



FLIGHT-WATCH



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NUMEROUS LOW PASSES BY JET PILOT RESULTS IN REVOCAION OF HIS CERTIFICATE

I. OVERVIEW

A jet pilot who made a number of low level, high-speed passes over the Santa Monica Pier had his license revoked. The flight in question took place on November 6, 2008, when the pilot, as part of a two-ship formation flight, departed Van Nuys Airport (VNY). The pilot was operating an Aero Vodochody L-39 jet aircraft. He was accompanied by another jet aircraft, and there had been an understanding that the aircraft would fly west of a banner tow aircraft that was operating off the coast of Santa Monica. The pilot in question was to operate as the lead aircraft while number two was flown by Skip Holm. The briefing called for four passes, and everything went according to plan for the first three passes. However, on the fourth pass, the pilot flew low over the beach area, headed toward the pier, and Skip Holm called out over the radio to “knock it off.” The pilot in question pulled up abruptly, and these maneuvers were videotaped from the aircraft operated by Skip Holm.

II. THE EMERGENCY ORDER OF REVOCAION

Following the flight of November 6, 2008, the FAA issued an emergency order of revocation on January 12, 2009 that contained the following allegations:

1. That the Respondent’s aircraft had operated in the Los Angeles International Airport (LAX) Class B airspace without an ATC clearance;
2. That while in the Class B airspace, the aircraft was flown in excess of 250 knots below 10,000 feet;
3. That the Respondent’s aircraft was observed making a number of passes in the vicinity of the crowded Santa Monica Pier and beach;
4. That two of the passes were below 500 feet above the beach;
5. That during the two passes below 500 feet, the beach area was congested with people;
6. That during the course of the low-altitude passes, had an emergency landing been nec-

essary, this could not have been safely effected;

7. That during one of the low-level passes, the aircraft was pulled upward in a steep acrobatic climb with smoke on;
8. That the aerobatic maneuver was performed at below 1,500 above the surface and within the Santa Monica Class D airspace and within 4 nautical miles of the centerline of a Federal airway;
9. That upon departing Santa Monica and returning to Van Nuys, the Respondent again entered the LAX Class B airspace at indicated airspeeds in excess of 250 knots;
10. That the aircraft was operated below the underlying airspace of LAX Class B airspace in excess of 200 knots; and
11. That the operations of the Respondent's aircraft were careless or reckless so as to endanger the life or property of another.

III.

THE REGULATIONS IN ISSUE

The pilot in question was cited for a number of violations of the Federal Aviation Regulations including the following:

- a. Section 91.117(a) [flying at an indicated airspeed of more



than 250 knots below 10,000 feet];

- b. Section 91.117(c) [flying at an indicated airspeed in excess of 200 knots while operating below Class B airspace];
- c. Section 91.119(a) [operating at an altitude where an emergency landing cannot be effected without undue hazard to persons or property];
- d. Section 91.119(b) [operating over a congested area below 1,000 feet above the highest obstacle within a horizontal radius of 2,000 feet];
- e. Section 91.119(c) [operating at an altitude of below 500 feet over an other than congested area];
- f. Section 91.303(c) [performing aerobatics in Class B, Class C, Class D or Class E Airspace];
- g. Section 93.303(d) [conducting aerobatics within 4 nautical

miles of the centerline of a Federal airway];

- h. Section 91.303(e) [conducting aerobatics at an altitude of below 1,500 feet above the surface]; and
- i. Section 91.13(a) [operating an aircraft so as to endanger the life or property of another].

IV. THE FAA'S CASE IN CHIEF

The hearing was convened before Judge Patrick Geraghty of the National Transportation Safety Board on February 17 and 18, 2009. The first witness was David Finley, a Harbor Services Officer who was working on the Santa Monica Beach Pier on the date in question, who testified that he noticed two jet aircraft and was concerned about their operations in the vicinity of the pier. Mr. Finley retrieved a video camera and recorded two passes directed at the pier conducted at a low altitude. The two video camera clips were sponsored into evidence by the FAA. The first video clip showed a jet proceeding from the west toward the pier and then abruptly turning just prior to reaching the pier. The second video clip showed the jet flying low over the beach and south of the pier, including an abrupt pull-up with aileron rolls over the pier. Mr. Finley testified there were several hundred people on the beach and up to 100 people on the west end of the pier.



