

SERVED: June 25, 2009

NTSB Order No. EA-5460

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 24<sup>th</sup> day of June, 2009

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J. RANDOLPH BABBITT,		)	
Administrator,		)	
Federal Aviation Administration,		)	
		)	
Complainant,		)	
		)	Docket No. SE-18277
v.		)	
		)	
LEONARD J. JABLON,		)	
		)	
Respondent.		)	
		)	
<hr/>		)	

**OPINION AND ORDER**

Respondent appeals from the oral initial decision of Administrative Law Judge William R. Mullins in this matter, issued following an evidentiary hearing held on October 29, 2008.<sup>1</sup> By that decision, the law judge affirmed the Administrator's complaint and ordered a 180-day suspension of

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

respondent's commercial pilot certificate, with rotorcraft-helicopter ratings, based on violations of 14 C.F.R.

§§ 91.119(a)<sup>2</sup> and 91.13(a).<sup>3</sup> We deny respondent's appeal.

The Administrator's May 12, 2008 order, which served as the complaint before the law judge, alleged that, on June 9, 2007, respondent operated as pilot-in-command of a McDonnell Douglas 600N helicopter (hereinafter, "MD 600N") in the vicinity of Lake Shore Drive and Wacker Drive in Chicago, Illinois. The complaint stated that respondent's operation of the aircraft was for the purpose of flying a cameraman in support of the filming of a movie. The complaint further alleged that, during the course of the flight, respondent allowed the helicopter to descend to less than 500 feet over persons and property on the surface, and that such operation did not allow for an emergency landing without causing undue hazard to persons or property in the event of a power unit failure. The complaint alleged that

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<sup>2</sup> Title 14 C.F.R. § 91.119(a) provides 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.

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

respondent's operation of the aircraft was careless or reckless so as to endanger the lives and property of others.

At the hearing, the Administrator called four eyewitnesses, two of whom were on the aircraft at the time of the flight at issue, and who testified that they observed respondent flying at a low altitude over the Chicago River, and over the Lake Shore Drive Bridge and Wacker Drive. First, Rich Moskal, who is employed by the City of Chicago as the Director of the Chicago Film Office, testified that he saw respondent's helicopter hovering slowly at an altitude of about 100–200 feet from where he was standing on Wacker Drive. Tr. at 30–31. Mr. Moskal told a person from the movie production team that the aircraft was too low, and that someone needed to notify the pilot to "call these guys off." Mr. Moskal also stated that he observed the helicopter hover over Wacker Drive for approximately 1 minute, and then saw it proceed over Lake Michigan at a higher altitude. Mr. Moskal, who oversees the production of films in Chicago, explained that he did not arrange to block off any streets in the city because he was not aware that the team would be flying so low. Mr. Moskal also testified that he saw traffic on Lake Shore Drive and Wacker Drive, and opined that, had an accident occurred, people would have been injured. Mr. Moskal stated that he sent an e-mail message to the FAA following the flight (Exh. R-1; Tr. at 33), and that he spoke with both the director

and cinematographer for the film, and that the conversation was "not friendly" (Tr. at 37).

Roy Dean, a lieutenant in the Chicago Fire Department, also testified as an eyewitness. Lt. Dean stated that he works as a safety officer with the movie industry on days in which he does not work at the Fire Department, and that, had he been aware that the aircraft would be flying at below 750 feet, he would have taken several steps to ensure safety. Tr. at 62, 79.

Lt. Dean further stated that he observed respondent's aircraft hovering over Lake Shore Drive to an extent that it interfered with traffic, because cars were slowing to look at the helicopter; he estimated that the aircraft was approximately 100 feet over Lake Shore Drive. Tr. at 71. Lt. Dean testified that he also saw the helicopter at approximately 75-100 feet over Wacker Drive, while there was a lot of traffic on Wacker Drive (Tr. at 76), and that he could have hit the helicopter "with a breakfast sandwich" (Tr. at 80). Following the flight, Lt. Dean stated that some people involved in the production of the film apologized to him, and said they had no control over the altitude of the aircraft. Lt. Dean subsequently sent a letter to the FAA concerning the flight. On cross-examination, Lt. Dean stated that his observation of respondent's helicopter over Lake Shore Drive was from a distance, and that he could not

definitively state that he observed the aircraft over Wacker Drive.

