SERVED: December 15, 2009

NTSB Order No. EA-5493

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 14th day of December, 2009

J. RANDOLPH BABBITT, Administrator, Federal Aviation Administration, Complainant, v. THEODORE B. HARMON, Respondent.	Docket SE-18712

OPINION AND ORDER

The Administrator appeals the oral initial decision of Administrative Law Judge William R. Mullins, issued on November 5, 2009.[1] In the initial decision, the law judge

[1] A copy of the initial decision, an excerpt from the hearing transcript, is attached.

granted respondent's appeal as to two[2] of four alleged violations, and denied respondent's appeal with regard to the other two[3] regulatory violations alleged in the Administrator's emergency revocation order.[4] The law judge reduced the sanction from revocation to a 45-day suspension. The Administrator appeals the law judge's determination that respondent did not violate §§ 91.111(a) and 91.113(f), and the law judge's reduction in sanction.[5] We deny the Administrator's appeal with

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[2] The Administrator alleged that respondent violated 14 C.F.R. § 91.111(a), which prohibits any person from operating an aircraft "so close to another aircraft as to create a collision hazard." The Administrator also alleged that respondent violated § 91.113(f), which states, "[e]ach aircraft that is being overtaken has the right-of-way and each pilot of an overtaking aircraft shall alter course to the right to pass well clear."

[3] The Administrator also alleged, and the law judge found, that respondent violated § 91.119(b), which requires the following as a minimum safe altitude: "[o]ver any congested area of a city, town, or settlement, or over any open air assembly of persons, an altitude of 1,000 feet above the highest obstacle within a horizontal radius of 2,000 feet of the aircraft." The Administrator further alleged, and the law judge found, that respondent violated § 91.13(a), which prohibits any person from operating an aircraft "in a careless or reckless manner so as to endanger the life or property of another."

[4] This case proceeds pursuant to the Administrator's authority to issue immediately effective orders under 49 U.S.C. §§ 44709(e) and 46105(c), and in accordance with the Board's Rules of Practice governing emergency proceedings, codified at 49 C.F.R. §§ 821.52—821.57.

[5] Respondent does not appeal the law judge's finding that he violated §§ 91.119(b) and 91.13(a).

regard to the alleged regulatory violations, and grant the Administrator's appeal, in part, concerning the sanction.

The Administrator issued the emergency revocation order, which became the complaint in this case, on October 15, 2009. The complaint revoked all airman certificates that respondent holds, including his airline transport pilot (ATP) certificate, based on alleged violations of the above-listed regulations, which the Administrator alleges occurred on May 8, 2009, when respondent operated a Piper Super Cub (PA-18) over Milwaukee in a banner tow flight. The Administrator's complaint asserted that respondent operated the Super Cub over Milwaukee during the city's Summer Fest event, and reported to air traffic control (ATC) that he had a Robinson R-44 news helicopter (hereinafter, "Channel 12") in sight. After informing ATC that he had Channel 12 in sight, the complaint alleges that respondent flew directly at Channel 12, and caused the pilot of Channel 12 to take evasive action in order to avoid a collision. The complaint alleged that respondent flew at Channel 12 in such a manner a total of four times, and that another Piper PA-18, operated by Mr. Brennan Michaelis also on behalf of Air Signs and Banners, Inc., joined respondent during his third orbit at the same altitude. The complaint stated that, at numerous times during the flight, one or more buildings, the top of which were in excess of 1,000 feet mean sea level (MSL), were within a

horizontal radius of 2,000 feet of respondent's aircraft. The complaint further alleged that the surface at the Milwaukee Summer Fest grounds and in the vicinity surrounding the grounds is between 600 and 650 feet above mean sea level. The complaint stated that, at all relevant times during the flight, respondent operated the Super Cub below an altitude of 1,000 feet above the highest obstacle within a horizontal radius of 2,000 feet of the Super Cub. The complaint asserted that, each time respondent operated the Super Cub in the direction of Channel 12, he created a collision hazard, and that his operation was reckless and endangered the lives of the people on the ground and in the Channel 12 helicopter when respondent flew straight at the hovering helicopter at a low altitude. The complaint concluded with the assertion that respondent's ATP certificate was revoked in 2006 for careless and reckless operation, which resulted in respondent undergoing criminal prosecution.

