

SERVED: March 24, 2008

NTSB Order No. EA-5375

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 20th day of March, 2008

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ROBERT A. STURGELL,)	
Acting Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-17904
v.)	
)	
RANDALL K. BOZARTH,)	
)	
Respondent.)	
)	
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OPINION AND ORDER

Respondent has appealed from the oral initial decision of Administrative Law Judge Patrick G. Geraghty, issued on June 27, 2007, after an evidentiary hearing.¹ The Administrator's November 16, 2006 order, which functions as the complaint in

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

this case, suspended respondent's commercial pilot certificate for 180 days, based on alleged violations of the Federal Aviation Regulations (FAR). In particular, the Administrator alleged violations of 14 C.F.R. §§ 91.119(d)² and 91.13(a).³ The law judge affirmed the violations and the sanction. Respondent appeals the law judge's finding that he violated § 91.13(a). We deny respondent's appeal.

On October 19, 2005, respondent was the pilot-in-command of a Hughes HU-369D helicopter, on an overwater flight from Long Beach, California, to Catalina Island. At approximately 2:30 p.m., respondent approached Little Geiger Cove, traveling west into the sun. Respondent was flying lead in a flight of two helicopters, at an altitude of approximately 75 feet above the water. At approximately 200 feet from the beach, respondent pulled up a little to the right, at an angle of more than

² Section 91.119(d) states that, except when necessary for takeoff or landing, no person may operate a helicopter at less than the minimums prescribed in paragraph (b) or (c) of this section unless the operation is conducted without hazard to persons or property on the surface. (Paragraphs (b) and (c) set those minimums, respectively, at 1,000 feet above the highest obstacle within a horizontal radius of 2,000 feet of the aircraft over any congested area of a city, town, or settlement, or over any open air assembly of persons; and, over other than congested areas, 500 feet above the surface, except over open water or sparsely populated areas.)

³ Section 91.13(a) states that no person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

30 degrees, but almost immediately struck power lines on the steep terrain of the island, then rolled to the right in excess of 90 degrees, almost inverted, struck the cliffs, and crashed, almost upside down, on the beach. Respondent was severely injured in the accident, and was unable to attend the hearing. He authorized his attorney to defend him in his absence. The flight carried passengers, but there is no indication in the record of the number of passengers or the extent of any other injuries.⁴

Respondent admitted, in his answer to the complaint, that he was flying the helicopter below 500 feet at the time of the accident, and asserted as an affirmative defense that the "power lines ... were not marked, nor were they readily visible to the pilot, which was the initiating or principal cause of the collision by [the helicopter]." At the hearing, respondent conceded violation of § 91.119(d). Now, on appeal, respondent again concedes that he violated § 91.119(d), and argues only that the Administrator did not prove that his operation of the aircraft was careless or reckless, in violation of § 91.13(a), citing a Civil Aeronautics Board (CAB) case, Arnold W. Rawlinson, 45 CAB 935 (1966).

⁴ However, included in the hearing exhibits was a deposition excerpt from a witness to the accident who testified pursuant to a personal injury lawsuit brought, apparently, by passengers injured in this accident.

In Rawlinson, the respondent operated 50 feet above a lake in a wooded area, in a fixed-wing aircraft, practicing a forced-landing maneuver, and struck power lines when he attempted to fly under them. The predecessor of this agency held that striking power lines was not careless where the wires were neither shown on aeronautical charts nor marked so as to be discernible from the air. The CAB based its decision on the fact that the power lines were not visible or marked and that, therefore, the pilot could not have reasonably known that the power lines existed. As the Administrator points out, however, the alleged violation was not residual to another operational violation as in the instant case. We note also that, in Rawlinson, the CAB specifically found that the respondent there violated no other FAR provision. Therefore, carelessness or recklessness had to be independently proven by a showing of actual or potential endangerment. Here, not only did the Administrator prove the underlying violation of § 91.119(d), respondent has admitted that violation throughout these proceedings.

