

91.119(c) and 91.13(a) by flying too low over neighboring property and chicken houses.² The law judge dismissed the Administrator's charge that respondent violated § 91.119(a), and, accordingly, halved the sanction proposed by the Administrator. We deny respondent's appeal.³ Initially, however, we address various procedural matters.

To his appeal, respondent attached a number of documents, none of which was introduced or admitted into the record at the hearing. The Administrator has moved to strike these attachments

²§ 91.119(c), Minimum safe altitudes; General, reads:

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(a) provides:

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

One of respondent's arguments on appeal is that the law judge erred in affirming the § 91.13(a) charge. Respondent misconstrues the law. Administrator v. Reynolds, 4 NTSB 240, 242 (1982), and Administrator v. Carman, 5 NTSB 1271 (1986), cited by respondent to support his contention that more than low flight must be shown to affirm a § 91.13(a) charge, are applicable only to helicopter operations (see Administrator v. Erickson & Nehez, NTSB Order EA-3869 (1993)). It is well established that a § 91.13(a) violation accompanies any fixed wing aircraft operational violation, of which low flight is one. Administrator v. Haney, NTSB Order EA-3832 (1993). The § 91.13(a) violation is, however, residual (derivative) and, thus, has no effect on sanction.

³The Administrator did not appeal dismissal of the § 91.119(a) charge or reduction of the sanction.

(Reply at footnote 9), and we grant that request. The material is untimely new evidence, and there is no showing it satisfies our rules for considering new evidence on appeal (e.g., that this material was not available at the hearing). See 49 C.F.R. 821.50(c). (Respondent's earlier representation of himself is not a basis to waive our requirements here. See Administrator v. Dudek, 4 NTSB 385 (1982), especially footnote 5.)

The Administrator has also moved to strike respondent's response to the Administrator's reply brief. As the Administrator correctly notes, this brief is not permitted by our rules, and leave of the Board to file the brief was not obtained (see 49 C.F.R. 821.48(e)). Thus, the brief constitutes an impermissible reply to a reply.

The Administrator also filed an unauthorized pleading (see Administrator's Response to Respondent's Answer to Motion to Strike), which we will strike on our own motion. The Board is capable of reaching an informed decision in this case without the parties' additional pleadings.⁴

On a different procedural note, respondent argues that testimony at the hearing was "tainted" by the law judge's

⁴Respondent alleges that a Board employee informed him that he could file a reply to a reply, provided it was filed within 15 days of the reply brief, although he does not identify the individual who allegedly provided this information. We have no evidence other than respondent's pleading that such a statement was made. Even if such a misstatement were made, it would not alter the Board's rules and would be contrary to long standing administrative practice.

admission into evidence of a videotape containing scenes of respondent's flight taken primarily by respondent's neighbor, Mrs. Holston, a witness for the Administrator in this case, and given to the FAA at its request.⁵ Respondent also argues, with reference to the videotape, that it was error for the law judge to direct its withdrawal without permitting respondent the opportunity to disclose the "misleading and contrived nature of said videotape."

We find no error in the law judge's approach. There is no doubt from the transcript that the law judge was well aware of respondent's concern that the videotape, in part due to the use of a zoom feature, did not accurately portray the aircraft's altitude. Reading the transcript, it is clear that the tape's perception errors were obvious. Moreover, the law judge directed withdrawal of the exhibit as a result of respondent's continuing challenges.

In these circumstances, there was no abuse of discretion in the law judge's declining to admit the video and declining to allow extensive testimony about what it could or could not prove.⁶ And, the initial decision (Tr. at 252-257) indicates that the law judge based her decision on the hearing testimony of

⁵Mrs. Holston took most of the videotape. Tr. at 38-39. And see discussion, infra.

⁶It is not clear that the Administrator offered the video to prove the aircraft's altitude as opposed to proving the existence of the incident and identity of the aircraft.

the witnesses.⁷ We see no ground to conclude that she relied on anything other than evidence in the record, and there is no question but that she was fully capable of disregarding the videotape, despite having seen it. Thus, contrary to respondent's claim, we do not find that the remainder of the hearing was "tainted" either by the initial admission and viewing of the videotape or its later withdrawal.

Respondent's remaining arguments relate to the reliability of the testimony of the Administrator's percipient witnesses. Respondent claims that Mr. Phillips and Mr. & Mrs. Holston perjured themselves at the hearing, and that the law judge relied on their perjured testimony. Respondent argues, in part, that the videotape's lack of proper perspective is evidence of this perjury, but we cannot agree. In fact, Mrs. Holston readily acknowledged that she had used the zoom feature (Tr. at 25), and recognized her filming difficulties generally, as well as errors of perspective seen on the videotape. Similarly, the Holstons' failure to mention that, when Mr. Holston took the last few seconds of tape, the zoom setting apparently was changed, is not a convincing reason to disregard all their testimony or to order

⁷We disagree with respondent's reliance on a discussion the law judge had with the FAA inspector regarding what he saw on the video. Tr. at 163. That discussion does not warrant a conclusion that the law judge relied on the excluded video in reaching her decision and the text of her actual decision indicates otherwise. The Administrator's four percipient witnesses testified that respondent made passes over their property at below and above 500 feet, but that certain passes ranged from 150 to 400 feet. Tr. at 38, 73, 80, 88 and 108. The law judge found that the "estimate of 300 to 400 feet is probably closer to the actual height." Tr. at 255.

a new hearing, especially when they were asked no questions regarding the matter.

Respondent challenges Mr. Phillips' testimony on the grounds that, although he testified that he had been a pilot and the law judge appeared to give special credence to his testimony for this reason, FAA records do not support this claim. The Administrator responded by noting that FAA records might not be adequate to confirm or deny the claim. In any case, testimony from this witness is confirmed by and consistent with that of three other eyewitnesses. The law judge did not rely solely on his testimony.

Respondent further argues that an ongoing dispute amongst the neighbors regarding respondent's plans for an airstrip on his property and its potential effect on nearby chicken raising operations was not fully developed on the record but also supports a perjury finding and he claims that, without the video, the low flight evidence is inconclusive and conflicting and, therefore, the complaint must be dismissed. In reviewing the testimony of the Administrator's eyewitnesses in light of respondent's alternate version of events and his supporting witnesses, the law judge was aware of the zoning dispute and, therefore, was able to take this into consideration in reaching her decision and making the credibility determinations she was required to make -- credibility determinations that respondent has not convinced us should be reversed.⁸ There was more than

⁸To the extent that the zoning dispute shows bias of the

adequate reliable testimony from the Administrator's four eyewitnesses on which to base a low flight finding.

Administrator v. Klock, NTSB Order EA-3045 (1989) at 4 (law judge's credibility choices "are not vulnerable to reversal on appeal simply because respondent believes that more probable explanations...were put forth...").

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's motions to strike are granted, and the documents attached to respondent's brief on appeal are stricken, as is his response to the Administrator's reply brief;
2. The Administrator's response to respondent's answer to the Administrator's motion to strike is stricken;
3. Respondent's appeal is denied; and
4. The 60-day suspension of respondent's private pilot certificate shall begin 30 days from the date of service of this order.⁹

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

(..continued)

Administrator's eyewitnesses, we note that information about the dispute was volunteered and readily admitted by Mrs. Holston.

⁹For the purposes of this order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to FAR § 61.19(f).