The second person to testify on behalf of the FAA was the pilot of the other jet, Skip Holm, who testified that he departed Van Nuys airport as number two of a flight of two, and the flight had been briefed as consisting of four passes to the left of a banner tow aircraft operating off the coast of Santa Monica. When the Respondent began his impromptu air show after the first three passes, Holm broadcast on the radio “knock it off.” Video clips taken from Holm’s aircraft were also sponsored into evidence.

Two lifeguards working at lifeguard towers near Santa Monica Pier testified on behalf of the FAA. The first lifeguard testified that there were about 100 people on the beach and about 400 people on the pier. The second lifeguard testified that she saw two jets, and one jet flew by at an altitude of about 50 feet at a distance of between 100 and 150 yards from her tower. She said she could see the pilot in the aircraft as it flew by, and she could feel the heat of the exhaust as the aircraft flew toward the pier.

V.
THE EVIDENCE FOR THE
DEFENSE

William Smith, an FAA Air Traffic Control Training Specialist, testified in the course of authenticating radar plots which were entered into evidence. He said the radar data was used from radar hits provided by the Burbank and Los Angeles radar sites. He testified the plots showed the aircraft had departed Van Nuys Airport and was identified on radar as it proceeded toward the Santa Monica Pier. Smith testified that the Respondent's aircraft entered the LAX Class B Airspace without contacting ATC and during that time its speed exceeded 250 knots, going as high as 299 knots. He also testified that on the return trip from the pier, the aircraft went in excess of 200 knots under the LAX Class B Airspace.

John Goldfluss, an Aviation Safety Inspector, testified that he had reviewed six video clips, and in his judgment, the Respondent's conduct had risked the lives of people on the beach and pier and was grossly negligent and reckless. Using a Terminal Area Chart, Goldfluss identified airspace surrounding the pier as Class D Airspace and also testified that aerobatic flight occurred over a congested area of persons and within four nautical miles of two Federal airways.

Finally, the FAA presented to Judge Geraghty the FAA's Sanction Guidance Table of which Judge Geraghty took judicial notice.

The Respondent testified in his own behalf and said he had no prior enforcement actions and that he was doing the flybys to promote his new movie, because film market buyers and producers were having a meeting at the Loew's Beach Hotel. The Respondent testified that during his flight down the beach, he performed a 45° zoom climb, and that he did not enter the LAX Class B Airspace. He further maintained that his airspeed did not exceed 200 knots.

Eugene Tanasescu testified that he had worked with Respondent in the past and that he estimated the jet was about 200 feet off the waterline at an altitude of 400 feet. Gary Shimon testified as an ATC expert for the Respondent, and he maintained that the FAA radar data was faulty. He testified there was no way to identify the aircraft or to determine if Respondent entered into the LAX Class B Airspace. He maintained that there is no way to get an accurate airspeed of the aircraft from the radar data, and he testified about how airspace incursions should be reported by an air traffic controller who observes a violation of the airspace requirements.

Jeff Acord testified via videotaped deposition viewed at the hearing that he called the FAA and got permission to do a flyby for the banner tow aircraft and two military jets off the

coast of Santa Monica. He also testified that when an airspace incursion takes place, air traffic control personnel are supposed to complete a pilot deviation report. He also testified that the aircraft were not supposed to enter the LAX Class B Airspace.

Ramona Cox testified that she was at the Santa Monica Loew's Beach Hotel to take pictures of Respondent flying his jet, but she was not able to determine the jet's distance from the shore or its altitude.

VI. REBUTTAL EVIDENCE BY THE FAA

The FAA then called a rebuttal witness in the form of Michael Sanchez, a Santa Monica Tower air traffic controller.