We have long held that the Administrator proves a charge under § 91.13(a) when an operational violation has been charged and proven.⁵ The Administrator consistently includes a

⁵ See Administrator v. Seyb, NTSB Order No. EA-5024 at 4 (2003); Administrator v. Nix, NTSB Order No. EA-5000 at 3 (2002).

"careless or reckless" charge in his complaints charging violations of operational regulations. This is referred to as a "residual" or "derivative" careless or reckless violation, as opposed to an "independent" careless or reckless violation. The cases that have established this policy are numerous.⁶

Given that the Administrator included the § 91.13(a) charge as a residual violation, based upon the other (§ 91.119(d)) violation, we do not find respondent's argument persuasive. We affirm the findings with regard to the independent operational violation. Therefore, we conclude that respondent's violation of the operational regulation also caused him to violate § 91.13(a).

We deny respondent's appeal, and affirm the law judge's findings that respondent violated §§ 91.119(d) and 91.13(a).

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;
2. The law judge's decision is affirmed; and

⁶ See, e.g., Administrator v. Pierce, NTSB Order No. EA-4965 at 1 n.2 (2002); Administrator v. Richard, NTSB Order No. EA-4223 at 13-14 (1994) ("a residual violation is justified without additional proof when an operational violation has been found"); Administrator v. Pritchett, 7 NTSB 784, n.17 (1991); Administrator v. Dutton, 7 NTSB 521, 523 (1990) ("unexplained violation of an operational regulation ... is tantamount to careless operation") (internal citations omitted).

3. The 180-day suspension of respondent's airman certificate shall begin 30 days after the service date indicated on this opinion and order.⁷

ROSENKER, Chairman, SUMWALT, Vice Chairman, and HERSMAN, HIGGINS, and CHEALANDER, Members of the Board, concurred in the above opinion and order.

⁷ For the purpose of this order, respondent must physically surrender his certificate to a representative of the Federal Aviation Administration pursuant to 14 C.F.R. 61.19(g).

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

* * * * *

In the matter of: *

MARION C. BLAKEY, *
ADMINISTRATOR, *
Federal Aviation Administration *

Complainant, *

v. * Docket No.: SE-17904

JUDGE GERAGHTY

RANDALL K. BOZARTH, *

Respondent. *

* * * * *

U. S. Bankruptcy Court
Dept. 5
Wienberger Courthouse
325 F Street
San Diego, California 92101

Wednesday,
June 27, 2007

The above-entitled matter came on for hearing, pursuant
to notice, at 9:30 a.m.

BEFORE: PATRICK G. GERAGHTY,
Administrative Law Judge

APPEARANCES:

On behalf of the Administrator:

NAOMI TSUDA, ESQ.
Deputy Regional Counsel
Federal Aviation Administration
P. O. Box 92007
Los Angeles, California 90009

On behalf of the Respondent:

CHARLES B. HARRIS, ESQ.
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ORAL INITIAL DECISION AND ORDER

ADMINISTRATIVE LAW JUDGE GERAGHTY: This has been a proceeding before the National Transportation Safety Board on the Appeal of Randall K. Bozarth, hereinafter referred to as Respondent, from an Order of Suspension which seeks to suspend his Commercial Pilot's Certificate for a period of 180 days. The Order of Suspension serves herein as the Complaint and was filed on behalf of the Administrator, Federal Aviation Administration, herein the Complaint, through one of her Staff Counsel of the Western-Pacific Region.

The matter has been heard before this Judge and, as provided by the Board's Rules, I am issuing a Bench Decision in the proceeding.

Pursuant to notice, this mater came on for trial on the 27th of June, 2007 in San Diego, California. The Complainant was represented by one of her Staff Counsel, Naomi Tsuda, Esquire, of the Regional Counsel's Office, Western-Pacific Region. The Respondent was represented by his Counsel, Charles V. Harris, Esquire, of La Mesa, California.

The Parties were afforded the opportunity to offer evidence, to call, examine, and cross-examine witnesses, and to make

1 argument in support of their respective positions.

2 I have considered all the evidence, both oral and
3 documentary, and will restrict myself to a summary of the evidence
4 which leads to the conclusion herein.

