

SERVED: March 17, 2009

NTSB Order No. EA-5436

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 17<sup>th</sup> day of March, 2009

_____	)	
LYNNE A. OSMUS,	)	
Acting Administrator,	)	
Federal Aviation Administration,	)	
	)	
Complainant,	)	
	)	Docket SE-18484
v.	)	
	)	
DAVID G. RIGGS,	)	
	)	
Respondent.	)	
_____	)	

**OPINION AND ORDER**

Respondent appeals the oral initial decision rendered by Administrative Law Judge Patrick G. Geraghty, on February 18, 2009, in this emergency revocation proceeding.<sup>1</sup> By that decision, the law judge affirmed the Administrator's complaint, but modified revocation of respondent's private pilot certificate and any other airman certificates held by respondent to a

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

suspension of 210 days. The Administrator appeals the modification of sanction. We deny respondent's appeal and grant the Administrator's appeal.

The Administrator's January 12, 2009 Emergency Order of Revocation, filed as the complaint in this proceeding, alleged the following, in pertinent part:

\* \* \*

2. On ... November 6, 2008, between approximately 12:45 pm and 1:20 pm local time, you were the pilot in command of a[n] L-39, an Aero Vodochody, civil registration number N139CK, which departed Van Nuys Airport (VNY) and then flew in and around Santa Monica, California, eventually returning back to Van Nuys Airport.
3. On your flight from VNY to the Santa Monica area, you entered LAX [Los Angeles International Airport] Class B airspace without an ATC clearance.
4. While in LAX Class B airspace, you flew N139CK at indicated airspeeds in excess of 250 knots below 10,000 feet.
5. While in the Santa Monica area, you were observed making a number of passes in the vicinity of the crowded Santa Monica Pier and beach.
6. On at least two passes, you flew less than 500 feet above the surface of the beach.
7. During both of these passes, the beach area was congested with people.
8. In the event of an emergency, you would have been unable to complete an emergency landing without undue hazard to persons or property on the surface.
9. During one of these passes over the Santa Monica beach area, you performed a steep aerobatic climb with smoke.
10. Your aerobatic maneuver was performed at an altitude below 1,500 feet above the surface and within Santa Monica Class D airspace and within 4 nautical miles of the centerline of a Federal airway.
11. On your return from the Santa Monica area back to the Van Nuys Airport, you again entered LAX Class B

airspace without an ATC clearance.<sup>[2]</sup>

12. While in LAX Class B airspace, you flew N139CK at indicated airspeeds in excess of 250 knots.
13. You also flew N139CK in the airspace underlying the LAX Class B airspace at an indicated airspeed of more than 200 knots.
14. Your operation of N139CK, in the manner and circumstances described above, was careless or reckless so as to endanger the life or property of another.

The order concluded that, by reason of the foregoing, respondent violated §§ 91.117(a), 91.117(c),<sup>3</sup> 91.119(a), 91.119(b), 91.119(c),<sup>4</sup> 91.131(a)(1), 91.303(c), 91.303(d), 91.303(e),<sup>5</sup> and

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<sup>2</sup> This allegation was withdrawn at the beginning of the hearing.

<sup>3</sup> Section 91.117 provides, in pertinent part:

**91.117 Aircraft speed.**

(a) Unless otherwise authorized by the Administrator, no person may operate an aircraft below 10,000 feet MSL at an indicated airspeed of more than 250 knots (288 m.p.h.).

\* \* \* \* \*

(c) No person may operate an aircraft in the airspace underlying a Class B airspace area designated for an airport or in a VFR corridor designated through such a Class B airspace area, at an indicated airspeed of more than 200 knots (230 mph).

<sup>4</sup> Section 91.119 provides, in pertinent part:

**91.119 Minimum safe altitudes: General.**

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

91.13(a)<sup>6</sup> of the Federal Aviation Regulations (FARs).

At the February 17 and 18, 2009 hearing, held in Gardena, California, the Administrator presented several exhibits and the testimony of seven witnesses. David Finley, a Harbor Services Officer who was working on the Santa Monica Beach Pier, testified that he noticed two jet aircraft and was concerned about their operations in the vicinity of the pier, such that he retrieved a video camera to record the activity, which included two passes directed at the pier at low altitude. He sponsored two video clips into evidence. The first showed a jet that flew from the west toward the pier and then abruptly turned just prior to reaching the pier. The second video clip showed the jet's low flight over the beach area to the south of the pier, including an abrupt pull-up with aileron rolls over the pier. Mr. Finley

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(..continued)

operated closer than 500 feet to any person, vessel, vehicle, or structure.

<sup>5</sup> Section 91.303 provides, in pertinent part:

**91.303 Aerobatic flight.**

No person may operate an aircraft in aerobatic flight—

\* \* \* \* \*

(c) Within the lateral boundaries of the surface areas of Class B, Class C, Class D, or Class E airspace designated for an airport;

(d) Within 4 nautical miles of the center line of any Federal airway;

(e) Below an altitude of 1,500 feet above the surface....

<sup>6</sup> Section 91.13(a) provides, in pertinent part:

**91.13 Careless or reckless operation.**

(a) *Aircraft operations for the purpose of air navigation.* No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

testified that there were several hundred people on the beach and up to 100 people on the west end of the pier.

The second witness was the pilot of the other jet. Skip Holm flew with respondent as they departed Van Nuys Airport as a flight of two. Mr. Holm testified that he did not have his transponder on throughout the flight and that respondent's aircraft was lead. Mr. Holm believed that respondent made the radio calls throughout the flight. Mr. Holm testified that the flight had been previously briefed as four passes to the west of a banner tow aircraft that was operating off the coast of Santa Monica. He said that passes 1 and 3 went according to plan, but on passes 2 and 4 respondent did not follow the briefing and flew very low, headed directly for the pier. Mr. Holm testified that, on the fourth pass, respondent flew low over the beach area headed toward the pier. Mr. Holm said that he made a radio call to respondent, telling him to "knock it off," and that respondent pulled up abruptly. Mr. Holm videotaped respondent's low passes, and two video clips were shown at the hearing and introduced into evidence.

Gevorg Akopyan testified that he was a lifeguard working on the Santa Monica Beach, at a lifeguard tower 0.14 miles to the north of the pier. He saw the two jets and observed that one was making low passes at the pier and along the beach. He said that there were about 100 people on the beach in his immediate vicinity and there were about 400 people on the pier. He videotaped the operations and the clips were introduced into evidence and viewed at the hearing. The fourth witness was also

a lifeguard. Rebecca Gilman testified that she was stationed at a lifeguard tower about 1 mile south of the pier. She saw the two jets, and indicated that one flew by at an altitude of about 50 feet above the beach at a distance of about 100 to 150 yards from her tower. She said that she could see the pilot in the aircraft as it flew past her and that she could feel the heat of the exhaust as it flew toward the pier.

FAA Air Traffic Control (ATC) Training Specialist William Smith testified that he had extensive experience in reviewing and plotting aviation radar data and that he did so in this case. The data and plots were entered into evidence. He said that the radar data that he used was from radar hits provided by the Burbank and Los Angeles radar sites. He testified that the plots showed an aircraft that departed from Van Nuys Airport and was identified on radar as it proceeded toward the Santa Monica Pier. Mr. Smith testified that the aircraft entered into LAX Class B airspace without contacting ATC and that, during that time, its speed exceeded 250 knots, going as high as 299 knots. He said that the return trip from the pier showed that the aircraft flew in excess of 200 knots under the LAX Class B airspace.

Aviation Safety Inspector John Goldfluss testified regarding his extensive aviation experience, including oversight of aerobatic flight. He reviewed the six video clips in evidence and testified that he observed aerobatic flight; he also testified that respondent's conduct risked the lives of the people on the beach and the pier and was grossly negligent and reckless. Using a terminal area chart, Inspector Goldfluss

identified the airspace surrounding the pier as Class D airspace and said that the aerobatic flights occurred over a congested area of persons and within 4 nautical miles of two Federal airways.

The Administrator requested, and the law judge took, judicial notice of the Sanction Guidance Table.

