

SERVED: April 27, 2006

NTSB Order No. EA-5220

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 25th day of April, 2006

_____)	
MARION C. BLAKEY,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-17119
v.)	
)	
DAVID E. SMITH,)	
)	
Respondent.)	
_____)	

OPINION AND ORDER

The Administrator has appealed from the oral initial decision of Administrative Law Judge William R. Mullins, issued on January 5, 2005, following an evidentiary hearing.¹ In that decision, the law judge found that respondent had violated 14 C.F.R. 91.13(a) in connection with his piloting of a hot air balloon in the vicinity of Rio Rancho High School in Albuquerque,

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

New Mexico.² The law judge dismissed the Administrator's additional allegation that respondent had violated section 91.119(b)³ and reduced the sanction from a suspension of 270 days to one of 75 days. The Administrator appeals both the dismissal of the section 91.119(b) charge and the sanction reduction.⁴ We deny the appeal.⁵

Respondent, the owner of the balloon, and a passenger⁶ were flying north with a group of balloonists. According to respondent, he had started with about 40 minutes of fuel and had 15-20 minutes left. Given his fuel situation, he decided to land. Respondent dropped down off the mesa over which the group had been flying and towards Rio Rancho High School. The record

² Section 91.13(a) prohibits careless or reckless operations so as to endanger the life or property of another.

³ This section provides that, except for takeoff or landing, no person may operate an aircraft below 1000 feet when over congested areas.

⁴ Respondent has withdrawn his appeal.

⁵ There is considerable Board precedent for the proposition that whether the carelessness violation is independent of the operational violation (here the 91.119(b) violation) depends on whether respondent has adequate notice. Administrator v. Murphy, NTSB Order No. EA-3935 (1993), at 7. In most cases, the carelessness violation is considered by the Administrator to be derivative or residual to the operational violation and, as such, is entitled to no weight in assessing sanction. Administrator v. Buller, NTSB Order No. EA-2661 (1988). In this case, both parties and the law judge appear to assume that the carelessness charge was brought as an independent violation. It is not so clear to us. We recommend that the Administrator's orders of suspension and revocation clearly state whether or not the section 91.13(a) charge is brought as an independent violation. See Administrator v. Moore, NTSB Order No. EA-4929, at 3-4 (2001).

⁶ The Administrator did not allege that this was a for-hire operation.

establishes that this is a common place to land; the Administrator's percipient witness, a teacher at the school and a balloonist, had landed there.

As the balloon came down off the mesa, there were several possible landing sites. Respondent testified that he intended to land in an open area north of the high school. As he descended, the wind began to blow east, pulling the balloon towards some power lines.⁷ Respondent had only one passenger and little fuel. Thus, the balloon was more susceptible to the wind than had it been heavier. The wind increased, but respondent was able to increase altitude to pass over the power lines. Respondent testified that he did not continue traveling at altitude in any direction to find a better landing area because he was concerned about his fuel situation.⁸

Respondent chose another landing site east of the high school, but while he was still north of the school the wind changed again, pulling him towards the school and some parked cars. At that point, all parties agree that there was another balloon higher than respondent that was stalled over the east end

⁷ The school was approximately 1500 feet from the power lines.

⁸ Although a witness for the Administrator argued that respondent had more fuel left and could have continued until he found a more appropriate landing site, that point was not clearly or convincingly developed, nor did the Administrator argue that in leaving so little fuel respondent acted carelessly or recklessly. From his acceptance of respondent's version of events, the law judge implicitly made a credibility finding in favor of respondent. There are no minimum fuel requirements for balloons.

of the high school. Respondent determined to stay low and pass over the school to hold the wind. When he got very near the school, he started ascending to clear it. Respondent testified that he chose not to try to land before he got to the school because the wind could easily have blown the balloon into the parked cars. See Exhibit R-2, at 3-6. He passed over the school and, as the school was blocking part of the wind, he was able to slow the balloon down and land in an area between a school building and a parking lot.⁹ An eyewitness approximated respondent's altitude to be 33 feet over the school buildings. Transcript (Tr.) at 76.

Section 91.119(b) prohibits operations, as pertinent here, below 1000 feet except where necessary for takeoff or landing. Respondent contends that the low flight was necessary for landing. As the Administrator notes, precedent establishes that if the landing site chosen is not appropriate, then the low flight cannot be justified as necessary to a landing. That is, if respondent created the situation that caused the low flight, he may not then have the benefit of the exception.

The Administrator argues that respondent's difficulties stemmed from his failure to judge the wind correctly. The Administrator also claims that there were a number of other available spots to land that would have been safer. The

⁹ The school was quite large and had a number of buildings and parking lots. School was in session, but there is no evidence that students were outside the buildings.

Administrator proposed a suspension of 270 days, a number that she said reflects a recent violation for which respondent's certificate was suspended for 30 days.

Respondent presents considerable unrebutted testimony to the effect that the winds were very changeable in this area and one could not tell what the wind would be on the surface based on its speed at a higher altitude. This is important in the context of respondent's choices and his fuel concerns, as respondent attempted to land a number of times but was prevented by higher than expected surface wind speeds and changeable wind direction. The Administrator's reliance on the FAA's *Balloon Flying Handbook* (*Id.*), which states that winds at the surface are usually lightest closer to the ground and that wind speed should be judged at altitude, is not convincing in the face of specific evidence here to the contrary. Tr. at 143; Exhibit R-2 at 3-6.

The Administrator cites statements by respondent purporting to show that respondent agreed he could have continued further north and found other spots to land. That is not a fair reading of respondent's statement, which qualified that agreement because of his fuel concerns. In dismissing the section 91.119(b) charge, the law judge accepted respondent's testimony that: (1) he had limited fuel; (2) the winds and respondent's diminishing fuel supply created considerable problems for landing in farther, more open areas where he might have the same wind problems; (3) the landing site was appropriate; and (4) respondent acted appropriately.

The Administrator's brief gives us no reason to amend the law judge's findings. As noted previously, it is extremely significant that the areas around the school, including the parking lots adjacent to the school buildings, were often used for balloon landings. Respondent headed for this area from the mesa because he knew it was a useable landing site, but tried to find a place closer that would create less hazard. Ballooning is an uncertain venture and it is not reasonable to impose the same standards for flight planning as apply to fixed-wing aircraft. Unanticipated wind changes can alter any plan no matter how good. The approximately 15-20 minutes of fuel left when respondent flew off the mesa would have been sufficient to find a more open landing area had the winds not continued to change.

We also are not convinced that a 270-day sanction remains appropriate, as argued by the Administrator. The law judge's reduction in sanction took into account his dismissal of the section 91.119 charge. Yet, in her brief, the Administrator offers no amendment to the sanction amount based on this fact. Therefore, we decline to disturb the law judge's reduction of the sanction to a 75-day suspension.

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's appeal is denied; and

2. The 75-day suspension of respondent's certificate shall begin 30 days after the service date indicated on this opinion and order.¹⁰

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

¹⁰ 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).