

SERVED: January 16, 2009

NTSB Order No. EA-5427

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 16<sup>th</sup> day of January, 2009

<hr/>		)	
ROBERT A. STURGELL,		)	
Acting Administrator,		)	
Federal Aviation Administration,		)	
		)	
	Complainant,	)	
		)	Docket No. SE-18224
	v.	)	
		)	
ROY A. BOURGEOIS,		)	
		)	
	Respondent.	)	
		)	
<hr/>		)	

**OPINION AND ORDER**

Respondent appeals the oral initial decision of Chief Administrative Law Judge William E. Fowler, Jr. in this matter, issued following an evidentiary hearing held on August 5 and September 25, 2008.<sup>1</sup> By that decision, the law judge affirmed the Administrator's complaint and ordered a 60-day suspension of

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

respondent's airman certificate with private pilot and commercial glider pilot privileges, based on violations of 14 C.F.R. §§ 91.119(a) and (c),<sup>2</sup> and 91.13(a).<sup>3</sup> The law judge found respondent had violated §§ 91.119(a) and (c), and 91.13(a), and reduced the suspension of respondent's commercial pilot certificate from 90 days to 60 days.<sup>4</sup> We deny respondent's appeal.

The Administrator's March 14, 2008 order, which served as the complaint before the law judge, alleged that, on August 2, 2007, at approximately 5:30 pm, respondent operated as pilot-in-

---

<sup>2</sup> The relevant portions of 14 C.F.R. § 91.119(a) and (c) provide as follows:

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

- (a) Anywhere. An altitude allowing, if a power unit fails, an emergency landing without undue hazard to persons or property on the surface.

\* \* \* \* \*

- (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.

<sup>3</sup> Section 91.13(a) prohibits careless or reckless operations so as to endanger the life or property of another.

<sup>4</sup> The Administrator did not appeal the law judge's reduction in sanction.

command of a Piper J3C-65 in the vicinity of the Wachusett Reservoir in Massachusetts. The complaint further alleged that respondent operated the aircraft closer than 500 feet to persons, vehicles and structures, and that such operation was not necessary for takeoff or landing. The complaint also stated that respondent operated the aircraft at an altitude that would not have allowed him to conduct an emergency landing without undue hazard to persons or property on the surface. The complaint alleged that respondent's operation of the aircraft was reckless so as to endanger the lives and property of others.

At the hearing, the Administrator called four eyewitnesses who testified that they observed respondent flying at a low altitude over the reservoir. First, Nicholas Fugere testified that he was fishing at the reservoir on August 2, 2007, and that he saw respondent's aircraft coming from the direction of the reservoir where the Wachusett Dam is located. Tr. at 31. Mr. Fugere stated that he specifically remembers the aircraft and noticed it because it was flying very low. Id. Mr. Fugere estimated that the aircraft was approximately 30 feet above the water, and that he was apprehensive about the low altitude of the aircraft. Tr. at 31-32. Mr. Fugere also estimated that the aircraft was approximately 50 feet from him on the shoreline, and that he saw the aircraft twice, because it turned around at the other end of the reservoir. Tr. at 34-35. Upon the

aircraft's return above the reservoir, Mr. Fugere stated that he could see the registration number on the aircraft clearly, without the aid of binoculars. Tr. at 35-36. Mr. Fugere also testified that he observed respondent's aircraft fly close to the Cosgrove Intake Building, which is adjacent to the reservoir, and saw the aircraft "hover over" an eagle's nest above the reservoir. Tr. at 38. Mr. Fugere opined that respondent would not be able to make an emergency landing in the vicinity of the reservoir because the shoreline consists of cliffs and rocky terrain. Tr. at 40, 48. Jaffrey Inman, who was fishing with Mr. Fugere on August 2, 2007, provided corroborating eyewitness testimony, and stated that he observed respondent's aircraft fly by twice, and that respondent's aircraft was approximately 30 feet from the location at which he was fishing. Tr. at 60. Mr. Inman stated that he frequently fishes at the reservoir, and had never before seen an aircraft fly over the reservoir at such a low altitude. Tr. at 62. Mr. Inman also testified that he observed the aircraft fly close to the Cosgrove Intake Building. Tr. at 67.