The Administrator also called Michael Goi, the cinematographer who was filming the city and a barge in the Chicago River at the time of the flight, to testify. Mr. Goi stated that, in preparing for the flight, he did not speak to respondent concerning the altitude from which he needed to film, but explained to respondent the types of camera shots he needed to film, in general. Mr. Goi estimated that the helicopter was approximately 30–40 feet over Lake Shore Drive (Tr. at 112, 128), and testified that, at one point, he told respondent to stop flying so low (Tr. at 112). Mr. Goi stated that he did not know if the helicopter flew over Wacker Drive, but that he knew the helicopter had banked close to the side of the river. Mr. Goi also narrated the footage that he shot during the flight, which the Administrator's counsel submitted into evidence. Tr. at 126–27; Exh. A-3.

The Administrator called Charles Carner, the president of Southside Films and the writer and director of this particular movie, to testify as an eyewitness who was also on the aircraft at the time of the flight. His testimony was consistent with that of Mr. Goi: that they discussed the type of footage they needed on the flight with respondent, and that respondent stated no objections. Mr. Carner testified that he heard from someone

that people on the ground were complaining about the low altitude of the helicopter after it proceeded over Lake Shore Drive. Tr. at 158-59. Mr. Carner recalled going over Lake Shore Drive three times, and going over Wacker Drive, but not hovering. Tr. at 161-62. He testified that he observed some cars and people on the ground, but not many. Mr. Carner stated that, after the third call they received concerning the altitude of the helicopter, they flew back to the airport. Mr. Carner did not know the altitude of the helicopter or how close the helicopter got to any buildings, and stated that no one gave him any specific instructions concerning a minimum altitude above which the aircraft needed to remain.

Finally, the Administrator called Kristian Kortokrax, an aviation safety inspector at the DuPage Flight Standards District Office, to testify. Inspector Kortokrax offered opinions concerning a height velocity diagram that the Administrator introduced into evidence, which indicates the areas from which a pilot cannot conduct a successful autorotation<sup>4</sup> of a helicopter such as an MD 600N. Exh. A-4.

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<sup>4</sup> Inspector Kortokrax stated that an autorotation is a maneuver that a helicopter pilot can do in the event of an engine failure or anti-torque failure. Tr. at 194. Inspector Kortokrax then described an autorotation as follows:

Once the engine fails[,] the flow through the rotor reverses. Airflow is then from the bottom up through the rotor and causes the rotor to turn much as a

Inspector Kortokrax stated that a gray area on the diagram depicts the areas that pilots should "stay out of." He opined that it would be "very difficult" to complete a successful autorotation 100 feet over Lake Shore Drive in the event of an engine failure. Tr. at 203-204. Inspector Kortokrax based his opinion concerning the likelihood of a successful autorotation on the fact that the video footage from respondent's flight indicated that respondent was flying the helicopter at a 90-degree angle, which is a high drag configuration, and because he was only 100 feet above Lake Shore Drive while operating the helicopter at a slow speed. Inspector Kortokrax opined that respondent violated §§ 91.119(a) and 91.13(a), as alleged, when

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(..continued)

child's pinwheel would spin. That transition from down-flow to up-flow is going to require some loss of altitude to effect. Once in the auto rotation we have basically three sources of energy. We have the energy, kinetic energies in the form of rotor RPM, kinetic energy in the form of forward air speed, and potential energy in the form of altitude, height above the ground. If we have sufficient height above the ground and we're slow we can trade the potential energy, convert it to kinetic energy in terms of airspeed. Ultimately, at the end of the auto rotation we need some forward airspeed kinetic energy to convert into rotor RPM. We accomplish that by flaring the helicopter, which slows the forward speed, arrests the high descent rate, the descent rate on the order of 1,500 feet per minute, and builds RPM. Subsequently, we level the ship, use the RPM that we have stored in the rotor to cushion the touchdown and [e]ffect a safe landing.

Tr. at 195.

he flew over Lake Shore Drive at a low altitude and a slow speed.

At the conclusion of the Administrator's case, the law judge took judicial notice of the Sanction Guidance Table, at the request of the Administrator's counsel. Tr. at 233. In response to the Administrator's case, respondent provided the testimony of one eyewitness, Robert Faison. He was also on the flight in question, as an assistant to Mr. Goi. Mr. Faison testified that the helicopter was over the Chicago River for most of the flight, and that he never heard anyone say they felt unsafe on the flight. Mr. Faison stated that he did not remember whether the helicopter proceeded directly over Wacker Drive, but testified that it was "certainly close." Tr. at 238. He recalled crossing over Lake Shore Drive two or three times, and estimated that the helicopter may have been 50 feet above the street light poles on the Lake Shore Drive Bridge.