Respondent testified on his own behalf and presented the testimony of four other witnesses. Ramona Cox testified that she was at the Santa Monica Loew's Beach Hotel to take pictures of respondent flying his jet. She was unable to determine the jet's distance from the shore or its altitude when it was over the beach. Jeff Acord testified via videotaped deposition viewed at the hearing. He said that he was working with respondent to set up a flyby of the pier. Mr. Acord testified that he called the FAA and got permission to do a flyby for a banner tow aircraft and two military jets off the coast of Santa Monica Pier. He also testified that when an airspace incursion is observed by an air traffic controller, the completion of a deviation report is required. He said that the flight of two was not supposed to enter LAX Class B airspace on November 6, 2008. Eugene Tanasescu testified that he had worked with respondent in the past and that he was by the pool at the Loew's Hotel and saw the jet flying over the beach area. He estimated that the jet was about 200 feet off the waterline at an altitude of about 400 feet. Gary Shimon testified as an ATC expert for respondent. He testified that the radar data from the FAA was faulty and that there is no way to identify the aircraft or to determine if

respondent entered into LAX Class B airspace. Mr. Shimon claimed that there was no way to get an accurate airspeed of the aircraft from the radar data provided. He also discussed how airspace incursions should be reported by an air traffic controller who observes a violation of airspace.

Respondent testified that he had no prior enforcement actions from the FAA and that he was doing the flybys to promote his movie because film market buyers and producers were having a meeting at the Loew's Hotel. He said that his flight down the beach on that day ended when he performed a 45-degree zoom climb, that he did not enter LAX Class B airspace, and that his airspeed never exceeded 200 knots.

The Administrator called Michael Sanchez, a Santa Monica air traffic controller, as a rebuttal witness. Mr. Sanchez testified that he received a phone call from a man on November 5, 2008, telling him that several aircraft would be doing a flyby in the vicinity of the Santa Monica Pier on the afternoon of November 6, 2008. Mr. Sanchez said that he told the gentleman that he could neither approve nor disapprove a request to enter either Santa Monica Class D airspace or LAX Class B airspace, but that the man would have to contact the Santa Monica tower at the time they intended to do the flyby and request access through Class D airspace.

At the conclusion of the hearing, the law judge reviewed the evidence in the record, and concluded that the Administrator proved all remaining allegations in the complaint. The law judge modified the sanction from revocation to a 210-day suspension.



On appeal, respondent argues that the evidence "fails to demonstrate by a preponderance of the reliable, probative, and substantial evidence, and applicable law, that certain acts were done and certain violations committed," arguing, by way of "example," that there was insufficient evidence to prove any intrusion into Class B airspace and that the FAA "failed in its burden of proving that the 'steep aerobatic climb' was, in fact, aerobatic," and then concluding that, "in at least these regards, the FAA failed to properly plead and prove violations of the FAR." Resp. Br. at 4-6. Respondent also argues that he was prejudiced in his defense as a result of "unnecessary conduct" by the Administrator and by "unduly restrictive rulings" of the law judge. The Administrator opposes each of respondent's arguments on appeal.

The Administrator further argues on appeal that the law judge erred in modifying the sanction. Respondent counters that the law judge properly modified the sanction and that the Administrator's choice of sanction was not entitled to deference.

After carefully reviewing the record of these proceedings, and in due consideration of respondent's argument, we find that the record clearly supports the law judge's findings that respondent committed the violations as alleged by the Administrator.<sup>7</sup> Key to the law judge's findings were his

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<sup>7</sup> Although not raised on appeal by respondent, counsel for the Administrator points out that he inadvertently failed to offer Exhibits A-6 and A-7 for inclusion in the record and, to the extent we find it necessary to complete the record, invites us to remand the case to the law judge for the limited purpose of placing the exhibits in the record. We find that a remand is unnecessary in that there is extensive testimony regarding these

credibility determinations. The law judge summarized witness testimony and reviewed the evidence in the record in determining that the Administrator's witnesses were more credible than respondent and his witnesses, noting that three of respondent's witnesses appeared to be in business or other relationships with respondent. We have held that our law judges are in the best position to evaluate witness credibility.<sup>8</sup> We have also held that credibility determinations are "within the exclusive province of the law judge," unless the law judge has made the determinations "in an arbitrary or capricious manner."<sup>9</sup> In this regard, the Board is free to reject testimony that a law judge has accepted when the Board finds that the testimony is inherently incredible or inconsistent with the overwhelming weight of the evidence.<sup>10</sup> Therefore, where parties challenge a law judge's credibility determinations, the Board will not reverse the determinations unless they are arbitrary, capricious,

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(..continued)

exhibits that were marked for identification at the hearing but not formally offered into evidence. This testimony establishes an incursion into LAX Class B airspace.

<sup>8</sup> See Administrator v. Rounds, NTSB Order No. EA-5359 at 4 (2008), citing Administrator v. Taylor, NTSB Order No. EA-4509 (1996) (the law judge sees and hears the witnesses, and he is in the best position to evaluate their credibility).

<sup>9</sup> Id. at 4-5, 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>10</sup> See Administrator v. Blossom, 7 NTSB 76, 77 (1990) (citing Administrator v. Powell, 4 NTSB 642, 645 (1983); Administrator v. Klayer, 1 NTSB 982, 983 (1970); and Administrator v. Chirino, 5 NTSB 1661, 1663 (1987)).

or clearly erroneous.<sup>11</sup> We see no arbitrariness or capriciousness in the law judge's determinations, as they are supported by the greater weight of the evidence of record.

Respondent argues that several of the law judge's rulings at the hearing constituted error,<sup>12</sup> first raising an issue regarding discovery. Respondent argues about discovery in general, and specifically about a tape from the Van Nuys Airport ATC tower. He complains that the tape was not provided until 2 business days before the hearing and that, when he raised it at the hearing, the law judge "refused to hear it." Resp. Br. at 6-7. Initially, we note that we have held, in an emergency proceeding, when respondent has identified no basis for finding that a delay in providing discovery materials prejudiced him in any cognizable way, that is, by showing that he was unable to review the evidence to the degree necessary to effectively respond to it at the hearing, that there was no abuse of discretion by the law judge in refusing to sanction the Administrator, through a preclusion order or otherwise.<sup>13</sup> Here, the law judge heard

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<sup>11</sup> Smith, supra at 1563.

<sup>12</sup> Respondent also argues that he was "prejudiced in his defense against the FAA's drastic enforcement action as a direct result of unnecessary conduct by the FAA." Other than addressing this argument in the context of the law judge's rulings, we note that we have held that we "do not judge the quality or extent of the Administrator's investigation." Rounds, supra at 7-8, citing Administrator v. Moore, NTSB Order No. EA-4992 at 8 (2002).

<sup>13</sup> See Administrator v. Basulto, NTSB Order No. EA-4474 (1996), wherein we stated:

It is not sufficient, in this regard, for respondent to complain that more time might have enabled him to explore other bases for challenging the probative value of the Air Force radar data. The issue is whether respondent

respondent's argument, and ruled, based on the compressed nature of discovery and the fact that counsel had received and listened to the tape, that he would allow it into evidence. The law judge also noted, as do we, that the tape was offered in redirect of the particular witness because respondent had raised the issue of which aircraft in the formation of two was the lead aircraft. The law judge did not abuse his discretion in admitting the tape.

Respondent then lists, in serial fashion, several of the law judge's rulings with which he takes issue. First is the law judge's "refusing to hear an explanation about the timing of service of a motion." Respondent's Br. at 7. Respondent stated that he had filed a motion for summary judgment on the Thursday before a Tuesday hearing. The law judge stated that it appeared to have been served on Saturday, but denied the motion because it was not supported by evidence and because all of the facts stated in the motion were in dispute.<sup>14</sup> We see no abuse of discretion.<sup>15</sup>

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(..continued)

had enough time, within the constraints of an emergency proceeding whose accelerated deadlines he chose not to waive, to understand the nature and substance of the evidence the Administrator intended to introduce in support of his charges.

<sup>14</sup> The Board's Rules of Practice provide for the filing of a motion for summary judgment on the basis that the pleadings and other supporting documentation establish that there are no material issues of fact to be resolved and that party is entitled to judgment as a matter of law. 49 C.F.R. § 821.17(d).

<sup>15</sup> We further note that, in Federal courts, generally, denial of a motion for summary judgment is not subject to review after a hearing on the merits. See, e.g., Chemetall GMBH v. ZR Energy, Inc., 320 F.3d 714, 718-20 (7<sup>th</sup> Cir. 2003); Lind v. United Parcel Service, Inc., 254 F.3d 1281, 1283-86 (11<sup>th</sup> Cir. 2001). Cf. Ondrusek v. Murphy, 120 P.3d 1053, 1056 (Alaska 2005).