The case proceeded to a hearing, at which the Administrator called Ms. Kyle Howard, who was the pilot of Channel 12 during the events at issue. Ms. Howard testified that she planned on getting video coverage of Summer Fest on May 8, 2009, for Channel 12. She stated that she hovered over Freeway 794 at 1,600 feet, and that respondent proceeded toward her at a similar altitude. Tr. at 34. Ms. Howard estimated that respondent was moving at approximately 60 to 70 miles per hour,

and that the nose of her aircraft was facing the nose of respondent's Super Cub. She testified that she took evasive action when respondent was approximately one quarter of a mile away from her, because respondent did not appear to alter his course as he approached. Ms. Howard stated that, if she had not taken evasive action, a collision could have occurred. Tr. at 36. Ms. Howard described respondent's orbit pattern as a race track pattern, or series of left-hand turns, which he repeated after Ms. Howard returned to her spot over Freeway 794 and hovered. Ms. Howard stated that, after respondent orbited a third time, she moved over and hovered in a different location. Ms. Howard also identified an e-mail message that she sent to Mike Mecha, who is a general aviation principal operations inspector at the Milwaukee Flight Standards District Office (FSDO), in which she recalled the events of the flights at issue, and opined, "[respondent] either did not see us, but told ATC he did, or he did see us, but felt he had the right to fly right at us. Neither condition is safe or shows good judgment." Exh. A-1. On cross-examination, Ms. Howard acknowledged that she did not file a report with ATC indicating a near-miss, and stated that ATC had instructed her to maintain visual separation, and that she felt that she maintained adequate separation from respondent.[6]

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[6] Ms. Howard testified that she felt that she had the right-of-

The Administrator also called Jeffrey Welch, a quality assurance support specialist at the Milwaukee Mitchell Airport Traffic Control Tower, to testify. Mr. Welch stated that he collected radar data of the events at issue, and combined the ATC audio communications with the radar data to create a record that shows the aircraft data, such as the speed, altitude, and distance between both aircraft at issue, and depicts the communications. Exh. A-4. Mr. Welch identified the portion of the record that shows that the closest the two aircraft got to one another was 0.18 of a statute mile apart. Tr. at 126; Exh. A-4 at 11:45. However, at that point, the aircraft were diverging, because Channel 12 was proceeding at 47 degrees, and respondent's Super Cub was proceeding at 253 degrees. Therefore, the closest point at which the two aircraft risked converging was when they were approximately 0.37 of a statute mile apart, based on the headings of both aircraft. Tr. at 142.

The Administrator then called Michael Mecha, the FAA general aviation operations inspector who investigated the case against respondent and consequently sent the letter of investigation to respondent. Mr. Mecha stated that he used radar data to conclude that respondent's proximity to the U.S.

(..continued)
way, but was only concerned at the time with moving out of respondent's way, and that respondent was flying his aircraft at a lower altitude than she was.

Bank Building in Milwaukee was within a horizontal radius of 2,000 feet, and that respondent was “too low for that particular position.” Tr. at 157. Mr. Mecha also testified that the height of the Bank Building is approximately 600 feet. Mr. Mecha identified radar evidence indicating that respondent was 1,500 feet from the U.S. Bank Building, and that his altitude was 1,600 feet MSL. Tr. at 159—60; Exh. A-9. Mr. Mecha also identified the Administrator’s previous emergency order revoking respondent’s airman certificates, which the Administrator issued after respondent positioned his aircraft on the ground at an airport and intentionally blew debris at onlookers. Exh. A-18.

On cross-examination, Mr. Mecha stated that both Channel 12 and respondent’s Super Cub were in Class C airspace, that ATC had instructed respondent to maintain visual separation, and that the general rule is to see and avoid at all times, but that respondent did not comply with the instructions because he did not sufficiently avoid Channel 12. Although he did not cite or provide any evidence to support this contention, Mr. Mecha opined that respondent flew his aircraft toward Channel 12 because he was playing “chicken.” Tr. at 185. Mr. Mecha further testified that Mr. Michaelis had told Mr. Mecha that respondent instructed Mr. Michaelis to fly at or around Channel

12 to make Channel 12 move out of the way. Tr. at 196.[7] Mr. Mecha acknowledged that no FAA guidance exists concerning how near is too near for purposes of the regulations, and that no pilot deviation report arose out of the flights on May 8, 2009. Mr. Mecha did not agree that § 91.113(d)[8] means that an aircraft towing has the right-of-way over all other engine-driven aircraft; Mr. Mecha implied that an aircraft towing *another aircraft* has the right-of-way under § 91.113(d). Mr. Mecha, however, did not reference or provide any FAA guidance concerning this interpretation.

In response to the Administrator's case-in-chief, respondent testified on his own behalf. Respondent stated that he has three Super Cubs for his company, Air Signs and Banners, and has flown over 500 banner flights, for which he has the necessary waiver from the Milwaukee FSDO.[9] Respondent testified

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[7] When Mr. Michaelis testified later at the hearing, on behalf of respondent, Mr. Michaelis denied that he told Mr. Mecha that respondent had instructed him to fly at or around Channel 12 so that Channel 12 would move out of the way. Tr. at 263.

[8] Section 91.113(d) states, in part, "an aircraft towing or refueling other aircraft has the right-of-way over all other engine-driven aircraft."