Respondent testified on his own behalf. He stated that he has been flying for 30 years, and has over 400 hours in an MD 600N. He opined that § 91.119(a) contains a subjective standard with regard to the term "undue hazard," and that no one from the FAA had ever told him that he must maintain a minimum altitude over water. Respondent described potential landing sites that he could have used during the flight, if necessary. He estimated that he flew the aircraft approximately 200 feet above

Lake Shore Drive, and stated that he was never over Wacker Drive, but may have been "alongside of it." Tr. at 254. He stated that he disagreed with the witnesses who testified that they saw him over Wacker Drive, and testified that he stayed down the middle of the river during the flight. Respondent also opined that the video footage of the flight did not correctly portray the flight.

Finally, respondent called Channing Morse, who has extensive experience with MD 600 series helicopters and who has written patents for helicopter control systems and developed height velocity diagrams, as an expert witness. Mr. Morse stated that he had tested aircraft to determine their autorotation capabilities, and that such testing involved simulation of engine failures. He agreed with Inspector Kortokrax's interpretation of the height velocity diagrams, in that pilots should not operate helicopters inside the shaded area on the diagram. Mr. Morse stated that he studied the video footage from respondent's flight, and opined that respondent could have autorotated the helicopter to the water from any point during the flight, including when he crossed over Lake Shore Drive; Mr. Morse also estimated that respondent operated his aircraft at approximately 150 feet. Mr. Morse stated that a roadway without traffic or people, in addition to the water, would have been suitable landing sites. On cross-examination,

Mr. Morse clarified that his experience with autorotations and landings had taken place in controlled environments for purposes of testing. He also stated that he did not consider the possibility that respondent had hovered over Wacker Drive in offering his opinions concerning the possibility of a safe landing.

At the conclusion of the hearing, the law judge issued an oral decision, in which he first acknowledged that the Administrator did not allege that respondent violated § 91.13(a) as an independent violation, but instead based the § 91.13(a) charge on the alleged violation of § 91.119(a). Initial Decision at 302–303. The law judge summarized the evidence and testimony that both parties provided, and concluded that respondent would not have been able to land anywhere in the case of an engine failure without harming someone. Id. at 310. The law judge concluded that a 180-day suspension was appropriate, based on the circumstances of the case and respondent's history of a previous violation. Id. at 311.

On appeal, respondent raises four main issues: whether the law judge erred in interpreting the phrase "undue hazard" in § 91.119(a); whether the regulation is void because it is ambiguous; whether the law judge relied on evidence that was improperly admitted; and whether the 180-day suspension period is excessive. In support of his argument that the law judge

applied an incorrect standard to find that respondent had violated § 91.119(a), respondent argues that the regulation itself does not define "undue hazard," and that we have previously interpreted the reference to "hazard" in § 91.119(d) as some actual interference with persons or property on the surface. Respondent also argues that there is no minimum safe altitude for helicopters over water, and that we have previously found violations of § 91.119(a) only in cases in which helicopters have flown extremely low. Respondent further contends that navigable water is an emergency landing location. Respondent argues that the law judge erred in finding that he violated § 91.119(a) because the law judge did not reject testimony that respondent could have executed an autorotation and reached the river in the event of an engine failure. Respondent asserts that the law judge applied a standard that is so broad that all flights over any body of water would violate § 91.119(a), and that such an interpretation contradicts Board case law. Similarly, respondent also contends that we should find § 91.119(a) void and unenforceable because it is necessarily subjective, and therefore ambiguous.

We find respondent's arguments concerning the alleged ambiguity of § 91.119(a) unavailing. First, we note that Congress has directed the Board to defer to the Administrator's interpretation of FAA regulations. 49 U.S.C. § 44709(d)(3); see

also Garvey v. NTSB, 190 F.3d 571, 576-79 (D.C. Cir. 1999). In particular, § 44709(d)(3) provides that the Board "is bound by all validly adopted interpretations of laws and regulations the Administrator carries out ... unless the Board finds an interpretation is arbitrary, capricious, or otherwise not according to law." Here, the Administrator urges the Board to adopt the plain meaning of the term "undue hazard," which the Administrator interprets as, "unwarranted or excessive danger, risk, or peril or an inappropriate, unjustifiable, or unpredictable 'something,' i.e., loss of a power unit, causing danger, peril, risk, or difficulty." Reply Br. at 23. We do not find that this interpretation is arbitrary, capricious, or otherwise not according to law; as such, we defer to the Administrator's interpretation of "undue hazard" in § 91.119(a). Moreover, we must reject respondent's argument that § 91.119(a) is unenforceable because it is ambiguous. We do not have jurisdiction to review the enforceability of FAA regulations, but only the authority to review certificate actions on appeal. See 49 U.S.C. § 1133. Should respondent seek to challenge § 91.119(a) based on its alleged ambiguity, he must do so under the Administrative Procedure Act (APA).<sup>5</sup>

