

SERVED: July 28, 2010

NTSB Order No. EA-5535

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 27th day of July, 2010

J. RANDOLPH BABBITT,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-18547
v.)	
)	
MARK SIMMONS,)	
)	
Respondent.)	
)	

OPINION AND ORDER

The Administrator appeals the oral initial decision of Chief Administrative Law Judge William E. Fowler, Jr., issued January 26, 2010, in this matter.¹ By that decision, the law

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

judge affirmed the Administrator's complaint, which ordered a suspension of respondent's airline transport pilot (ATP) certificate, based on alleged violations of 14 C.F.R. §§ 91.119(a), (b), and (c),² 91.311,³ and 91.13(a).⁴ The Administrator's complaint alleged that respondent operated a Piper Model 25 aircraft on June 19, 2008, on a banner-towing flight in Westerly, Rhode Island, and violated the aforementioned regulations when he flew the aircraft over a congested area below an altitude of 1,000 feet above the highest

² The pertinent portions of § 91.119 provide 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.

(b) *Over congested areas*. Over 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.

(c) *Over other than congested areas*. An altitude of 500 feet above the surface, except over open water or sparsely populated areas. In those cases, the aircraft may not be operated closer than 500 feet to any person, vessel, vehicle, or structure.

³ Section 91.311 provides that, "[n]o pilot of a civil aircraft may tow anything with that aircraft ... except in accordance with the terms of a certificate of waiver issued by the Administrator."

⁴ Section 91.13(a) provides that, "[n]o person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another."

obstacle, which was within a horizontal radius of 2,000 feet. The Administrator's complaint also stated that respondent's operation of the aircraft did not comply with the FAA-issued certificate of waiver or authorization for respondent's banner-towing business. The law judge affirmed the Administrator's complaint, but reduced the suspension period from 180 days to 90 days; this reduction in sanction is the basis of the Administrator's appeal. We grant the appeal.

The law judge held an evidentiary hearing on December 1, 2009, and January 26, 2010. The Administrator provided the testimony of three eyewitnesses, all of whom consistently stated that they saw respondent operating the aircraft on at least two circular passes above the construction site at which they were working. The eyewitnesses all stated that, given their careers as construction workers, they had experience with judging heights and distances. Tr. at 20, 76, 111. They also estimated that approximately 50 people were working on the construction site when respondent flew over it, and that they felt apprehension when they saw respondent's aircraft, because it was so low. They testified that the beach was approximately 300 feet from the construction site, and was occupied by beachgoers. Two of the witnesses further testified that respondent's aircraft was 80 to 150 feet from the ground. Tr. at 48 (testimony of 80 feet), 85 (testimony of "100, 150 feet").

The other eyewitness stated that respondent was 100 to 125 feet above the nearest tree, which was approximately 50 feet high (Tr. at 113), and that respondent was approximately 75 to 100 feet, laterally, from the crane on the construction site (Tr. at 117).

The Administrator also provided photographs of respondent's aircraft over the construction site (Exhs. A-2 - A-6), which one of the eyewitnesses took because he "thought it was a reckless, dangerous act," and felt the need to document it. Tr. at 80. The photographs depict respondent's aircraft in close proximity to the building under construction. One of the eyewitnesses, a field superintendent for the construction company completing the work at the site, submitted a complaint to the local airport and the FAA about respondent's flight.

The Administrator also called two aviation safety inspectors to testify. One of the inspectors conducted an investigation of the flight at issue and determined that respondent violated the regulations listed above. The other inspector, George Gabriel, from the FAA's Safety Analysis Branch in Burlington, Massachusetts, provided expert testimony on the alleged violations. Inspector Gabriel opined that respondent's conduct was reckless and exhibited a disregard for the safety of others, given that respondent flew over several construction workers and a residential area. Tr. at 167-68. Inspector

Gabriel stated that the range of sanction in the Administrator's Sanction Guidance Table, FAA Order 2150.3A, applicable to respondent's conduct is 60 to 180 days, and that the Administrator treats each pass as a separate infraction; therefore, Inspector Gabriel testified that a 180-day suspension of respondent's ATP certificate is appropriate. Inspector Gabriel also listed what he believed to be aggravating factors: respondent had a violation history; is held to the highest standard of care because he holds an ATP certificate; and felt that it was permissible to fly close to a populated, residential area. Tr. at 173. Inspector Gabriel testified that he did not believe any mitigating factors existed for the law judge's consideration.