[9] The waiver from the FAA that allows respondent to conduct banner tow operations states, in general, that respondent may conduct such operations pursuant to 14 C.F.R. § 91.311. Exh. A-6 at 3. Attached to the waiver is a list of "special provisions," which include certain requirements, such as that all banner tow operations be conducted in VFR weather conditions between the hours of official sunrise and sunset; that

that he typically flies at 40 to 45 miles per hour during such flights. Regarding the events of May 8, 2009, respondent stated that he was in Class C airspace and made contact with the requisite Terminal Radar Approach Control (TRACON) facility. Respondent stated that he believed § 91.113(d) means that an aircraft towing banners has the right-of-way over other aircraft. Tr. at 228—29. Respondent acknowledged that pilots are responsible for maintaining visual separation when given the clearance from ATC to do so. Respondent testified that he had no intent of flying within 2,000 feet of the U.S. Bank Building, and that he did not intend to fly directly at Channel 12, but merely sought to orbit in a perfect circle above Summer Fest, which was where ATC approved him to go. Respondent further stated that he proceeded at approximately 60 miles per hour and maintained visual separation with Channel 12, which he saw to his north, and never created a collision hazard during the flight. Respondent stated that he overheard an air traffic controller say that he did not believe a violation occurred.

Respondent also called Mr. Michaelis, who was operating another Super Cub on behalf of Air Signs and Banners, Inc. on

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(..continued)
respondent obtain the airport manager's approval to conduct banner tow operations at that respective airport; that respondent coordinate with the FAA control tower during such operations; and that the tow attachment and release mechanisms on the aircraft be approved by the FAA. Exh. A-3 at 5.

May 8, 2009, above Summer Fest. Mr. Michaelis stated that, like respondent, he operated the Super Cub in Class C airspace and was in contact with TRACON. Mr. Michaelis recalled that ATC advised him to watch out for respondent's Super Cub and two news helicopters, Channel 12 and Channel 4, while in the airspace. Mr. Michaelis stated that he intended to trail respondent in the orbit as tightly as possible, which involved making a series of left-hand turns. Mr. Michaelis testified that he did not believe respondent was within 2,000 feet of the U.S. Bank Building, nor was he too low, nor did he create a collision hazard by flying too close to Channel 12. Tr. at 252–53.

Respondent took the stand twice more,[10] and called Mr. Mecha again. Mr. Mecha acknowledged that it is difficult to draw a radius of 2,000 horizontal feet around the U.S. Bank Building on a chart without a scale, and that he overflew the area with an instrument flight rules-certified global positioning system, commonly known as GPS, in order to determine the latitude and longitude of the U.S. Bank Building. Respondent testified that he did not fly within a horizontal radius of 2,000 feet of the U.S. Bank Building, and attempted to mark his plot and the

[10] Respondent's counsel called respondent to the stand for a brief follow-up to his testimony, in which he stated that the Board's affirmation of the Administrator's order would result in the cessation of his banner tow business, and therefore have a negative effect on the local economy. After Mr. Mecha testified, respondent took the stand again to plot his orbit on charts that had come into evidence.

location of the building on an exhibit. In rebuttal, the Administrator again called Mr. Mecha, who testified that he had spoken with Mr. Michaelis for his investigation into the flights of May 8, 2009, and that Mr. Michaelis recalled that respondent told him to fly at or near Channel 12, so that Channel 12 would move.

At the conclusion of the hearing, the law judge determined that the Administrator proved that respondent violated §§ 91.119(b) (altitude restrictions) and 91.13(a) (careless or reckless operation), but that the Administrator did not prove that respondent violated §§ 91.111(a) (collision hazard) or 91.113(f) (right-of-way). The law judge summarized the radar evidence that the Administrator provided, and stated that Ms. Howard did not ever feel that a collision hazard existed, because she moved the Channel 12 helicopter out of the way when she saw respondent proceeding toward her. As a result, the law judge determined that the Administrator did not meet the burden of proof concerning the allegation that respondent violated § 91.111(a). With regard to § 91.113(f), the law judge stated that the language of § 91.113(d) indicated that an aircraft towing something had the right-of-way over other aircraft, due to the limited maneuverability that the act of towing causes. Initial Decision at 337. As a result, the law judge found that respondent did not violate § 91.113(f) because he had the right-

of-way. Conversely, the law judge found that the Administrator proved that respondent violated § 91.119(b) because the evidence showed that respondent was within a horizontal radius of 2,000 feet of the U.S. Bank Building, and not at least 1,000 feet above it. Id. at 341. Based on that finding, the law judge also found that respondent operated the Super Cub in a careless or reckless manner, in violation of § 91.13(a). The law judge ordered a suspension of respondent's certificates for a 45-day period, and stated that he had considered respondent's previous violation history in determining the sanction.