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<sup>5</sup> Anyone who seeks to challenge an agency's enforcement of its own regulation may do so in limited circumstances under the APA. See 5 U.S.C. § 702.

Respondent further argues that the law judge relied on evidence that he admitted improperly, because he denied respondent's motion in limine, which sought to prevent the Administrator from offering evidence contrary to the Administrator's admissions during discovery. Respondent also asserts that the law judge relied on facts not in evidence, such as the presence of boats in the river, the location of the barge in the river that the film crew sought to capture for the movie, the existence and location of pedestrians, and the altitude above Wacker Drive. Respondent argues that the law judge also erred in denying respondent's counsel the opportunity to offer proof concerning the Administrator's selective enforcement of the regulations.<sup>6</sup>

With regard to respondent's argument that the law judge relied on improperly admitted evidence in reaching his conclusion that respondent violated § 91.119(a), we find this argument unpersuasive. We have previously held that law judges have considerable discretion in overseeing hearings,<sup>7</sup> and this

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<sup>6</sup> Respondent's argument appears to be based upon the contention that the Administrator did not charge the film crew of another movie, which was filming in Chicago on the same day, with violation of any Federal Aviation Regulations, even though that other movie also included some aerial photography.

<sup>7</sup> See, e.g., Administrator v. Giffin, NTSB Order No. EA-5390 at 12 (2008) (citing Administrator v. Bennett, NTSB Order No. EA-5258 (2006)). Moreover, we will not overturn a law judge's evidentiary ruling unless we determine that the ruling was an

standard also calls for deference to law judges during the discovery phase of cases. As such, respondent's arguments concerning his motion in limine and his offer of proof regarding the Administrator's selective enforcement of the Federal Aviation Regulations are without merit, because he does not establish that the law judge's rulings were an abuse of discretion.

Likewise, respondent's reliance on Administrator v. Finazzo, NTSB Order No. EA-5412 (2008), with regard to the law judge's weighing of the evidence is misplaced because, in Finazzo, we reversed the law judge's decision after finding that the weight of the evidence was contrary to the law judge's credibility assessments. Id. at 12-14. In the case at hand, respondent merely states that the Board may reverse a law judge's decision when the Board finds that the overwhelming weight of the evidence necessitates a different result; respondent does not identify any evidence that contradicts the law judge's decision or credibility determinations.

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(..continued)

abuse of discretion. See, e.g., Administrator v. Martz, NTSB Order No. EA-5352 (2008); Administrator v. Zink, NTSB Order No. EA-5262 (2006); Administrator v. Van Dyke, NTSB Order No. EA-4883 (2001). Furthermore, the Board is aware of the wide latitude that the APA provides agencies with regard to the admissibility of evidence at administrative hearings. 5 U.S.C. § 556(d).

Respondent's argument concerning the law judge's reliance on allegedly incorrect facts is also not persuasive. None of the facts upon which respondent argues the law judge inappropriately relied would overcome the evidence that the Administrator has submitted. The law judge's assumption that boats were likely in the Chicago River at the time of respondent's flight, his hypothetical statement concerning the possibility that respondent's helicopter could hit the barge in the river, and his presumption that pedestrians were likely nearby, are neither inappropriate nor material to the outcome of the case. It was reasonable for the law judge to consider that boats may have been in the Chicago River and that respondent's helicopter may have come within a range that could have rendered the barge and pedestrians unsafe in the event of an engine failure. Even if these presumptions were incorrect, such facts still do not contravene the eyewitness testimony<sup>8</sup> and video evidence<sup>9</sup> that the Administrator submitted, which shows that

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<sup>8</sup> The eyewitness testimony at the hearing formed a basis for the law judge's determination that respondent operated the helicopter at an impermissibly low altitude. We have long held that we will defer to our law judges' credibility determinations in the absence of a showing that the determinations are arbitrary, capricious, or contrary to the weight of the evidence. 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)).

