

SERVED: November 22, 1993

NTSB Order No. EA-4020

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 4th day of November, 1993

DAVID R. HINSON,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-11951
v.)	
)	
VAL J. McCOLLOUGH,)	
)	
Respondent.)	
)	

OPINION AND ORDER

Respondent has appealed from an initial decision of Administrative Law Judge Patrick G. Geraghty, issued orally at the conclusion of an evidentiary hearing held on October 22, 1991.¹ By that decision, the law judge affirmed the Administrator's determination that respondent had violated

¹A copy of the decisional order, together with the comments that are incorporated in it by reference, both excerpted from the transcript, is attached.

sections 91.119(c) and 91.13(a) of the Federal Aviation Regulations ("FAR," 14 C.F.R. Part 91) in connection with the operation of a Learjet aircraft on a flight conducted on September 30, 1990, in the vicinity of Cedar Valley Airport, Cedar Valley, Utah.² Additionally, the law judge sustained a 30-day suspension of respondent's airline transport pilot (ATP) certificate, which had been ordered by the Administrator for such alleged FAR violations.³ In rendering his decision, the law judge found that:

Respondent . . . operate[d] his aircraft in a high-speed pass down the entire length of the Cedar Valley Airport at an altitude of about 50 feet AGL [(above ground level)], the airspeed being somewhere between 200 and 300 knots, that such was not necessary for purposes of takeoff or landing or . . . demonstrating an approach -- missed approach, and the area was, in fact, not a suitable area for purposes of landing [and was] admittedly within less than 500

²FAR §§ 91.119(c) and 91.13(a) provide as follows:

"§ 91.119 Minimum safe altitudes: General.

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

* * * * *

(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.

§ 91.13 Careless or reckless operation.

(a) Aircraft operations for the purpose of air navigation. No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another."

³In his original order, the Administrator alleged that respondent had also violated FAR § 91.531(c) and mandated that his ATP certificate be suspended for 60 days. At the hearing, the § 91.531(c) charge was withdrawn and the length of the suspension assessed for the violations remaining at issue was reduced to 30 days. See Tr. 6-7.

feet of people, structures, and vehicles on the surface.⁴

Respondent has posited, both at the hearing and in connection with his appeal, that his operation fell within the exception set forth in the prefatory clause of section 91.119, in that it was performed in connection with a practice landing approach and was, therefore, permissible. On appeal, he contends that the law judge erred in crediting testimony provided by certain witnesses as to his airspeed.⁵ Respondent also maintains that the evidence failed to establish that he could not have landed his aircraft at Cedar Valley Airport had he been forced to do so in an emergency. He further points out that the prefatory clause of section 91.119 does not contain any language requiring a landing site to be "suitable," and argues that the application of that requirement to his operation is violative of his due process rights. Respondent also maintains that another low flight occurred at Cedar Valley Airport on the same day, and

⁴Tr. 195-96.

⁵The evidence concerning airspeed which respondent attacks (as well as evidence relating to the configuration of the aircraft's landing gear, flaps and spoilers) was apparently introduced by the Administrator in an attempt to show that the operation in question was not a legitimate practice approach maneuver, but was, instead, a low altitude "buzzing" of persons in the vicinity of Cedar Valley Airport. See Tr. 172-74. In view of our analysis of this case, ante, it is unnecessary for us to determine whether respondent was conducting a simulated approach or "buzzing" individuals on the surface. We will assume, arguendo, that a practice approach was performed. Thus, matters relating to respondent's airspeed are immaterial to our consideration of his appeal.

contends that it was impermissible for the Administrator to have brought a certificate action against him while failing to bring charges against the pilot of the other flight as well.⁶

The Administrator has submitted a reply brief, in which he urges the Board to affirm the initial decision.

Upon consideration of the briefs of the parties and the entire record, the Board has determined that safety in air commerce or air transportation and the public interest require affirmation of the Administrator's order and the law judge's initial decision. We will, therefore, deny respondent's appeal for the reasons set forth below.

As has been previously noted, we will assume for purposes of this appeal that the operation conducted by respondent at Cedar Valley Airport was a practice landing approach. Under Board precedent, simulated landing maneuvers are treated as landings

⁶In addition, respondent has asserted that the law judge committed procedural errors at the hearing by: 1) "constantly" interrupting his testimony to ask questions (Respondent's Br. 24-25), and 2) permitting the Administrator to call as a rebuttal witness an individual who could have been called as part of his case-in-chief, with the result being that "respondent could not offer independent evidence to counter any statements of th[at] witness" (id. 25). We find no merit in such contentions. In questioning respondent, the law judge was exercising a legitimate function to fully develop the evidentiary record, and we discern no bias in his performance of that function here. Insofar as respondent's other procedural argument is concerned, we note that he did not raise any objection at the hearing when the Administrator's rebuttal witness was called, that the witness testified as to matters raised during the presentation of respondent's case-in-chief (which were, thus, subject to rebuttal) and that respondent cross-examined him freely. We do not, therefore, believe that respondent's ability to present his defense to the Administrator's charges was prejudiced by the introduction of that witness.