On appeal, the Administrator urges us to find that the law judge erred in finding that respondent did not violate §§ 91.111(a) and 91.113(f), and in reducing the sanction to a 45-day suspension. With regard to § 91.111(a), the Administrator argues that the law judge specifically found that Ms. Howard testified that she feared a collision and took evasive action, yet nevertheless held that respondent did not create a collision hazard by flying toward the Channel 12 helicopter. The Administrator asserts that the timely action Ms. Howard took to avoid a collision does not prevent the Administrator from taking action against respondent based on § 91.111(a). The Administrator contends that respondent made a conscious decision to point his aircraft at the Channel 12 helicopter and play "chicken." With regard to § 91.113(f), the

Administrator asserts that the plain language of § 91.113(d) indicates that aircraft that are towing or refueling *other aircraft* have the right-of-way, not that aircraft towing *anything* have the right-of-way. The Administrator contends that, if this were not the meaning of the regulation, the words "other aircraft" in the regulation would be unnecessary. As a result, the Administrator argues that respondent violated § 91.113(f) on four separate occasions while orbiting over Summer Fest. Finally, with regard to sanction, the Administrator presents two arguments. The Administrator first argues that revocation is appropriate here, because respondent's conduct and prior violation history exhibits a disregard for safety. The Administrator also asserts that, in the alternative, if we affirm that respondent only violated §§ 91.119(b) and 91.13(a), then we should increase the suspension to 150 days, given the sanction range in the Sanction Guidance Table[11] and respondent's prior violation history. Respondent opposes each of the Administrator's arguments, and urges us to affirm the law judge's decision.

We have carefully evaluated the evidence and determined that the Administrator has not established that respondent created a collision hazard, in violation of § 91.111(a), when he orbited over Summer Fest on May 8, 2009, while towing a banner.

[11] FAA Sanction Guidance Table, FAA Order 2150.3B (Oct. 1, 2007).

The radar and ATC evidence, as well as the testimony of Ms. Howard, indicates that she saw respondent approaching and moved to avoid him before respondent could have come too close to Channel 12. The law judge concluded that neither aircraft was moving at a high rate of speed, and that Ms. Howard testified that she did not feel that respondent caused a collision hazard. Overall, the Administrator did not provide adequate evidence in this case to prove that respondent violated the regulation. We have long recognized that the Administrator has the burden of proving each violation charged by a preponderance of the evidence.[12] In Administrator v. Hayes, NTSB Order No. EA-5459 at 12 (2009), we stated, "when the evidence appears to conflict and the case is close, the party with the burden loses." In the case at hand, the Administrator has not established by a preponderance of the evidence that respondent created a collision hazard.

With regard to § 91.113(f), both parties imply that our disposition of this alleged regulatory violation depends upon our interpretation of § 91.113(d), which states that, "an aircraft towing or refueling other aircraft has the right-of-way

[12] Administrator v. Glennon and Shewbart, NTSB Order No. EA-5411 at 14 (2008) (citing Administrator v. Opat, NTSB Order No. EA-5290 at 2 (2007); Administrator v. Schwandt, NTSB Order No. EA-5226 at 2 (2006); and Administrator v. Van der Horst, NTSB Order No. EA-5179 at 3 (2005)).

over all other engine-driven aircraft." The Administrator, however, charged respondent with a violation of § 91.113(f), not § 91.113(d). See Order of Revocation at 3. Section 91.113(f) states that an aircraft being overtaken has the right-of-way and the pilot of the overtaking aircraft shall alter the course of the aircraft to the right "to pass well clear." It appears that the only evidence that the Administrator provided to establish that respondent violated § 91.113(f) was the testimony of Ms. Howard, who stated that respondent was overtaking her during the flights. Tr. at 96. The radar evidence that the Administrator provided does not conclusively establish that respondent overtook the Channel 12 helicopter. Exh. A-4. Mr. Welch, who summarized the radar evidence at the hearing, testified that he had not had any experience with interpreting § 91.113. Tr. at 145. Assuming that respondent did operate his aircraft in a manner to overtake Channel 12, the Administrator did not establish, based on the evidence in this record, that respondent failed to pass "well clear." As we stated above, the Administrator did not show that respondent operated his Super Cub so close to Channel 12 that he created a collision hazard. With regard to whether respondent violated § 91.113(d), we decline to address that contention, as the Administrator did not allege that respondent violated § 91.113(d) in his October 15,

2009 complaint.[13] Section 91.113(f) does not reference § 91.113(d), and the Administrator also has not established that the two subsections are intertwined such that we must analyze whether respondent violated § 91.113(d).

Finally, with regard to sanction, we agree with the Administrator that the law judge erred when he reduced the sanction to a 45-day suspension. The law judge found that respondent violated §§ 91.119(b) and 91.13(a). In addition, the evidence in the record shows that the Administrator revoked respondent's ATP certificate in 2006 after respondent operated his aircraft in a careless or reckless manner.