<sup>9</sup> A review of the video evidence that the Administrator submitted

respondent operated the helicopter at a very low altitude over part of the city of Chicago.

Finally, respondent asserts that the 180-day suspension period is excessive because the Administrator initially charged respondent with violating § 91.119(d) in addition to the present charges, but then withdrew the § 91.119(d) charge. Respondent also contends that he has been found in violation of a regulation only one time, almost 20 years ago, and that the revocation that resulted from that violation did not involve his rotorcraft-helicopter ratings. Respondent further argues that he will suffer economic hardship if we affirm the law judge's decision, and that the record does not contain evidence indicating that he was ever in close proximity to any pedestrians. The Administrator contests each of respondent's arguments, and urges us to affirm the law judge's decision.

We believe that a reduction in sanction is inappropriate in this case. First, we note that respondent's argument that he will suffer economic hardship if we suspend his certificate is not a factor that we consider in our analysis. Administrator v.

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(..continued)

corroborates the eyewitnesses' testimony, as it shows camera footage taken from over the Chicago River as well as portions of the city of Chicago from a low altitude. See Exh. A-3. In addition, the video evidence that respondent submitted also contains two brief clips taken from a low altitude over what appears to be portions of the city. Exh. R-2 (clips 7 and 9).

Peacon, NTSB Order No. EA-4607 at 14–15 (1997). Moreover, the record contains no evidence or indication that the Administrator had originally charged respondent with a violation of § 91.119(d), but then withdrew it<sup>10</sup>; the complaint that is the basis of this appeal does not contain a § 91.119(d) charge. Furthermore, the law judge took judicial notice of the Administrator's Sanction Guidance Table at the hearing, and referred to the Table in the initial decision. Initial Decision at 311. 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); Administrator v. Law, NTSB Order No. EA-5221 at 4 (2006); see also Go Leasing v. NTSB, 800 F.2d 1514, 1518 (9th Cir. 1986). We find the law judge's determination of sanction in this case to be appropriate for the violations proven.

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<sup>10</sup> The only references in the administrative record to § 91.119(d) are found in some of respondent's pleadings. There is no indication, however, that respondent was ever "charged" with a violation of § 91.119(d); there is only an indication that the Administrator investigated such a violation. Because the Administrator did not charge a § 91.119(d) violation (we note that the suspension order was never amended; this is not a case in which the Administrator initially charged the violation and then amended the order to withdraw the charge), said violation was not considered in the Administrator's choice of sanction and is, therefore, not relevant to this discussion.

**ACCORDINGLY, IT IS ORDERED THAT:**

1. Respondent's appeal is denied;
2. The law judge's decision is affirmed; and
3. The 180-day suspension of respondent's commercial pilot certificate, with rotorcraft-helicopter ratings, shall begin 30 days after the service date indicated on this opinion and order.<sup>11</sup>

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

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<sup>11</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

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In the matter of:	*	
	*	
ROBERT A. STURGELL,	*	
ACTING ADMINISTRATOR,	*	
Federal Aviation Administration,	*	
	*	
Complainant,	*	
v.	*	Docket No.: SE-18277
	*	JUDGE MULLINS
LEONARD J. JABLON,	*	
	*	
Respondent.	*	

\* \* \* \* \*

Dirksen Federal Building  
U.S. Bankruptcy Court  
219 South Dearborn Street  
Courtroom 760 (7th Floor)  
Chicago, Illinois 60604

Wednesday,  
October 29, 2008

The above-entitled matter came on for hearing,  
pursuant to notice, at 9:16 a.m.

BEFORE: WILLIAM R. MULLINS,  
Administrative Law Judge

## APPEARANCES:

On behalf of the Administrator:

MICHAEL F. MCKINLEY, ESQ.  
Federal Aviation Administration  
Office of the Regional Counsel  
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On behalf of the Respondent:

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ORAL INITIAL DECISION AND ORDER

ADMINISTRATIVE LAW JUDGE MULLINS: This has been a proceeding before the National Transportation Safety Board held under the provisions of Section 44709 of the Federal Aviation Act of 1958, as amended, on the appeal of Mr. Leonard Joseph Jablon from an Order of Suspension that seeks to suspend his Airman's Certificate for a period of 180 days. The Order of Suspension was issued by the Administrator of the Federal Aviation Administration through regional counsel of the Great Lakes Region.

The matter has been heard before me, William R. Mullins. I'm an Administrative Law Judge for the National Transportation Safety Board. Pursuant to Board's rules I will issue a bench decision at this time.