The Administrator also provided the testimony of two watershed rangers from the Massachusetts Department of Conservation and Recreation, who observed respondent's aircraft fly over the reservoir at a low altitude. First, Bruce Fant, who has experience with measurements, map reading, and compass

work, testified that the reservoir is approximately 8 miles long and 2 miles wide, at its widest point, and has a rocky shoreline. Tr. at 70. Mr. Fant testified that the Cosgrove Intake Building, which is approximately 45 to 50 feet above water level, is the location where the water leaves the reservoir and goes into an aqueduct to supply drinking water to 47 cities, including Boston. Tr. at 71-72. Mr. Fant stated that the building is also the work site for certain employees, and is secure. Tr. at 71. With regard to the August 2, 2007 flight, Mr. Fant stated that he viewed the aircraft through his binoculars, and saw it fly approximately 5 feet below the roofline of the building. Tr. at 77-78. Mr. Fant estimated that the aircraft was approximately 45 feet above the water, and was "very close" to the building. Tr. at 78. When the aircraft flew back by the area, Mr. Fant testified that he saw both respondent and another man in the aircraft, and described them. Tr. at 83-84. Mr. Fant stated that he was fearful of the aircraft's low altitude, and that the aircraft was flying very slowly. Tr. at 86-87. The Administrator also provided corroborating testimony from Derek Liimatainen, who is also a watershed ranger. Mr. Liimatainen testified that he saw the aircraft fly within about 200 feet of the dam, and within about 50 to 70 feet of the Cosgrove Intake Building. Tr. at 145-46. Mr. Liimatainen stated that the aircraft flew approximately 70

to 75 feet from where he was standing, lower than the roofline of the building, and proceeded to fly approximately 30 feet from Route 70, which is a "very busy road" adjacent to the reservoir. Tr. at 146-47.

The Administrator also called Matthew McDevitt, who is a state police officer in Massachusetts, to testify. Mr. McDevitt testified that he was assigned to watershed patrol on August 2, 2007, and that he completed a police report for his investigation of the flight after interviewing respondent. Tr. at 124, 127; Exh. A-6. Mr. McDevitt's police report indicates that respondent stated that he did not deny that witnesses reported seeing him flying low at the reservoir, because respondent "had a passenger who was taking pictures of wildlife." Exh. A-6 at 5.

The Administrator also provided the testimony of Aviation Safety Inspector John Rote, who investigated the flight after receiving notification from the state police. Tr. at 180. Inspector Rote stated that respondent admitted to flying the aircraft approximately 50 feet above the water in the reservoir. Exh. A-14 at 2 (respondent's response to Inspector Rote's Letter of Investigation, in which respondent stated he "flew a circuit around the reservoir at approximately 50 foot altitude and approximately 200 feet offshore"); Exh. A-13 (memorandum of telephone conversation between respondent and Inspector Rote

stating that respondent "descended over the reservoir to about tree top level or about 50 feet above the water," and "was aware of some of the structures around the lake and tried to [keep] 500 feet away"). In spite of these admissions, Inspector Rote stated that respondent contended that he did not operate the aircraft within 500 feet of any person, vehicle, or structure. Inspector Rote opined that respondent had violated 14 C.F.R. § 91.119, and that respondent's operation of the aircraft was reckless. Tr. at 198-99. Inspector Rote also stated that a suspension period of 90 days is consistent with the Administrator's Sanction Guidance Table, and is appropriate in this case. Tr. at 201.