In this case, the radar evidence, combined with the testimony at the hearing, establishes that respondent operated his Super Cub within 2,000 feet from the U.S. Bank Building in Milwaukee at an altitude of less than 1,000 feet above the building. Exh. A-9; Tr. at 158–61. Although respondent testified that he had no intent of operating his aircraft within 2,000 feet of the building, he acknowledged that it is difficult to estimate the distance between his aircraft and buildings

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[13] See generally Administrator v. Western Air Express, NTSB Order No. EA-5486 at 8 (2009) (stating that, "the function of a complaint is to notify the respondent of the charges in order to allow the respondent to prepare a defense," and citing Administrator v. Pierce, NTSB Order No. EA-4965 at 4 (2002); Administrator v. Sanderlin, NTSB Order No. EA-4510 at 5 n.4 (1996); and Administrator v. Parrott, NTSB Order No. EA-3692 at 5–6 (1992)).

based on his visual observations alone. Tr. at 230. The evidence in this record indicates that respondent came within approximately 1,520 feet of the building at an altitude of about 1,600 feet MSL, which is less than 1,000 feet above the building. The Administrator's Sanction Guidance Table, FAA Order 2150.3A , states that a suspension of 60 to 180 days is appropriate for violations of § 91.119(b). We discern no basis for departing from a suspension within the range of 60 to 180 days, and believe that ample evidence supports a suspension within the middle of the range. In particular, the evidence establishing the violations of §§ 91.119(b) and 91.13(a), in conjunction with respondent's previous revocation of his ATP certificate, indicates that a suspension of 120 days is appropriate.[14] As such, we grant the Administrator's appeal, in part, with regard to sanction.

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's appeal concerning the alleged violations of 14 C.F.R. §§ 91.111(a) and 91.113(f) is denied;

2. The Administrator's appeal concerning sanction is granted, in part;

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[14] We have previously viewed either a history of previous regulatory violations, or a single egregious act, as a basis for increasing a sanction. See, e.g., Administrator v. Poland, NTSB Order No. EA-5449 at 9—10 (2009); Administrator v. Frost, NTSB Order No. EA-3856 at 8—9 (1993); Administrator v. Wingo, 4 NTSB 1304, 1305—1306 (1984).

3. The law judge’s decision is affirmed with regard to the findings that respondent violated 14 C.F.R. §§ 91.119(b) and 91.13(a), and modified with regard to the sanction; and

4. The Administrator’s emergency order of revocation is modified to a 120-day suspension of all airman pilot certificates that respondent holds, including his ATP certificate.

HERSMAN, Chairman, HART, Vice Chairman, and SUMWALT, Member of the Board, concurred in the above opinion and order.

UNITED STATES OF AMERICA

NATIONAL TRANSPORTATION SAFETY BOARD

OFFICE OF ADMINISTRATIVE LAW JUDGES

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In the matter of:                 *
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J. RANDOLPH BABBITT,              *
Administrator,                    *
Federal Aviation Administration,  *
                                  *
                   Complainant,   *
     v.                           *    Docket No.:  SE-18712
                                  *    JUDGE MULLINS
THEODORE B. HARMON,               *
                                  *
                   Respondent.    *
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U.S. Bankruptcy Court
219 South Dearborn Street
Courtroom 760
Chicago, Illinois 60604

Wednesday,
November 4, 2009

The above-entitled matter came on for hearing, pursuant to Notice, at 9:06 a.m.

BEFORE: WILLIAM R. MULLINS,
Administrative Law Judge

APPEARANCES:

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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 here in Chicago. We started the hearing on November the 4th at 9:00, and today is November the 5th. It's now about 11:20 a.m. and pursuant to Board rules, I will issue a decision at this time.

As I said, the matter was on for hearing on an Emergency Order of Revocation, that has revoked the Airman Certificate of Theodore B. Harmon, and the Board docket number is SE-18712. The Emergency Order of Revocation was filed on behalf of the Administrator of the Federal Aviation Administration through Regional Counsel at 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, and as is provided by the Board's rules, as I've said, I'm issuing a Bench Decision at this time.

The matter came on for hearing here in Chicago, and the Administrator was present and represented by counsel Ms. Kate Barber, Esquire, of the Great Lakes Region, and also she was assisted by Mr. Chris Zurales, Senior Attorney for the Great Lakes Region.

The Respondent was present throughout these proceedings and represented by his counsel, Mr. John Hoff and Mr. Jeff Clement of the law firm of Hoff and Herran of Chicago. The parties were afforded a full opportunity to offer evidence, to call, examine, and cross-examine witnesses. In addition, the parties were afforded an opportunity to make argument in support of their respective positions.