The matter came on for hearing pursuant to notice that was given to the parties, and was called for trial here in Chicago this 29th day of October 2008. The Administrator was present throughout these proceedings and represented by counsel, Mr. Mike McKinley, Esquire of the Great Lakes Region. The Respondent was present throughout these proceedings and was represented by his counsel, Mr. Brandt R. Madsen, Esquire of Chicago.

The parties were afforded a full opportunity to offer evidence, to call, examine, and cross examine witnesses. And, in addition, the parties were afforded an opportunity to make argument in support of their respective positions.

1 STATEMENT OF THE CASE

2 ADMINISTRATIVE LAW JUDGE MULLINS: This hearing and this  
3 Order of Suspension involved a helicopter flight operated by  
4 Respondent, Mr. Jablon, and I'll refer to him as Respondent, on  
5 June 9th of 2007.

6 At that time he was operating the helicopter in Downtown  
7 Chicago, and I mean literally over Downtown Chicago over and near  
8 the Chicago River while he had a film crew onboard the helicopter  
9 filming a segment or part of the filming for a movie called  
10 Witness Protection.

11 As a result of that flight the Administrator has alleged  
12 that during the flight Respondent was in regulatory violation of  
13 FAR 91.119(a), which prohibits a person from operating an aircraft  
14 except when necessary for takeoff or landing at an altitude  
15 allowing if a power unit fails, and an emergency landing without  
16 undue hazard to persons or property on the surface. And then also,  
17 the Administrator has alleged regulatory violation as a residual  
18 violation FAR 91.13(a), which prohibits any person from operating  
19 an aircraft in a careless or reckless manner so as to endanger the  
20 life or property of another.

21 And I'll say this just at the, at this time, and I won't  
22 address it again because it's an interesting issue. There was  
23 some suggestion that it might not be residual, although the only  
24 notice that the Administrator gave Respondent was that it was a  
25 residual violation, but there was some argument about if there had

1 been an emergency landing in the river, which would not have  
2 necessarily, may not have necessarily created a hazard, an undue  
3 hazard to persons or property on the surface, it would very well  
4 have created a hazard to the people onboard the helicopter.

5 I don't know how to resolve that issue, but it, the  
6 Administrator did not allege it as a standalone violation but as a  
7 residual. And so I just pass on that because I'm not going to  
8 consider that.

9 The Administrator had five witnesses. The first was  
10 Mr. Rich Moskal, who is the Director of the Chicago Film Office,  
11 and he described his job as being someone who interfaces, I guess,  
12 with the movie industry and tries to promote movies coming to the  
13 Chicago Area to film because of the financial benefit to the city  
14 and so forth.

15 But he testified on that morning, and these flights, or  
16 this flight occurred early morning hours, between 7:00 and 8:00,  
17 but he testified that he was down in this area. And the sight of  
18 the flights were well identified in Exhibit A-1, A-2, and A-2A,  
19 which are aerial photographs of that portion of Downtown Chicago  
20 where the Chicago River runs out of Lake Michigan. And that's  
21 well represented in those, but the highway that's across on the  
22 top side, the main road there is Lake Shore Drive.

23 And Mr. Moskal said that at the time of that morning  
24 when he first became aware of the problem he was below, or in the  
25 lower level, apparently Lake Shore Drive has two levels, and he

1 was on the lower level of Lake Shore Drive. And he got a phone  
2 call from the Chicago Fire Department and said that this  
3 helicopter that was flying was way too low. And he said he then  
4 got in his car, drove up, and apparently you have to circle around,  
5 and he ended up on Wacker Drive, where he first saw the helicopter.

6 And his testimony was that the helicopter, well, let me  
7 back up. He said that the agreement for this particular flight  
8 was that it was supposed to be 500 to 750 feet, and that would be  
9 okay. But he said when he got up, when he got this phone call and  
10 he went up on Wacker Drive and he saw the aircraft he said it was  
11 below or at 200 feet when he saw it.

12 The second witness called by the Administrator was  
13 -- was it Roy or Ray Dean?

14 MR. MCKINLEY: Roy (R-o-y).

15 ADMINISTRATIVE LAW JUDGE MULLINS: Okay. Mr. Roy Dean,  
16 and he's a Lieutenant with the Chicago Fire Department, but he  
17 works on the weekends and on his time off for these movie  
18 production companies. And that particular morning he was working  
19 for the Batman movie, The Dark Knight, which was being filmed at  
20 the same time on down the river a little ways.