In response to the Administrator's case, respondent offered the testimony of two eyewitnesses who hired him to tow the banner over the construction site. The eyewitnesses stated that they did not recall seeing several construction workers, and they did not believe respondent flew over the construction site or the residential area. Respondent's witnesses did not offer testimony concerning the altitude of the aircraft on the flight. Respondent also testified on his own behalf, and stated that he made five circles around the area, but stayed between 550 and 700 feet above the ground, and never flew over the crane, but stayed between 1,975 and 2,075 feet away from it. Respondent

confirmed that he waved to the group of people who hired him when he saw them on the ground, but did not recall seeing construction workers on the job site. Respondent also acknowledged that he had a previous violation.⁵

At the conclusion of the hearing, the law judge issued an oral initial decision, in which he determined that the Administrator had presented persuasive evidence to prove each of the alleged violations. In particular, the law judge stated:

[T]o say that the Administrator had produced during the course of this proceeding a prima facie case would be an understatement, in my opinion ... the Administrator's witnesses were strong, compelling, logical and persuasive, and more than made the case on behalf of the Administrator as set forth in the Administrator's Order of Suspension.

Initial Decision at 352. The law judge determined that the eyewitness testimony established that respondent made a minimum of two passes over the construction site, and that respondent flew over an area with homes and beachgoers. Although the law judge affirmed all the allegations in the Administrator's complaint, he determined that respondent did not operate the aircraft in a reckless manner, but instead was careless, "[b]ased on the totality of the evidence adduced" during the

⁵ The record does not contain many details of respondent's prior violation. In his testimony, respondent indicated that the violation was related to a maintenance issue in another aircraft, and resulted in a 120-day suspension of his certificate, which he did not appeal. Tr. at 315-16.

proceeding. Id. at 356–57. The law judge also reduced the sanction to 90 days. With regard to sanction, he stated:

[T]aking into account all of the facts and circumstances, coupled with the testimony and the documentary exhibits adduced during the course of this proceeding, it is my determination that the sought sanction of the Administrator of a period of a 180-day suspension of the Respondent's airline transport certificate be modified to a period of suspension of 90 days of Respondent Simmons' airline transport pilot certificate.

Id. at 357. Aside from the above-quoted statement concerning his finding that respondent operated the aircraft in a careless, rather than reckless, manner, the law judge did not offer any reason for his reduction in the sanction. The law judge acknowledged that respondent, as the holder of an ATP certificate, is held to a high standard of care. Id. at 357. Aside from that mentioning, he did not provide an assessment of any factors that he believed to be aggravating or mitigating. The law judge also did not explain why he believed respondent's conduct was not reckless, notwithstanding Inspector Gabriel's testimony to the contrary.

The Administrator has submitted an appeal of the law judge's decision, on the basis that the law judge erred when he did not defer to the Administrator's choice of sanction, which was based on the Sanction Guidance Table. The Administrator argues that the law judge exceeded his authority in this regard, because 49 U.S.C. § 44709(d)(3) provides that the Board "is

bound by all validly adopted interpretations of laws and regulations the Administrator carries out and of written agency policy guidance available to the public related to sanctions to be imposed under this section unless the Board finds an interpretation is arbitrary, capricious, or otherwise not according to law." The Administrator asserts that the law judge erred by not explaining whether the Administrator's choice of sanction was arbitrary, capricious, or not according to law. Therefore, the Administrator contends that the Board is obligated to defer to the Administrator's choice of sanction. Respondent contests the Administrator's arguments, and urges us to affirm the law judge's decision.