for purposes of determining whether the exception found in the prefatory clause of section 91.119 applies to a particular flight.⁷ We have long held, however, that the exception is inapplicable in cases where an unsuitable landing site is used.⁸

Thus, in Administrator v. Hart, NTSB Order EA-2884 (1989), we observed that the prefatory clause exception did not apply to a practice rejected landing performed by the pilot of a Lockheed Electra at a 2,000-foot-long by 100-foot-wide grass-dirt-sod airstrip which was admittedly not suitable for a normal landing by that aircraft. The Board, in Hart, specifically rejected the notion that a low flight charge may be vitiated "solely by the fact that [a] practice low approach is made to 'a' designated landing area," and opined that "practice landings at landing areas where an actual landing would not be permissible are subject to all of the prohibitions of . . . [the regulation] in respect to altitude."⁹

⁷See Administrator v. Johnson, 2 NTSB 1598, 1599 (1975), involving the application of FAR § 91.79, which was recently recodified verbatim as § 91.119.

⁸See, e.g., Administrator v. Cobb and O'Connor, 3 NTSB 98 (1977) (landing of fixed wing aircraft on taxiway found in violation of § 91.79), affirmed sub nom. Cobb v. Nat'l Transp. Safety Bd., 572 F.2d 202 (9th Cir 1977); Administrator v. Bellows, 3 NTSB 3844 (1981) (landing of floatplane under bridge found in violation of § 91.79), affirmed sub nom. Bellows v. Helms, 688 F.2d 845 (9th Cir 1982); and Administrator v. Essery, 5 NTSB 609 (1985) (landing of helicopter at downtown intersection found in violation of § 91.79), affirmed as to determination of regulatory violation but reversed as to sanction sub nom. Essery v. Dep't of Transp., 857 F.2d 1286 (1988).

⁹NTSB Order EA-2884 at 8. Clearly, under Hart and the other Board decisions cited at n.8, supra, the suitability of a landing site must be evaluated in light of its appropriateness for a

In the instant case, it is undisputed that the runway at Cedar Valley Airport has a gravel surface and that respondent's aircraft was not equipped for landings on gravel. It therefore follows that the runway was unsuitable for a landing by that aircraft. Consequently, we must find that the exception set forth in the prefatory clause of section 91.119 does not apply to respondent's practice approach maneuver. As it is also uncontroverted that respondent's aircraft overflowed the runway at an altitude well below 500 feet AGL and that there were persons, buildings and aircraft within 500 feet of the runway at the time, we concur with the law judge that the FAR violations alleged by the Administrator have been established.¹⁰

In arriving at the above determination, we have noted respondent's contention that, as no landing site suitability requirement appears in the language of the prefatory clause of section 91.119, the imposition of that requirement upon his operation deprived him of due process. We must, however, point out that the United States Court of Appeals for the Ninth

(..continued)

landing under normal conditions, and not on the basis of whether it could accommodate an emergency landing.

¹⁰In this regard, the Board notes the Administrator's FAR § 91.13(a) charge was residual to his allegation of a § 91.119(c) violation. See Tr. 175. We have previously indicated that the establishment of a violation of an operational FAR provision such as § 91.119(c) warrants a finding of a § 91.13(a) violation on a derivative basis without further proof of carelessness. See, e.g., Administrator v. Cory, NTSB Order EA-2767 at 6 (1988); Administrator v. Dutton, NTSB Order EA-3204 at 6-7 (1990); Administrator v. Thompson, NTSB Order EA-3247 at 5 n.7 (1991); Administrator v. Haney, NTSB Order EA-3832 at 4-5 (1993).

Circuit expressly considered and rejected such an argument in Essery v. Department of Transportation, *supra*, holding that the suitability requirement represented a reasonable administrative interpretation of the low flight regulation and that previous decisions setting forth that requirement provided airmen with adequate notice of its applicability.¹¹

The Board is also unpersuaded by respondent's suggestion that the Administrator should be barred from bringing an enforcement action against him because he failed to proceed similarly against another pilot who conducted a low flight at Cedar Valley Airport on the same day. In this regard, we note that we have previously held that "[t]he selection of which cases to prosecute, and the manner in which they are prosecuted, are matters within the discretion of the Administrator, acting pursuant to his statutory authority,"¹² and that our jurisdiction in certificate enforcement actions "extends only to the question of whether safety and the public interest require affirmation of the Administrator's order"¹³ and "not . . . to an evaluation of the procedural steps leading to the issuance of that order except when a question arises concerning the Board's own stale complaint rule."¹⁴

¹¹857 F.2d at 1289-90.

¹²Administrator v. Greiner, 1 NTSB 874, 877 (1970).

¹³Id.

¹⁴Administrator v. Hunt, 5 NTSB 2314, 2316 (1987).

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;
2. The Administrator's order and the law judge's initial decision are affirmed; and
3. The 30-day suspension of respondent's ATP certificate shall begin 30 days from the date of service of this order.¹⁵

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

¹⁵For the purposes of this order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to FAR § 61.19(f).