In response to the Administrator's case, respondent provided the testimony of Robert Hansman, who accompanied respondent during the August 2, 2007 flight at issue. Mr. Hansman, who is a professor in the Department of Aeronautics and Astronautics at the Massachusetts Institute of Technology, testified that they flew the aircraft more than 700 to 1,000 feet from the dam, and did not fly the aircraft within 500 feet of the Cosgrove Intake Building. Tr. at 257. Mr. Hansman testified that it seemed reasonable to operate the aircraft at a low altitude, and that if he and respondent had encountered an engine problem, they would have landed on the shoreline. Tr. at 258. Mr. Hansman stated that he did not observe anything in

respondent's operation of the aircraft that he considered reckless or unsafe. Tr. at 263, 288. Mr. Hansman opined that it would be safe to fly the aircraft within 200 feet of persons, vehicles, or structures if the pilot conducted the operation appropriately. Tr. at 275. Mr. Hansman acknowledged that he and respondent flew the aircraft at an altitude of approximately 50 to 100 feet. Tr. at 286. Respondent also provided the testimony of Jeffrey Dorwart, who knows respondent from the Greater Boston Soaring Club. Tr. at 292-93. Mr. Dorwart testified that he flew with respondent on an earlier flight near the reservoir on August 2, 2007 (Tr. at 294, 303), and that he does not recall seeing any people on the ground along the reservoir (Tr. at 301-302). Mr. Dorwart testified that he saw objects under the water from the aircraft while he and respondent were flying, and that he believed they could have landed on the shoreline of the reservoir, if necessary. Tr. at 303-304.

Finally, respondent testified on his own behalf. Respondent stated that he has several years' experience in soaring and gliding clubs, and that this experience is largely transferable to other types of aircraft, such as the Piper J3C-65 (hereinafter, "Cub") that respondent flew on August 2, 2007. Tr. at 323 (stating that, "you tend to treat the airplane like a glider"). Respondent testified that he has flown over the

reservoir "hundreds if not thousands of times," but mostly in gliders. Tr. at 327, 330, 339. Respondent testified that he has previously flown over the reservoir in the Cub at a low level, and that no one had complained to him about those flights. Tr. at 346-47. Respondent stated that, in all his flights in the Cub over the reservoir, respondent has never flown within 500 feet of the dam or the Cosgrove Intake Building, because they are both within a densely populated area. Tr. at 348, 405. Respondent acknowledged that if he had flown in that area, then he would have violated § 91.119; respondent stated that he avoided the area on August 2, 2007, and that he had a discussion with Mr. Hansman about circumventing the area. Tr. at 348, 354. Respondent stated that he did not see any people near the reservoir during either flight on August 2, 2007. Tr. at 363-64. Respondent testified, however, that he could see remnants of buildings below the water while flying. Tr. at 384-86. Respondent opined that the flight at issue was not careless, reckless, or dangerous. Tr. at 370, 404-405.

At the conclusion of the hearing, the law judge issued an oral decision, in which he acknowledged that respondent was an experienced airman who is very familiar with the reservoir area. Initial Decision at 440. The law judge stated that the Administrator provided the testimony of four eyewitnesses, all of whom feared the close proximity of respondent's aircraft.

Id. at 441, 443. Based on the testimony of the Administrator's witnesses, the law judge concluded that the evidence was "compelling and quite persuasive" that respondent flew over the reservoir at an altitude of less than 100 feet, and made two passes along the reservoir. Id. at 443. As such, the law judge determined that respondent violated the regulations as charged. The law judge, however, reduced the suspension period to 60 days, based on respondent's record of no previous violations. Id. at 444-45.

On appeal, respondent raises three main issues: whether the evidence supports the law judge's finding that respondent violated § 91.13(a); whether the 60-day suspension period is consistent with law, precedent, and policy; and whether suspension of respondent's glider license is appropriate when respondent was not operating a glider on August 2, 2007. In support of his argument that the evidence does not support the law judge's finding that respondent violated § 91.13(a), respondent asserts that the Administrator neither provided evidence showing that respondent intentionally operated the aircraft in a reckless manner, nor that respondent knew or should have known that fishermen were at the reservoir when respondent flew over it. Respondent argues that his flight within 500 feet of them was inadvertent, and not deliberate. Respondent also argues that the basis for Inspector Rote's

opinion that respondent operated the Cub in a reckless manner was that respondent could have harmed the water supply in the reservoir, and that the Administrator did not prove this because the Administrator did not present evidence from the Massachusetts Water Resource Authority to establish that respondent's flight threatened the water supply. As such, respondent contends that the law judge erred in not discussing any endangerment to the public water supply within the reservoir. Respondent also states that the evidence that the Administrator introduced did not establish that respondent flew within 500 feet of the Cosgrove Intake Building or the dam, because the fishermen could not see the dam from their vantage points. Respondent further asserts that, under the Board's Lindstam doctrine,<sup>5</sup> he has sufficiently rebutted the Administrator's allegation that he operated the aircraft in a reckless manner. Respondent also distinguishes the facts of this case from those of Administrator v. Oliveira and Morais,

