SERVED: August 24, 1992

NTSB Order No. EA-3646

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 11th day of August, 1992

THOMAS C. RICHARDS, Administrator, Federal Aviation Administration, Complainant, v. BERNARD J. PICK, and JOHN M. REDIG, Respondents.	)	Dockets SE-10444 SE-10481

OPINION AND ORDER

Respondents have appealed from the oral initial decision of Administrative Law Judge Jerrell R. Davis, issued on May 3, 1990, following an evidentiary hearing.[1] We deny the appeals.[2]

[1]The initial decision, an excerpt from the hearing transcript, is attached.

[2]Respondent Pick is represented by counsel; respondent Redig appears pro se. Although separate appeals were filed, they are substantially similar.

In his decision, the law judge affirmed an order of the Administrator suspending respondents' certificates for 60 days.[3] Respondents were found to have violated Federal Aviation Regulations § § 91.79(b) and 91.9 (14 C.F.R. Part 91)[4] in connection with a March 3, 1989 Cessna Model 150 (N714HH) flight in the vicinity of Shepard Mesa, CA, for the purpose of aerial photography.

Respondents challenge four aspects of the law judge's decision, each of which is addressed below. For the reasons that follow, we find that none of the challenges warrants reversing the initial decision.[5]

1. Was the overflown area a congested area of a city, town, or settlement?

[3]Respondent Pick possessed a commercial pilot certificate (having relinquished an earlier-held flight instructor certificate). Respondent Redig possessed a private pilot certificate.

[4]§ 91.79(b), Minimum safe altitudes; General. (now 91.119(b)) read:

> Except when necessary for takeoff or landing, no person may operate an aircraft below the following altitudes:
>
> (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.

§ 91.9 (now 91.13) provided:

> No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

[5]For ease of analysis, the issues are resolved in an order different from that posed by respondents.

The Administrator urged, and the law judge found (Tr. at 302), that respondents violated § 91.79(b), in that the flight occurred in a congested area. Respondents claim, to the contrary, that Shepard Mesa is not such an area. Although the Administrator's reply inexplicably fails to address this claim, it is without foundation in case law. See, e.g., Administrator v. Harkcom, 35 C.A.B. 934, 937 (1962), and cases cited there. Thus, the Shepard Mesa subdivision -- comprised of a minimum of 20 houses,[6] in an area approximately .5 mi. x .66 mi.[7] -- would qualify as a congested area.

2. Did the aircraft fly below 1,000 feet?

The Administrator offered the testimony of three eyewitnesses, all residents of the Shepard Mesa development.[8] Two testified to making note of the aircraft number N714HH, and all three testified to witnessing various altitudes, all below 1,000 feet.[9] At the hearing, respondents contended that these witnesses either were mistaken or were lying, and on appeal

[6]Tr. at 66. But see Tr. at 29 (50-60 houses), 78 (50 houses), 97 (40-70 houses).

[7]Tr. at 175.

[8]A fourth witness offered hearsay testimony. That testimony was not discussed by the law judge, is not necessary to support the law judge's decision, and will not be further considered. Respondent's objections to it are, therefore, immaterial.

[9]Witness Mease testified to seeing the aircraft at an altitude of 500-600 feet. Witnesses Decker and Williams testified to seeing the aircraft at 100-200 feet. Tr. at 21, 71, 73, and 95.

respondents contend that the inconsistencies in the witnesses' statements made their testimony unreliable. Accordingly, in their view, the law judge's decision is not supported by a preponderance of the evidence.

We disagree. Where the testimony is conflicting, it is incumbent on the law judge to make credibility determinations. Those determinations will not be overruled absent a finding they were arbitrary or capricious, without basis in the record. Administrator v. Smith, 5 NTSB 1560, 1563 (1987). We cannot conclude it error for the law judge to have found that the three percipient witnesses testifying for the Administrator were "the most disinterested and the least self-serving." Tr. at 301.

In their appeals, respondents focus especially on two matters where the eyewitnesses' testimony was conflicting: the altitude of the aircraft; and the time of the incident. As to the former, that the witnesses did not have exactly the same impressions is not surprising, especially when none were pilots, nor were they trained or experienced in measuring distance. The law judge concluded that "the aircraft flew at least as low as 300 feet." Tr. at 301. In so finding, he relied on a subsidiary finding that the witnesses had no difficulty reading the aircraft's identification number with the naked eye (id.), and cited Administrator v. Ingham, 3 NTSB 4063 (1981) for the proposition that the numbers would be illegible at 500 feet.[10]

[10]Although that decision was fact-driven, and the issue

Consistent with their position that the aircraft did not operate below 1,000 feet, respondents instead suggest that the witnesses used binoculars to read the aircraft's identifying number. However, there was evidence to the contrary (e.g., Tr. at 95) and we cannot find the law judge arbitrary or capricious in relying on it.

