ORDER DISMISSING APPEAL

On September 28, 1979, respondent filed a notice of appeal from the initial decision of Administrative Law Judge Patrick Geraghty, issued orally on September 21, 1979, wherein the law judge affirmed the Administrator's order suspending respondent's private pilot certificate for 60 days. Respondent has not, however, filed an appeal brief, which is necessary to perfect the appeal, and the appeal is therefore subject to dismissal under the Board Rules of Practice. 1/

1/ Section 821.48(a) reads as follows:
Sec. 821.48 Brief and oral argument.
(a) Appeal briefs. Each appeal must be perfected within 40 days after an oral initial decision has been rendered, or 30 days after service of a written initial decision, by the filing with the Board and the serving on the other party of a brief in support of the appeal. Appeals may be dismissed by the Board on its own initiative or on motion of the other party, in cases where a party who has filed a notice of appeal fails to perfect his appeal by filing a timely brief.
ACCORDINGLY, IT IS ORDERED THAT:
Respondent's appeal be and it hereby is dismissed.

KING, Chairman, DRIVER, Vice-Chairman, McADAMS, GOLDMAN, and BURSLEY, Members of the Board, concurred in the above order.
NATIONAL TRANSPORTATION SAFETY BOARD

Office of Administrative Law Judges

LANGHORNE M. BOND, ADMINISTRATOR,
FEDERAL AVIATION ADMINISTRATION,

Complainant

VS

ALFRED SPECKMAN

Respondent

Docket No.
SE-4206

Washington, D.C.

September 21, 1979

Alfred Speckman appearing Pro se.
Diane Recio, Esq., for Complainant.

Patrick G. Geraghty, Administrative Law Judge:

ORAL INITIAL DECISION AND ORDER

This has been a proceeding before the National Transportation Safety Board, held pursuant to the provisions of the Federal Aviation Act of 1958, as amended, and the Board's Rules of Practice in Air Safety Proceedings, on the appeal of Alfred Speckman, hereinafter referred to as Respondent, from an order of suspension would cease to suspend his private pilot's certificate, Number 2137049, for a period of sixty (60) days.

The order of suspension under the Board's rules of practice serves herein as the complaint and was filed on behalf of the Administrator of the Federal Aviation Administration, herein the Complainant, through his Regional
Counsel of the Eastern Region of the Federal Aviation Administration.

The matter has been heard before this Administrative Law Judge and as is provided by the Board's rules of practice I have elected to issue an oral decision in the matter.

Following due notice to the parties, this matter came on for trial in Washington, D. C. on September 21, 1979. The respondent was present and elected to represent himself pro se. The complainant was represented by one of his staff attorneys, Diane Recio, Esquire, of the Eastern Regional Counsel's Office, Federal Aviation Administration.

The parties were afforded full opportunity to offer evidence, to call, examine and cross-exam witnesses. In addition, the parties were offered the opportunity to make argument in support of their respective positions and to propose orally findings of fact and conclusions of law.

AGREEMENTS

By pleading it was agreed that there was no dispute as to the following:

1. That respondent on or about August 15, 1978 was the holder of a private pilot certificate, Number 2137049, and did on that date act as pilot-in-command of the Bellanca 7ECA Civil Aircraft Number N88388 on a banner towing flight in the vicinity of Selbyville, Delaware.
2. That subsequent to the aforesaid flight, investigation revealed that on May 26, 1978, Aerial Enterprises Unlimited, Inc. was issued a Certificate of Waiver or Authorization to operate the aforesaid aircraft an aerial towing of an advertising banner within the States of Delaware and Maryland.

3. That at the time of the aforesaid flight, the respondent was not the holder of a commercial pilot's certificate.

The matters contained in those agreements and admissions are taken as having been established for purposes of this decision.

DISCUSSIONS

The Administrator, herein the complainant, seeks a sixty (60) day suspension of the respondent's private pilot certificate based upon the allegation that the respondent operated in regulatory violation at the time and place noted. The specific regulations relied upon by the Administrator are Section 91.18 of the Regulations, Section 61.118 and Section 91.9 of the Federal Aviation Regulations.