5 It is also observed that the Respondent was not present
6 during the proceeding. However, there was a declaration submitted
7 on behalf of the Respondent through his Counsel, which was
8 received as ALJ Exhibit 1, in which the Respondent waived his
9 right to be present and authorized Mr. Harris to proceed to
10 represent him, the Respondent during the course of the proceeding
11 in the absence of the Respondent.

12 AGREEMENTS

13 By pleading, it was agreed there was no dispute as to the
14 allegations contained in Paragraphs 1, 2, and 3 of the Complaint.
15 It was also agreed by pleading that there was no dispute as to the
16 portion of Paragraph 4 which alleges that at the time and date
17 stated in the Complaint, that is, October 19th, 2005, that the
18 aircraft being operated by the Respondent that is a helicopter
19 designated as November 268 Sierra Tango flew at an altitude of
20 below 500 feet. The remainder of that Paragraph is denied.
21 However, the allegations to which it is admitted are taken as
22 having been established for purposes of this decision.

23 DISCUSSION

24 As noted, the Complaint seeks to suspend the Respondent's
25 Commercial Pilot's Certificate for a period of 180 days. That is

1 based upon the allegation that at the time and the place, that is,
2 in the area of Big Geiger Cove and Little Geiger Cove on Catalina
3 Island, Avalon, California, that the Respondent so operated a
4 Hughes helicopter with the designation November 268 Sierra Tango
5 that he so operated as to be in regulatory violation of Sections
6 91.119(d) and 91.13(a) of the Federal Aviation Regulations. The
7 specific provisions will be referred to later as required.

8 Testimony in the case was offered through the testimony of
9 one witness, a Mr. Bruce Campbell, who is an Aviation Safety
10 Inspector, Operations, with the Federal Aviation Administration,
11 located at the Long Beach Flight Standards Office, the FSDO.
12 There was also testimony offered through two joint Exhibits which
13 were received as J-1, which was the Complainant's submission of a
14 deposition of one Mr. Blunt, and also a J-1(a), which is two
15 pages, apparently, from the same deposition which were submitted
16 on behalf of the Respondent by his Counsel, Mr. Harris. I have
17 considered the testimony of Mr. Blunt as recorded in the excerpts
18 from this deposition and I will refer first to the highlights that
19 I gleaned from a review of the Joint Exhibit.

20 In J-1 Mr. Blunt testified that on the dates in question,
21 which was October 19th, 2005, he was in the process of anchoring
22 his sailing boat in Little Geiger Cove at Catalina Island. He had
23 just finished anchoring his boat to the mooring can located in
24 Little Geiger Cove at about two to three o'clock in the afternoon.
25 While he was in the process of doing that, he observed two

1 helicopters to be approaching from the mainland towards Catalina
2 Island in the area of Little Geiger Cove, stating that one
3 helicopter was lower than the other one, that's when it drew his
4 attention because one was flying much lower than the other one,
5 and this was before he even heard them. As the aircraft got
6 closer, he observed the one helicopter as being "very low," and I
7 quote, it was the same helicopter that he later observed to crash,
8 that is, the Hughes helicopter, and he states that it was flying
9 fast and low. In his deposition testimony he indicated that both
10 aircraft, including the very low one, passed either directly over
11 or alongside his boat and the lower helicopter was flying "very
12 low" and "quite fast," and those terms are quotes from the
13 deposition testimony.

14 Mr. Blunt stated that the helicopter was very low for the
15 fact that it was very steep terrain immediately behind him from
16 the beach in the Little Geiger Cove into rising terrain in the
17 direction that the helicopter was flying. That is, the area
18 behind where the Blunt boat was moored consisted of very steep
19 terrain.

