

SERVED: April 29, 1998

NTSB Order No. EA-4656

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 9<sup>th</sup> day of April, 1998

_____	)	
JANE F. GARVEY,	)	
Administrator,	)	
Federal Aviation Administration,	)	
	)	
Complainant,	)	
	)	Docket SE-14519
v.	)	
	)	
GERALD THOMPSON BLOSE,	)	
	)	
Respondent.	)	
_____	)	

**OPINION AND ORDER**

Respondent has appealed from the oral initial decision of Administrative Law Judge William E. Fowler, Jr., rendered in this proceeding at the conclusion of an evidentiary hearing held on March 11, 1997.<sup>1</sup> By that decision, the law judge affirmed an order of the Administrator suspending respondent's airman certificates, including his commercial pilot certificate, for a

<sup>1</sup>An excerpt from the hearing transcript containing the initial decision is attached. Respondent filed a brief on appeal

period of 90 days based on his violation of sections 91.111(a), 91.119(a) and (b), and 91.13(a) of the Federal Aviation Regulations (FARs).<sup>2</sup> 14 C.F.R. §§ 91.111(a), 91.119(a) and (b), and 91.13(a). In addition, the law judge found that sanction could not be waived under the Aviation Safety Reporting Program (ASRP). As discussed below, we affirm the initial decision.

The Order of Suspension (complaint) alleged as follows:<sup>3</sup>

1. You are the holder of Commercial Pilot Certificate Number 196446838.
2. On or about August 6, 1995, you acted as pilot-in-command of a Cameron Balloon, CAN-56,

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(..continued)

and the Administrator filed a reply.

**<sup>2</sup>§ 91.111 Operating near other aircraft.**

(a) No person may operate an aircraft so close to another aircraft as to create a collision hazard.

**§ 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.

**§ 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.

<sup>3</sup>Respondent admitted the allegations in paragraphs one and two.

identification number N1995P, on a flight in the vicinity of the Three Rivers Regatta in Pittsburgh, Pennsylvania (hereinafter "the flight").

3. During the flight, you operated the balloon in a congested area at an altitude of less than 1,000 feet above the highest obstacle within a horizontal radius of 2,000 feet of the balloon.
4. During the flight, you operated the balloon below an altitude which would allow, if a power unit fails, an emergency landing without undue hazard to persons or property on the surface.
5. During the flight, you operated the balloon through the aerobatic box during an airshow and came so close to another aircraft that was performing aerobatics that the airshow had to be stopped to avert a midair collision.
6. By virtue of the above, you operated an aircraft in a careless or reckless manner so as to endanger the life or property of another.

It is undisputed that the FAA issued a Certificate of Waiver or Authorization to the Pittsburgh Three Rivers Regatta for the dates of August 3-6, 1995.<sup>4</sup> (Exhibit (Ex.) A-2.) The certificate, by its own terms, was in force on Sunday, August 6, 1995 from 6:00 a.m. to 6:30 p.m. According to the printed schedule attached to the waiver, the aerobatic air show was slated to conclude at 5:45 p.m. It also required that a Notice to Airmen (NOTAM) be issued at least 24 hours before each air show event. As a result of several delays in the day's events, the air show started late. Shortly before the waiver would have expired, the FAA Monitor of the air show, Aviation Safety Inspector (ASI) Darrell Miller, agreed to extend the time of the

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<sup>4</sup>The regatta is a large, annual festival that includes both water and air events. (Transcript (Tr.) at 20.)

waiver and coordinated his decision with air traffic control at the Pittsburgh tower.<sup>5</sup> (Tr. at 91, 131.)

Respondent testified that he sent up test helium balloons to check the wind direction and then took off at about 7:00 p.m. from the north side of West Park, just behind Three Rivers Stadium.<sup>6</sup> He could not see the water from his launch site. His flight was not part of any organized regatta event and respondent knew that it was not covered by the waiver. The balloon he operated was sponsored by Kings Family Ice Cream/Restaurants and displayed advertising for the sponsor.<sup>7</sup>

Upon reaching an altitude of approximately 600 feet, respondent noticed an airplane over the river performing aerobatic maneuvers and saw vast crowds of people along the shoreline. (Tr. at 197-98.) He testified that he did not intend to fly low over the crowd but, when the airplane appeared to be headed for him, he quickly descended to within several feet of the water in order to avoid a collision.<sup>8</sup> (Tr. at 187, 199.) After traveling what he considered a safe distance over the water, he ascended and left the area.

