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NTSB Order No. BA-1524



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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 1st day of December, 1980

LANGHORNE M. BOND, Administrator,
Federal Aviation Administration,

Complainant,

vs.

HAROLD BERNARD MICHELSON,

Respondent.

Docket No. SE-4404

OPINION AND ORDER

The Administrator and the respondent have both appealed from the initial decision Administrative Law Judge John E. Faulk issued in this proceeding on June 27, 1980, following an evidentiary hearing on March 18, 1980.^{1/} The law judge affirmed an order of the Administrator suspending respondent's pilot's license for 90 days for alleged violations of sections 91.79(a) and (b) and 91.9 of the Federal Aviation Regulations in connection with a helicopter flight respondent made over the Rawhide Ranch Nudist

1/ A copy of the initial decision is attached.

Resort near Sacramento, California on April 1, 1979.^{2/} The Administrator appeals the law judge's findings that all of the violations charged were not proved, and the respondent contends that no violations were established by the evidence.^{3/}

The law judge found that respondent flew over the resort at an altitude between 75 to 100 feet at a speed of from 60 to 70 miles per hour. The resort itself is roughly square in shape and approximately 600 feet on a side. The resort has several permanent residential structures but is mostly composed of mobile homes located primarily along the southern and western perimeter and extending about two-thirds of the way down a west-east line through its center. The evidence shows that respondent flew first around the perimeter of the resort and then across it, traveling east to west, on a course essentially parallel to and between the two rows of trailers and over an orchard area which also had several trailers located within it. This course of travel took respondent over the row of trailers along the western perimeter.

2/ Sections 91.79 and 91.9 read as follows:

"§91.79 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 that case, the aircraft may not be operated closer than 500 feet to any person, vessel, vehicle, or structure.

(d) Helicopters. Helicopters may be operated at less than the minimums prescribed in paragraph (b) or (c) of this section if the operation is conducted without hazard to persons or property on the surface. In addition, each person operating a helicopter shall comply with routes or altitudes specifically prescribed for helicopters by the Administrator."

* * * * *

Section 91.9 reads as follows:

"§91.9 Careless or reckless operation.

No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another."

3/ Respondent's request for oral argument in connection with his appeal is denied, as we find nothing in the record of this proceeding which would suggest that oral argument is either necessary or desirable. The sufficiency-of-the-evidence contentions respondent raises on appeal largely involve the law judge's credibility determinations and resolutions of conflicting evidence. Our review of the record discloses no basis on which we could find that the law judge abused his discretion in this regard.

We have reviewed the record carefully and conclude that the law judge's findings of fact are adequately supported by the evidence. We therefore adopt as our own such findings of the law judge as are consistent with this opinion.

The Administrator alleged that respondent's low flight over the resort violated sections 91.79(a), (b) and 91.9. The law judge found that a violation of (a) had not been established, that the Administrator's failure to allege a violation of 91.79(d) precluded a finding that (b) had been violated, but, in any event, the evidence established a violation of Section 91.9. He found this violation sufficient to support the 90-day suspension. The Administrator contends that the law judge erred by not finding violations of all three provisions.

We think the law judge and the Administrator have both misconstrued the intent and applicability of section 91.79. We will therefore discuss our views on that section before evaluating whether the violations alleged were proved by the evidence.

Section 91.79 sets forth general rules concerning minimum allowable altitudes for aircraft operations between climb out from a takeoff and descent for a landing. Subsection (a) prohibits flights below any altitude which would not allow, in the event of an engine failure, an emergency landing without "undue hazard to persons or property on the surface". This provision, which applies to all aircraft covered by Part 91 (see section 91.1), clearly accords a pilot the exercise of some judgment, informed by knowledge of a given aircraft's operating capabilities under engine-out conditions, in selecting a flight altitude over persons or property.