Section 91.18 provides as follows: That no pilot of a civil aircraft may tow anything with that aircraft other than as is provided in 91.17, except in accordance with the terms of a Certificate of Waiver issued by the
Administrator.

However, a Certificate of Waiver is not issued to tow a glider unless the pilot in command of the towing aircraft is qualified under Section 61.69 of this chapter.

Section 61.118 of the Regulations provides as is pertinent that except as provided in paragraphs (a) through (d) of this Section, a private pilot may not act as pilot-in-command of an aircraft that is carrying passengers or property for compensation or hire, nor may he for compensation or hire act as pilot-in-command of an aircraft.

Section 91.9 of the Regulations prohibits a pilot from operating an aircraft in a reckless or careless manner so as to endanger the life or property of another.

I will discuss the further intent and purposes and interrelation of these regulations as I get into the decision and discussion of the evidence.

The Administrator's case is made through several testamentary witnesses, the first of whom was Mr. Richard Bartel. Mr. Bartel is presently with the International Civil Aviation Organization in Canada. However, prior to his assignment to that duty, he was employed as an aviation safety inspector with the Federal Aviation Administration, holding that latter position from about September 1976 through January of 1979. Mr. Bartel holds an airline transport pilot certificate, a certificated flight
instructor and has about 4,500 hours. There are other
eratings and limitations; however, they are not necessary
to be listed here.

Mr. Bartel in his assigned duties with the Federal
Aviation Administration was stationed with the General
Aviation District Office in Philadelphia, Pennsylvania, and
in the course of those duties was informed on August 15,
1978 of an accident which had occurred at Warrington Airport
in Selbyville, Delaware.

Mr. Bartel went to the airport and when he
arrived there he found the aircraft, which I have already
had reference to here, had crashed into some trees at the
southern end of the airport.

Mr. Bartel stated that he inspected the accident
site and noted that the aircraft had crashed in a nose-down
position into the woods, and that the aircraft had been
towing a banner which was still attached to the tail of the
aircraft. The banner had words on it, as the witness
stated, "Now Open Skateboard Park" with some additional
information which the witness was not able to recall.

Mr. Bartel indicated that there were individuals
at the site including a Delaware State Trooper, who
apparently had handed to him a wallet which had been found
inside the crashed aircraft. Mr. Bartel indicated that
on examining the wallet, he found inside the wallet a
Maryland driver license belonging to the respondent and also a private pilot's certificate that had been issued to the respondent.

With respect to Administrator's Exhibit A-1 the Federal Aviation Administration Oklahoma City Record Center does indicate through its search of the records that the respondent is the holder of a private pilot's certificate and in his records there is no other notation to indicate that the respondent has ever held any higher degree of pilot certification.

Mr. Bartel indicated that because the accident had occurred in the jurisdiction to which he was assigned for duty, he was conducting the accident investigation; however, that the certificate of waiver for the towing operation and the pilot, respondent, were located within the jurisdiction of the Baltimore General Aviation District Office and that therefore coordination was had by Mr. Bartel with the Baltimore District Office.

Part of that coordination required into obtaining a copy of the waiver and certificate of authorization which authorized the towing operation. The Administrator's Exhibit A-2, sponsored by Mr. Bartel, is the Certificate of Waiver or Authorization.

As pointed out by the witness, the Certificate of Waiver lists the pilots who are authorized under that waiver
to conduct the towing operations for Aerial Enterprises Unlimited, Inc. The exhibit shows under Condition 10 thereof a list of pilots containing three names. Without reading the names, it suffices to note that the respondent's name is not listed on the Certificate of Waiver or Authorization as an authorized pilot for towing operations.

Mr. Garrisi is also employed by the Federal Aviation Administration as an aviation safety inspector and is assigned to duty with the District Office located at the Baltimore/Washington International Airport.

Mr. Garrisi coordinated in the investigation, as I already have referenced to, as it was being conducted with Mr. Bartel with reference to the accident. Mr. Garrisi had information forwarded to his office, as the aircraft and the pilot were located in his District, and it was Mr. Garrisi's office that apparently completed the investigation, spoke with the owner and obtained copies of various lease agreements or information concerning the leases of the aircraft.