---

<sup>5</sup> Under Administrator v. Lindstam, 41 C.A.B. 841 (1964), the Administrator need not allege or prove specific acts of carelessness to support a violation of § 91.13(a). Instead, using circumstantial evidence, he may establish a prima facie case by creating a reasonable inference that the event would not have occurred but for respondent's carelessness. The burden then shifts to respondent to promulgate an alternative explanation for the event that casts reasonable doubt on, or overcomes the inference of, the Administrator's claim of carelessness. Id.; Administrator v. Stepovich, NTSB Order No. EA-4931 (2002).

NTSB Order No. EA-4995 (2002), because in that case, the respondents flew within 500 feet of a crowded beach and of John F. Kennedy International Airport, respectively, without their transponders activated, whereas in the case at hand, respondent "flew within 500 feet of three people along the entire 37-mile shoreline that he did not see." Resp. Br. at 21.

Respondent further contends that the 60-day suspension period is excessive, and that the law judge erred in suspending respondent's glider pilot's license. With regard to the suspension period, respondent acknowledges that the Sanction Guidance Table recommends a suspension period of 30 to 120 days, but states that Inspector Rote's rationale for his suggestion of a 90-day suspension stemmed from respondent's alleged unawareness of a Notice to Airmen (NOTAM). Respondent, however, emphasizes that the Administrator did not charge a NOTAM violation. Respondent also argues that the Administrator did not provide any evidence that respondent knew that any people would be near his flight path around the reservoir, and that such lack of knowledge is a mitigating factor. Respondent asserts that the lack of severity and deliberate nature of the conduct should also mitigate the sanction. Finally, respondent's argument that the Administrator should not suspend his glider license is based on respondent's contention that the August 2, 2007 flight could not have been performed in a glider,

and that adequate landing space existed in the vicinity for a glider. Respondent argues that the Administrator's suspension of his glider license is arbitrary and capricious. The Administrator disputes each of respondent's arguments, and urges us to affirm the law judge's decision.

With regard to respondent's argument that the evidence does not support the law judge's finding that respondent violated § 91.13(a) by operating the Cub in a reckless manner, we do not find respondent's contentions on this issue persuasive. First, we note that we have long recognized that the Administrator consistently includes a § 91.13(a) charge in complaints alleging a violation of an operational regulation. We have held that, "[u]nder the Administrator's interpretation of [his own] regulations, a charge of carelessness or recklessness under § 91.13(a) is proven when an operational violation has been charged and proven." Administrator v. Seyb, NTSB Order No. EA-5024 at 4 (2003) (citing Administrator v. Nix, NTSB Order No. EA-5000 at 3 (2002) and Administrator v. Pierce, NTSB Order No. EA-4965 at 1 n.2 (2002)).

In addition, we note that we have long held that the Administrator need not establish actual danger in order to prevail in proving that a respondent has operated an aircraft in a careless or reckless manner. In Administrator v. Lorenz, NTSB Order No. EA-5205 at 2-3 (2006), we recognized that a showing of

potential endangerment is sufficient to prove a violation of § 91.13(a), and cited several cases holding that proof of actual danger is unnecessary for a § 91.13(a) charge. See, e.g., Roach v. Nat'l Transp. Safety Bd., 804 F.2d 1147, 1157 (10<sup>th</sup> Cir. 1986) (finding that it is not necessary to prove actual endangerment in order to sustain a carelessness charge); Haines v. Dep't of Transp., 449 F.2d 1073, 1076 n.10 (D.C. Cir. 1971) (quoting regulation and stating that, "[t]he wording of the regulation does not support a requirement of actual danger. Instead it prohibits the '[operation of] an aircraft in a careless ... manner so as to danger life or property'"); Administrator v. Szabo, NTSB Order No. EA-4265 at 4 (1994) (stating that, "innumerable Board cases make clear that no more than potential endangerment is required" in order to find a violation of § 91.13(a)).