Second in respondent's list of challenged rulings is the law judge's "refusing to hear a proffer for questions regarding an earlier flight that would go to show witness' knowledge of the inoperable transponder and decision to use witness' aircraft transponder on flight in question." Respondent's Br. at 7. Respondent was attempting to elicit testimony that Mr. Holm was flying lead because respondent's transponder was not working and, further, that Mr. Holm had flown respondent's aircraft earlier that day and was aware that respondent's transponder was not working. Although the law judge was initially curt in his ruling,<sup>16</sup> and we caution our law judges to be careful in that

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<sup>16</sup> [Administrator's Counsel]: Your Honor, I'm going to object as to relevance. We just [sic] testimony that he flew that maybe at a different time during the day. It has nothing to do with this flight, and as such, would be irrelevant.

[Law Judge]: No response. Sustained.

[Respondent's Counsel (RC)]: No, Your Honor.

[Law Judge]: Yeah, too late.... I don't know how you practice law, but I waited --

[RC]: Well, Your Honor --

[Law Judge]: He has already said that he flew it at a different time.

[RC]: Correct.

[Law Judge]: It's not relevant.

\* \* \*

[RC]: Can I explain to you why it's relevant, Your Honor?

[Law Judge]: No.

[RC]: This is absurd that I can't explain to you why this is not (sic) relevant.

[Law Judge]: Well, why don't -- when he objects, make a comment.

[RC]: Well, I didn't know if he was finished objecting.

regard, he did eventually allow the testimony and the witness testified that he did not remember flying respondent's aircraft earlier that day. The law judge committed no error here, and we note that the law judge is charged with conducting an orderly and efficient hearing, such that warnings to counsel regarding proceeding in such a manner are often appropriate.

Respondent next argues that the law judge erred in "refusing to allow questions to develop the degree of interest the witness would have in avoiding another charge of a violation against him and a suspension or revocation action on top of the 'few' enforcement actions that have been taken against him." Respondent's Br. at 7. Respondent elicited testimony that the witness had as many as six FAA enforcement actions, and the law judge specifically noted that in his credibility determination. The law judge did not abuse his discretion in limiting further testimony regarding the witness's previous violations. The fact that the witness had violations, and the fact that respondent was able to infer that the witness's testimony was somehow biased by the motivation to avoid further enforcement action, was sufficient to satisfy respondent's purposes regarding this issue and he therefore suffered no prejudice based on the law judge's ruling.

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(..continued)

[Law Judge]: Well, there was a big silence.

[RC]: Well, I didn't know if he was finished.

[Law Judge]: Go ahead. I will listen to you, but when an objection is made, respond.

Tr. at 49-50.

Respondent listed other instances of the law judge's rulings which respondent argues were in error. We have reviewed them and have determined that they have no merit, and mention them only to note that we have previously held that law judges have broad discretion in conducting hearings.<sup>17</sup> Where the law judge has allowed the respondent the opportunity to present and cross-examine witnesses, we generally will not find a due process violation.<sup>18</sup>

We now turn to the Administrator's appeal of the law judge's modification of the sanction. The law judge stated that the Administrator "has not pointed to any specific case in which revocation has been sustained by the Board for these violations. On the other hand, Respondent has cited numerous cases." Initial Decision at 354. The law judge then said, "based upon my view of all of the evidence in this case, I do not find that deference<sup>19</sup> need be shown since it is not shown that the sanction sought is in accord with any prior determination by the Administrator or by the Board. And therefore, I will modify the sanction in this case." Id.

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<sup>17</sup> See Administrator v. Nickl, NTSB Order No. EA-5287 at n.4 (2007), citing, e.g., the Board's Rules of Practice, 49 C.F.R. § 821.35(b).

<sup>18</sup> See Administrator v. Corredor, NTSB Order No. EA-5322 at 9 (2007), citing Administrator v. Nowak, 4 NTSB 1716 (1984).

<sup>19</sup> Title 49 U.S.C. § 44709(d)(3) states that, "the Board is not bound by findings of fact of the Administrator but 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."

It is the Administrator's burden to articulate clearly the desired sanction, and to ask the Board to defer to that determination, supporting the request with evidence showing that the sanction was not selected in an arbitrary or capricious manner, and that the Administrator's choice of sanction is not contrary to law.<sup>20</sup> Whether or not the Administrator's choice of sanction is entitled to deference in this case, we find that respondent's intentional, deliberate violation of safety regulations is particularly egregious. We conclude that respondent knowingly and intentionally ignored and disregarded rules meant to ensure public safety. He admitted to low flight, and the evidence is certainly overwhelming as to his other violations on the flight in question.

Although our law judges certainly have the authority to modify sanction in a case in which the Administrator's choice of sanction is arbitrary or capricious, we do not find that the Administrator's sanction was either. Although the law judge cited the Administrator's failure to cite precedent supporting the choice of sanction during argument at the close of the hearing below, and noted that respondent cited numerous cases, we have reviewed each of the cases cited by respondent and find that none of the cases support his argument. The holdings of the cases are either taken out of context (both factually and procedurally) or the facts of the cases are sufficiently dissimilar such that they do not aid our resolution of this issue. We do rely on Board precedent, however, in coming to a

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<sup>20</sup> Administrator v. Peacon, NTSB Order No. EA-4607 at 10 (1997).



resolution. In Administrator v. Oliveira and Morais, NTSB Order No. EA-4995 (2002), the respondents flew at low altitude, estimated at 25 to 50 feet above the surface, in the vicinity of a beach and within 500 feet of swimmers in the water and objects near the shoreline, and their certificates were revoked.<sup>21</sup> We find the violations in the instant case to be more egregious than Oliveira and Morais, particularly with regard to respondent's nearer proximity to more people. We also note that the Administrator sought and received judicial notice of the Sanction Guidance Table. We specifically note that, although the guidance regarding range of sanction for each of respondent's individual violations does not call for revocation, FAA Order 2150.3B, Chapter 7, paragraph 2.b.(2) does state that revocation is appropriate whenever a certificate holder's conduct demonstrates a lack of the technical proficiency or a lack of the degree of care, judgment, or responsibility required of the holder of such a certificate, and that paragraph 2.b.(3) states that even a single violation may be sufficient to warrant a conclusion an individual lacks qualifications. We therefore reverse the law judge's modification of the sanction.

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<sup>21</sup> We reject respondent's attempt to distinguish Oliveira and Morais based on its occurrence in the wake of the September 11, 2001 tragedies. Instead, we look at the more egregious circumstances of the instant case, in which respondent flew a military trainer jet at speeds approaching 300 knots; in which he flew near or over hundreds of people on the beach and the pier at Santa Monica, California; in which he flew directly toward the west end of the pier and abruptly pulled up before hitting the pier; in which he entered the Class B airspace of Los Angeles International Airport without ATC clearance to do so; and in which he performed aerobatic flight within 4 nautical miles of two different Federal airways and under the Class B airspace of LAX—all for the purpose of promoting a movie to film executives.

Respondent's conduct, as shown by the record evidence and confirmed by the law judge's findings of violations of 14 C.F.R. §§ 91.117(a), 91.117(c), 91.119(a), 91.119(b), 91.119(c), 91.131(a)(1), 91.303(c), 91.303(d), 91.303(e), and 91.13(a), establishes that he has demonstrated a flagrant disregard for the rules and that he, therefore, lacks the qualifications to hold any airman certificate.

**ACCORDINGLY, IT IS ORDERED THAT:**

1. Respondent's appeal is denied;
  2. The Administrator's appeal is granted;
  3. The law judge's initial decision as to findings and violations is affirmed;
  4. The law judge's modification of sanction is reversed;
- and
5. The Administrator's emergency revocation of respondent's private pilot certificate, and any other airman certificates held by respondent, is affirmed.

