

UNITED STATES OF AMERICA  
NATIONAL TRANSPORTATION SAFETY BOARD  
(First Circuit)



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In the Matters of:

LANGHORNE M. BOND, Administrator,  
Federal Aviation Administration,

Complainant,

v.

LOWELL G. FERGUSON,

Respondent.

Docket SE-4474

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LANGHORNE M. BOND, Administrator,  
Federal Aviation Administration,

Complainant,

v.

JAMES H. BASTIANI,

Respondent.

Docket SE-4475

\*\*\*\*\*

Los Angeles, California  
June 4, 1980

Frederick C. Woodruff and Karl B. Lewis for Complainant.

Kenneth B. Cooper for Respondents.

INITIAL DECISION AND ORDER

Jerrell R. Davis, Administrative Law Judge:

On November 28, 1979, Complainant, pursuant to

1 Section 609 of the Federal Aviation Act of 1958, as Amended,  
2 issued separate orders suspending the ATP certificates of  
3 Respondents Ferguson and Bastiani for 60 and 30 days,  
4 respectively.

5 Respondents Ferguson and Bastiani were charged with  
6 acting as captain and first officer, respectively, and  
7 conducting an approach and landing Western Airlines Flight 44,  
8 Boeing 737, N4223W, a regularly scheduled passenger-carrying  
9 flight, at Buffalo Municipal Airport, Wyoming, on July 31, 1979,  
10 without a clearance therefor from Air Traffic Control (ATC).

11 The order of suspension directed to Captain Ferguson  
12 charged him with violation of the following sections of the  
13 Federal Aviation Regulations (FAR):

14 (a) Section 91.75(a), by deviating from  
15 an ATC clearance;

16 (b) Section 121.590(a), by landing at an  
17 airport which is not certificated under Part 139  
18 of the FAR;

19 (c) Section 121.555(b), by causing or  
20 permitting Western Airlines Flight 44 to be  
21 operated to and land at an airport not listed  
22 in the Western Airlines Operations  
23 Specifications; *and*

24 (d) Section 91.9, by operating an aircraft  
25 in a careless or reckless manner so as to  
endanger the life or property of another.

1 Captain Ferguson was also charged with failure to  
2 exercise the degree of care, judgment, and responsibility  
3 required of the holder of an ATP certificate while serving as  
4 pilot-in-command of an aircraft engaged in scheduled air  
5 transportation.

6 With the exception of 91.75(a), First Officer Bastiani  
7 was charged with the same infractions of the FAR. He was also  
8 charged with failure to exercise the degree of care, judgment,  
9 and responsibility required of him as second-in-command.

10 The Respondents appealed the orders of suspension  
11 and such orders were subsequently filed and served as the  
12 Complaints herein, pursuant to Section 821.31(a) of the Rules  
13 of Practice.

14 In their filed Answers, Respondents admitted  
15 Paragraphs 1 and 2 of the Complaints. They denied Paragraphs  
16 3 through 13 thereof, as well as any violation of the FAR.  
17 Additionally, they asserted as an affirmative defense the  
18 timely filing of a report under Aviation Safety Reporting  
19 Program (ASRP).

20 The appeals were consolidated for hearing and an  
21 evidentiary hearing, <sup>thereon</sup> was held today in Los Angeles, California.  
22 Section 821.32 of the Rules of Practice provides that, in  
23 proceedings under Section 609 of the Act, the burden of proof  
24 shall be upon the Complainant.

25 Prior to receipt of evidence, Respondents orally

1 amended their written Answers to the Complaints. More  
2 specifically, Captain Ferguson admitted Paragraphs 3, 4, 5, 8,  
3 9, 10, 11 and 12 of the Complaint. With respect to Paragraphs  
4 4 and 5 thereof, Captain Ferguson stated that he was without  
5 knowledge to admit or deny whether Sheridan County Airport has  
6 an Airport Operating Certificate under Part 139 of the FAR or  
7 whether the Buffalo Municipal Airport has no Airport Operating  
8 Certificate under Part 139. The paragraphs in the Complaint  
9 against First Officer Bastiani are numbered numerically the  
10 same as in the Complaint against Captain Ferguson, and  
11 First Officer Bastiani admitted to the same corresponding  
12 paragraphs as Captain Ferguson.

13 Motions of the Complainant to amend the Complaints  
14 were granted in the following particulars:

15 (a) In Paragraph 5 of the Ferguson Complaint  
16 and Paragraph 6 of the Bastiani Complaint, the words "35 miles"  
17 were deleted therefrom, and the words "26 nautical miles" were  
18 substituted in lieu thereof. Also, in those same paragraphs,  
19 the words "no approved instrument approach procedures" were  
20 stricken therefrom, and the words "VOR-DME approach to Runway  
21 30" were substituted in lieu thereof.

22 (b) With respect to Paragraph 9 of the Ferguson  
23 Complaint and Paragraph 10 of the Bastiani Complaint, the words  
24 "in the soft pavement of the runway" were stricken therefrom,  
25 and the words "in the turnoff pad beyond the runway" were

1 substituted in lieu thereof; and,

2 (c) In Paragraph 13 of both Complaints, the  
3 words "careless or" were stricken therefrom.

4 Discussion and Conclusions

5 In view of the amended Answers of Respondents and  
6 their admissions on the stand here today, very few factual  
7 allegations are in dispute.

8 Having considered the testimony of the witnesses and  
9 the exhibits sponsored by them, it is my conclusion that there  
10 is a sufficient evidentiary basis in the record to support a  
11 finding that the Respondents violated all of the sections of  
12 the FAR cited in the Complaints.