Mr. Thomas Foley is the owner and manager of the Rolling Surf Skateboard Park for whom the banner was being towed. The name of the enterprise is the Rolling Surf Skate Park and it is located in Ocean City, Maryland. Mr. Foley indicates that this enterprise opened about July 21, 1978.
Mr. Foley is apparently a general partner of the organization and is assigned the duties of the management and general daily operations with reference to this amusement park. Mr. Foley is assisted in the handling of the administrative details by his wife, who, on the witness' testimony, handles advertising and also pays bills.

Mr. Foley indicated that prior to the July 21, 1973 opening date the respondent came to the skate park representing Aerial Enterprises, and offered to the skate park the services of Aerial Enterprises for purposes of advertising through banner towing.

Administrator's Exhibit A-3 is a calling card, which lists Aerial Enterprises. It also contains the respondent's name and on the back of that card is a schedule or break-down listing charges for various packages of tows, or numbers of tows.

Mr. Foley indicated that at about the time the park opened that he, on behalf of the skate park, did contract with the respondent to purchase multiple tows. Apparently, they had agreed to purchase a package of tows to get the most possible tows between July and the end of August, indicating that for every ten tows they paid for they would get one free tow.

The Administrator's exhibits A-4, A-5 and A-6 are documents which reflect the number of tows, billing and
payments made to Aerial Enterprises for tow made on behalf
of the Rolling Surf Skateboard Park. Administrator's A-4
does reflect that on August 15th a tow was observed by
Rolling Surf Skate Park personnel to have been made, and
also containing a notation on the bottom of that exhibit
for payment.

A-5 shows two bills for which there was a dispute.
A-6 are two checks in payment endorsed on the back in
both instances; Aerial Enterprises, Inc. and containing
thereunder the respondent's signature.

The respondent testified on his own behalf. He
indicates that he is the President of Aerial Enterprises
Unlimited, Inc. and notes that in that capacity he had
made an application for a Certificate of Waiver or Authoriza-
tion, and states that by reason of having made that applica-
tion that he felt that he was himself personally authorized
to conduct operations under the Certificate of Waiver or
Authorization as it was issued by the Federal Aviation
Administration.

He further testified that he believes that there
are some sections of the Regulations, in particularly
Section 61.118(a) which permits the conduct of a banner
towing operation, although one might not be the holder of
a commercial pilot's certificate; that is, he feels that
under reading of the regulations as he reads it, that he was
authorized, although he was the holder only of a private pilot's certificate to operate the aircraft in a banner towing flight.

He further submits that the flight of August 15, 1978, being a free tow on his testimony, that this would not be a towing for compensation or hire. At least that was the import of this statement or argument.

In a proceeding under Section 609 of the Act, the burden of proof rests with the Administrator on the allegations. The first allegation that I would deal with is whether or not the banner towing flight on August 15th was one for compensation or hire.

Mr. Foley testified extensively as to the negotiations and the billing and payment for the banner towing. He indicated that an employee of his organization always checked to make sure the tow was being made on the particular day that they were informed by Aerial Enterprises that a tow was to be done. The exhibit indicates that August 15th does show a tow being made. Further, the exhibits indicate a billing by Aerial Enterprises and two checks in payment, both of which are endorsed by Aerial Enterprises and the respondent.

It therefore stands amply demonstrated by a clear preponderance of the reliable, probative evidence that the banner towing by Aerial Enterprises for Rolling Surf
Skate Park was an operation for compensation or hire. And I so hold. And I would do that even if the tow on August 15th was one of the so-called free tows. The free tow was only an inducement to the organization to have them purchase a package and, therefore, was clearly included within the purchase of the overall towing package. And be that as it may, it clearly is an operation for compensation or hire.

With reference to the termination of the flight at the Selbyville Airport, there is no contradictory evidence. The aircraft crashed at the Warrington Airport in Selbyville, Delaware. It is not pertinent as to what caused the crash or the probable cause of the crash. It is alleged that the flight terminated in an accident and a crash. There is no contradictory; there is direct evidence to that fact. It was put forth by Mr. Bartel. I, therefore, find that a clear preponderance of the evidence does establish that fact, and I so hold.