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

UNITED STATES OF AMERICA  
NATIONAL TRANSPORTATION SAFETY BOARD  
OFFICE OF ADMINISTRATIVE LAW JUDGES

\* \* \* \* \*

In the matter of: \*

LYNNE A. OSMUS, \*  
Acting Administrator \*  
Federal Aviation Administration, \*

Complainant, \*

v. \* Docket No.: SE-18484

JUDGE GERAGHTY

DAVID G. RIGGS, \*

Respondent. \*

\* \* \* \* \*

1515 West 190th Street  
Courtroom 555  
Gardena, California

Wednesday,  
February 18, 2009

The above-entitled matter came on for hearing, pursuant  
to Notice, at 9:00 a.m.

BEFORE: PATRICK G. GERAGHTY  
Administrative Law Judge

## APPEARANCES:

On behalf of the Complainant:

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1 ORAL INITIAL DECISION

2 ADMINISTRATIVE LAW JUDGE GERAGHTY: This has been a  
3 proceeding before the National Transportation Safety Board on the  
4 Appeal of David G. Riggs, hereinafter Respondent, from an  
5 Emergency Order of Revocation which seeks to revoke his Private  
6 Pilot's Certificate. The Emergency Order of Revocation serves  
7 herein as the Complaint and was filed on behalf of the  
8 Administrator, Federal Aviation Administration, herein, the  
9 Complainant.

10 The matter has been heard before this judge and, as  
11 provided and required in emergency proceedings, I am issuing a  
12 Bench Decision in the proceeding.

13 The matter came on for trial on February 17, 2009 in  
14 Gardena, California. The Complainant was represented by one of  
15 his Staff Counsel, Theodore P. Byrne, Esquire, of the Regional  
16 Counsel's Office, Western Pacific Region. The Respondent was  
17 present at all times and was represented by his Counsel, David R.  
18 Brien, Esquire, of Calabasas, California.

19 The parties were afforded the opportunity to offer  
20 evidence, to call and examine witnesses, and to make argument in  
21 support of their respective positions.

22 I have considered all the evidence, both oral and  
23 documentary, and in discussing the evidence, I will simply  
24 highlight that which leads to the conclusion I have reached  
25 herein. The evidence that I do not specifically mention is viewed

1 by me as merely being corroborative or not materially affecting  
2 the outcome of the Decision.

3 AGREEMENT

4 By pleading, it was agreed that there was no dispute as  
5 to the allegations contained in Paragraph 1 of the Complaint.  
6 Therefore, that allegation is established for purposes of the  
7 decision.

8 Further, in open session the Complainant struck  
9 Paragraph 11 of the Complaint from the Complaint, with also the  
10 agreement of Respondent. And therefore, the allegations contained  
11 in Paragraph 11 of the Complaint are disregarded for purposes of  
12 this decision.

13 DISCUSSION

14 As stated above, the Complainant seeks herein on the  
15 evidence educed to revoke on an emergency basis the Private Pilot  
16 Certificate of the Respondent, Mr. Riggs. That is predicated upon  
17 allegations pertaining to a flight operation allegedly conducted  
18 on November 6, 2008 in the vicinity of the Santa Monica Pier,  
19 Santa Monica, California, the Van Nuys Airport when he was  
20 operating allegedly as the pilot in command of an L39 jet  
21 aircraft, registration number N139CK.

22 With respect to the allegations in Paragraph 2 as to the  
23 time and place of the allegation and the fact that the Respondent  
24 was pilot in command of that aircraft, that is clearly established  
25 on all of the evidence offered during the course of the proceeding

1 and therefore I will not discuss it any further. It is clearly  
2 established by testimony of Mr. Holm and also the admission of the  
3 Respondent himself.

4           Turning then to the evidence, as for the Complainant  
5 made through several exhibits and witnesses called and videos of  
6 incident taken by various lifeguard personnel that were in the  
7 Santa Monica beach/pier area on the date in question. The first  
8 of these is Mr. David Finley. He is a lifeguard. He works with  
9 the Harbor Police Department, Harbor Patrol. He was on duty on  
10 the date in question and states that he was at the end of the  
11 Santa Monica pier at Santa Monica when he observed the jet to  
12 operate in his vicinity, and as he's testified, making several  
13 passes on the pier.

14           He identified in his testimony two passes from what he  
15 saw and those are referred to by me as Finley clip 1 and clip 2  
16 from the videos that we saw. And I will discuss the videos after  
17 I go through the testimony of the various individuals that  
18 actually photographed this alleged incident.

19           As to the number of people in the vicinity at the time  
20 of this occurrence, Mr. Finley testified that there were numerous  
21 people at the west end of the Santa Monica pier that is the ocean  
22 end, stating that was somewhere between 60 to 100 people, and on  
23 the beach that there were several hundred people in that vicinity.

24           With respect to the first clip, he identifies the  
25 aircraft as coming down and passing off to what would be the south

1 side of the pier coming from the west. The second one on the clip  
2 we'll discuss, indicates that is over a beach with an abrupt pull  
3 up, in his words, aileron roll and he considered it aerobatic  
4 maneuver on his testimony. With respect to the aircraft operating  
5 along the beach, he indicated from his observation that the  
6 aircraft was approximately 50 feet above the shoreline, which he  
7 described as the intersection between the actual sand and the  
8 water itself so that the aircraft was, if you're looking at it,  
9 along a line where the water would actually be lapping up onto the  
10 beach, which is what he termed the shoreline.

11 On cross-examination, with respect to the camera he was  
12 using, he said he had no zoom feature in that camera for him to  
13 use. He did not know the pilot or the "N" number of the aircraft  
14 that he was observing, that the aircraft from his position had  
15 passed within 100 to 200 feet from him; and that when he was  
16 making the video he did believe that the aircraft had passed over  
17 people and the aircraft was along the, as I indicated, beach and  
18 waterline on its passes.

19 Mr. Skip Holm was operating an L39. He was part of this  
20 two-ship flight, which involved Mr. Riggs in one L39 and Mr. Holm  
21 operating another L39.

22 According to Mr. Holm, Mr. Riggs was the pilot in  
23 command of the aircraft identified as N139CK.

24 As to voice communications, he indicated that the  
25 Respondent was the one in communication and conducting all



1 coordination involved in the flight with anyone that they were in  
2 contact with. Also testified that Mr. Riggs, the Respondent, was  
3 the lead aircraft and that he was the lead aircraft at all times  
4 until possibly the return to Van Nuys when Mr. Holm assumed the  
5 lead, that is, on the return to the Van Nuys Airport from which  
6 they had departed.

7           This flight was briefed for a flight to go out and join  
8 up with a tow plane. He was towing a banner in the Santa Monica  
9 area. And on the testimony from the Respondent himself, it does  
10 appear that the intended purpose of the flight was for the jets to  
11 rendezvous with the tow plane, make passes, according to Mr. Holm,  
12 on the Oceanside, or split one jet on one side, one on the other  
13 to attract the attention of individuals to that tow plane.

14           And skipping ahead, the testimony of the Respondent is  
15 that there was a gathering or convention of film directors and  
16 producers that was taking place at a hotel, I believe it's Lowes  
17 Hotel, which is in the immediate vicinity of the Santa Monica Pier  
18 area. And I think a reasonable inference was that the purpose was  
19 to attract the attention of those conventioners to this film that  
20 the Respondent was producing, or had produced by this operation in  
21 the Santa Monica area. And that's the conclusion that I reached  
22 or inference.

23           Mr. Holm indicated that there were, as he put it, four  
24 passes. The first and third passes, on his testimony, went as  
25 briefed, which I've just described. However, according to this

1 witness, both the second and the fourth passes deviated from what  
2 had been briefed for the purpose of this flight. Mr. Holm had a  
3 video camera with him and since he, on his testimony, had a camera  
4 that had been given to him apparently, he had it along for  
5 purposes of trying it out. He filmed the Respondent a little bit  
6 of the second pass and all of the fourth pass.

7           At the time of the second pass, according to Mr. Holm,  
8 his altitude was equal to that of the banner tow aircraft, which  
9 was stated as 500 AGL. As to the second clip, which would be the  
10 fourth pass, according to this witness, he observed the Respondent  
11 to operate along the beach and then do, in his words, an abrupt  
12 pull up, in the vicinity of the Santa Monica Pier Ferris wheel.  
13 As he described it, the pass that the Respondent was doing was  
14 running along the beach line with the pull up as he approached the  
15 Pier, and at that point, according to Mr. Holm, and that is really  
16 not disputed, Holm called to the Respondent to "knock it off."  
17 And knock it off, I don't think, takes much in the way of  
18 interpretation. It means stop whatever it is you're doing. If  
19 you're hitting me and I say, "Knock it off," it means please don't  
20 punch me anymore. I think that is a reasonable conclusion to  
21 reach.