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<sup>5</sup>Mr. Miller testified that he has over seven years experience with the FAA, has an ATP certificate with multi-engine rating and has over 7000 hours of flight time. (Tr. at 129.)

<sup>6</sup>Respondent has a commercial pilot certificate with a lighter-than-air rating and has over 600 hours of balloon flight time. (Tr. at 180.)

<sup>7</sup>In fact, the balloon was shaped like a carton of ice cream. Respondent stated that the purpose of the flight was to advertise for his sponsor. (Tr. at 214.)

<sup>8</sup>As he descended, he saw "thousands" of people in front of

According to Kevin Poeppelman,<sup>9</sup> the president of the company that produced the balloon events for the regatta, all balloon pilots who wished to participate in any regatta events were required to attend organized briefings, where a hand-out was distributed which listed the approved launch sites and instructed, as to Sunday, August 6<sup>th</sup>, that no launches could be undertaken "until after the air show[, ] which ends at 6:30 p.m." (Tr. at 31, 33; Ex. A-3.) At each briefing, the pilots were informed that the air show could run overtime and were advised to monitor radio frequency 123.45 to be certain that the show was concluded before they took off.<sup>10</sup> (Tr. at 34.) Respondent attended the Saturday briefing, but did not pay much attention because it was raining and he knew he would not be able to launch that day.<sup>11</sup> (Tr. at 182.) At the Sunday briefing, the advice to monitor the regatta radio frequency was repeated and, again, later at the balloon pilots' brunch. (Tr. at 36-37.) Although respondent did not attend the Sunday briefing, he attended the brunch.

Mr. Poeppelman testified that before respondent's balloon

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him at Point State Park. (Tr. at 198.)

<sup>9</sup>Mr. Poeppelman has a commercial pilot certificate with a lighter-than-air rating, over 20 years experience, and over 5700 hours of flight time in hot air balloons. (Tr. at 16-17.) He was not, however, offered as an expert witness in ballooning.

<sup>10</sup>In addition to the regatta show frequency, the handout listed telephone numbers for the Pittsburgh tower, Allegheny tower, FSDO-19, and one labeled "Regatta phone." (Ex. A-2.)

<sup>11</sup>Respondent did not recall Mr. Poeppelman saying that the air show might run past 6:30 p.m. (Tr. at 216.)

appeared in the vicinity of the air show on Sunday evening, another balloon was operated from the direction of the city and crossed the river at an altitude of 1400-1500 feet. (Tr. at 40.) He was not concerned by the first balloon's flight, as it was at a sufficient altitude to traverse the area without interfering with the air show, but was alarmed when he saw respondent's balloon descend rapidly from an altitude of 500-600 feet, down very low over the crowd, to several feet above the water.<sup>12</sup> Mr. Poeppelman, as well as several other witnesses (including respondent), testified to a perceived collision threat.<sup>13</sup> (Tr. at 41-42, 44, 58, 95, 135.) As a result, the FAA monitor stopped the air show for about four to five minutes, until he believed the area was clear. (Tr. at 135.) Throughout this occurrence, respondent did not respond to repeated attempts to contact him by radio. (Tr. at 96, 122.)

Respondent stated that he had no reason to suspect the air show would run late and that, since his flight was not part of the regatta activities, he was not obligated to coordinate his

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<sup>12</sup>He did not have a continuous, unobstructed view of the balloon; however, he saw respondent, when at an altitude of 100 feet or less, waving to the crowd. (Tr. at 51.) Respondent claims that he was not waving but, instead, was adjusting the burner controls. (Tr. at 200-01.)