With reference to the Certificate of Waiver or Authorization Administrator's A-2 is a copy of that waiver as issued by the Administrator. It clearly indicates under Condition 10 of that waiver that the pilots authorized to operate for Aerial Enterprises Unlimited, Inc. and the towing operation that was being authorized under this waiver does not include the respondent as one of the authorized pilots. I, therefore, find and conclude that a clear
preponderance of the reliable and probative evidence does establish that the Certificate of Waiver, as issued by the Administrator to Aerial Enterprises Unlimited, Inc., did not list the respondent as being eligible to operate the aircraft in question in aerial towing. And I so hold.

Turning to the regulations, Section 91.18 clearly states that, other than when one is dealing with the towing of gliders, a pilot of a civil aircraft may not tow anything from an aircraft unless that particular pilot is doing so in accordance with the terms of a Certificate of Waiver issued by the Administrator.

The second sentence of that particular regulation, that is 91.18, again deals only with towing of gliders, and that is why there is a further reference to Section 61.69. That is not relevant; that is, the second sentence of Section 91.18 is not relevant to this proceeding. What is relevant is the fact that towing from an aircraft may only be done under this regulation in accordance with the terms of a specific waiver or authorization issued by the Administrator. On the clear preponderance of the evidence here the Certificate of Waiver authorized towing by Aerial Enterprises Unlimited, Inc. when the aircraft was being operated by three pilots listed under Condition 10.

On August 15, 1978 the respondent was acting as pilot of the aircraft. He is not listed on that waiver.
The statement by respondent that he thought that the application authorized him to operate the aircraft is rejected. I don't think that it would require much in the way of knowledge, experience or education to realize there is a difference between an application for something and the certificate itself. There is a difference between an application for a driver's license and a driver's license. You can't drive your automobile based upon your application for a certificate for a driver's license, nor can you operate the aircraft under a waiver based upon an application for the waiver before you actually get the waiver. If that's the case, then the waiver doesn't mean anything nor does the driver's license mean anything. You just apply and go out and do it. That boggles the mind and I reject it.

I find and conclude, therefore, that upon a consideration of the evidence in its entirety that the respondent at the time and place as alleged in the complaint did act as pilot-in-command of a civil aircraft in towing operation at a time when the Certificate of Waiver issued by the Administrator did not list him as a pilot eligible to operate the said aircraft in that type of operation, and that therefore under a clear preponderance of the evidence the respondent did operate in regulatory violation of Section 91.18(a) of the Federal Aviation Regulations.

Turning to Section 61.118 of the Regulations,
that section of the regulations lists and sets forth the
privileges and limitations as they apply to the holders
of a private pilot certificate. It is clearly provided
therein that a private pilot may not act as pilot-in-command
of an aircraft that is carrying passengers or property
for compensation or hire, nor may he for compensation or
hire act as pilot-in-command of an aircraft.

Now those two phrases are in the disjunctive. The
first prohibits a private pilot from operating an aircraft
for which compensation is being paid to someone that is not
him. That is, if I own the aircraft and I am being paid
for the particular operation, I can't get a private pilot
to operate that aircraft. The second phrase of that
regulation prohibits the private pilot himself from being
paid for operations. That is, he may not for compensation
or hire act as pilot-in-command. So what that paragraph
does in its entirety is prohibit either the pilot being
paid directly for an operation as pilot-in-command or from
operating as pilot-in-command when someone else is being
paid for that particular flight operation.

Subparagraph (a) is not applicable here. Sub-
paragraph (a) is an exception. It provides that a private
pilot may operate as pilot-in-command where a business or
employment is only secondary or incidental in the flight.
That is not the question here. This was not an incidental
operation. This was the main purpose; that is the flight
was for purposes of towing a banner and that's what payment
was being made for. So I specifically reject 61.118(a)
as being applicable here.

Rather on a clear preponderance of the evidence, it
does indicate that Aerial Enterprises Unlimited, Inc. was
being paid under a verbal contract as testified to by Mr.
Poley for towing a banner advertising the skate park. The
other exhibits indicate that bills were submitted and pay-
ments were in fact made to Aerial Enterprises for this
operation, that is compensation was paid.