22           As to the operation of N139CK, it does turn out on the  
23 testimony that Mr. Holm did operate that aircraft earlier in the  
24 day. However, on the evidence in front of me, it's clear that at  
25 the time of the incident, which is at issue here, that the

1 Respondent was in fact the pilot in command of 139CK, and I so  
2 find.

3           Mr. Holm was questioned as to his bias or interest in  
4 his testimony and was questioned as to whether or not he made his  
5 living out of flying, as maybe a consequence of not wanting to  
6 give testimony that might be adverse to himself because he would  
7 lose his license. Mr. Holm specifically stated that he does not  
8 make his living out of flying, but rather as an engineer or from  
9 engineering, and that, in his words, he was not concerned about  
10 whether or not he lost his license. He did, however, admit that  
11 he had had prior violation history with the Federal Aviation  
12 Administration, and I did note that.

13           As to the operation in Class D airspace, Mr. Holm stated  
14 that it was simply his understanding from what he had been briefed  
15 that permission had been obtained from someone for operation in  
16 Class D airspace. And on his testimony, he denied that he,  
17 himself, had ever entered into Class Bravo, B, airspace.

18           Mr. Akopyan is a lifeguard. He was at Station 15 on the  
19 beach, which is on the north side of the pier, according to the  
20 map, which was received as Exhibit A-4. He was at tower 15, which  
21 is circled on Exhibit A-4, which is close to the north side of the  
22 Santa Monica pier. Mr. Akopyan observed the aircraft to be  
23 operating in the vicinity of the pier. He made a video of it and  
24 in his testimony he stated that he made the video because he  
25 thought the flight was unsafe as he was observing it and that, in

1 fact, he thought the aircraft might, in fact, strike the pier. He  
2 also filmed two clips and I call that Akopyan clips 1 and 2. Clip  
3 1 is one that apparently is, and I'll discuss it the same as one  
4 of the clips by Mr. Finley, and clip 2 is of the pull up in the  
5 vicinity of the Ferris wheel.

6           With respect to the beach area itself, Mr. Akopyan  
7 indicated there were people on the beach in his immediate area,  
8 putting the number as 100 persons, and that there were  
9 approximately, in his estimation, 400 people on the entire pier,  
10 that is from the ocean and all the way back to the anchoring on  
11 the shore.

12           With respect to the clip that he did take, he did  
13 indicate that he observed one of the aircraft to be making smoke  
14 and that it did a roll, and from what he could identify for the  
15 aircraft, the aircraft that he observed had a white bottom to the  
16 fuselage.

17           Ms. Rebecca Gilman is also a lifeguard. She was working  
18 tower 26, which is again, circled on A-4. That's on the southside  
19 of the pier, according to Exhibit A-4. She was in her lifeguard  
20 station on her tower when she observed a jet to go past her, low  
21 in height, as she indicated. It appeared to go down to the Venice  
22 area and then at extremely low altitude, turn around and come  
23 back. She stated that on the return, the jet went directly over  
24 her while she was in the tower, stating she was on the deck of her  
25 tower, which was about two or three feet off the sand level.

1           She stated that she observed the jet to be operating  
2 about 100 yards from her tower. She indicated her tower was about  
3 50 feet to the shoreline and then 100 yards, total 50 and 100,  
4 which would put it out, as I understood her mathematics, at least  
5 50 yards out into the water. That of course, is 3 feet times 50,  
6 you get 150 feet. And even if you go to 150 feet, you still get,  
7 what, 450 feet. So, those numbers are significant.

8           As to the condition of the beach itself, in her words,  
9 the beach was "plenty crowded."

10           Mr. William Smith is employed by the Federal Aviation  
11 Administration. He's been with the FAA for 25 years and he has 10  
12 to 12 years interpreting tracking data and conducting plots such  
13 as he testified to, which is identified as Exhibit A-6 and as A-  
14 6(a), all the way down through A-6(i.)

15           Mr. Smith testified that he created the document A-6 and  
16 A-6 is plotted, according to him, from the aircraft returns in the  
17 vicinity of the Santa Monica pier and that it's a correlation  
18 between the aircraft being observed from departure from Van Nuys  
19 out into the Santa Monica area. It is admitted that the aircraft  
20 dropped off the radar, which would be not usual for the aircraft  
21 to get at a low altitude and be below the operative range of the  
22 radar. You can go behind mountain, you might not be able to be  
23 received by radar, but you also can be unobserved by radar if you  
24 get too low.

25           In any event, on his testimony, he was able to correlate

1 the outbound and then the appearance again of the return portion  
2 back to Van Nuys and that therefore, on his testimony, he was  
3 tracking the same jet aircraft with respect to what he is plotting  
4 on A-6.

5           With respect altitudes during the time, he testified  
6 that all altitudes during the period of time, as plotted on A-6  
7 and has supporting documentation, were all below 10,000 feet.  
8 Referring to A-038, which is part of the raw data which is used by  
9 him in the plot, he pointed out that there was speed of 252 knots  
10 that increased to 274 knots on the outbound to the Santa Monica  
11 pier area. He stated that on his calculations that the aircraft  
12 had, in fact, on its departure from Van Nuys out to the Santa  
13 Monica area, had entered into Class B airspace, pointing as A-054  
14 on page 6(i.)

15           He then uses the Los Angeles, LAX radar, which is on  
16 6(d) page of this exhibit. And he correlates the positions from  
17 6(d) to positions on 6(g.) He testified that the Class B airspace  
18 is clearly denoted on A-41 on 6(e) with an airspeed of 278 knots,  
19 and that the last target of A-52 indicating an airspeed of 290  
20 knots, all of which is below, in his testimony, 10,000 feet and  
21 within Class Bravo airspace.

22           On the return to Van Nuys, there is a squawk of VFR code  
23 1200 and that appears on 6(b) of this exhibit. He testified it  
24 was a consistent track on the return and the identification code,  
25 as it appears on here is 39CK. I'll discuss that significance

1 when I talk about Mr. Acord. And he indicates that there was  
2 falloff of the radar at the Van Nuys. However, that all the times  
3 were consistent and that the arrived aircraft did turn out to be,  
4 in fact, N139CK.

5 He was not able to testify as to actually who had pulled  
6 all the data off the various FAA computers, simply that he had the  
7 data and that was his training and assignment to prepare the  
8 document A-6.

9 Mr. John Goldfluss is an Aviation Safety Inspector with  
10 the FAA. He has multiple certificates, experience with air shows.  
11 He is, on his testimony, a regional coordinator for air shows.  
12 He's worked with the Blue Angels, the United States Marine Corps  
13 demonstration team, so he has the experience with air show and  
14 maneuvers that are usually performed at air shows. He testified  
15 that he had reviewed the material, which I've already discussed,  
16 the videos and the plots, and that his view that the videos  
17 demonstrated that the activities of the aircraft were, in fact,  
18 aerobatic activities. And his opinion, the activity was not  
19 inadvertent but was, in fact, reckless flight.

20 With respect to A-8, which is the LAX Terminal Area  
21 Chart, he reviewed that and using the coordinates gave us his  
22 opinion as he expressed it that the aircraft at the Santa Monica  
23 Pier had operated in Class D airspace from the Santa Monica  
24 Airport, that's their Class D airspace, and that the aircraft that  
25 he saw on the video was, in fact, operating in Class D airspace.

1           He also testified based upon A-8 and the videos and  
2 descriptions that he had reviewed that the aircraft had, in fact,  
3 operated too close to a federal airway, identifying V107 and  
4 possibly within four nautical miles of V airway 247.

5           On cross-examination, he was unable to say anything  
6 about whether or not the aircraft was ever actually in Class B  
7 airspace, but stated that from what he knew that it appeared that  
8 the aircraft operated beneath the limits of Class B airspace. He,  
9 of course, was unable to identify who the pilots were and didn't  
10 have any knowledge to that effect.

11           Mr. Jeff Acord testified for the Respondent. He has a  
12 long history with air traffic control and is apparently an  
13 instructor for Raytheon and teaches people at the FAA TRACON. And  
14 he states he was hired by the Respondent to contact the Santa  
15 Monica Tower and Southern California TRACON to make arrangements  
16 on this operation on November 6.