DISCUSSION

Generally, the facts of this case are not disputed. Some of the important parts of them are. But the incidents that arose and gave rise to this Emergency Order of Revocation occurred on May 8th in the Milwaukee area when this Respondent, Mr. Harmon, was towing a banner around the area of some Summerfest activities just south of downtown Milwaukee along the lakefront there, and it also involved a Robinson helicopter being operated by Channel 12 up there that was operated by Ms. Kyle Howard. And it was undisputed that this was Class C airspace, that both of these aircraft had been assigned discrete transponder codes and were in constant contact with Air Traffic Control, and Mr. Harmon proceeded to at least on four occasions do his orbit of this festival area, and each time he came around in this orbit, his westward portion of his orbit was in the general direction of the Channel 12 helicopter.

As a result of that, the Administrator has issued an

Emergency Order of Revocation alleging regulatory violation of FAR 91.111(a), which relates to collision hazards, FAR 91.113(f), which is the rule of the right-of-way when you're overtaking another aircraft, 91.119(b), which is an altitude restriction, and as a residual of those charges, the Administrator has alleged 91.13(a), which is the careless and reckless regulation.

The Administrator had three witnesses, and I will talk about the witnesses. I think all of the witnesses -- well, let's see, not Mr. Michaelis, but Ms. Howard was recalled and Mr. Harmon was recalled and Mr. Mecha was recalled, so all of these witnesses were recalled at one time or the other, but there were basically six witnesses. The three witnesses called by the Administrator, first, Mrs. Kyle Howard, who was the helicopter pilot of the Channel 12 Robinson helicopter. Mr. Jeffrey Welch was called to testify, he's a Quality Assurance Specialist with Air Traffic Control in the Milwaukee area, and he prepared tape, which was A-4, where they had the radar data combined with the Air Traffic Control tape, and that was played here. And then the third witness called by the Administrator was Mr. Mike Mecha, who's the Aviation Safety Inspector who worked this incident.

Respondent called three witnesses, Mr. Harmon -- well, he first called Mrs. Howard who was recalled, and then he called Mr. Harmon and then Mr. Brennan Michaelis. That

concluded yesterday, and then this morning Mr. Harmon was recalled, Mr. Mecha was recalled. Then Mr. Harmon was called again, and then the Administrator called Mr. Mecha then in rebuttal.

And I'll just go through the exhibits briefly. There may be a couple that I'll highlight in my discussion, but Exhibit A-1 is the e-mail from Ms. Howard to Mr. Mecha, and I'll come back and talk about that in a little bit because there's some interesting consideration, for me at least, on that. A-2 and 3 are audiotapes of phone conversations with Ms. Howard and Mr. Harmon. And then Exhibit 4 is the RAPTOR and ATC tape during this incident, incidents. And if I refer to one incident, there was one flight by each aircraft, but there were four laps around this area where the banner was being towed, and the Administrator has alleged in the Order of Revocation each one of those laps or circuits.

And in regard to whoever might have to review this, and I would suggest, Ms. Barber, you know, the Administrator has as much time as he needs to file these emergency actions or any action. Well, you have a six month rule if it's not an emergency. But it is so much better to have a typed version of these audiotapes, and to sit here and try to figure out what's going on without some visual reference to a typewritten transcript, it just makes it more difficult for the judge and then whoever's going to be reviewing this decision, if anybody.

But that was Exhibits A-2, 3 and 4. A-5 was the Letter of Investigation to Mr. Harmon from Mr. Mecha. A-6 was Mr. Harmon's Certificate of Waiver for his banner tow operation. A-17 was the response to the Letter of Investigation from the Respondent. A-9 was the extract of legal -- I mean the written or paper copy of an extract showing the bank building and the proximity of Respondent's aircraft on the issue of the coming within the 2,000 feet radius.

And then A-18 was the Order of Revocation from a previous case, I think it was 2007, against the Respondent, and in that case, and that was my case, although it was settled prior to go to hearing, there were some allegations against Mr. Harmon that but for that Order of Revocation, Mr. Harmon, we wouldn't be here today, and I hope you appreciate that because you're going to have to live with that forever. That's part of your airman record.

Respondent had Exhibits 20, 21, and 24 that were offered this morning, and they're all either aerial maps or maps of downtown Milwaukee and that area. Exhibits 22 and 23 are exhibits that Mr. Hoff took from the internet this morning, he said, one is from a website called Sentimental Journey and the other one is Cave News, which purport to discredit the Wikipedia web site which Mr. Mecha made reference to.

And then R-25 was information about the bank. Respondent's Exhibit 12 was an extract from the Compliance and

Enforcement Handbook, FAR 2153(b). R-13 was the transcript of the settlement that was presented in the hearing where Mr. Harmon's certificate was revoked two years ago.