In light of this precedent, respondent's arguments concerning § 91.13(a) are unavailing. First, respondent does not identify any evidence to show that he did not violate § 91.119(a) and (c), as charged. As described above, the Administrator provided the testimony of four eyewitnesses, all of whom stated that they observed respondent fly close to the Cosgrove Intake Building (Tr. at 38, 67, 77-78, 146), and two of whom testified that they observed respondent fly near the dam (Tr. at 112-13, 145). Respondent does not dispute that he flew at a low altitude over the reservoir, but asserts that he did

not fly near the dam or the building. The law judge resolved this discrepancy in testimony by finding that the Administrator's witnesses were credible, and that the Administrator had presented adequate evidence to prove that respondent had violated § 91.119(a) and (c) by flying within 500 feet of a person, vessel, vehicle, or structure. We defer to the credibility findings of the Board's law judges in the absence of a showing that such findings are arbitrary, capricious, or contrary to the weight of the evidence.<sup>6</sup> Respondent has not established that the law judge's findings in this regard were erroneous; therefore, we defer to the law judge's assessment that the evidence established that respondent violated § 91.119(a) and (c).

Our affirmation of the law judge's finding that respondent violated § 91.119(a) and (c) as alleged leads to our conclusion that respondent violated § 91.13(a), given our long-held precedent that an operational violation serves as proof that a respondent has acted in a careless or reckless manner. To the extent that respondent seeks to establish that the Administrator's charge of a § 91.13(a) violation is independent of the § 91.119(a) and (c) charge, we note that this argument is

---

<sup>6</sup> Administrator v. Nickl, NTSB Order No. EA-5287 at 6 (2007) (citing Administrator v. Kocsis, 4 NTSB 461, 465 n.23 (1982); see also Administrator v. Smith, 5 NTSB 1560, 1563 (1986); Administrator v. Sanders, 4 NTSB 1062 (1983)).

similarly unavailing. Based on the eyewitness testimony concerning the flight at issue, potential endangerment resulted from respondent's flight; the testimony established that respondent could not have landed the aircraft along the reservoir if necessary (Tr. at 40, 48, 64, 198-99) and that respondent operated the aircraft 50 feet or less from the fishermen standing on the shore of the reservoir (Tr. at 34, 60; see also Tr. at 398 (respondent's admission that he flew the aircraft approximately 50 feet above the water)). Such evidence indicates the existence of potential endangerment.

With regard to respondent's arguments concerning sanction, we note that, in general, we will defer to the Administrator's choice of sanction when the Administrator includes the Sanction Guidance Table in the record. Garvey v. NTSB, 190 F.3d 571, 581 (D.C. Cir. 1999) (directing the Board to defer to the Administrator with regard to a respondent's sanction, when the Board had reduced the sanction on the basis that the pilot had acted "responsibly and prudently"); Administrator v. Law, NTSB Order No. EA-5221 at 4 (2006) (deferring to the Administrator's choice of sanction); see also Go Leasing v. NTSB, 800 F.2d 1514, 1518 (9th Cir. 1986) (recognizing that Federal Aviation Act authorizes Administrator to issue orders suspending, revoking, amending, or modifying aviation certificates in interests of safety, and holding that the Administrator may decide which

certificate action is appropriate). Here, the law judge took judicial notice of the Sanction Guidance Table, which recommends a 30- to 120-day suspension period for failure to maintain required minimum altitudes over structures, persons, or vehicles in a sparsely populated area. Tr. at 201-202. In his initial decision, the law judge reduced the suspension period from 90 days to 60 days, based on respondent's lack of previous violations. We do not find a 60-day suspension period excessive, in light of our deference to the Sanction Guidance Table, combined with the circumstances of the flight at issue. With regard to respondent's argument that the law judge erred in suspending his glider privileges, we note that respondent ostensibly bases his argument on the Administrative Procedure Act, which requires agencies to include adequate reasoning in their decisions. Respondent, however, provides no authority from any of our previous cases to indicate that the Board should not defer to the Administrator with regard to which certificates are appropriate for sanction. See Go Leasing, supra, at 1518.

