

SERVED: November 10, 1999

NTSB Order No. EA-4800

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 29th day of October, 1999

| | | |
|----------------------------------|---|------------------|
| _____ |) | |
| JANE F. GARVEY, |) | |
| Administrator, |) | |
| Federal Aviation Administration, |) | |
| |) | |
| Complainant, |) | |
| |) | |
| v. |) | Dockets SE-15221 |
| |) | SE-15222 |
| |) | SE-15223 |
| WILLIAM E. THOMPSON, |) | |
| JERRY K. COPAS, |) | |
| BRADLEY K. BOROUGHS, |) | |
| |) | |
| Respondents. |) | |
| |) | |
| _____ |) | |

OPINION AND ORDER

Respondents have appealed from the oral initial decision of Administrative Law Judge William A. Pope, II, rendered on September 29, 1998, at the conclusion of a two-day evidentiary hearing.¹ By that decision, the law judge affirmed the orders of the Administrator suspending respondents' commercial pilot

¹An excerpt from the hearing transcript containing the initial decision is attached. Respondents have filed an appeal brief and the Administrator filed a reply.

certificates for their violations of sections 91.119(b) and 91.13(a) of the Federal Aviation Regulations (FAR), 14 C.F.R. Part 91.² As discussed below, we deny the appeal.

The Administrator alleged that, on April 25, 1997, the respondents each operated a hot air balloon on a flight from Cherokee Park to a school in Louisville, Kentucky, and that, during the course of those flights, they operated the balloons at altitudes of 300 feet or less over a congested area when it was not necessary for takeoff or landing.

The law judge thoroughly discussed the evidence in the initial decision and we need not repeat it here. He rejected respondents' assertions that the low flight was necessary for landing. He acknowledged their explanations that, soon after takeoff, they encountered an unexpected wind shift which they believed would eventually push them toward Standiford Field; they believed that if they ascended, the wind would have blown them

²§ **91.119 Minimum safe altitudes: General.**

Except when necessary for takeoff or landing, no person may operate an aircraft below the following altitudes:

* * * * *

(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

further toward the controlled airspace; they decided to land as soon as possible; and they did not want to contact ATC to request a clearance into controlled airspace. He disagreed, however, that their low flight over a distance of about five miles was necessary for landing, noting that respondents made a conscious choice not to maintain an altitude of 1,000 feet and contact ATC to advise that their balloons might be blown into controlled airspace while they looked for a suitable landing site. Instead, they chose to remain below 1,000 feet over a congested area and violated the FAR, as alleged by the Administrator. The law judge also concluded that Respondent Copas may not have his sanction waived under the Aviation Safety Reporting Program (ASRP), as the low flight was deliberate, not unintentional.

On appeal, respondents argue that the law judge erred because their low flight was the best option available, given the unanticipated wind shifts, and kept them from intruding into controlled airspace near a busy airport. They further argue that the period of sanction imposed is excessive and, in any event, Respondent Copas should have his sanction waived under the ASRP because his "decisions were carefully considered and implemented." Respondents' brief at 11.

We see no reason to disturb the law judge's findings. He found credible the several FAA inspectors who testified that they saw the balloons traverse a major highway and go over part of the

(..continued)

manner so as to endanger the life or property of another.

city at altitudes of 300 feet AGL and below,³ passing within 2,000 feet of a large building, and ultimately land on the grounds of a middle school.⁴ The law judge also credited respondents' testimony regarding the unexpected wind change and their concerns that, at higher altitudes, the wind may have blown them into Class C controlled airspace. He determined, however, that remaining below 1,000 feet for the entire flight, approximately five miles, was not shown to have been "necessary for takeoff or landing."

The law judge correctly recognized that respondents were not, as they try to argue, left with no other choice but to operate the balloons at low altitudes over the city. As the law judge noted, respondents had another choice available to them: maintain altitude and contact ATC, then look for a suitable place to land.⁵ It was not necessary for respondents to operate the balloons at low altitude for the entire flight in order to land at an appropriate site. We find no error in that determination.

³One inspector testified that, as he observed the balloons from his office on the 11th floor, he was looking down on the balloons. (Tr. at 34.)

⁴The Administrator did not allege that the landing site was inappropriate.

⁵There was no evidence introduced to indicate that respondents were not free to contact ATC or were instructed to avoid the area. In fact, Respondent Copas testified that in the conversation he had with Standiford Tower before the flight for the purpose of advising ATC that the balloons would be operating that morning, ATC asked, "if you see you're coming over in our neighborhood, call us..." (Tr. at 196.)

Respondents also argue that the sanctions imposed are excessive, stating that two other airmen who operated balloons on the same basic flight but settled their cases received suspensions of less than 30 days. This argument is unavailing. The Administrator sufficiently supported her choice of sanction through introduction into evidence of the Sanction Guidance Table. This is the controlling evidence on the issue of sanction, not what other airmen who settled their cases received. In fact, as the law judge pointed out (and respondents acknowledged), the sanctions sought by the Administrator in the instant cases are lower than the range set forth in the Table.⁶

Finally, Respondent Copas maintains that, since he filed a timely report with NASA under the ASRP, his sanction should be waived. The law judge, however, determined that the low flight was a "deliberate choice among various options" and, as an intentional act, it rendered the respondent ineligible for the benefits of the ASRP.⁷ This decision is consistent with his findings in the case and precedent. See, e.g., Administrator v. Blose, NTSB Order No. EA-4656 at 11 (1998), and cases cited therein.

⁶As for the financial impact of a suspension, another reason respondents raise to reduce the sanction, it is not a factor that may serve to reduce an otherwise reasonable sanction. See Administrator v. Van Ovost, NTSB Order No. EA-4681, n.9 (1998).

⁷The ASRP may only be utilized if the violation resulted from inadvertent behavior.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondents' appeals are denied;
2. The initial decision is affirmed; and
3. The 30-day suspension of their commercial pilot

certificates shall begin 30 days after the service date indicated on this opinion and order.⁸

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

⁸For the purpose of this order, respondents must physically surrender their certificates to a representative of the Federal Aviation Administration pursuant to FAR section 61.19(f).