R-17 was a copy of the METAR for I guess an airport somewhere in the vicinity of downtown Milwaukee. It wasn't the main airport, but it was some field, and that was identified. In any event, it showed the wind. And although the wind at that airport was out of the west, I think it was clear under the evidence, particularly from Ms. Howard, that the wind, at least down in this area, was out of the east because that's her alignment. She always said she hovered her helicopter into the wind, which makes sense, and so I didn't take a lot of stock from the METAR as far as the wind conditions.

And R-18 was a video that I rejected. There wasn't enough ground reference to tell exactly where the aircraft was located with reference to anything, and that's very difficult to take one of those and use it to show, in this case, evidence about proximity to a building.

Ms. Howard was called to testify, and her testimony, I think, was pretty critical to these proceedings, and she testified that when she was out there, ATC had given her an instruction, and there was a lot of conversation about that, but her instructions from the ATC was to maintain visual separation. And she testified that she saw the aircraft, Mr. Harmon's aircraft, the Respondent's aircraft. She knew it

was towing a banner. She heard ATC talk about it towing a banner, and she saw it when Mr. Harmon, who had not made contact, visual contact, with the helicopter, was given a heading of 120, and Ms. Howard said then he turned back and then notified ATC that he had the aircraft. Mr. Harmon's testimony was that he told ATC he had the aircraft as he was turning back, and that's pretty consistent. I don't see any inconsistencies there.

But Ms. Howard said on the second page of this, A-1 and she talks about her video as being inconclusive in reference to one that they had taken a year before, but she said I'd rather stay focused on the fact that the pilot, Mr. Harmon, flew right at us after telling ATC he had us in sight. And she said he was very emphatic that he once before on another occasion at Timmerman Field, I guess that's the field where the METAR was originated, that he had the right-of-way because he was towing and that his altimeter was 1,000 feet. And then in the little cover to the e-mail, Ms. Howard stated that she had had issues with Mr. Harmon in the past, and there probably isn't anything one can do about the flying low issue, but the flying right at us has got to stop.

But on cross-examination, Mrs. Howard was clear that there was not in her opinion a collision hazard, ever a collision hazard, because she moved her aircraft back to the north and, interestingly, the flight regulations cited in

91.113 requires an aircraft overtaking the aircraft to go to the right. Neither the helicopter nor Mr. Harmon's aircraft moved to the right. They each moved to their left.

Ms. Howard testified that her helicopter was facing the lake back to the east. She saw him coming. She moved off to the left, and that there was never a collision hazard. Mr. Harmon said that he continued his loop to the right. And there was some talk yesterday about Mrs. Howard's airspace, but it was clear under the RAPTOR Exhibit A-4 that after the helicopter moved back to the north in each pass depicted on RAPTOR, that Mr. Harmon flew right through or right over the area where the helicopter had been.

And it was brought to the Court's attention about that paragraph which is under 91.113(b), which says that an aircraft towing or refueling another aircraft has the right-of-way over all other engine-driven aircraft. That's a critical consideration for me in this case. I think there was some indication to the Administrator that that didn't mean that the Administrator might be interpreting that as an aircraft towing another aircraft. But Mr. Mecha testified, and I'll talk about his testimony in a minute, but he testified that when you're towing another aircraft, and he had some glider time both as a glider pilot but also a pilot towing a glider, that they have maneuverability because they're in constant communication with the towing aircraft and the aircraft being towed. So you would

assume that this regulation relates to the maneuverability of an aircraft towing something, and so that would make the Harmon aircraft, the respondent's aircraft, in this instance a towing aircraft and would have the right-of-way over an engine-driven aircraft, i.e., the Robinson helicopter, which is an engine-driven helicopter.

Mr. Welch was the second witness called. He's Quality Assurance. He identified this, but as a result of the conversations, he had 27 years with ATC. When I asked him if he had ever worked as an air traffic control specialist with aircraft towing banners in his area, and he said he had on several occasions, and I asked him if he had ever advised other aircraft about the fact that the banner towing aircraft had the right-of-way, and he said no, he'd never given that sort of instruction even when there was banner operations going on.

Mr. Mike Mecha then was called as the Aviation Safety Inspector who worked this incident, and he testified particularly about taking the low flight within 2,000 feet of a building, horizontal, and he went to Wikipedia, obtained the latitude/longitude of the bank building and referenced it on Exhibit A-9 and said that that bank building was within 1,500 feet of the aircraft operated by Respondent, well within the 2,000 feet restriction.

He said, even though there was some discredit given this morning in Respondent's case in chief to the Wikipedia,

Mr. Mecha did testify that he had gone out with an IFR-certified GPS, flew over the bank building, and confirmed the latitude/longitude given in the Wikipedia in arriving at this distance that's reflected there in A-9.