**ACCORDINGLY, IT IS ORDERED THAT:**

1. Respondent's appeal is denied;
2. The law judge's decision, including the reduction in sanction from 90 to 60 days, is affirmed; and
3. The 60-day suspension of respondent's airman certificate with private pilot and commercial glider pilot

privileges shall begin 30 days after the service date indicated on this opinion and order.<sup>7</sup>

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

---

<sup>7</sup> 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: \*  
\*  
ROBERT A. STURGELL, \*  
Administrator, \*  
Federal Aviation Administration, \*  
\*  
Complainant, \*  
v. \*  
ROY A. BOURGEOIS, \*  
\*  
Respondent. \*

Docket No.: SE-18224  
JUDGE FOWLER

U.S. Tax Court  
Thomas P. O'Neill Federal Building  
10 Causeway Street  
Boston, Massachusetts

Thursday,  
September 25, 2008

The above-entitled matter came on for hearing,  
pursuant to Notice, at 10:05 a.m.

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

## APPEARANCES:

On behalf of the Administrator:

JOHN R. DONNELLY, Senior Attorney  
Federal Aviation Administration  
Office of the Chief Counsel  
New England Region  
12 New England Executive Park  
Burlington, Massachusetts 01803-5299  
(781) 238-7045  
(781) 238-7055 (fax)  
Ejohn.donnelly@faa.gov

On behalf of the Respondent:

ROBERT S. WHITE  
Bourgeois, Dresser, White & Beard, LLP  
Four Dix Street  
Worcester, Massachusetts 01609  
(508) 798-8801  
(508) 754-1943 (fax)  
robbw@bdwlaw.com

ORAL INITIAL DECISION AND ORDER

ADMINISTRATIVE LAW JUDGE FOWLER: This has been a proceeding before the National Transportation Safety Board held pursuant to the provisions of the Federal Aviation Act of 1958, as that Act was subsequently amended, on the appeal of Roy A. Bourgeois from an Order of Suspension issued by the Federal Aviation Administrator dated March 14, 2008, which seeks to suspend the Respondent Bourgeois' Airman Certificate Number (omitted), with private pilot and commercial glider pilot privileges, and any and all airman certificates that he currently possesses.

I did say "suspend," didn't I?

THE REPORTER: You did.

JUDGE FOWLER: All right.

The Administrator's Order of Suspension, as duly promulgated under the National Transportation Safety Board's Rules of Practice, was issued by the Enforcement Division of the Central Region of the Federal Aviation Administration.

MR. DONNELLY: Judge, excuse me. That's New England Region.

JUDGE FOWLER: I'm sorry. Thank you, Mr. Donnelly. New England Region of the Federal Aviation Administration. I think I said the date of the Order of Suspension was March 14, 2008.

This matter has been heard before this United States Administrative Law Judge, and as is provided by the Board's Rules of Practice, specifically Section 821.42 of those rules, I am given the option as the Judge in this proceeding to either issue -- to write a subsequent decision or to issue, as I'm going to do at this time, an Oral Initial Decision on the record.

Following notice to the parties, this matter came on for trial on September 25, 2008, in Boston, Massachusetts. The Respondent, Roy A. Bourgeois, was present at all times and was very ably represented by Robert White, Esquire. The Complainant in this proceeding was likewise very ably

represented by John Donnelly, Esquire, of the Regional Counsel's Office, New England Region of the Federal Aviation Administration.

Both parties have been afforded the opportunity to offer evidence, to call, examine and cross-examine witnesses that have been adduced during the course of this case. In addition, the parties were afforded the opportunity to make argument in support of their respective positions.