21 Any event, he said it was around 6:30 or 7:00 in the  
22 morning, he was having a burrito, a breakfast burrito at the, at  
23 this place where they feed the people that are come in for the  
24 movie.

25 But anyway, he, it was down just off of Wacker. He said

1 he, when he heard this low flight he ran up to Wacker, and then he  
2 proceeded then north, well, not north, I guess it's east, I always  
3 think of that as north, but I guess it's east on Wacker until he  
4 could see the helicopter.

5           And he said that he saw the helicopter coming over Lake  
6 Shore Drive at 75 to 100 feet and then dropped down, proceeded  
7 down the river, and then at an, at a subsequent time while it was  
8 circling it came out over Wacker Drive and it was 75 to 100 feet  
9 over Wacker Drive.

10           He said later after the incident, the people, the  
11 filming crew came to him and made their statements to him, and I  
12 don't think he identified who it was. If he did I didn't get it  
13 in my notes, and that's not important I don't think. But he said  
14 they said they have, they apologized and said they had no control  
15 over what the pilot did.

16           The third witness called by the Administrator was  
17 Mr. Michael Goi, who was the cinematographer and director of  
18 photography for this film, and he was onboard the helicopter that  
19 morning running the film. He said that at one time they crossed  
20 over Lake Shore Drive and he estimated they were about 30 feet  
21 over the stanchions of that bridge where the, where Lake Shore  
22 Drive crosses the river there.

23           The next witness called by the Administrator was  
24 Mr. Charlie Carner, and he's the President of Southside Film, and  
25 he wrote and directed this film. And he was also onboard the

1 helicopter setting in front alongside the pilot.

2 Both he and Mr. Goi testified that while the filming was  
3 going on Mr. Goi was looking through his camera and didn't have a  
4 lot of reference to the ground.

5 And Mr. Carner sort of said the same thing. He had a  
6 monitor apparently in front of him that was showing what the  
7 filming was doing. And he was watching that and wasn't paying any  
8 attention to the ground.

9 The fifth witness called by the Administrator was  
10 Mr. Kris Kortokrax, who's the FAA expert, called in this matter.  
11 He has a number of hours including 1,200 hours in rotorcraft. And  
12 he identified, and I'll go back in a minute and talk about some of  
13 the exhibits.

14 But he identified Exhibit A-4, which was the height  
15 velocity curve for this particular helicopter that was being  
16 operated that morning, and also Exhibit A-5, which was the glide  
17 slope and auto rotation, glide distance and auto rotation for that  
18 particular helicopter. Those were Administrator's Exhibits A-4  
19 and 5.

20 I mentioned A-1, A-2, A-2A. A-3 was the film that was  
21 actually taken and I observed it here in the courtroom today, and  
22 it's one of the Exhibits here as A-3. Now, Respondent had his  
23 Exhibit R-2, which was pieces of the film kind of broken out. And  
24 I only saw one small piece, but R-2 because all of the filming was  
25 reflected on A-3.

1           Also, I didn't say it, but Mr. Carner identified  
2 Respondent's Exhibits R-3 and R-4, which were taken that day. And  
3 then R-1 was an e-mail that Mr. Moskal sent to the FAA about this  
4 incident apparently that morning. And that's in the record as  
5 Exhibit R-1.

6           The first witness called by the Administrator was Mr., I  
7 mean, by the Respondent was Mr. Robert Faison, who testified here  
8 that he was the fourth person on the helicopter that morning, and  
9 he was sort of a film person, he was reloading the camera for  
10 Mr. Goi. He didn't recall or didn't have a lot of recollection  
11 about heights or anything. And Mr. Goi had talked about the fact  
12 that Mr. Faison was getting ill on the, getting airsick on the  
13 aircraft.

14           The second witness called by the Respondent was the  
15 Respondent himself, Mr. Jablon. Mr. Jablon has several, three  
16 helicopters I believe he said, testified to, has over 10,300 hours  
17 in helicopters. And he was pretty, he emphasized about the  
18 minimum altitudes, and said that there was no minimum altitude for  
19 a helicopter over water.

20           And then the third witness called by the Respondent was  
21 Mr. Channing Morse, who probably is one of the most qualified  
22 experts that I've heard over the years. And he's an Air Force  
23 Academy graduate, went through the Naval Test Pilot School while  
24 he was on active duty. And then after he got off active duty he  
25 did all of the test flights, in fact he testified that he was the

1 first, he flew the first flight of this helicopter when it was  
2 first produced, and it was an MD600N, was the type of helicopter,  
3 McDonald Douglas 600N, and obviously those folks are now Boeing.