20 He observed the low flying helicopter to perform a severe
21 angle of climb well in excess of 30 degrees after it had passed
22 him and encountered the rising terrain. When the helicopter
23 operated by the Respondent went past Mr. Blunt's boat, Mr. Blunt
24 stated that the aircraft was at mast height, which he stated was
25 70 feet to the top of his mast off the water and the aircraft

1 being operated by the Respondent was flying level at a fast rate
2 of speed as it passed Mr. Blunt's, boat at that mast level of 70
3 feet. Mr. Blunt also indicated the sun was behind them and that
4 the pilot, therefore, had the sun in his eyes in the direction
5 that he was operating his helicopter. Mr. Blunt observed the
6 impact of Respondent's helicopter with the wires that were strung
7 across the right to left in the area in which the helicopter was
8 proceeding. After it struck, Mr. Blunt observed actual sparks
9 coming from the strike. He observed one of the wires to be on the
10 right skid of the helicopter. He described the helicopter as
11 rolling over to a 90 degree angle to the right, almost inverted,
12 and at that time it then passed over the headline or headland
13 between Little Geiger Cove and Big Geiger Cove and disappeared
14 into the area of Big Geiger Cove, and, as the deposition proceeds,
15 indicates that, after Mr. Blunt went around the head point after
16 he untied his boat and proceeded over, he observed the helicopter
17 actually crash on the beach on Big Geiger Cove.

18 In Exhibit J-1(a), Mr. Blunt estimated that the distance from
19 the mooring can where he had tied up his boat to the beach in
20 Little Geiger Cove was less than 200 feet. So the rising terrain
21 then occurs, based upon that, as I would draw the inference, is
22 from 200 feet past the mooring can you have the beach and then
23 immediately, as Mr. Blunt testified, steeply rising terrain. So
24 the helicopter was proceeding past Mr. Blunt's boat on this
25 testimony at a quite fast rate of speed and very low, 70 feet,

1 mast level, 200 feet prior to where he would encounter on the
2 beach the rising terrain.

3 That's my understanding of the deposition testimony.

4 Returning then to the testimony of Inspector Campbell, he
5 went to the scene twice. He didn't go immediately after the
6 incident, since he indicated he couldn't get out to the island.
7 However, he did sponsor and it was received into evidence Exhibit
8 A-1, which consists of four different photographs, and he marked
9 on those locations of the power poles and what he testified to as
10 the area in which the strike between the Respondent's helicopter
11 and the power wires had occurred and, also, on Page 3 of Exhibit
12 A-1, the crash site, which as Mr. Blunt testified, appears to be
13 on the beach side immediately over the headland between Little
14 Geiger Cove and Big Geiger Cove.

15 Mr. Campbell testified that he was basing his testimony on
16 reviewing Mr. Blunt's testimony, walking the territory on two
17 occasions, and observing where the power poles appeared to have a
18 splice or repair being made to the wires. He described the two
19 poles and indicating that there were three wires, two poles on
20 each side of the canyon with a T between them to support them with
21 a guide wire and two power poles, indicating that he observed the
22 splices to be to the power line on the ocean side and, also, to
23 the guide wire, and he also testified that the base of the power
24 pole was 240 feet above sea level and the pole to the ground level
25 to the top of the pole was 35 feet, approximately, in his

1 estimate. He estimated that the point where the splice appeared
2 that the height above the ground at that area, which would be, as
3 he testified, was the area of the wire strike on the wire, between
4 40 to 60 feet above ground level.

5 In his opinion, the operation by the Respondent was a
6 reckless operation and he based that upon the testimony that he
7 had reviewed as given by Mr. Blunt, which I've already referenced,
8 the fact that the aircraft was being flown at a fast rate of speed
9 or a high rate of speed at a low altitude, that there were power
10 lines in the area that he struck with his helicopter and, also,
11 that the wires were close to the ground, between 40 to 60 feet,
12 and that, therefore, he was flying in regulatory violation of the
13 Sections of the Federal Aviation Regulations, which I've already
14 referenced. He also referenced that not only the steeply rising
15 terrain, but also that the helicopter was being operated into the
16 sun, which would, of course, affect the pilot's vision.