<sup>13</sup>Mr. Poeppelman stated that he did not ever see the balloon enter the aerobatics box, but saw the balloon close to it and fly through what he perceived as the airplane's anticipated flight path. (Tr. at 46-47, 61.) Although the aerobatic aircraft are confined to the aerobatics box for the performance of maneuvers, they may go outside the box for other purposes, such as to set up and climb. (Tr. at 22.) ASI Miller stated that, from his perspective, the balloon entered the aerobatics box. (Tr. at 153.)

flight with anyone or monitor the regatta radio frequency. (Tr. at 185, 218.) Before the launch, he did not inquire over the radio whether the air show was still in progress. (Tr. at 219.)

The law judge found that respondent acted carelessly, created a collision hazard with another aircraft, and endangered people on the ground. He further determined that the deliberateness of respondent's acts disqualified him from an ASRP sanction waiver.

On appeal, respondent asserts that the law judge placed undue weight on the opinions of witnesses who were not qualified as ballooning experts. We disagree. In reaching his conclusion, the law judge entertained the opinions of two FAA inspectors who were qualified at hearing as aviation experts in general, as well as respondent's expert witness also qualified as an aviation expert, rendered in their capacity as aviation experts, not as experts in the operation of hot air balloons.<sup>14</sup> The law judge's reliance on this testimony was not in error and is consistent

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<sup>14</sup>ASI Thomas Conway testified that he has 11 years of experience with the FAA and 20 years of industry experience as a mechanic and director of maintenance. (Tr. at 160-61.) In addition, he was a partner in a hot air balloon business (which included flight instruction, balloon repairs inspection, and scenic flights) for several years. *Id.* He holds a commercial pilot certificate with a lighter-than-air free balloon rating and a mechanic's certificate with an airframe and powerplant rating. He has about 500 pilot hours and 250 hours in a hot air balloon, including experience in a Cameron 56, the type of balloon operated by respondent. (Tr. at 161-62.)

ASI Martin Lynn testified that he has over 17 years experience with the FAA. (Tr. at 174.) Among the certificates and ratings he possesses are an ATP certificate and a commercial certificate with a lighter-than-air free balloon rating, 2000 flight hours as a pilot and 50 hours in hot air balloons. (Tr.

with his factual findings.<sup>15</sup>

Respondent also argues that he cannot be found to have violated FAR § 91.119(a), which states that an aircraft may not be operated below an altitude allowing, if a power unit fails, an emergency landing without undue hazard to persons or property on the surface, because his balloon has two separate burners. Therefore, he asserts, if a power unit had failed, he would have had a backup and, furthermore, it would be extremely unlikely that both power units would fail during the same flight.

In response, the Administrator takes issue with respondent's interpretation of the regulation, stating that "[s]ection 91.119(a) examines an aircraft's altitude from a situation that assumes a power unit failure, regardless of the likelihood of such a failure," citing Henderson v. FAA, 7 F.3d 875, 879-880 (9<sup>th</sup> Cir. 1993) ("How likely it is that a power unit will fail is not relevant to a [section 91.119(a)] determination"). Administrator's brief at 17, n.4. This citation, we think, does not answer the issue raised by respondent. Respondent's point, as we read it, is not just that it is unlikely that both of his balloon's burners would fail, but that if one did, he could continue his flight on the other, without the necessity for an emergency landing that might create an undue hazard.

We have examined the record and found that there is simply

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at 174-75.)

<sup>15</sup>In addition, the observations of the Administrator's other eyewitnesses, such as Mr. Poepelman and Don Riggs, the air show's announcer, support the law judge's decision.

not enough evidence to support a 91.119(a) violation. There is very little testimony regarding how the balloon would be affected "if a power unit fail[ed]." The only information regarding the aircraft's two independent burners came from respondent, who testified that each of the power units, including the burners, fuel lines, and tanks, was independent of the other. (Tr. at 202.) He also stated that, during the flight, he had both burners on and, if one power unit had failed, he would have used just the other one. (Tr. at 200-01.)

On the issue of power unit failure, the Administrator presented the testimony of aviation safety inspector Thomas Conway, who opined that, if respondent had experienced a "power failure," he probably would not have been able to make a safe landing in the area.<sup>16</sup> (Tr. at 169.) When asked if he knew how many burners respondent had on the balloon, Mr. Conway stated he had "no idea." (Tr. at 170.) If, for example, there was a power unit failure, would that necessitate an immediate emergency landing? Is there a reason why the balloon could not be operated safely on one burner? The record is sparse on these issues and,

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<sup>16</sup>Counsel for the Administrator asked, "[i]n your opinion, based on what you heard, did the Respondent operate the balloon at sufficient altitude to enable the aircraft to make an emergency landing without [undue] hazards to persons or property on the surface in the event of the failure of the balloon?"