Subsections (b) and (c) of section 91.79, on the other hand, involve no real judgment on the pilot's part. They simply set forth, with respect to flights over congested and uncongested areas, altitudes below which, in general, no pilot may fly without violating them. In our view, these two provisions do not apply to helicopter operations. The minimum flight altitude for helicopters is,

instead, specified in subsection (d), which, assuming the requirement of subsection (a) is also observed, allows helicopters to fly at any altitude that does not create a hazard to persons or property on the surface. When a helicopter is operated at an altitude that creates such a hazard, the pilot has violated subsection (d), not (b) or (c). The pilot may also have thereby violated subsection (a), but that is not necessarily so.^{4/} The hazards contemplated by subsection (d) may relate to the harm that could be occasioned by the actual operation of a helicopter near the surface, where, for example, the down blast of air from the rotor blades might itself cause damage or injury or effect that result by moving otherwise stationary objects on the ground. It is possible, we believe, that a helicopter could create such a hazard, for purposes of subsection (d), and still be at an altitude that would satisfy the requirements of subsection (a). We think it is unnecessary for our decision here to attempt to determine whether the hazards sought to be avoided by subsections (a) and (d) are the same, or whether they differ simply in degree or on some other basis. Both impose a duty on pilots to exercise safety-conscious judgment in altitude selection.

Our conclusion that subsections (b) and (c) do not apply to helicopter operations is required by their unambiguous regulatory history.^{5/} The FAA adopted Part 91 in an effort to recodify into simpler and more convenient form pre-existing operating requirements. The proposed minimum altitude provision for Part 91 was first contained in section 91.69. See 28 FR 1008 (1963). Subsections (b), (c) and (d) of that proposal contain the same language as is currently in subsections (b)

^{4/} The provisions applicable to helicopters in the predecessor regulation to Part 91 expressly stated that "[h]elicopters may be flown at less than the [minimum] prescribed herein if such operations are conducted without hazard to persons or property on the surface and in accordance with paragraph (a) of this section" (see 14 CFR 60.17(b) and (c) (1963) (emphasis added)). Paragraph (a) of section 60.17 is identical to subsection (a) in section 91.79.

^{5/} The Administrator's appeal brief cites instances where the Board has affirmed violations of subsection (b) in enforcement cases involving helicopters. In each of those cases, however, a violation of either subsection (a) or (d) had been established, and it does not appear that the applicability of (b) was ever drawn in issue.

and (c) of section 91.79. Section 91.69 stated unequivocally, however, that "[p]aragraphs (b), (c), and (d) of this section do not apply to the operation of a helicopter" (id). When the regulation was finally adopted in its present form, however, it was renumbered and reworded to include in a new subsection (d) not only the prior exemption of helicopter operations from the altitude minimums specified in 91.69(b), (c) and (d), but also the past requirement, in former Part 60.17, that helicopter operations be conducted at such an altitude as would not create a hazard to persons or property on the surface.^{6/} This was done, again, without any intent to change then-existing substantive regulations. See 28 FR 6702 (1963).^{7/} We turn now to an assessment of the record in light of our construction of section 91.79.

As noted above, the law judge did not find that respondent's flight violated section 91.79(a). However, his conclusion is based on an interpretation of "undue hazard" which we do not share (see, I.D. at 6-7). Few would argue that an aircraft that has suffered an engine failure does not present a risk of harm to people or property on the surface below or near the aircraft's flight path. The degree of risk, or hazard, however, associated with a given emergency landing, is directly

^{6/} In an earlier version of Part 60, an explanatory note to a provision exempting helicopters from a minimum altitude requirement stated that:

"The rule recognizes the special flight characteristics of the helicopter which can accomplish an emergency landing within a relatively small space. However, if a helicopter is flown over the congested area of a city, town or settlement, at less than 1,000 feet above the highest obstacle, the pilot is required to fly with due regard to places in which an emergency landing can be made with safety and, further, to maintain an altitude along the flight path thus selected from which such an emergency landing can be effected at any time" (14 CFR 60.107(b), Note (1947)).