17           He spoke to, according to this witness, Mr. Veitch. And  
18 in his testimony, Mr. Acord says that when he talked to  
19 Mr. Veitch, he told him that the aircraft intended to do fly-bys.  
20 There was no direct testimony other than that and there's nothing  
21 here that he described anything to Mr. Veitch or anyone either at  
22 SoCal or at Santa Monica Tower as to the activities that were  
23 actually conducted at the Santa Monica Pier and beach area.  
24 Simply fly-bys. And I simply observed that what I saw in the  
25 videos do not constitute fly-bys.



1           He testified the same as Mr. Goldfluss did as to the  
2 absence by ATC of any tag where an aircraft that may have  
3 penetrated Class B airspace. Of course, Mr. Goldfluss said he  
4 wasn't able to testify about a penetration. But both Mr. Acord  
5 and Mr. Goldfluss qualified that by saying, and I quote, "If a  
6 target was observed by ATC, then track data would be assigned and  
7 it would be tracked to its destination and a request for a phone  
8 call so that the FAA could straighten the matter out." That of  
9 course is a qualification. If ATC doesn't see it, it's not going  
10 to be tracked and we don't know anything about that. It's just  
11 that it's not there.

12           But a possible explanation agreed to by this witness is  
13 that it's possible that the controller simply did not observe it.  
14 And this is a heavily travelled area. You got LAX airport just  
15 immediately to the south. You got Van Nuys, you got Santa Monica,  
16 several other airports in the vicinity, so controllers are  
17 probably busy.

18           Turning then to what he considered there were some  
19 errors in the data itself, he pointed to the longitude/latitude.  
20 That is an error that's on here but that does not go to the  
21 position of the aircraft as the rest of the evidence shows.  
22 There's really no question about whether the aircraft were  
23 operating at Sri Lanka or whether they were in Santa Monica.

24           There is a discrepancy on the front, according to Mr.  
25 Acord, and it is observed on A-6. It's simply 39CK, which on his

1 testimony, that tail number 39CK belongs to, I believe, a lear jet  
2 registered in Wisconsin. There's no testimony that that aircraft  
3 was, in fact, operating in Santa Monica on the date in question.  
4 And the dropping of 139CK, to me, is not that significant. It's  
5 not unusual for an aircraft that has a double alphabet identifier  
6 after the numbers for the pilot to simply recite the last two  
7 numbers and the alphabetical, you know, 45JP. You don't have to  
8 give the preceding number. It might be preferable, but it's not  
9 necessary. In any event, in light of all of the evidence in front  
10 of me, there is no doubt that the plot data on A-6 does refer to  
11 the aircraft being operated as N139CK.

12           As to discrepancies in the airspeeds that are returned  
13 on the radar, and I would agree with that testimony, the radar is  
14 painting the aircraft based upon predictions, based upon the prior  
15 return, and that the aircraft makes an abrupt change or bank that  
16 there can be a discrepancy in the speed related so that it is not  
17 exact. But by the same token when we're talking about airspeeds  
18 as we were, 298, even taking a different of 50 knots off that for  
19 a change of heading, you're still within the prescribed area under  
20 the Federal Aviation Regulations, which I'll cite.

21           Ms. Ramona Cox also was called by the Respondent. She  
22 testified she was outside the Lowes Hotel apparently on a balcony  
23 or whatever, and she was there to take photos of Mr. Riggs flying.  
24 She observed the aircraft, according to her, directly in front of  
25 her but it was out over the water. However, she had no estimate

1 of how far the aircraft was out over the water and she was unable  
2 to give any estimate of how high the aircraft was. And of course,  
3 there was also a problem because it was never identified in the  
4 testimony exactly where the Lowes Hotel is with respect to the  
5 water. So how far away she was from the point where she was  
6 observing to the point where the aircraft was, there was never any  
7 testimony to exactly place her in space. So really of very little  
8 value.

9           Mr. David Riggs, the Respondent, testified on his own  
10 behalf. He has no prior violation history. And of course, that's  
11 in accord with what the Board expects. However, I do acknowledge  
12 that he does not have a prior violation history and he has been  
13 flying for a considerable period of time. He acknowledged that he  
14 was, in fact, operating N139CK, also that Mr. Holm had called him  
15 with the phrase, "knock it off," which according to the Respondent  
16 meant to him stop what you're doing. Respondent also acknowledged  
17 that he was flying the aircraft that was making smoke and that the  
18 aircraft he was operating has a white underbelly, or white under  
19 the fuselage and under the wings, which is one of the ways to  
20 identify it.

21           As to one of the operations, he indicated that on his  
22 pass as he approached the Ferris wheel that he performed, and  
23 these are his words, a 45-degree zoom climb and then that Mr. Holm  
24 had taken the lead on the way back into Van Nuys Airport, which  
25 I've already discussed.

1           With respect to transponder codes, there's dispute as to  
2 whether or not Mr. Holm was operating a transponder. Mr. Holm's  
3 testimony is that he never operated a transponder. There is some  
4 evidence from the Respondent that the transponder in his aircraft  
5 was inoperative. However, that issue to me is not critical  
6 because on the testimony of Mr. Smith, I do resolve that the plots  
7 on A-6 are in fact these two aircraft.

8           The Respondent also testified that he had conversations  
9 with Mr. Holm afterwards, that Mr. Holm indicated to him that he  
10 was blaming everything on the Respondent because Mr. Holm makes  
11 \$5,000 from flying, and I don't know whether that was for each  
12 flight that he made or by the month. But in any event, as I've  
13 already discussed that Mr. Holm denied that specifically.

14           On cross-examination, he did concede that the American  
15 film market buyers and producers were at the Lowes Hotel and that  
16 he was doing the fly-bys to promote his movie. Also, he conceded  
17 that the banner tow aircraft was operating at 500 feet AGL and  
18 that when he made his pass down the beach that the tow plane was  
19 above him as he was below 500 AGL.

20           On questioning also on cross-examination, he conceded  
21 having a history in which he had convictions of a misdemeanor,  
22 stealing by deceit, and as he indicated, also had done prison time  
23 for wire fraud, bank fraud, which of course taken into  
24 consideration on credibility of the witnesses.

25           Mr. Eugene Tanasescu was at the pool area at the Lowes

1 Hotel. And again, I don't know exactly where the Lowes Hotel is  
2 with reference to the shoreline. He stated that he observed a  
3 biplane carrying a banner, which was obviously the banner tow  
4 airplane. Then he saw a couple of jets. He stated that according  
5 to him they never flew over the sand. According to him, the  
6 aircraft he observed was "a couple hundred feet off the sand." So  
7 a couple hundred feet would be 200 feet.

8           So, taking this witness, he places the aircraft 200 feet  
9 from the shoreline, that is the meeting between the sand and the  
10 water edge. As to his being at the hotel on the date in question,  
11 he conceded that he had been invited by the Respondent to attend  
12 the event at the hotel. So Mr. Tanasescu apparently is also  
13 involved in production or direction of films.

14           Mr. Gary Shimon has a long history, 34 years, with the  
15 Federal Aviation Administration. He has retired in 1996 and he  
16 has a consulting firm in which he does consulting involving  
17 investigations and incidents such as at issue here. He holds a  
18 Bachelor's of Science Degree and a Master's of Science, I believe  
19 those were from Embry-Riddle. He indicated he had reviewed the  
20 tracking data, which is Exhibit 6. And upon his review, he was of  
21 the opinion you can't tell from the codes that are on here whether  
22 they are from the same aircraft. According to him, the aircraft  
23 were never positively identified by a direct code and that on the  
24 return the Van Nuys, the aircraft had never penetrated Class B  
25 airspace.

1           He stated that with respect to violations of Class B  
2     airspace that -- his testimony was essentially the same as Mr.  
3     Goldfluss and Mr. Acord, which was "when the controller sees this  
4     happen and the aircraft is in Class B airspace, then you do the  
5     data tags."

6           MR. BRIEN: Your Honor, are you referring to Mr. Smith  
7     instead of Goldfluss?

8           ADMINISTRATIVE LAW JUDGE GERAGHTY: I said that he was  
9     agreeing with the testimony of Acord and Goldfluss as to the  
10    controller must see the violation.