Citing photographs allegedly taken of Shepard Mesa houses that day (Exhibits R-6 and R-8), respondents also argue that the equipment that was used to take these photos prevents a clear picture at less than 1,200 feet. Tr. at 251.[11] The flaw in this argument, however, is that there is no testimony (expert or otherwise) other than respondent Redig's to support this proposition. Nor is there incontrovertible evidence that the specified equipment actually was used. Thus, resolution of the matter again requires a credibility determination. In view of the contrary evidence in the record, we cannot find it arbitrary or capricious for the law judge to have rejected this explanation.

As to the second matter, one witness testified to seeing respondents' aircraft twice: near 9:30 A.M. and near noon. Respondents offered testimony indicating that the aircraft physically could not have been in the vicinity at 9:30, including

(..continued)
uncontested, we note that respondents do not question the citation's relevance or the underlying proposition.

[11]In his appeal, respondent Pick uses a figure of 1,000 feet. The difference is not material.

the testimony of an employee of the lessor, who stated that the aircraft did not take off until after 11:00 A.M. Tr. at 156. The law judge considered all this evidence and found that the overflights did not occur until around noon.[12]

The law judge properly noted that, in determining the facts, he need not accept testimony in its entirety, instead he is permitted to reconcile conflicting, inconsistent evidence to reach the most reasonable factual conclusions to be drawn from all of the evidence. Accord Administrator v. Crowe, 5 NTSB 1372, 1373 (1986). He did so here in a number of instances, and respondent offers no reason to reject the law judge's conclusions as arbitrary or capricious.[13]

3. Did the Administrator prove that respondent Pick was manipulating the controls or acting as pilot in command at the time(s) of the violation?[14]

There were no witnesses other than respondents as to who was flying the aircraft at particular times. They testified only that respondent Redig, who had hired the aircraft, took off, flew

[12]This was consistent with the testimony of the other two witnesses.

[13]Respondents also contest the finding that the aircraft was operated over, as opposed to around, the mesa. Again, this finding relied on the testimony of the three eyewitnesses and was not without basis in the record. A quick look at the photos (Exhibits C-1 through C-7), including the noted position of the witnesses' houses, suggests that respondents' aircraft would have been over the mesa for its identification number to have been readable by the witnesses. See also Tr. at 18 ("aircraft began circling around and 'round and 'round . . . directly overhead"), and 94, and Exhibit C-10.

[14]Respondent Redig did not include this issue as to himself.

to the Shepard Mesa vicinity and, when positioned to take pictures, turned the controls over to respondent Pick, who was employed by the aircraft's lessor, and was hired by Redig to assist in just this manner.

The law judge held: "on the basis of respondents' testimony, . . . that both of them alternated as pilot of the aircraft during the aerial photography." Tr. at 302. It is clear that the law judge's finding flows from his conclusions that the aircraft violated the altitude restriction of § 91.79(b) and did so over the mesa. These findings, combined with the testimony that Redig took pictures of the mesa houses and respondent Pick flew the aircraft when Redig was taking pictures, amply supported the conclusion that Pick violated the cited regulations.

4. Is a 60-day suspension too harsh a sanction?

Respondent Pick suggests that his voluntary relinquishing of his flight instructor rating should be ample punishment. He cites testimony that he was a competent and careful pilot. Appeal at 9. Respondent Redig states that the hardship endured "is penalty enough." Appeal at 3. These grounds do not present clear and compelling reason to reduce the sanction. See Administrator v. Muzquiz, 2 NTSB 1474 (1975). In fact, the sanction sought by the Administrator and imposed by the law judge is consistent with precedent. See, e.g., Administrator v. Emetrio, 4 NTSB 1126, 1128 (1983) (precedent supports suspensions of 60-120 days for individual incidents of low flight over

congested areas).[15]

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondents' appeals are denied;

2. The 60-day suspension of respondent Pick's commercial pilot and respondent Redig's private pilot certificates shall begin 30 days from the date of service of this order.[16]

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

[15]Respondents are expected to be competent and careful pilots. Being so is no basis to reduce the sanction. Administrator v. Thompson, NTSB Order EA-3247 (1991), at fn. 9 (neither respondent's violation-free record or attitude justifies reduction of the sanction).

[16]For the purposes of this order, respondents must physically surrender their certificates to an appropriate representative of the FAA pursuant to FAR § 61.19(f).