^{7/} Apart from the regulatory history, logic dictates that subsections (b) and (c) cannot be violated by helicopter operations. Subsection (d) reflects recognition that helicopters can be safely operated below the minimum altitudes specified in (b) or (c). That recognition would be essentially meaningless should those subsections be held applicable. For example, if it were found in a given case that a specific flight at 100 feet was hazardous, it would be anomalous to find the pilot in violation of (b), for failing to maintain 1000 feet, because there may have been numerous altitudes between 100 and 1000 feet which would have presented no hazard.

related to the aircraft's altitude at the outset of the emergency, because more altitude provides more time to select a landing site clear of people and property and to prepare or position the aircraft for an approach to it. Whatever else "undue hazard" may mean, we are satisfied that it embraces a situation in which a pilot's cruising altitude would not likely permit the aircraft to land without striking, or passing dangerously close to, people or property on the surface. We think the Administrator proved just that in this case.

To prove a violation of section 91.79(a), the Administrator did not have to show that it would have been impossible for respondent to have made an emergency landing without injury or damage to persons on the surface in the event his engine had failed at some point along his low pass over the resort.^{8/} The Administrator had to show only that an emergency landing from the altitude respondent passed through presented an unreasonable risk of such harm.^{9/} The Administrator did more than that. He presented two witnesses, both experts on helicopter operation, who testified that, given the estimated speed and altitude of respondent's helicopter as it passed over the resort, it was unlikely that respondent could have made an emergency landing either inside or outside of the resort area without hitting residents or property within or along the perimeter of the resort.^{10/} Respondent offered no expert witnesses to rebut this

^{8/} Respondent's argument that because it might have been possible for him to clear the perimeter of the resort, and the mobile homes located there, if he had had a sufficient tailwind, proves nothing. The Administrator established a prima facie violation of section 91.79(a) through expert testimony that it was doubtful that respondent could have made a non-hazardous emergency landing within or outside of the resort area. This showing shifted the burden to the respondent to come forward with any evidence he might have, such as extremely favorable meteorological conditions, which could have supported a finding that it was likely that a safe emergency landing could have been executed. He did not do so.

^{9/} While the law judge found that there were from 86 to 200 people in the resort area at the time of respondent's flight, we do not think the actual number is too important, except perhaps for purposes of assessing sanction. As section 91.79(a) forbids the creation of an undue hazard with respect to persons or property, the hazard created with regard to the mobile homes was sufficient under the subsection, without regard to whether the mobile homes were in fact occupied or whether people were located under the flightpath.

^{10/} We find no prejudice in the law judge's viewing of a video tape, proffered by the Administrator, on the auto-rotational operating characteristics of the helicopter type (an Engstrom F-28A) respondent owned. The law judge clearly recognized that the tape provided illustrative information only and was not intended to portray exactly how respondent's helicopter would have operated on the day of the alleged violations, given the acknowledged differences in the conditions under which the flights were conducted.

testimony. We conclude, based on this evidence and the law judge's findings on other matters respecting respondent's airspeed, altitude and flightpath, that the violation of section 91.79(a) was established.^{11/}

On the issue of sanction we think it relevant that there is no evidence that respondent's flightpath carried him directly over any person, or assembly of people, as the complaint herein alleged, although some residents may have been in the mobile homes he passed over. In fact, the record is virtually silent as to where the 86 to 200 people the law judge found were present in the resort were located during respondent's flight over it. In these circumstances we think the 90-day suspension ordered by the Administrator is excessive in light of relevant Board precedent (see Administrator v. Richards, 2 N.T.S.B. 1160 (1974) (Low flight at 100 feet directly over crowd of 16,000 at speed of 25 mph justified 60-day suspension).^{12/} We will therefore modify the Administrator's order to provide for a 30-day suspension.

For the foregoing reasons we find that the violations of section 91.79(a) and 91.9 were fully established by the evidence of record, that sections 91.79(b) and (c) are not applicable to helicopter operations, and that these findings dictate the conclusion that safety in air commerce or air transportation and the public interest require affirmation of the Administrator's order, as modified herein with respect to sanction.

^{11/} In the context of this case we think a section 91.79(a) violation supports a finding that section 91.9 was also violated, although the additional violation would not justify any greater sanction here.