17 On cross-examination, he acknowledged that there were other
18 sets of wires that were broken, apparently, on the Big Geiger side
19 of Geiger Cove. That would be consistent with Mr. Blunt's
20 description that the helicopter had actually rolled to the right
21 and then disappeared down into the area of Big Geiger Cove,
22 ultimately coming to rest at the crash site. Mr. Campbell, on
23 cross, stated that in his opinion the aircraft was flying too
24 fast, that the pilot was not able to see the wires in his path,
25 and that, therefore, it was a combination of both altitude and

1 speed with the sun obscuring his vision that, in his view, was
2 reckless. He also conceded that the wires were not, in fact,
3 marked on any aeronautical chart to the best of his knowledge. In
4 sum total of his testimony on cross that it was his opinion that
5 the pilot should have done a reconnaissance of the area and that,
6 if he had done that, that he would have known the wires were
7 there, even though the wires weren't on a chart, and that, in any
8 event, he was flying too low to be flying into the area in the
9 absence of having done a reconnaissance.

10 That, to me, is the pertinent evidence in the case and in the
11 section of Mr. Campbell's testimony.

12 The burden of proof in the case, of course, rests with the
13 Complainant, and she must carry it by a preponderance of the
14 reliable and probative evidence, and that burden of proof goes to
15 the establishment of the two charges of regulatory violation and
16 the first of which was a violation of Section of 91.119(d) of the
17 Regulations. That prohibits operation of a helicopter in such a
18 way, although it may be operated at altitudes less than the
19 minimums specified in the other sub-sections of this Regulation,
20 but the operation must be conducted without hazard to persons or
21 property on the surface. Section 91.13(a) prohibits operation of
22 an aircraft in either a careless or reckless manner so as to
23 endanger the life or property of another.

24 In this case, the evidence in front of me establishes that
25 the aircraft, as observed and testified to by Mr. Blunt in his

1 deposition, was being flown at a low altitude. As it went past
2 Mr. Blunt's boat, it went past his boat at a fast rate of speed,
3 and Mr. Blunt in J-1 establishes that he has observed other
4 helicopters flying. So his estimate was that this aircraft, and
5 that's what drew his attention, was being flown at a very low
6 altitude that Mr. Blunt considered at a too fast rate of speed
7 considering the type of terrain into which the helicopter was
8 proceeding into the area of Little Geiger Cove. As it went past
9 Mr. Blunt's boat, which on the deposition testimony as sponsored
10 in J-1(a) as given to me by Respondent, it went past Mr. Blunt's
11 boat at 70 feet above the surface of the water. So it was
12 proceeding into this cove area into terrain which was somewhere
13 more than 200 feet beyond where the boat was moored. As Mr. Blunt
14 testified, it was less than 200 feet from where the mooring can is
15 in Little Geiger Cove to the beach in Little Geiger Cove. So the
16 rising terrain would have been encountered by Respondent somewhere
17 between 200, maybe 300 feet, at best, before the helicopter would
18 engage what Mr. Blunt stated was steeply rising terrain. Also
19 adding to this, and I take into account, is the fact that the
20 testimony is clear that the pilot was operating into the sun.
21 This, of course, is an impediment to the vision of the helicopter
22 pilot. It is well known operating into the sun decreases the
23 ability of the observer looking in that direction to see an
24 object. In aerial combat, the favorite position is to approach
25 from the sun. And why? Because the object of your gun is going

1 to have trouble observing you as you dive into him. The same
2 thing here. Approaching into the sun would be known to any
3 reasonable and prudent pilot to be an impediment to his ability to
4 observe whether or not there's some obstacle in his course or an
5 impediment to the operation safety of his aircraft. The testimony
6 of Mr. Campbell is that the wire strike occurred somewhere 40 to
7 60 feet above ground level. It is conceded in the pleadings that
8 it was less than 500 feet. Yes, there is no direct testimony as
9 to that from the power company, but there is no direct contraction
10 of Mr. Campbell's statement that the wire splices that he observed
11 would be the area in which the helicopter struck and that, in
12 addition to Mr. Blunt's testimony, that it had to be close enough
13 to the power pole on the right side of these photographs in A-1 so
14 that, when the helicopter severed the wires with the right skid
15 and then proceeded to roll, that the helicopter rolled 90 degrees
16 to the right and over the headland. If it was further out to the
17 left into the middle of the valley, rolling 90 degrees almost
18 inverted, I would draw the inference that it would be impossible
19 for the helicopter to have rolled and then proceeded over the
20 headland if it had been in the middle of the valley. It had to be
21 much closer to the pole, as testified to by Mr. Campbell, to be
22 able to roll 90 degrees, almost inverted, and proceed over the
23 headland and into the beach area of Big Geiger Cove to the
24 ultimate crash site.