The Respondent then recalled Ms. Howard, and then the Respondent, Mr. Harmon, testified, and Mr. Harmon went on several times talking about distance from buildings and about his compass, and I never did understand that. I asked him this morning what that meant, but I don't know what a compass has to do with building distances. I still don't. But, in any event, he talked about that. He talked about this operation. Yesterday, he said he'd done about 20 operations in the area of this park, Summerfest place where they were operating. Today he said it might have been 50. But he has been in the banner towing business for about 19 years, so he has quite a bit of experience in pulling the banner. He talked about the 500 foot banner and, interestingly for me because I don't work in the industry, both he and Mr. Michaelis testified that their speed towing the banner was about 40 miles an hour.

So the record, video, and the testimony of the pilots, Ms. Howard and Mr. Michaelis and Mr. Harmon, showed that the helicopter was stationary, the other aircraft doing maybe 40, some indication maybe 50 miles an hour, but we're not talking about the normal aircraft operation. This is not aircraft that are coming at each other at high rates of speed,

and it's also an area where all of the parties, i.e., Ms. Howard, Mr. Michaelis, and Mr. Harmon, all were aware of each other, where each was situated throughout this whole four routes that Mr. Harmon made around this area where he was towing the banner.

I think I've covered the exhibits and the witnesses who have testified. Let me turn to the regulations and what I can see under the evidence here.

First, the Administrator does have the burden of proof on each of these allegations by a preponderance of the evidence or, as the Board says, preponderance of reliable and probative evidence. Under FAR 91.11, it says no person in an aircraft may operate an aircraft so close to another aircraft as to create a collision hazard.

The collision hazard is, I believe, and I believe it's supported by all the cases I'm familiar with, collision hazard is sort of like beauty; it's in the eyes of the beholder. It's not something that somebody else would set down and look at the some videotape or some radar tapes and say well, now there was a collision hazard there. Particularly when the aircraft are operated in Class C airspace, they're watching each other all the time. ATC's in constant communication to them. And the aircraft that the Administrator is alleging was subjected to the collision hazard, the pilot said that she never felt there was a collision hazard. She had

a highly maneuverable aircraft, a helicopter, goes up and down, front and back, sideways. She saw the guy coming, and she moved out of the way.

And the argument of counsel is that he did this four times. Well, she knew that he was circling this area, and if you circle an area, you're going to come back by the same area as many times as you circle it, and certainly Ms. Howard was aware of that. And in her report, she says she wants to stay focused on the fact that the pilot flew right at us after telling ATC he had us in sight. That suggests to me that Ms. Howard's belief is that she was there first, he has to go around her, and that's not what FAR 91.113 says. 91.113 says an aircraft towing or refueling another aircraft has the right-of-way.

So in that regard I believe that the Administrator has not established the regulatory violation of FAR 91.111 given the fact that the other aircraft, i.e., Ms. Howard, said she saw the aircraft all the time, saw him turning toward her, and she moved her helicopter out of the way, and she complied with her ATC instruction to maintain visual separation.

The second regulation was the one about overtaking, and again the aircraft towing has the right-of-way, so I'm satisfied that the Administrator has not satisfied the burden of proof on that regulatory violation.

FAR 91.119(b) states that except when necessary for

takeoff or landing, no personnel may operate an aircraft below the following altitude over any congested area of a city, town, settlement: at an altitude of 1,000 feet above the highest obstacle within a horizontal radius of 2,000 feet of the aircraft.

I think the Administrator's Exhibit A-8 conclusively shows that the Respondent's aircraft was within that 2,000 foot radius of the bank building, and I find under the evidence that that regulatory violation has been established. And there's another allegation, 91.13, which would be a residual violation of 91.119(b), so I find that there has been established those two regulatory violations.

Needless to say, those violations would not justify an affirmation of the Administrator's Emergency Order of Revocation, but I feel that given the prior violation history of the Respondent, that a 45-day suspension of his Airman Certificate would be appropriate under that finding.

ORDER

IT IS THEREFORE ORDERED that safety in air commerce and safety in air transportation does not require an affirmation of the Administrator's Emergency Order of Revocation as issued. And, specifically, I find under the evidence as discussed, that there was not shown regulatory violation of FAR 91.111, which was the collision hazard allegation. It was not established by a preponderance of the

evidence the regulatory violation alleged of 91.113, which is the right-of-way and the overtaking aircraft, given that that regulation gives the right-of-way to aircraft towing.

I did find that there was established under the evidence regulatory violation of FAR 91.119(b), which was the low flight within the proximity of the 2,000 horizontal distance to a structure, horizontal radius of 2,000 feet of the aircraft, and I found that was established, and based on that violation, I found that there was a residual violation of the careless and reckless allegation of 91.13. And given the prior history of violation of this Respondent, I found that an appropriate sanction would be a 45-day suspension of his Airman Certificate, and it will be so ordered.

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EDITED ON
November 16, 2009

WILLIAM R. MULLINS
Administrative Law Judge