Further there is the indication and the evidence
that the respondent was acting as pilot-in-command and that,
therefore, under all of the facts and circumstances it
was clearly indicated that respondent on the evidence as
a private pilot did act as pilot-in-command of an aircraft
that was being operated for compensation or hire when he
was not the holder of a commercial pilot's certificate and,
therefore, that he was operating in regulatory violation
of Section 61.118 of the Federal Aviation Regulations, and
I so hold.

Section 91.9 of the Regulations prohibits careless
operation that endangers the life or property of others.
It is sufficient under prior precedent to show potential
hazard to either life or property to establish a violation
here. I find that under all of the facts and circumstances and the fact that the airplane did crash when it was actually the property of the other that potential endangements and actual endangerment did occur and actual damage in fact did occur. I, therefore, find that the operation by the respondent at a time when he was not authorized to do so under the Certificate of Waiver did constitute a careless operation and that potential hazard did exist and actual damage did occur as a result of the operation and that, therefore, under all of the facts and circumstances a violation of Section 91.9 of the Regulations has been established. And I so hold.

With respect to the sanction, there has been nothing offered in evidence here that would lead me to view the suspension period sought by the Administrator to be other than required under all of the facts and circum-
stances; that is, I find no facts, evidence or circumstances which would warrant reduction of that penalty.

I find rather under all of the facts and circum-
stances that the sixty (60) days is justified and warranted and, therefore, the Administrator's Order of Suspension will be affirmed as issued.

ORDER

IT IS THEREFORE ADJUDGED AND ORDERED:

1. That safety in air commerce or air transportation
of public interest requires the affirmation of the Administrator's Order of Suspension as issued.

2. The Administrator's Order of Suspension be, and the same hereby is, affirmed as issued.

3. That respondent's airman's certificate Number 2137049 be, and the same hereby is, suspended effective eleven (11) days from this date, such suspension continuing thereafter for a period of sixty (60) days after said certificate shall have been physically in the possession of the Administrator of the Federal Aviation Administration.

4. The certificate shall be surrendered either by depositing in the United States mail postage prepaid and properly addressed to the Regional Counsel of the Eastern Region, Federal Aviation Administration, or by personal delivery to an authorized representative of the Administrator.

5. If the respondent surrenders his certificate on or before the effective date of this order, the period of suspension shall commence to run as of the date of the actual surrender and continue in force and effect for the period specified herein; however, if the respondent fails to surrender his certificate on or before the effective date of this order, the period of suspension ordered herein shall continue in effect until the certificate will have been physically in the possession of the Federal
Aviation Administration for the period specified herein.

Issued this 21st day of September, 1979, at
Washington, D. C.

Patrick G. Geraghty
Administrative Law Judge

APPEAL

Either party to this proceeding may appeal from
this oral initial decision and order by filing with the
Board a notice of appeal within ten (10) days after this
date.

Such appeal is to be perfected within forty (40)
days after this date by filing with the Board in support
of that appeal. Appeals may be dismissed by the Board
on its own motion or on the motion of the other party in
those cases where the appealing party fails to perfect its
appeal by the timely filing of the appeal brief.

The parties' attention is directed to the pertinent
section of the Board's rules of practice and their safety
proceedings dealing with appeals for further information
concerning the form and content of appeal briefs.

An original and four copies of each document must
be filed with the National Transportation Safety Board
Docket Section, P. O. Box 23269, L'Enfant Plaza Station,
Washington, D. C. 20024, with a copy of each document served
upon the other party.

The timely filing of an appeal from the decision herein shall stay the order contained in this initial decision during the pendency of the appeal. However, if no appeal from either party is received within the time allowed or if the Board on its own motion does not review this initial decision, the initial decision and order shall become final.

SERVICE: Alfred Speckman
615 Salt Spray Road, Apartment 2-B
Ocean City, MD 21842

Diane Recio, Esq.
Eastern Region
Federal Building, John F. Kennedy
International Airport
Jamaica, New York 11430