Concerning sanction issues in general, the Administrator is correct that the FAA Civil Penalty Administrative Assessment Act (the Act)⁶ states that the Board is bound by written agency guidance available to the public relating to sanctions to be imposed, unless the Board finds that any such interpretation or case sanction guidance is arbitrary, capricious, or otherwise not in accordance with law.⁷ It is the Administrator's burden under the Act to articulate clearly the sanction sought, and to ask the Board to defer to that determination, supporting the

⁶ 49 U.S.C. §§ 44709(d) and 46301(d).

⁷ Administrator v. Hewitt, NTSB Order No. EA-4892 at 2 (2001).

request with evidence showing that the sanction has not been selected arbitrarily, capriciously, or contrary to law.⁸ Even when the Administrator has not introduced the Sanction Guidance Table into the record and requested such deference, we have still ordered a serious sanction when the respondent's conduct indicates that the respondent acted in a deliberate manner that demonstrates an unwillingness to comply with the regulations.⁹

We have also indicated, however, that we will consider mitigating or aggravating factors in determining whether the Administrator's choice of sanction is appropriate.¹⁰

Furthermore, we have compared cases that are factually similar in determining whether the Administrator's choice of sanction was arbitrary, capricious, or not in accordance with law.¹¹

⁸ Administrator v. Peacon, NTSB Order No. EA-4607 at 10 (1997); see also Administrator v. Oliver, NTSB Order No. EA-4505 (1996) (Administrator introduced no evidence regarding applicable or relevant sanction guidance).

⁹ Administrator v. Armstrong, NTSB Order No. EA-5320 at 24–25 (2007) (citing, for the proposition that the Board imposes serious sanctions for a disposition that indicates a lack of compliance, the following: Administrator v. Bigger, NTSB Order No. EA-4856 at 3 (2000); Administrator v. Bennett, NTSB Order No. EA-4762 at 3 (1999); and Administrator v. Basulto, NTSB Order No. EA-4474 at 10 (1996)).

¹⁰ Administrator v. Hackshaw, NTSB Order No. EA-5501 (2010). We further note that we have declined to extend the plain language of the Sanction Guidance Table. Administrator v. Alvarez, NTSB Order No. EA-5492 (2009).

¹¹ See, e.g., Administrator v. Poland, NTSB Order No. EA-5449 at 9–10 (2009) (opinion involving a respondent's low flight, in which we cited similar cases for finding that the respondent's

As indicated above, the law judge did not explain his reduction in the sanction. The law judge did not explicitly list any mitigating factors that we should consider in determining whether the Administrator's choice of sanction was appropriate.¹² In addition, we are unsure of whether the law judge considered all the aggravating factors that the Administrator proffered; while the law judge acknowledged that, as the holder of an ATP certificate, respondent is held to the highest standard of care, he did not mention respondent's violation history or the persuasiveness of Inspector Gabriel's testimony concerning respondent's disregard for the safety of the construction workers and beachgoers. Therefore, we are unaware of the law judge's basis for his reduction in the suspension period.

(..continued)

conduct warranted revocation); accord Administrator v. Riggs, NTSB Order No. EA-5436 at 16-17 (2009), pet. for rev. denied, No. 09-71516 (9th Cir. filed June 17, 2010).

¹² When viewing the law judge's decision in the most deferential manner, one may conclude that the law judge believed respondent's surprise at the crane at the construction site, for which a Notice to Airman had not been issued, indicated that respondent's conduct was not deliberate. However, the undisputed evidence at the hearing established that respondent made multiple passes around the construction site and waved at onlookers.