13 In this respect, it is my further conclusion that,  
14 in substantiating a violation of Section 91.9, Complainant has  
15 shown by a clear preponderance of the evidence that Respondents  
16 acted in a reckless manner. Respondents simply did not adhere  
17 to the procedures-flight instructions of their employer by  
18 utilizing all radio navigation aids to positively identify the  
19 airport of intended landing, which was Sheridan County Airport.  
20 Their actions in this respect were ill-advised, precipitous and  
21 unjustified. In short, they relied solely on visual reference.

22 As holders of ATP certificates, they are held to the  
23 highest degree of care, and, neither having ever flown into  
24 this area before, they should have exercised considerably more  
25 care and attention than they did.

1 Respondents have asserted an affirmative defense  
2 under ASRP. The modification under ASRP is in the form of  
3 Advisory Circular 00-46B, issued June 15, 1979, effective  
4 July 1, 1979. This circular is in the record as Joint Exhibit  
5 1. The pertinent portion of this advisory circular is found in  
6 Paragraph 9c.(1) and reads as follows:

7 "The filing of a report with NASA  
8 concerning an incident or occurrence involving  
9 a violation of the Act or the Federal Aviation  
10 Regulations is considered by the FAA to be  
11 indicative of a constructive attitude. Such an  
12 attitude will tend to prevent future violations.  
13 Accordingly, although a finding of a violation  
14 may be made, neither a civil penalty nor certificate  
15 suspension will be imposed if:

16 "(1) The violation was inadvertent  
17 and not deliberate;"

18 Complainant's counsel concedes that the violations  
19 found herein were not deliberate, but he further contends  
20 that they were not inadvertent because Respondents' conduct  
21 was reckless, involving numerous acts which culminated in the  
22 violations. He further contends that Respondents' conduct was  
23 aggravated so as to approach gross negligence and cannot,  
24 therefore, be considered inadvertent. As Complainant's counsel  
25 put it, Respondents saw an airport on the same general heading

1 of Sheridan County Airport and proceeded to approach and land  
2 at that other airport, without availing themselves of the  
3 numerous navigational aids to ascertain that they were  
4 approaching the correct airport.

5 Ballentine's Law Dictionary contains the following  
6 definition of the term "inadvertence":

7 "The word includes the effect of  
8 inattention, the result of carelessness,  
9 oversight, mistake, or fault of negligence  
10 and the condition or character of being  
11 inadvertent, inattentive, or heedless.

12 Gross negligence is not inadvertence  
13 in any degree. (*Emphasis added*).

14 In light of the above definition of the word  
15 "inadvertence" and the conclusions reached herein that  
16 Respondents acted in a reckless manner, in violation of  
17 Section 91.9, I feel compelled to conclude that Respondents  
18 have not shown entitlement to ~~the~~ immunity under the ASRP.  
19 because of their failure to show that their acts were  
20 inadvertent.

21 In my judgment, Respondents have presented no  
22 extenuating or mitigating circumstances. Although the  
23 imposition of sanction is a matter of judgment and one on which  
24 reasonable men may differ, the Complainant, as the agency  
25 charged with the formulation and administration of the

1 Regulations, has considerable experience and expertise in the  
2 selection of sanctions.

3 My review of Board Decisions indicates that 60 and  
4 30-day suspensions herein are in line with precedent and will  
5 serve to deter Respondents and others similarly situated, and  
6 I can discern no valid reason to modify the sanctions sought  
7 by the Administrator.

8 Contentions of the parties as to fact or law which  
9 have not been discussed hereinabove have been given due  
10 consideration and are found to be <sup>either</sup> not materially significant  
11 or not justified.

#### 12 Findings and Order

13 Upon consideration of all evidence of record, it is  
14 found that (1) a preponderance of the substantial, reliable,  
15 and probative evidence establishes the facts alleged in the  
16 Complaints and shows that Respondents violated the sections of  
17 the FAR cited therein, and (2) safety in air commerce or air  
18 transportation and the public interest require affirmation of  
19 the orders of suspension.


20 It is Ordered, That the orders of suspension be, and  
21 they are hereby, affirmed.

22 It is further Ordered, That, unless stayed by the  
23 timely filing of a notice, or notices, of appeal, this Order  
24 shall become effective June 24, 1980, and Respondents shall  
25 surrender their ATP certificates to the Office of Western  
Regional Counsel on or before that date.



1 Dated at Los Angeles, California, this 4th day of  
2 June, 1980.

3 Edited  
4 6/23/80  
5 JRD

  
6  
7 Jerrell R. Davis  
8 Administrative Law Judge

9 Appeal

10 An appeal from the Decision and Order herein may be  
11 made by filing with the National Transportation Safety Board,  
12 Docket Section, Dodge Center, Suite 301, 1010 Wisconsin  
13 Avenue, N.W., Washington, D. C. 20007, and serving upon the  
14 other party a notice of appeal within 10 days from today,  
15 perfected by the filing and serving of a brief in support  
16 thereof within 40 days from today.

17 The procedure on appeal is set forth in detail in  
18 Sections 821.43, 821.47, and 821.48 of the Rules of Practice.

19 Off the record.

20 (Discussion off the record.)

21 JUDGE DAVIS: Back on the record.

22 There being no further matters to come before the  
23 Bench in connection with these proceedings, I declare this  
24 hearing adjourned.

25 (Whereupon, at the hour of 7:20 o'clock p.m., the  
hearing in the above-entitled matters was adjourned.)

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FERGUSON, LOWELL G.  
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SE-4474  
SE-4475

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