^{12/} Generally, suspensions for 30-day periods for low flights involving fixed-wing aircraft have been deemed appropriate. See Administrator v. McCollough, 2 N.T.S.B. 1034 (1974). Moreover, in a helicopter case involving an endangerment somewhat comparable to the one created in the circumstances of this case, in that it concerned a landing in a residential neighborhood, a 30-day suspension was imposed. Administrator v. Bell, 1 N.T.S.B. 1960 (1972).

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's appeal is denied;
2. The respondent's appeal is denied;
3. The Administrator's order is affirmed as modified herein to provide for a 30-day suspension of respondent's airman certificate; and
4. The 30-day suspension of respondent's airline transport pilot certificate shall commence 30 days after service of this order.^{13/}

KING, Chairman, DRIVER, Vice Chairman, McADAMS, GOLDMAN, and BURSLEY, Members of the Board, concurred in the above opinion and order.

^{13/} For the purposes of this order, the respondent must physically surrender his certificate to an appropriate representative of the Federal Aviation Administration pursuant to section 61.19(f), FAR.

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

LANGHORNE M. BOND, ADMINISTRATOR,
FEDERAL AVIATION ADMINISTRATION,

Complainant,

vs.

Docket SE-4404

HAROLD BERNARD MICHELSON,

Respondent.

Karl B. Lewis, Esq., for the Complainant.

Craig Farmer, Esq., For the Respondent.

INITIAL DECISION AND ORDER

John E. Faulk, Senior Judge, First Circuit

This proceeding arises under the provisions of Section 609 of the Federal Aviation Act of 1958, as amended (49 U.S.C. 1429). It comes here on plea of Harold B. Michel'son, hereinafter referred to as Respondent, seeking review of the order, which is the complaint, of the Federal Aviation Administration (FAA) suspending Respondent's airman certificate for a period of 90 days. Specifically, the Respondent is charged with operating as pilot-in-command a helicopter, civil aircraft registration N9268 on a flight over Rawhide Ranch Nudist Resort (Resort) near Sacramento, California. The alleged act occurred on April 1, 1979 and said operation is alleged to have been conducted at an altitude of approximately 100 feet above ground level (AGL), and at an airspeed from

30 to 75 miles per hour over large numbers of mobile homes as well as an open-air assembly of some 100 persons. As a result of these allegations, the Administrator further alleges that said operations were conducted below an altitude which, if the power unit had failed, would not have allowed an emergency landing without undue hazard to persons or property on the surface. Further, it is alleged that the heretofore described allegations constitute a careless or reckless act so as to endanger the life or property of another. As a result, Respondent is said to have violated Sections 91.79(a) and (b) as well as Section 91.9 of the Federal Aviation Regulations. Respondent denies the culpable allegations.

Public hearing was held in Sacramento, California, on March 18, 1980. At its conclusion, the parties requested that they be permitted to file briefs on or before May 16, 1980. Said request was granted. These, along with all evidence of record have been considered although not necessarily discussed hereinafter.

THE LOW FLIGHT OVER THE NUDIST RESORT

At approximately 2:00 p.m. on Sunday, April 1, 1979, Mr. and Mrs. John H. Hinley were sitting outside their mobile home at the Resort enjoying the pleasures of being a nudist. At approximately 2:00 p.m. Mr. and Mrs. Hinley observed a helicopter flying in a westerly direction pass laterally approximately 50 feet from their position at an altitude of between 75 and 100 feet AGL

at an estimated speed of 50 knots per hour. Upon first sighting the helicopter Mrs. Hinley went into her mobile home to obtain pen and paper for the purpose of noting the helicopter's registration numbers. She made a note of these numbers and turned them over to her husband for submission to the FAA. They were N9268. The Hinley mobile home was located on the northerly edge of the resort. The helicopter continued in more or less a circling maneuver around the resort turning from a westerly heading to a southerly heading and thence to a easterly heading, thence over the center of the more heavily populated area of the resort. (See Administrator's Exhibit C-1 and C-2 for an aerial photograph of the nudist resort as well as the flight path of the helicopter as described by Mr. and Mrs. Hinley) The helicopter made a left turn from its easterly heading to a westerly heading at 75 feet rising to about 100 feet to clear certain trees in the area. Mr. Hinley estimates trees to be from 25 to 30 feet in height and certain utility poles with wires to be approximately the same height. He estimated the height of the helicopter above ground level in relationship to the height of the trees plus his experience in the Air Force observing aircraft operations. The entire incident lasted for approximately five minutes. On the opposite side of the Resort Mr. John Smay, a fellow nudist, was outside his trailer working in a shed adjacent thereto. Mr. Smay heard the sound of a