11          MR. BRIEN: I believe it was Mr. Smith. Goldfluss was  
12    only as to the flight over Santa Monica. Smith was the one who  
13    was testifying as to the air data stuff.

14          ADMINISTRATIVE LAW JUDGE GERAGHTY: I know that, but  
15    Mr. -- I know what Mr. Goldfluss said. I just -- Mr. Goldfluss  
16    also said that.

17          MR. BRIEN: Okay.

18          ADMINISTRATIVE LAW JUDGE GERAGHTY: And please don't  
19    interrupt me while I'm doing this.

20          MR. BRIEN: I apologize, Your Honor.

21          ADMINISTRATIVE LAW JUDGE GERAGHTY: Thank you.

22          The final witness was Mr. Michael Sanchez. He was  
23    called as a rebuttal witness by the Complainant. He is an air  
24    traffic controller with the Santa Monica Tower. He was on duty,  
25    according to him, both on November 5, 2008 and November 6, 2008;

1 been a controller since 1965. He states that he received a phone  
2 call on the 5th of November. He was asked nothing in particular  
3 but simply he was told what was going to happen the next day, the  
4 fly-bys. According to Mr. Sanchez, Mr. Acord wanted to come into  
5 the Santa Monica Pier area with a banner tow and two, as he  
6 stated, "experimentally certified jet aircraft."

7           Mr. Sanchez said there was no specific request made to  
8 him for any kind of permission to do anything. It was simply an  
9 informational phone call. And according to this witness, he  
10 simply informed Mr. Acord as to the existence of Class B and Class  
11 D, Bravo and Delta, airspace and that he, Mr. Sanchez, could not  
12 grant any type of approval or disapproval for operations. And  
13 specifically that air traffic control cannot authorize any pilot  
14 to deviate from the requirements of specific Federal Aviation  
15 Regulations.

16           Turning then to the videos themselves, there are three  
17 separate videos, what I call the Finley videos, the Holm videos,  
18 and the Akopyan videos. There are two clips on each one of these.  
19 We have Finley clip 1 and 2, Holm 1 and 2, and 1 and 2 from  
20 Mr. Akopyan. Clip 1, as I observed it, and I've watched them more  
21 than once, you observe the aircraft approaching from the ocean  
22 from the west. You can see people on the west end of the pier, as  
23 testified to by Mr. Finley. I observed the aircraft to pass low  
24 on the south side of the pier itself and the structure, which I  
25 believe is the restaurant that's on the pier.

1           In fact, the aircraft is obscured by the building. As  
2 the aircraft pulls away, if you look closely, you can observe a  
3 white cast to the undercarriage of that particular aircraft, which  
4 goes with what I've already discussed.

5           Clip 2 of the Finley is a pass up the beach from south  
6 to north. You see smoke and then, as the Respondent testified, a  
7 zoom pull up as it approached the Ferris wheel. And then there is  
8 two aileron rolls, as I observed them, at the top. Aileron rolls  
9 are not charged in the Complaint so I don't consider that as being  
10 part of the Complaint.

11           However, the aileron rolls are significant  
12 because it goes to the testimony of the complaint of the  
13 Respondent that he made the one roll, as his testimony was,  
14 because he had lost situational awareness of the banner aircraft  
15 and that he had to roll into a left bank so that he could  
16 determine where the tow plane was, and that since he was already  
17 over there, it was easier once he regained situational awareness  
18 to simply complete the roll. However, what I observed on the  
19 video does not comport with the testimony of the Respondent, in my  
20 view.

21           Holm video clip 1 is essentially the same thing as  
22 observed on the Finley clip 1. Clip 2 of the Holm is along the  
23 beach and, again, you can observe the two rolls and you can  
24 observe the undercarriage, the fuselage and the wings of the  
25 aircraft performing it. And of course, the Respondent has



1 conceded that he used the aircraft laying down smoke.

2           The last video the video of Mr. Akopyan, which is on  
3 the north side of the pier, which is essentially the same as  
4 Finley clip 1, except it's taken from the position north of the  
5 pier.

6           And again, you observe the aircraft to disappear  
7 essentially behind the building structure on the pier. You can  
8 also observe in these clips the people on the beach and the area  
9 of his lifeguard station, which was station 15. So, numerous  
10 persons on the beach, and on clip 2, this is again the aircraft  
11 laying down smoke with the pitch up and, again, you see numerous  
12 people on the beach area.

13           That's my view of the evidence in the case. The  
14 Complainant must sustain his complaint by the preponderance of the  
15 reliable, credible, substantial, persuasive evidence. And  
16 although there is a lot of technical evidence offered in this, it  
17 also involves credibility determination.

18           And to that end, I did observe closely the demeanor of  
19 the various witnesses. I undertook to perceive the apparent  
20 interest of the witness who were called, whether they had any  
21 prior connections with either side, and frankly, I perceive  
22 nothing on the part of the lifeguards. They have nothing to gain  
23 or lose as a consequence of this proceeding. On the other hand,  
24 Mr. Acord, Mr. Tanasescu, and Ms. Cox all seemed to be in some  
25 business or other relationship presently or in the past with the

1 Respondent. And of course, the Respondent has his own particular  
2 interest in the case.

3 With respect to the testimony of Mr. Smith and Mr.  
4 Shimon, I found quite frankly the testimony of Mr. Smith the more  
5 persuasive and the more credible and I do make that particular  
6 determination. I also observed that Mr. Shimon, as I indicated,  
7 never expressed any opinion as to operations in federal airways or  
8 in Class D airspace. And in fact, he did not really offer much,  
9 in my view.

10 Mr. Sanchez's testimony is essentially the same, in  
11 agreement, with Mr. Acord. Mr. Acord said that he was inquiring  
12 as to fly-bys. What was observed on the videos are not fly-bys.  
13 Fly-bys can be more than one thing, but there's no indication that  
14 Mr. Acord ever specifically described what these aircraft were to  
15 do other than to join up with a tow airplane and do fly-by.

16 In any event, there was no permission given for these  
17 aircraft to any way deviate from any Federal Aviation Regulations.  
18 And even, assuming arguendo, that Mr. Sanchez had said something  
19 to Mr. Acord, who would've passed that on to Complainant or Mr.  
20 Holm, has no force and effect. Controller cannot waive the  
21 requirements of the Regulations. And there's no indication here  
22 that any waiver was ever requested or granted to the Respondent  
23 for his operation on the date in question.

24 With respect to the testimony of Ms. Gilman and Mr.  
25 Tanasescu, Ms. Gilman puts the aircraft, as I've indicated, about

1 50 feet out into the water, or at best 150 feet. So it's  
2 somewhere between three times fifty, 150 feet or 450 feet. Other  
3 testimony is that it is right along the shoreline. As I've  
4 already observed, there's really, with respect to Cox and  
5 Tanasescu, a lack of showing as to exactly how far they were away  
6 the event that they state that they were perceiving, which again  
7 goes to an evaluation of their testimony.

8 I further find, therefore, and specifically do find  
9 that on the issue of credibility for the reasons I've already  
10 reviewed here that I resolve those issues in favor of the  
11 Complainant.

12 Turning then to the Emergency Order of Revocation, the  
13 Complaint herein, and in summary therefore, I do find that the  
14 Complainant has by a preponderance of the reliable, probative, and  
15 persuasive evidence, has established the allegations contained in  
16 the Complaint as amended and I so hold.

17 I further find upon evaluation of the evidence in front  
18 of me, the videos and the testimony, that the operation by the  
19 Respondent was, in fact, an intentional operation, it was  
20 deliberate, and therefore it is a reckless operation.

21 There is a reasonable nexus between the operation and  
22 potential endangerment to life or property of persons on the beach  
23 and on the pier. And therefore, I do find that the allegation in  
24 Paragraph 14 is established in that there was a reckless operation  
25 so as to potentially endanger the life and property of others by

1 the Respondent at the time and place as alleged.

2           Turning to the violations found, based upon the  
3 conclusions I've reached herein, I do find that the Respondent has  
4 operated in regulatory violation of the provisions of Sections  
5 91.117(a) and (c) of the Federal Aviation Regulations. It is  
6 clearly established on the testimony by Mr. Smith and the  
7 exhibits.