25 In my view, therefore, the evidence in front of me is that

1 the Respondent operated his helicopter unnecessarily at a low
2 altitude proceeding into a steeply rising terrain and there's no
3 evidence of whether he had ever been to this area before, but, in
4 any event, it may be inferred that he hadn't, since, obviously, he
5 was not aware that there were wires there. He had not done a
6 reconnaissance on a reasonable inference from this evidence.
7 Otherwise, a reasonable and prudent pilot would not have been
8 flying at such a low altitude that he would have struck those
9 wires or would have proceeded into an area of steeply rising
10 terrain where he had to pitch up at a severe angle of more than 30
11 degrees and this, in conjunction with flying with the sunlight in
12 his eyes, which he should have known as a reasonable and prudent
13 pilot would have obscured his vision or, at least, impacted it to
14 the extent that it would have been a deterrent to being able to
15 discern objects that might possibly be in his path. It is not any
16 one single item in my view or in the view of Mr. Campbell's
17 testimony. It is not the wire strike alone. It is the totality of
18 the circumstances to me. The rising terrain, the low altitude 70
19 feet past Mr. Blunt's boat to less than 200 feet from the beach
20 into steeply rising terrain, into the sun, into an area which I
21 believe a reasonable inference is that the Respondent was not
22 familiar with, and striking wires at an altitude of between 40 to
23 60 feet above ground level. That totality leads me to conclude
24 that the Respondent was in regulatory violation of Section
25 91.119(d) and that he did, in fact, conduct his helicopter

1 operation as to conduct it with a hazard to property on the
2 surface. That is, the wires of Southern California power
3 transmission. Further, on the totality of all the circumstances,
4 I conclude that this was an intentional operation. Intentional
5 tosses this into the area of recklessness. There was no reason on
6 any of the evidence in front of me that the Respondent had to be
7 operating at a fast rate of speed at a very low altitude, 70 feet,
8 past Mr. Blunt's boat, less than 200 feet from the shoreline into
9 this type of area with the sun in his eyes, that it is, in fact, a
10 reckless operation. It is something that I believe a reasonable
11 and prudent helicopter pilot, unfamiliar with the area, on a
12 reasonable inference, would not have done, and it does cause not
13 only potential hazard, but actual hazard and damage to persons and
14 property, a passenger that was in the helicopter, the Respondent
15 himself, apparently, was severely injured, and, also, actual
16 damage to the power lines. I, therefore, find that the evidence
17 by a preponderance does establish a violation of Section 91.13(a)
18 and that the Respondent did conduct a reckless operation to
19 actually endanger the persons and property.

20 Turning then to the sanction. The statute requires deference
21 to be shown to the Complainant's choice of sanction unless it is
22 clearly shown to be arbitrary or capricious or not in accordance
23 with Board precedent. In this instance, I have conduct by the
24 Respondent in an intentional reckless manner which caused damage
25 to persons and property. There has been no showing that this is

1 an arbitrary or capricious decision and it does appear to be in
2 line with Board precedent with sanctions found for intentional
3 reckless operation. I, therefore, will affirm the Administrator's
4 Order of Suspension, the Complaint herein, as issued.

5 IT IS, THEREFORE, ADJUDGED AND ORDERED THAT:

6 The Complainant's Order of Suspension, the Complaint herein,
7 and the same hereby, is affirmed as issued.

8 The Pilot's Commercial Pilot's Certificate and the same
9 hereby, is suspended for a period of 180 days.

10 Entered this 27th day of June, 2007 at San Diego, California.

11

12

13 EDITED & DATED ON

14 JULY 23, 2007

PATRICK G. GERAGHTY

ADMINISTRATIVE LAW JUDGE