Mr. Conway replied, "[b]ased on the testimony I heard and the number of people in the point area, as you crossed the point area, there was probably no way you could have made a safe landing in that area based on the number of people, if you had a power failure." (Tr. at 169.)

therefore, we must conclude that there is insufficient evidence to sustain a 91.119(a) charge.

While respondent admits that he operated the balloon at an altitude well below 1000 feet over the large crowd, he argues that he was permitted to deviate from the FARs because he was faced with an emergency situation.<sup>17</sup> What he fails to acknowledge, however, is that the emergency was one of his own making. He had been repeatedly advised to monitor the regatta radio frequency and warned that the air show could run late. As an experienced balloonist and past participant in the regatta, respondent knew that, if the air show was still in progress, there would be thousands of people along the river. A reasonable and careful pilot would have confirmed that the airshow had concluded before he took off near the site.<sup>18</sup> See Administrator v. Krachun, NTSB Order No. EA-4002 at 8, n.12 (1993), where we stated that a pilot may deviate from the FARs in an emergency if the emergency was "unforeseen and unavoidable by the exercise of sound judgment."

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<sup>17</sup>Respondent testified that he saw the aerobatics airplane "coming at" him and that, as a result, he was forced to abruptly descend in order to avoid a collision. (Tr. at 197-98.) Such statements may be interpreted as an admission that his balloon was close enough to the airplane to create a collision hazard.

On appeal he argues that, since a balloon has the right-of-way over an airplane, the collision hazard was created by the airplane operating too close to the balloon, not vice versa. Respondent's brief at 4. As discussed above, it was respondent's actions that created the conflict.

<sup>18</sup>Respondent also had the option to ascend out of the way, like the balloon that witnesses described seeing moments before.

Further, it is clear that the deliberate choice to take off without checking the status of the air show or utilizing his on board radio and the subsequent decision to drop down low over the large crowd render respondent ineligible for a waiver of sanction under the ASRP.<sup>19</sup> See Administrator v. Russo, NTSB Order No. EA-3800 at 9-10 (1993) (ASRP waiver could not be applied when respondent made a deliberate decision to bypass an alternative airport and land at an airport he knew had no functioning runway lights).<sup>20</sup> The charges sustained, especially given the deliberate nature of respondent's actions, are sufficient to support a 90-day suspension.

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<sup>19</sup>As explained by the Ninth Circuit Court of Appeals,

an inadvertent act is one that is not the result of a purposeful choice ... a pilot acts inadvertently when he flies at an incorrect altitude because he misreads his instruments. But his actions are not inadvertent if he engages in the same conduct because he chooses not to consult his instruments to verify altitude.

Ferguson v. NTSB, 678 F.2d 821, 828 (9<sup>th</sup> Cir. 1982).

<sup>20</sup>We have considered respondent's additional argument that he was prejudiced by the law judge's refusal to strike the testimony of a witness for the Administrator who, after testifying, did not remain at the hearing site and, thus, could not be called as a witness by respondent. We find no error. Respondent questioned the witness on cross examination regarding the same subject about which he wished to question her on direct. If he felt his case would be prejudiced without her additional testimony, he could have requested a continuance when he learned that the witness was no longer available.

**ACCORDINGLY, IT IS ORDERED THAT:**

1. Respondent's appeal is denied, in part;
2. The initial decision is affirmed in all respects except the finding of a section 91.119(a) violation is reversed; and
3. The 90-day suspension of respondent's airman certificates, including his commercial pilot certificate, shall begin 30 days after service of this order.<sup>21</sup>

HALL, Chairman, FRANCIS, Vice Chairman, HAMMERSCHMIDT, GOGLIA, and BLACK, Members of the Board, concurred in the above opinion and order.

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<sup>21</sup>For the purpose of this order, respondent must physically surrender his certificates to a representative of the Federal Aviation Administration pursuant to FAR § 61.19(f).