helicopter at about 2:00 p.m. on the day in question and stepped outside of his shed and observed the helicopter fly almost directly overhead at an altitude of from 100 to 125 feet AGL at an approximate speed of 60 to 70 miles an hour. Mr. Smay did not record the number of the helicopter.

The Respondent denies that he flew over the Resort. He contends he flew alongside of the Resort and has done so on numerous occasions inasmuch as he travels by helicopter in the course of his business of farming and the Resort is located between two pieces of his property. However, Respondent does concede that on the day in question he does remember circling the Resort. Respondent also contends that he was at an altitude of 300 feet AGL at all times and flew his helicopter at 80 miles per hour. At no time did the Respondent experience any control problems with his helicopter and he estimates on the day in question the aircraft's weight to be under 1800 pounds.

While the Respondent denies he flew over the Resort on April 1, 1979, at 2:00 p.m., the evidence of record requires a finding to the contrary. Mr. and Mrs. Hinley as well as Mr. Smay who were located at different points at the Resort had a clear opportunity to observe the helicopter and its flight path. Although the helicopter did disappear for a few moments from the view of Mr. and Mrs. Hinley as it traveled on the southerly boundary of the Resort, they could observe the helicopter turn to a westerly heading and fly more or less

down the center of the more populated area of the resort. This is confirmed by Mr. Smay's testimony in that he observed the helicopter fly almost directly over his location within the Resort. While there is some conflict as to the total number of people in the Resort on April 1, the evidence does reflect that a minimum of 86 persons and possibly 200 people were present.

All credibility of findings have been made in favor of the Administrator's witnesses. It is found the Respondent did operate his helicopter at an altitude of between 75 and 100 feet at approximate speed of from 60 to 70 miles and hour. The finding of the altitude being between 75 and 100 feet is based upon the testimony given by Mr. Hinley inasmuch as he had a better opportunity to observe the height from an angle than did Mr. Smay who testified the helicopter was almost directly overhead. Also, the record reflects that Mr. Hinley has had several years of experience in observing Air Force aircraft taking off and landing while working on the flight line while in the Air Force.

CONGESTED AREA

There is no question that the Resort is a congested area within the meaning of Section 91.79(b) of the FAR. In Administrator v. Harcom, 35 CAB 937 (1962), it was stated that ". . . the intent of the regulation is to protect persons and

property in small, sparsely settled residential communities as well as persons and property in large metropolitan areas from the hazards and from the noise of low flying aircraft. The applicable term in the regulation is congested areas of cities, towns or settlements." See also, Administrator v. Travis, EA 1114 (1978) and Administrator v. Eby, EA 1061 (1977). Thus, a population of 86 persons with numerous permanent and mobile homes as well as campers constitutes a congested area.

THE APPLICABILITY OF SECTION 91.79
TO HELICOPTERS

Subparagraphs (b) and (c) of Section 91.79 are direct prohibitions against operating any aircraft below a specified altitude. Subparagraph (a) relates to a safe operating altitude in the event of a power failure at any altitude. Thus, for example, it is possible for a pilot to comply with subparagraph (b) by operating his aircraft at 1000 feet AGL over a congested area and yet be in violation of subparagraph (a) in that 1000 feet AGL in a particular fact situation may not be sufficient to permit an emergency landing without undue hazard to persons or property on the ground. The use of the word "undue" with respect to the word "hazard" is significant in that the provisions of subparagraph (a) contemplate an emergency situation and not a normal operating condition of flight. It must be assumed that in the event of a power failure a distinct

probability of a hazard exists beyond the control of the pilot. However, subparagraph (a) does not hold a pilot liable for any hazard that could occur in an emergency situation but only those that would cause an undue hazard, that is, something excessive or inordinate with respect to the operating conditions existing at the time. On the other hand, subparagraph (d) employs only the word "hazard" and is restrictive in its application that this subsection applies only to the operation of a helicopter. Thus, a pilot may operate a helicopter at less than 1000 feet AGL if such operations do not create a hazard, that is, something less than an excessive or inordinate hazard. Therefore, a hazard less than undue would be sufficient for a finding of a violation of subparagraph (d) if the pilot is so charged and the evidence so establishes.