8           I also find that the operation as conducted by the  
9 Respondent was not necessary for purposes of either takeoff or  
10 landing. He wasn't doing that along the Santa Monica beach or the  
11 Pier. Also at the altitudes, as testified to and observed on the  
12 video, Ms. Gilman, directly over her on one pass 50 feet that if  
13 something untoward had happened at the speed that the aircraft was  
14 flying that it's doubtful and emergency landing could've been made  
15 without undue hazards to persons or property on the beach or on  
16 the pier. That's what emergency landing is, something unexpected  
17 happens. And in this environment, it was an undue hazard to  
18 persons or property on the beach.

19           I do find that there's a regulatory violation of  
20 Section 91.119(b) and that it was not necessary for takeoff or  
21 landing, and that the Respondent did operate over open air  
22 assembly of persons. Under Board precedent, a picnic area, if it  
23 is sufficiently populated can be an open air assembly of persons.  
24 So can a beach area.

25           As Ms. Gilman testified, there were plenty of people on

1 the beach. And according to Mr. Finley, there were 60 or 100  
2 people at the west end of the pier and over 400 people total on  
3 the pier. And there were numerous people on the north side of the  
4 pier, as observed in the film clip. And that prohibits an  
5 operation below an altitude of 1,000 feet and there's no question  
6 that this aircraft, as observed on the video, was less than 1,000  
7 feet and it was certainly less than 2,000 feet horizontally from  
8 the pier or from the shoreline. And there were people on the  
9 beach, so that violation's established.

10 I further find that there's a violation of Section  
11 91.119(c) as, again, not necessary for takeoff or landing, and  
12 that aircraft, even if it was over the open water, on the  
13 testimony in front of me, it was closer than 500 feet to persons  
14 on the beach. As I've already indicated, Ms. Gilman puts the  
15 aircraft over the water but even at the best of her estimates,  
16 since her math was a little fuzzy, 450 feet, too close. Mr.  
17 Tanasescu says a couple hundred feet. That's 200. That's within  
18 the 500 feet. There are "plenty of people" on the beach and they  
19 are observing the area Ms. Gilman is testifying about. So the  
20 violation is established.

21 The violation charged of Section 91.131(a)(1) has been  
22 established on the preponderance of the reliable and credible  
23 evidence.

24 Turning to the alleged violation of Section 91.303(c)  
25 of the Regulations, that paragraph precludes aerobatic flight

1 within lateral boundaries of Class B, Class C, or Class D airspace  
2 and not relevant in Class E airspace. The Regulation defines what  
3 is considered an aerobatic maneuver, and as stated in the  
4 regulation that's pertinent here means an intentional maneuver,  
5 and these were intentional maneuvers. The airplane didn't do it  
6 by itself; involving an abrupt change in the aircraft's attitude  
7 not necessary for normal flight.

8           On the Respondent's own testimony, he did a 45 degree  
9 pitch up zoom climb. That was not necessary for normal flight.  
10 It was necessitated by the fact that he was operating at speed  
11 down the beach area, towards the Ferris wheel on the Santa Monica  
12 Pier and had to pitch up, and I refer only to the pitch, not the  
13 aileron rolls, as I've indicated. And that pitching, in my view  
14 as I viewed it and under the interpretation of the Regulation, is  
15 sufficient to support this violation.

16           The only evidence with respect to the charge of  
17 91.303(d) of the Regulations is that offered by the Complainant.  
18 It's not been contested by anyone else with respect to Victor  
19 Airway 107 or 274 or four nautical miles of the center line of a  
20 federal airway. Therefore, on the evidence in front of me, that  
21 stands as established.

22           I further find and conclude that there is violation of  
23 91.1303(e) of the Federal Aviation Regulations and that the  
24 aerobatic flight, which I referenced as the pull up, clearly is  
25 below 1,500 feet above the surface. And therefore, that violation

1 is established.

2           Lastly, there is a violation, as I've indicated, of  
3 Section 91.13(a) and I do not view this as a lesser included  
4 offense. It is a violation established in its own right based  
5 upon all of the evidence, not simply because there are other  
6 operational violations. This was a reckless operation that  
7 potentially endangered the life and properties of other and I so  
8 hold.

9           Turning to the issue of sanction, in argument  
10 Complainant has not pointed to any specific case in which  
11 revocation has been sustained by the Board for these violations.  
12 On the other hand, Respondent has cited numerous cases.

13           Although there is an early case, I think it's a CAB  
14 case, which one violation if it's sufficiently egregious, can be  
15 grounds for revocation. However, based upon my view of all of the  
16 evidence in this case, I do not find that deference need be shown  
17 since it is not shown that the sanction sought is in accord with  
18 any prior determination by the Administrator or by the Board. And  
19 therefore, I will modify the sanction in this case.

20           However, before resolving that question, as a final  
21 issue, I do specifically discuss the affirmative defense as raised  
22 by the pleading and the answer offered by the Respondent. In  
23 looking at the affirmative defenses, I must view these as the  
24 Board has clearly held that is the burden of the one asserting an  
25 affirmative defense to fulfill that burden by proving the factual

1 basis for the affirmative defense, as well as the legal  
2 justification. Adminstrator vs. Winton, EA-5415, 2008 case and  
3 reinstated by the Board in Administrator vs. Winton, EA-5429, 2009  
4 case.

5 MR. BRIEN: I'm sorry, Your Honor, could you spell that  
6 for me?

7 ADMINISTRATIVE LAW JUDGE GERAGHTY: Winton, W-i-n-t-o-  
8 n.

9 MR. BRIEN: Thank you, Your Honor.

10 ADMINISTRATIVE LAW JUDGE GERAGHTY: Affirmative  
11 defense 1, the Board does not consider arguments as to the  
12 Regulations being unconstitutionally vague or un-vague. I will  
13 consider that it was raised for purposes of disposing of your  
14 administrative remedies. However, we have no jurisdiction to rule  
15 on those. You are entitled to due process and I believe that due  
16 process has been afforded. But as to the constitutionality of the  
17 Regulations, the Board is bound by the regulations as promulgated.

18 Affirmative defense 2 is denied. Affirmative defense  
19 3, attempt to comply, is not an excuse. You must comply, not  
20 attempt to comply. 4 is an allegation that the Respondent relied  
21 upon others who had a duty to coordinate the facts. However, on a  
22 reasonable reliance, I think the key case is Administrator vs. Fay  
23 and Takas, EA-3501, a 1992 case. And the evidence in this does  
24 not fulfill the criteria as forth in Administrator vs. Fay and  
25 Takas. Therefore, I reject that affirmative defense.



1           The military jet, as I indicated during the case  
2 itself, does have a different flight profile from a piper cub;  
3 Cessna 152, a Beach Baron, whatever. However, the operations as  
4 demonstrated herein on the preponderance of the evidence were not  
5 necessary for normal flight activities of this particular jet.  
6 These were low passes along crowded beach. Flight profile of this  
7 jet did not require that, nor would it require it from a Cessna  
8 172. Operation by either one of those aircraft would in fact have  
9 been a similar violation.

10           As to retaliation, there's simply insufficient evidence  
11 in front of me that would establish that the incident of November  
12 6, as filmed by the lifeguards, are in any way misconstrued by the  
13 Federal Aviation Administration. Whether or not the people in the  
14 FSDO may have a problem with the Complainant, there is no factual  
15 evidence in front of me that people in the FSDO concocted a story  
16 to implicate the Respondent. We have civilian testimony here and  
17 I do not find that the affirmative defense in 6 has been  
18 established.

19           Turning then to the issue of sanction, I've indicated  
20 that I believe that modification is due. And therefore, I will  
21 modify the Emergency Order of Revocation, the Complaint herein, to  
22 provide for a suspension of 210 days because these are serious  
23 violations. And with that modification, I believe that that would  
24 satisfy the public interest in air safety and also act as a  
25 deterrent to the Respondent in the future, or to any other pilot

1 who might be, for some unknown reason, similarly disposed.

2 ORDER

3 IT IS THEREFORE ADJUDGED AND ORDERED THAT:

4 1. The Emergency Order of Revocation, the Complaint  
5 herein, become and the same hereby is modified to provide for a  
6 period of suspension of 210 days rather than revocation.

7 2. The Emergency Order of Revocation, the Complaint  
8 herein, as modified for sanction, is hereby affirmed.

9 Entered this 18th day of February 2009, at Gardena,  
10 California.

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15 EDITED ON

16 MARCH 10, 2009

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Patrick G. Geraghty  
Administrative Law Judge