  
25 Respondent has admitted the first four numbered paragraphs, so I

1 will not repeat those.

2 Paragraph 5, I find that on May 30, 2009, based on the  
3 evidence adduced before me, that the Respondent, Paul D. Cole,  
4 operated over the hard surface of Runway 25 at the above-described  
5 airport at an altitude of approximately 100 feet above the ground  
6 and at the speed of at least 200 knots.

7 Paragraph 6, the Respondent has admitted.

8 My finding is, where paragraph 7 is concerned, on May  
9 30th, Respondent started a takeoff roll on Runway 25 at the above-  
10 described airport when a tow ship with a glider in tow was still  
11 approximately 200 feet from the end of Runway 25 on takeoff.  
12 Respondent has admitted that he took off and overtook the tow ship  
13 and glider before they had turned crosswind.

14 It is found that Respondent then performed a wide high-  
15 speed downward based and final with the gear and flaps up.

16 Respondent has admitted, and it is found, that at the  
17 time Respondent was conducting the above operation, a student  
18 pilot was in the pattern for landing. It is admitted the student  
19 pilot landed on Runway 25.

20 It is found that as the student pilot was rolling out on  
21 the runway, Respondent operated off his right side in close  
22 proximity at less than 100 feet above the ground and at a speed of  
23 approximately 250 knots.

24 It is found that after the above-described pass,  
25 Respondent performed an acrobatic maneuver and departed the

1 airport area.

2           It is further found that at no time during the operation  
3 described in paragraphs 7 through 13 above, did the Respondent  
4 make any radio calls on the common radio frequency. In that  
5 connection, there is testimony, not only by the Respondent  
6 himself, but testimony by at least one, possibly two, of the  
7 Administrator's witnesses that they overheard calls made by  
8 Respondent about his contemplating approach to the airport at that  
9 time.

10           It is found that during portions of the above-described  
11 operations, Respondent operated at altitudes below 1,000 feet over  
12 a congested area surrounding Marion Municipal Airport when it was  
13 not necessary for takeoff or landing.

14           It is found on or about June 6, 2009, Respondent again  
15 operated the above-described aircraft, L-39, as pilot-in-command  
16 on a pass over Runway 25 at approximately 100 feet above the  
17 surface of the runway at a speed of approximately 200 knots. This  
18 is what I had stated regarding Dr. Behrends, you may remember, who  
19 was re-called, who could not validly identify the Respondent as a  
20 pilot at that time, but he did say that he very readily  
21 recognized, as he had on previous occasions, this particular  
22 aircraft which he witnessed on June 6, 2009, making a high-speed  
23 pass over Runway 25 at approximately 100 feet above the surface of  
24 the runway.

25           It is found at the time of the above-described

1 operation, the Central Ohio Soaring Club was in operation  
2 operating sailplanes in the airport area.

3 It is found that prior to the above-described operation,  
4 the Respondent made a radio call on the common frequency  
5 announcing his intention to do a flyby.

6 Further it is found that during the above-described  
7 radio call, the Respondent gave no information as to his location  
8 or distance from the airport.

9 It is found that on or about June 27, 2009, Respondent  
10 operated the above-described L-39 aircraft as pilot-in-command on  
11 a pass over Runway 25 at the above-described airport.

12 It is found that Respondent operated his aircraft over  
13 Runway 25 at an altitude below 100 feet above the ground and a  
14 distance of less than 100 feet laterally from a glider on short  
15 final for the grass area adjacent to the runway.

16 We have had live testimony that -- and I'm basing my  
17 finding here on that the above-described operation created  
18 turbulence which affected the glider which was operating at that  
19 day and time on June 27, 2009 in the vicinity of the Marion County  
20 Airport.

21 Further, it is found that on May 30, June 6, and June  
22 27, 2009, Respondent Paul D. Cole operated the above-described  
23 aircraft contrary to the operating limitations issued to  
24 Respondent on April 15, 2009.

25 It is found that Respondent's operations as described

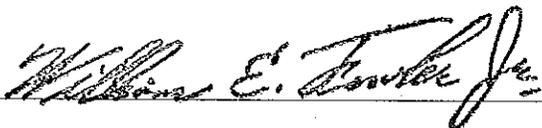


1 affirmed.

2

3

4



5 EDITED ON

WILLIAM E. FOWLER, JR.

6 APRIL 26, 2011

Chief Administrative Law Judge

7

8

APPEAL

9 JUDGE FOWLER: And on the issue of appeal, either party  
10 may appeal the Judge's Oral Initial Decision just issued. The  
11 appellant must file his notice of appeal within 10 days following  
12 the Judge's Oral Initial Decision, issued, on March 31st, 2011.

13 The appellant must file a brief within 50 days setting  
14 forth his objections to the Judge's Oral Initial Decision. The  
15 notice of appeal and the brief shall be sent to the National  
16 Transportation Safety Board, Office of Judges, 490 L'Enfant Plaza  
17 East, SW, Washington, D.C. 20594.

18 If no appeal to the Board from either party is received,  
19 or if the Board of its own volition does not file a motion to  
20 review the Judge's Oral Initial Decision within the time allowed,  
21 then the Judge's Decision shall become final. Timely filing of  
22 such an appeal, however, shall stay the Order as set forth in the  
23 Judge's Decision.

24 (Off the record.)

25 (On the record.)

1           JUDGE FOWLER: Counsel for the Respondent has stated he  
2 does contemplate filing a notice of appeal. He has 10 days to  
3 file a notice of appeal in writing to the Office of Judges,  
4 National Transportation Safety Board, at the address which I just  
5 mentioned, and he has 50 days to file a brief setting forth his  
6 objections on behalf on his client, Mr. Cole, setting forth his  
7 objections to the Judge's Oral Initial Decision.

8           If there's nothing further at this time, declare the  
9 hearing closed. But before we go off the record, I would like to  
10 thank both counsel for their extremely diligent and erudite  
11 efforts on behalf of their respective clients. I would like to  
12 express my thanks to the witnesses, even though they're not here  
13 at the moment. I would like to express my thanks to them for  
14 their help, assistance and cooperation during the course of this  
15 proceeding.

16           Thank you all very much. We stand adjourned.

17           (Whereupon, at 10:33 a.m., the hearing in the above-  
18 entitled matter was adjourned.)

19  
20  
21  
22  
23  
24  
25

CERTIFICATE

This is to certify that the attached proceeding before the  
NATIONAL TRANSPORTATION SAFETY BOARD

IN THE MATTER OF: Paul D. Cole

DOCKET NUMBER: SE-18995

PLACE: Columbus, Ohio

DATE: March 31, 2011

was held according to the record, and that this is the original,  
complete, true and accurate transcript which has been compared to  
the recording accomplished at the hearing.

---

Gary Baldwin  
Official Reporter