We have previously taken seriously a respondent's failure to comply with the requirements of § 91.119.¹³ A respondent's failure to comply with minimum altitude requirements, in the absence of a mistake or emergency, usually indicates a disregard for safety. In the case at hand, respondent admitted to waving to people on the ground, and operating the aircraft near the construction site, which had a crane that extended approximately 230 feet high, at an altitude of 500 to 700 feet. Tr. at 279.¹⁴ Moreover, respondent acknowledged that he had a violation history.¹⁵ These facts are largely undisputed, and the law judge

¹³ See, e.g., Administrator v. Jablon, NTSB Order No. EA-5460 (2009) (imposing 180-day suspension); Administrator v. Todd, NTSB Order No. EA-4320 at 12-13 (1995) (imposing 180-day suspension and quoting Administrator v. Dopp, 4 NTSB 1489, 1490 (1984), in which the Board described as "exceptionally lenient" a 180-day suspension for low flight involving deliberate, reckless conduct); see also Poland (imposing revocation) and Riggs (imposing revocation), supra note 11.

¹⁴ We have previously indicated that a finding that a respondent's conduct was reckless is appropriate when the evidence indicates that respondent's conduct was deliberate. Administrator v. Windwalker, NTSB Order No. EA-4638 (1998) (reinstating the 180-day suspension imposed by the Administrator instead of the reduced 90-day suspension imposed by the law judge, based on finding that the weight of the evidence showed respondent acted recklessly).

¹⁵ To the extent that respondent contends that his prior violation should not be considered an aggravating factor because it concerned a different regulation unrelated to a low flight, we do not find this argument persuasive. We have previously held that, in general, a violation history may indicate a disregard for the regulations, which is an aggravating factor. See, e.g., Poland, supra note 11, at 9-10.

determined that the Administrator proved all the allegations contained in the complaint.

The Administrator's choice of sanction is appropriate even in light of the law judge's conclusion that respondent's conduct was only careless. Our prior cases indicate that a distinction between careless and reckless conduct will not automatically necessitate a modification of sanction.¹⁶ In this instance, as stated above, the Administrator proved all allegations contained in the complaint. The record does not contain any indication that the Administrator included additional days in the sanction calculation for the § 91.13(a) violation.¹⁷ The Administrator's sanction lies at the center of the prescribed range and, considering the other aggravating factors, is not arbitrary or

¹⁶ In Administrator v. Ribar, NTSB Order No. EA-4318 at 3 (1995), we stated as follows with regard to sanction:

While the dismissal of one or more allegations from a complaint is a circumstance that may well result in a finding that a lower sanction than that originally sought by the Administrator should be affirmed, it does not justify an automatic or formulaic reduction in the sanction in all cases. Rather, the law judge in such instances must evaluate the seriousness of the charges he has found proved and inform his judgment on sanction by reference to precedent and such other sources as may be helpful or necessary in the interest of furthering uniformity.

See also Administrator v. Peacon, *supra*, at 10 (stating that, "[w]e do not think that a reassessment necessarily dictates a modification. Sanction assessments do not lend themselves to simple calculations").

¹⁷ See Administrator v. Heras, NTSB Order No. EA-5102 at 2 (2004) (affirming a sanction at the highest end of the range in the Sanction Guidance Table, presumably due to reckless conduct).

capricious. Therefore, we do not believe that we must reduce the sanction due to the law judge's conclusion that respondent's conduct was careless.

In addition, the Administrator submitted the Sanction Guidance Table into evidence and offered expert testimony concerning the degree of recklessness of respondent's actions, and the resulting appropriateness of the 180-day suspension. These facts indicate that the Administrator fulfilled the burden of proving that he did not select the sanction in an arbitrary or capricious manner. Moreover, given our previous cases concerning violations of § 91.119, we do not believe that a 180-day suspension is contrary to law.

