

helicopter (Jet Ranger; N40EA), with passengers aboard, at slow speeds and at low altitudes over persons and property.² However, the law judge reduced the sanction from a 180-day suspension of respondent's airline transport pilot (ATP) certificate (helicopters) to one of 60 days.³ For the reasons discussed below, the Board has decided to affirm the initial decision.

A careful review of the evidence of record supports a conclusion that the identity of the "offending" helicopter was sufficiently established in the record and that respondent was its pilot. Respondent admitted⁴ that he had

²Sections 91.79(a) and (d), and 91.9 of the Federal Aviation Regulations (FAR) read at the time of the incident as follows:

"§ 91.79 Minimum safe altitudes; general.

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.

* * * *

(d) *Helicopters.* Helicopters may be operated at less than the minimum prescribed in paragraphs (b) or (c) of this section if the operation is conducted without hazard to persons or property on the surface.

§ 91.9 Careless or reckless operation.

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

³The Administrator did not perfect his appeal from the reduction in sanction but filed a brief in reply.

⁴Respondent conceded to an FAA inspector during the course of the investigation that he was the pilot in command of the alleged operations, but claimed at the hearing that it could not have been
(continued...)

been the pilot of N40EA, a blue and white Jet Ranger, on the dates alleged, he described his route of flight, and he explained that he flew low over as many as 500 houses trying to select one that would be suitable for an advertisement. His passenger, Eric Saarinen, director of Plum Productions, wrote in a declaration that he had engaged respondent's services for "location scouting", i.e., locating good backgrounds for television commercials, during the period from January 13 to 17, 1987. (Exh. A-5). Respondent testified that they "scouted" houses, including houses in the English Hill area (Mrs. Benedetti's area), and every hill facing west from "Petaluma to Mendocino". (Tr. 219). They flew low enough to view the houses and evaluate them without the aid of binoculars. While scouting, respondent related, they landed the helicopter at many of the houses. (Tr. 225). Respondent's helicopter (N40EA) is sufficiently well marked (See photo, Exh. R-6) as to make identification easy. Samuel Beardsley, the first eyewitness to testify, clearly identified the helicopter by registration number, which he saw when the helicopter flew low near his bedroom window on January 16.⁵

(continued from previous page:)

his helicopter because he never flew lower than 250 or 300 feet, except when he landed with the owner's permission.

⁵We reject respondent's attempts to attack the credibility of this witness. In our opinion, the fact that the witness concedes that the helicopter's altitude varied throughout his observation lends credence to his version of the facts.

One of the Administrator's percipient witnesses, Elizabeth Ashiku, testified that on January 14, 1987, a helicopter that bore the numbers either 4DA or 4CA made numerous passes and hovered over her and later her home. Considering the extreme fear and pain which she testified that she experienced during this incident, we do not find it incredible that the numbers she wrote down concerning a blue and white helicopter do not completely match the registration number of respondent's blue and white helicopter. It was reasonable for the law judge to conclude that this witness observed respondent, and respondent's unsupported claim of some phantom helicopter's presence in the area is insufficient to rebut the inferences reasonably drawn from her testimony.

The third witness, Mrs. Benedetti, testified (by deposition) that she was put in fear for her own safety and that of her two children on January 13, 1987 by the operation of a helicopter which hovered 75 feet over her driveway and, at one point, seemed to hover almost directly above them at a distance of less than 15 feet. She did not, however, "get the numbers," although we note that in her original letter of complaint to the FAA which is attached as an exhibit to the deposition, she identified the aircraft as being blue and white and bearing the number N4034. She gave this description of the helicopter she saw to the FAA's investigating inspector who put all the witness reports

together and surmised that this was a helicopter owned by Rotor Connection. When he telephoned that company, he was told that respondent was the pilot. The inspector, whose background and experience qualify him as a helicopter expert, testified by deposition. We think the testimony of the Administrator's percipient witnesses adequately supports the conclusion that respondent's helicopter was the one they observed flying slow and low over and near them and their residences.

We also find that the law judge correctly concluded that the Administrator must demonstrate that: 1) the likelihood of harm is unacceptably high; or 2) the pilot's exercise of judgment was clearly deficient. See, for example, Administrator v. Carman, 5 NTSB 1271 (1986). We think that both prongs of the test have been met here. Either one is sufficient.

We also find no merit to respondent's allegation that the law judge misunderstood the safety significance of the height-velocity diagram. It is patent that a combination of low speed and low altitude is, as indicated by the operating manual for the make and model helicopter dealt with here, within the "dead man's" curve from within which a safe autorotation cannot be accomplished in the event of engine failure. ("...a safe power-off landing cannot be made," Exh. C-6). The law judge states on the record that the height-velocity diagram is not a prohibition but an operating

limitation. Its safety significance is more pronounced in a case, such as this one, involving hazard to persons on the ground. The FAA inspector who testified at the hearing gave details on the actual hazards created by low flight at slow speeds in the helicopter involved (Jet Ranger) which fully support the findings of the regulatory violations alleged by the Administrator.

The contradictory evidence to which respondent points is, first, a written declaration of respondent's passenger, Mr. Saarinen, who confined his statement to an opinion in regard to the safety of the flight. Since we have no idea of Mr. Saarinen's helicopter training, we are loath to challenge the law judge's rejection of his opinion. He is a photographer and has used helicopters in as many as 200 photographic flights; hence, his testimony, under oath and subject to cross-examination, on the matter of the use of helicopters for filming movies would have been an enlightening addition to the record, especially in regard to what the pilot can see when he hovers close to a person on the ground. He did not testify. His opinion appears to have been concerned only with the safety of the helicopter and its occupants. That is not the matter before us. The complaint alleges hazard to persons and property on the ground; hence, Mr. Saarinen's written opinion is not material.

The other evidence that was contradictory to the testimony of the two helicopter experts that the

Administrator provided was the testimony of respondent. He judges that the operations he conducted were not hazardous. However, the other witnesses, both percipient and expert, thought that his flights were extremely hazardous. We agree that the likelihood of harm was extremely high and respondent's judgment in conducting these scouting operations at extremely low altitudes was clearly deficient.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;
2. The Administrator's order, as amended at hearing and as modified in respect to sanction, and the initial decision are both affirmed; and
3. The 60-day suspension of respondent's airline transport pilot certificate shall begin 30 days after service of this order.⁶

COUGHLIN, Acting Chairman, LAUBER, KOLSTAD, HART, and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

⁶For the purposes of this order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to FAR Section 61.19(f).