4 But in any event, he did all of the testing on the  
5 helicopter, he developed the height velocity curve. And it was  
6 his opinion that this helicopter could, over the areas of the  
7 flight could have landed if there had been a loss of an engine  
8 could have landed in the river without undue hazard to persons or  
9 property on the surface.

10 Those are the witnesses. I think I've mentioned all of  
11 the exhibits, if I haven't I've certainly considered all of the  
12 exhibits.

13 Several things came out during the trial, and I wanted  
14 to discuss those just a little bit. Each of the people onboard  
15 the helicopter, except Mr. Jablon, was asked if they ever felt  
16 like they were in harms way or felt any fear. And I thought that  
17 was an unusual question in the context of this violation, alleged  
18 violation in that you wouldn't feel any harm or fear until the  
19 engine quit.

20 If you're flying along, you know, and particularly if  
21 you're not helicopter qualified, you probably wouldn't even  
22 appreciate how low you were. You probably would think it was just  
23 another thrill flying in a helicopter. I was concerned about that.

24 Then there was the thing and then the offer of proof  
25 about all this money that this other film was spending and why

1 weren't they violated because they flew their helicopter lower.

2           And I don't want to make little of that, Mr. Jablon,  
3 because I know that that would be something of real concern to you,  
4 and if I were in your shoes it would be of real concern to me.

5           But it's not a concern for the judge that's hearing your  
6 case, that's just another case. And I don't prosecute these  
7 things, the FAA does. And if they don't file it, and I don't know  
8 what went on out there. But just to come in and say, they had  
9 more money so they didn't, they weren't violated just doesn't have  
10 any impact in this case.

11           This particular flight day was a slow flight. And in  
12 fact, as you could probably tell from the film, it certainly was  
13 talked about by a couple of the witnesses that the helicopter was  
14 flying sideways so that it could be doing this film. The door was  
15 taken off and Mr. Goi was in this opening where the helicopter was  
16 turned and they were filming this barge that's going down the  
17 Chicago River. And if you see in all of the pictures the barge is  
18 clear and, in each one of those pictures.

19           And I think it was Mr. Kortokrax who testified about,  
20 and he had a little model helicopter when he's talking about if  
21 you're flying sideways at slow speed the, in the event of engine  
22 failure it's even more difficult to get your auto rotation started.

23           But I keep coming back that the only place it could have  
24 landed, particularly when there was that testimony about the  
25 aircraft being low over Wacker Drive, the only place that the

1 aircraft could have gone if it was 75 or 100 feet, and there's no  
2 reason, at least I'm satisfied that the evidence has established  
3 that the aircraft was at that altitude at some point in the flight  
4 that day.

5           And if there had been an engine failure the only place,  
6 beside the Wacker Drive which had, people testified there were  
7 people on Wacker Drive, there were cars, there was cars parking at  
8 this Swiss Hotel that was identified, I think, by Mr. Dean.

9           But if the aircraft had auto rotated in the river it's  
10 not to say it wouldn't have hit the barge, which would have been  
11 undue hazard. But this is a Chicago River, Downtown Chicago in  
12 the middle of summer. I came by there this morning, there were  
13 boats on that river, and there's other boats, there was no  
14 evidence today that the river had been shut down for this filming,  
15 and certainly there was this big barge with the thing pushing it.

16           But even at that, and, you know, and I was thinking  
17 about my rural background, but this is not like sitting down in  
18 the Arkansas River in the middle of rural Oklahoma, this is  
19 Downtown Chicago. And even if there hadn't been any boats down  
20 there, and they was successfully auto rotated in the river there  
21 would have been an undue hazard to people getting down there,  
22 trying to get in there and save the people, pull them out of the  
23 helicopter in that particular location.

24           So, basically, I think, given, in consideration of all  
25 of the testimony that I've heard here today, and the witnesses,

1 and the exhibits, I'm satisfied that the Administrator has  
2 sustained his burden of proof in establishing regulatory violation  
3 of FAR 91-119(a) and the residual violation of 91.13(a).

4 And as to the sanction, the sanction guidance table  
5 calls for 60 to 180 days. And given the prior violation history I  
6 think the Administrator's selection of 180 day suspension is  
7 appropriate under the circumstances of this case.

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ORDER

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EDITED & DATED ON  
December 2, 2008

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Judge William R. Mullins  
Judge