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's appeal is granted;
2. The law judge's initial decision is reversed with regard to his reduction in sanction; and
3. The 180-day suspension of respondent's ATP certificate shall begin 30 days after the service date indicated on this opinion and order.¹⁸

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

¹⁸ 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

* * * * *

In the matter of: *

J. RANDOLPH BABBITT *

Administrator *

Federal Aviation Administration, *

Complainant, *

v. *

Docket No.: SE-18547

JUDGE FOWLER

MARK SIMMONS, *

Respondent. *

* * * * *

John O. Pastore Building
2 Exchange Terrace
Courtroom C
Providence, Rhode Island

Tuesday,
January 26, 2010

The above-entitled matter came on for hearing,
pursuant to Notice, at 9:50 a.m.

BEFORE: WILLIAM E. FOWLER, JR.
Chief Administrative Law Judge

APPEARANCES:

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ORAL INITIAL DECISION AND ORDER

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ADMINISTRATIVE LAW JUDGE FOWLER: This has been a proceeding before the National Transportation Safety Board held pursuant to the provisions of the Federal Aviation Act of 1958, as that Act was subsequently amended, on the appeal of Mark A. Simmons from an Order of Suspension dated March 13, 2009, issued by the Administrator of the Federal Aviation Administration, which seeks to suspend Respondent Simmons' Airline Transport Pilot Certificate Number (omitted) for a period of 180 days.

The Administrator's Order of Suspension, as duly promulgated under the National Transportation Safety Board's Rules of Practice in Air Safety Proceedings, was issued by regional counsel, New England Region, of the Federal Aviation

1 Administration.

2 This matter has been heard before this United States
3 Administrative Law Judge, and, as is provided by the Board's
4 Rules of Practice, specifically Section 821.42 of those rules,
5 I am going to invoke the option granted to me as the judge in
6 this proceeding to issue an Oral Initial Decision forthwith at
7 this time.

8 Following notice to the parties, this matter came on
9 for trial on December 1, 2009, in Providence, Rhode Island,
10 whereupon, the testimony of a number of witnesses both for the
11 Administrator and the Respondent testified. We were unable to
12 conclude the proceeding on the date of December 1, 2009, so we
13 adjourned until today's date of January 26, 2010.

14 In this proceeding here today, the Respondent, Mark
15 A. Simmons, was present at all times and was very ably
16 represented by Paul Lange, Esquire. The Administrator was
17 likewise represented by a very able counsel, Ben Sargent,
18 Esquire, of the New England Regional Office of the Federal
19 Aviation Administration.

20 Both parties have been afforded the opportunity to
21 offer evidence, to call, examine and cross-examine witnesses.
22 In addition, the parties were afforded the opportunity to make
23 final argument in support of their respective positions.

24 I have reviewed the testimony and the evidence, both

1 the testimony and the documentary evidence adduced during the
2 course of this proceeding, which consisted of five witnesses
3 adduced by the Administrator, coupled with approximately 13
4 exhibits. The Respondent had three witnesses, including the
5 Respondent himself, and Respondent produced four exhibits.
6 All these exhibits that I've mentioned have been duly admitted
7 into the record as it is presently constituted.

8 The five witnesses on behalf of the Administrator,
9 three of whom were involved in the construction of this new
10 large hotel, on or about June 19, 2008, as the Administrator
11 has set forth in his Order of Suspension, the Respondent, Mark
12 A. Simmons, was involved in a banner towing operation. And
13 I'm going to attempt to be as brief and concise as I can with
14 the facts as set forth by the testimony and evidence that
15 we've had during the course of this proceeding.

16 Much has been made over the fact as to whether or
17 not the area in question that the Respondent traversed while
18 involved in the banner towing operation of June 19, 2008,
19 whether that area, or any part of it was congested, or could
20 be deemed a congested area. Let me say in finality, the
21 Administrator's first three witnesses were foremen and people
22 in charge, as well as construction workers at the scene.
23 Their testimony, coupled with the two FAA witnesses, Inspector
24 Gabriel and Aviation Safety Inspector Michael Wheeler, all

1 five of those witnesses' testimony on behalf of the
2 Administrator was very strong, compelling, logical, and
3 persuasive. I cannot discount or reject out of hand the
4 testimony of the three construction witnesses: Mr. Majewski
5 and Mr. Rouleau and Mr. Kraunelis. These witnesses all
6 testified very forthrightly and candidly about the two passes,
7 a minimum of two passes that the Respondent, while engaged in
8 the banner towing operation of June 19, 2008, flew very near
9 them and near the crane, which in and of itself, the top of
10 the crane was in a range of from 230 to 260 feet in height,
11 and the testimony was that at some point, all three of these
12 witnesses testified, the construction workers, that the flight
13 of the aircraft in the banner towing operation was well below
14 500 feet.