Sanchez testified that the day before the flight in question, he received a phone call from a man who told him that several aircraft would be doing a flyby in the vicinity of the Santa Monica Pier on the afternoon of November 6, 2008, and Mr. Sanchez responded by saying that he could neither approve nor disapprove the request to enter the Santa Monica Class B Airspace nor the LAX Class B Airspace. Sanchez recommended that the pilots contact the Santa Monica Control Tower at the time they intended to conduct the flyby and request access through the Class D Airspace.

VII. THE INITIAL DECISION

At the conclusion of the hearing, Judge Geraghty found that the FAA had proven all of its allegations but modified the sanction from a revocation of the airman's certificate to a suspension of 210 days. Following the initial decision by Judge Geraghty, both the Respondent and the FAA appealed to the NTSB.

VIII. THE RESPONDENT'S APPEAL

In the Respondent's appeal, he maintained that the FAA had failed to prove its case by the preponderance of reliable, probative and substantial evidence. He further maintained that there was insufficient evidence to prove any incursion into the Class B Airspace and that the FAA had failed to prove that the steep climb was in fact an aerobatic climb. He further maintained that he was prejudiced in his defense as a result of the "unnecessary conduct" by the Administrator and by "unduly restrictive rulings" by Judge Geraghty. Finally, the Respondent argued that Judge Geraghty did properly modify the sanction and that the FAA's choice of sanction was not entitled to deference.

The NTSB affirmed the decision of Judge Geraghty to the extent it found violations of the Federal Aviation Regulations noting that Judge Geraghty was in the best position to evaluate the credibility of witnesses.

The Board declared that Administrative Law Judges employed by the NTSB are in the best position to make credibility determinations unless the judge has made the determination in an arbitrary or capricious manner. The Board went on to say that if a party challenges the credibility determinations of a judge, the Board will not reverse those determinations unless they are arbitrary, capricious, or clearly erroneous.

The Respondent further argued that he had been prejudiced by untimely discovery from the FAA of a Van Nuys Airport air traffic control tower tape provided to him only two business days before the hearing. Respondent maintained that he attempted to raise this issue before Judge Geraghty who refused to hear it. With regard to this issue, the Board remarked:

Initially, we note that we have held, in an emergency proceeding, when respondent has identified no basis for finding that a delay in providing discovery materials prejudiced him in any cognizable way, that is, by showing that he was unable to review the evidence to the degree necessary to effectively respond to it at the hearing, that there was no abuse of discretion by the law judge in refusing to sanction the Administrator, through a preclusion order or otherwise. Here, the law judge heard respondent's argument, and ruled, based on the compressed nature of discovery and the fact that counsel had received and

listened to the tape, that he would allow it into evidence. The law judge also noted, as do we, that the tape was offered in redirect of the particular witness because respondent had raised the issue of which aircraft in the formation of two was the lead aircraft. The law judge did not abuse his discretion in admitting the tape.

The Respondent also advanced a number of other arguments, such as the fact that he had filed a motion for summary judgment on the Thursday preceding the Tuesday hearing. The motion was denied by the judge because it was not supported by evidence and because all of the facts stated in the motion were in dispute. The NTSB found no abuse of discretion by the judge in denying the motion for summary judgment. The Respondent advanced a number of other arguments which are beyond the scope of this treatment.

IX. THE FAA'S APPEAL

The FAA appealed from the decision of the law judge to the extent the sanction was reduced from revocation to a suspension of 210 days. The NTSB did say that law judges employed by the NTSB have the authority to modify a sanction in a case where the FAA's choice is arbitrary or capricious. However, in this case, the NTSB found that the choice of the FAA was neither arbitrary nor capricious. The Board also cited *Administrator v. Oliveira and Morais*, NTSB Order No. EA-4995 (2002), where the pilots flew at an altitude of between 25 to 50 feet above the surface in the vi-

cinity of a beach populated by 500 swimmers, and their certificates were revoked. The Board found the facts at hand more egregious than those presented in *Oliveira and Morais*.

Accordingly, the NTSB reversed the decision of the judge and reinstated the sanction of revocation.

Administrator v. David G. Riggs, NTSB Order No. EA-5436 (March 17, 2009).



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