I would like to say at the outset, a number of cases that I have heard recently -- and I think this case typifies it -- of experienced airmen, as we have here in Mr. Bourgeois, who has been flying for a number of years under the aegis of the Federal Aviation Administration, 34 years, I believe his counsel informed me.

During the course of the comments we've had here today, counsel for the Administrator said sometimes experienced airmen, particularly flying the same route of flight which they've done over and over so many times, things happen that shouldn't happen ordinarily, and I think this case may typify that.

We have an experienced airman here in Respondent Bourgeois. No question about it. He knows this Massachusetts Reservoir area almost like the back of his hand. What exactly happened when his plane was over the water there on August 2, 2007, he was, at least part of the flight, was in the rear seat

of this Piper aircraft, Professor Hansman was in the front seat, and they shared the controls. However, the Respondent Bourgeois is charged with operating the aircraft, so he's the one that this Order of Suspension for a 90-day period has been brought against by the Administrator.

As the Judge in this case, I'm bound by the evidence produced before me. I cannot ignore or reject out of hand the testimony of the six witnesses that the Administrator has adduced on his behalf, coupled with the 17 exhibits. The Respondent has had three witnesses, including the Respondent himself, and two exhibits. To be as brief and concise as possible, these six witnesses that the Administrator has adduced, four of them were put in fear and apprehension by the close proximity of this flight to them: Witness Fugere, Witness Inman, Witness Fant, and Witness -- I may be mispronouncing his name -- Liimatainen. All of these witnesses have testified they, in effect, were put in fear and apprehension by the proximity of Respondent's aircraft to them in the vicinity of the Wachusett Reservoir on August 2, 2007.

Let's take a look briefly at what these witnesses said testified to.

Witness Fugere said the aircraft was a mile away from him and his friend, and then the aircraft subsequently came within 50 feet of them at an altitude of approximately 30 feet above the water. The aircraft made two passes at this altitude

during a 15-minute episode that the aircraft was present.

Witness Inman said he saw the aircraft make two passes, and the aircraft came within 30 to 50 feet of him. Witness Inman said he could see two people in the plane because of the proximity of the aircraft.

Witness Bruce Fant says the aircraft was within 30 feet horizontally from him. It was a yellow-colored, single-engine aircraft. Witness Fant testified this aircraft endangered him. He saw the aircraft, based on his testimony, circling the eagles' nest, which was present in this reservoir area. He was in fear, he said. He testified additionally that the aircraft was approximately, to the best of his opinion and determination, 300 feet off of the dam.

Administrator's Exhibit A-6, stated in this exhibit, based on the testimony that we've had here today, Ranger Fant recorded the registration number of the plane, N-38360. Ranger Liimatainen stated the plane flew below the roofline of a building near the dam, that the building is approximately one to two stories high. This witness also observed the plane at a low altitude above the eagles' nest.

Ladies and gentlemen, the point of it is, as I may have stated earlier, I cannot disclaim, ignore, or reject out of hand the testimony of four percipient witnesses that the Administrator has adduced during the course of this proceeding. I had denied the Administrator's Motion for Judgment when we

started this hearing here the second session this morning, and I stated at that time that at the very minimum, the Administrator had created a prima facie case. But as we heard testimony and additional exhibits were put in, there's no question that the Administrator has adduced more than the necessary quantity of reliable, probative, and credible evidence.

Looking at this proceeding in its entirety, the Respondent's side of the case, Respondent had two witnesses, Professor Hansman, a very, learned gentleman who was on the flight in question with Respondent Bourgeois. It's unusual to have a witness who is a flight instructor who has earlier checked out the Respondent's ability as a glider pilot, which abilities Respondent Bourgeois still has.

The evidence is very compelling and quite persuasive that Respondent flew under 100 feet, made two passes, as I've just mentioned, and quoted the testimony of four of the percipient witnesses of the Administrator, some of whom were put in fear and apprehension by this flight.

I may have mentioned earlier that Ranger Fant, the second or third witness in this case, while he approached two men who were fishing in the area and while speaking with these men, the aforesaid aircraft flew over them at approximately 50 feet.