15 In addition to that, we have the two FAA safety
16 inspectors who testified that, in their opinion, this is a
17 congested area. The testimony shows there are homes there,
18 there were people out on the beach, out on the land, and to
19 sum this up, to say that the Administrator had produced during
20 the course of this proceeding a prima facie case would be an
21 understatement, in my opinion. As I mentioned there, the
22 Administrator's witnesses were strong, compelling, logical and
23 persuasive, and more than made the case on behalf of the
24 Administrator as set forth in the Administrator's Order of

1 Suspension.

2 Now, if I may digress just for a moment. What do we
3 have here? Mr. Simmons is a very well-experienced airman.
4 He's been doing these type of operations, based on his
5 testimony and the testimony of some of his witnesses, for a
6 lengthy period of time. He is very familiar with the area
7 here that we're concerned with, giving him the benefit of the
8 doubt, which I'm going to do to a certain extent, every
9 previous attempt or flight over this area before June 19,
10 2008, all he saw was a hole in the ground. On this flight on
11 June 19, 2008, he saw this crane. He was surprised. That's
12 his testimony. I believe him. There's a lot of things he
13 didn't notice about people in the area and his altitude. I
14 mean, that's obvious when you contrast his testimony with the
15 testimony of the FAA witnesses -- I mean, when you have three
16 construction workers who are put in fear and apprehension by
17 the low altitude of this flight. Mr. Majewski, who was a
18 field superintendent, was so moved by this case, he was
19 informed if he wanted to do anything about it to go to the
20 FAA. First he went to the state aeronautical official, Mr.
21 Warcup, who chose not to do anything about it, which, of
22 course, has nothing to do with whether or not the Federal
23 Aviation Administration proceed which they did.

24 And as I said, and I don't want to keep saying it,

1 the Administrator's case here is very strong as to the low-
2 level flight of the Respondent's aircraft. Not one, not two,
3 but three witnesses have testified that he was well below 500
4 feet when he was near the crane and over the construction
5 site. This gave feelings of apprehension to Mr. Majewski and
6 Mr. Rouleau and Mr. Kraunelis, the construction workers who
7 were there at the site of this hotel construction. Then the
8 FAA inspectors saying that this was a congested area, which
9 even if it wasn't, most of the violations the Administrator
10 has alleged in his Order of Suspension could be found, so that
11 I will proceed to do that accordingly.

12 You may recall the Administrator's Order of
13 Suspension of March 13, 2009, was comprised of 13 numbered
14 paragraphs setting forth the allegations in reference to the
15 alleged violations by Respondent Simmons. With his answer,
16 the Respondent admitted the first four paragraphs of that
17 Order. That's Paragraphs 1, 2, 3 and 4. And I will
18 incorporate those admissions by reference. So what we have
19 remaining is Paragraph 5 through 13, which are the matters
20 that are at issue. Based upon my review of the testimony and
21 the evidence, I am going to make the following specific
22 findings of fact and conclusions of law. As I mentioned, the
23 first four have been admitted by the Respondent, the first
24 four paragraphs of the Administrator's Order. Paragraph:

1 5. It is found that on said flight, the Respondent,
2 at approximately 1:15 p.m. local time, made a series of
3 multiple low-level passes over a construction crane and
4 surrounding construction site. You may recall, incidentally,
5 before I proceed, one of the FAA witnesses said the flight
6 went right over him, as well as over the beach, well below an
7 altitude of 500 feet.