Applying these principles to the case at bar, it is found that the Administrator has failed in his burden of proof to establish by a preponderance of the evidence that Respondent's operation at 75 to 100 feet AGL constituted an undue hazard within the meaning of Section 91.79(a) of the FAR. The evidence does establish, however, that the Respondent's operations constituted a hazardous operation with respect to persons and property on the ground. In this connection, the testimony of the Administrator's witness, Mr. Charles Arnold, was neither rebutted nor diminished on cross-examination by the Respondent and is found

to be credible. However, the Administrator has not charged the Respondent with a violation of subparagraph (d), a charge which is necessary for a finding of a violation of subsection (b). This is so since a violation of subparagraph (b) cannot occur as a result of a helicopter operation until first it is charged and found that the helicopter pilot violated the exemption stated in subparagraph (d). Thus, inasmuch as the Respondent was not charged with a violation of subparagraph (d), it is found that the Respondent did not violate subparagraph (b).

CARELESS OPERATIONS WITHIN THE
MEANING OF SECTION 91.9 OF THE FAR

Although Respondent is found not to have violated Sections 91.79(a) or (b) of the FAR, it is found that Respondent's hazardous operations constitute a careless operation within the meaning of Section 91.9 of the FAR. As noted by counsel for the Administrator on brief . . . "the term 'hazard' is synonymous with that of 'endangerment' . . . " Section 91.9 prohibits careless operations so as to endanger the life or property of another.

SANCTION

The Administrator seeks a 90-day suspension of Respondent's Air Transport Pilot Certificate. While it has been found that Respondent did not violate Sections 91.79(a) and (b), Respondent's careless operations constituted a real threat to those on the surface, and inasmuch as no mitigating factors can be found

in the record, a 90-day suspension will be imposed as provided for in the order below.

ORDER

NOW, THEREFORE, IT IS ORDERED that the Respondent's Air Transport Pilot certificate is hereby suspended for a period of 90 days. Said certificate shall be surrendered to the Regional Counsel of the Western Region, Federal Aviation Administration, P. O. Box 92007, Worldway Postal Center, Los Angeles, California 90009. IT IS FURTHER ORDERED that, unless stayed by the Board on its own initiative or by the timely filing of a notice of appeal, this order shall become effective immediately upon the date of service hereof.

Entered this 18th day of June 1980.


John E. Faulk
Administrative Law Judge

APPEAL

Any party to this proceeding may appeal this initial decision or order by filing with the Board a notice of appeal within 10 days after this date. Such appeal must be perfected within 30 days after this date by filing with the Board a brief in support of such appeal. Appeals may be dismissed by the Board in cases where a party fails to perfect its appeal by the timely filing of the brief. Attention is directed to Sections 821.43, 821.47, and 821.48 of the Board's Rules of Practice in Air Safety Proceedings for further information regarding appeals. An original and four copies of each document must be filed with the National Transportation Safety Board, Docket Section (LJ-10), Waterfront Center, Suite 301, 1010 Wisconsin Avenue, N. W., Washington, D. C. 20007, as provided in Section 821.7 of the Board's Rules with copies served upon the other party. The timely filing of an appeal herein shall stay the order in this initial decision.

SERVICE: Harold B. Michelson
8151 Sloughouse Road
Elk Grove, California 96635

Craig Farmer, Esq.
BOLLING, POTHOVEN, WALTER & GAWTHROP
555 University Avenue
Sacramento, California 95825

Karl B. Lewis, Esq.
Office of the Regional Counsel
Federal Aviation Administration
P. O. Box 92007, Worldway Postal Center
Los Angeles, California 90009