Now, I cannot deny the validity of the

Administrator's Order of Suspension. The Respondent and his passenger, and Respondent's witness, Dorwart, who was with the Respondent on the first flight, they didn't see anyone on the ground. I don't understand that. We know from the testimony of the Administrator's witnesses the people were there. They have testified here under oath what they saw. The Respondent's position, in effect, is that some of the Administrator's witnesses did not see what they saw on August 2, 2007, while the Respondent's aircraft was flying in the vicinity of the reservoir area.

I have had many low-flying cases where reckless conduct was charged, which the Administrator has charged here and which, in his final analysis, Aviation Safety Inspector Rote, after his investigation, -- and he's a very experienced aviation safety inspector, -- made the recommendation which the Administrator adopted of the charge of being a reckless operation against Mr. Roy A. Bourgeois, the Respondent in this case.

Based on the totality of the evidence here, particularly the Administrator's four percipient witnesses, it is my conclusion and final determination that the Administrator was validly premised in these allegations that he set forth in the Administrator's Order of Suspension of March 14, 2008. However, taking into account the Board does not always agree with me or some of the other judges concerning sanction, but

taking into account the longevity and violation-free record of the Respondent in this proceeding, I'm going to modify the requested 90-day period of suspension to 60 days. I cannot modify it more than that because, as I said, a number of people were put in fear and apprehension, as well as the Respondent having a passenger on board his plane with him.

So, ladies and gentlemen, I will proceed to make the following specific findings of fact and conclusions of law based on the testimony of the six witnesses on behalf of the Administrator, the three witnesses of the Respondent, coupled with the 17 documentary exhibits of the Administrator and the two exhibits of the Respondent, as the hearing record is presently constituted.

1: The Respondent, Roy A. Bourgeois, is now and at all times mentioned herein admits and it is found was the holder of Airman Certificate Number (omitted), with private pilot and commercial glider pilot privileges.

2: The Respondent admits and it is found that on August 2, 2007, Respondent was pilot-in-command of civil aircraft N-3860, a Piper J-3C-65, partially owned by another, with a passenger on board in the vicinity of the Wachusett Reservoir, Massachusetts.

3: It is found that on said flight at approximately 1730 hours local time, the Respondent operated the aforesaid aircraft closer than 500 feet to persons and structures.

4: It is found that at no time was it necessary to conduct the operation described in paragraph 3 above for the purpose of takeoff or landing.

5: It is also found that Respondent operated an aircraft as described above at an altitude which would not allow, if a power unit failed, an emergency landing without undue hazard to persons or property on the surface.

6: It is found that Respondent's operation of the aforesaid aircraft N-3860, in the manner so described, was reckless as to endanger or potentially endanger the lives and property of others.

7: It is found by reason of the foregoing facts and circumstances the Respondent violated the following sections of the Federal Aviation Regulations, Title 14 code of those Federal Aviation Regulations:

(a) Section 91.13(a), and I'm incorporating by reference what these sections spell out.

(b) Section 91.119(a), and

(c) Section 91.119(c).

And I am incorporating by reference what those aforesaid sections state.

8: Based on the foregoing, would affirm that safety in air commerce and air transportation and the public interest does require the suspension of Airman Certificate Number (omitted), with private pilot, single-engine land, and

commercial glider pilot privileges.

9: This Judge finds that safety in air commerce or air transportation and the public interest does require the affirmation of the Administrator's Order of Suspension dated March 14, 2008, in view of the aforesaid violations of the regulations alluded to previously, 91.13(a), 91.119(a), and 91.119(c). However, taking into account all of the peculiar and pertinent facts and circumstances pertaining to and surrounding this case and the testimony and the exhibits herein, this Judge modifies the sanction from a 90-day period of suspension to a 60-day period of suspension of the Respondent's airman certificates.

ORDER

IT IS ORDERED AND ADJUDGED that the Administrator's Order of Suspension of March 14, 2008, be and the same is hereby modified to a period of suspension of the Respondent's airman certificate for a period of 60 days.

DATED & EDITED ON  
OCTOBER 15, 2008

-----  
WILLIAM E. FOWLER, JR.  
Administrative Law Judge