8 6. It is found that at no time during the passes
9 described above was it necessary to conduct such operations
10 for the purpose of takeoff or landing.

11 7. It is found that during the passes referred to
12 above, the Respondent, Mark Simmons, operated N4898Y at
13 altitudes which would not allow if a power unit failed an
14 emergency landing without undue hazard to persons or property
15 on the surface.

16 8. It is found that during the passes referred to
17 above, the Respondent operated the aforesaid aircraft over a
18 congested area of Westerly, Rhode Island, and over an open-air
19 assembly of persons below an altitude of 1,000 feet above the
20 highest obstacle within a horizontal radius of 2,000 feet of
21 the aircraft.

22 9. It is found that during the passes referred to
23 above, Respondent operated a banner tow with N4898Y around a
24 congested area and failed to exercise due care so that in

1 event of an emergency, release of the banner or the tow rope,
2 would not cause undue hazard to persons or property on the
3 surface.

4 10. It is found that during the passes referred to
5 above, Respondent Simmons operated a banner tow and the
6 aforesaid aircraft over a construction site in Westerly, Rhode
7 Island, within 500 feet of people, vehicles and structures on
8 the surface, including but not limited to a construction
9 crane.

10 11. It is found that based on the facts contained
11 in paragraphs 9 and 10 above, Respondent towed a banner and
12 the aforesaid aircraft contrary to the terms of the
13 Certificate of Waiver issued by the Administrator.

14 12. It is found that Respondent's operation of the
15 aforesaid aircraft in the manner and under the circumstances
16 described above was careless so as to potentially endanger the
17 life or property of others.

18 13. It is found that by reason of the foregoing
19 facts and circumstances, the Respondent Simmons violated the
20 following sections of the Federal Aviation Regulations:

21 (A) Section 91.119(a); and I'm incorporating that
22 section as to what it says by reference.

23 (B) Section 91.119(b); and I'm incorporating that
24 section as to what it says by reference.

1 (C) Section 91.119(c); and I'm incorporating what
2 that section spells out by reference.

3 (D) Incorporating by reference Section 91.311 as to
4 what that section says by reference.

5 (E) Section 91.13(a) in that the Respondent operated
6 the aircraft in a careless manner so as to potentially
7 endanger the lives or property of others. Based on the
8 totality of the evidence adduced before me during the course
9 of this proceeding, I do not find that such aircraft operation
10 was reckless.

11 14. This judge finds that safety in air commerce or
12 in air transportation and the public interest does apparently
13 require the affirmation of the Administrator's Order of
14 Suspension dated March 13, 2009. However, taking into account
15 all of the facts and circumstances, coupled with the testimony
16 and the documentary exhibits adduced during the course of this
17 proceeding, it is my determination that the sought sanction of
18 the Administrator of a period of a 180-day suspension of the
19 Respondent's airline transport pilot certificate be modified
20 to a period of suspension of 90 days.

21 Let me mention that as everyone in this room
22 certainly knows, the holder of an airline transport pilot
23 certificate is held to the highest degree of care,
24 responsibility, and judgment. It is my determination that the

1 Administrator cannot be faulted for bringing this case as he
2 did, consummating it in a legal proceeding, in view of the
3 violations which I've just recited and which has been
4 overwhelmingly proven by the Administrator's witnesses,
5 coupled with the documentary exhibits of the Administrator, as
6 set forth during the course of this proceeding.

7 ORDER

8 IT IS ORDERED AND ADJUDGED that the Administrator's
9 Order of Suspension dated March 13, 2009, the period of
10 suspension set forth therein, be modified to a period of
11 suspension of 90 days of the Respondent's airline transport
12 pilot certificate.

13 This Order is issued by William E. Fowler, Jr.,
14 United States Administrative Law Judge.

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16

17 EDITED ON

18 FEBRUARY 18, 2010

WILLIAM E. FOWLER, JR.

Chief Administrative Law Judge