SERVED: March 1, 1982

NTSB Order No. EA-1756

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 16th day of February, 1982

J. LYNN HELMS, Administrator, Federal Aviation Administration, Complainant, v. CURTIS FRANK SIMONYE, Respondent.	Docket No. SE-5326

OPINION AND ORDER

The Administrator has appealed from the oral initial decision Administrative Law Judge Joyce Capps issued in this proceeding on September 25, 1981, following an evidentiary hearing.[1/] The initial decision affirmed in part an emergency order of the Administrator issued on allegations that respondent's operation of a hot-air balloon in Lafayette, Indiana on July 29, 1981, had violated numerous provisions

1/ An excerpt from the hearing transcript containing the initial decision is attached.

of the Federal Aviation Regulations ("FAR"). Specifically, the law judge sustained the allegations that respondent's flight involved lower altitudes than are permissible under sections 91.79(a) and (b); that he operated after sunset without having a lighted position light as required by section 91.73(a); and that his operation therefore created the type of endangerment proscribed by section 91.9.[2/] The law judge dismissed the allegations, under sections 91.11(a)(1) and (a)(2), and 91.85(b), that respondent had operated the flight while under the influence of alcohol or within 8 hours after consuming an alcoholic beverage and that he had not received air traffic control authorization before operating within an airport traffic area.[3/] Concluding

2/ Sections 91.79(a) and (b), 91.73(a), and 91.9 provide 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."
* * * * *

"§91.73 Aircraft lights.
No person may, during the period from sunset to sunrise (or, in Alaska, during the period a prominent unlighted object cannot be seen from a distance of three statute miles or the sun is more than six degrees below the horizon)--
(a) Operate an aircraft unless it has lighted position lights."
* * * * *

"§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/ Sections 91.11(a)(1) and (a)(2) and 91.85(b) provide as follows:
"§91.11 Liquor and drugs.
(a) No person may act as a crewmember of a civil aircraft--
(1) Within 8 hours after the consumption of any alcoholic beverage;
(2) While under the influence of alcohol."
* * * * *

"§91.85 Operating on or in the vicinity of an airport; general rules.
* * * * *
(b) Unless otherwise authorized or required by ATC, no person may operate an aircraft within an airport traffic area except for the purpose of landing at, or taking off from, an airport within that area. ATC authorizations may be given as individual approval of specific operations or may be contained in written agreements between airport users and the tower concerned."
* * * * *

that the evidence underlying the charges sustained did not warrant revocation, the law judge modified the Administrator's order to provide for a 120-day suspension of respondent's pilot certificate.[4/]

On appeal the Administrator argues that the law judge, contrary to the requirements of our Rule 39, denied him an opportunity to present argument on the alcohol related allegations in the case before rendering her initial decision. For the reasons stated below, we find ourselves in agreement with the Administrator's argument. At the same time, however, our review of the matter persuades us that the law judge's error cannot be cured on appeal, as the Administrator appears to believe. We will, therefore, return the record to the law judge for further proceedings consistent with our decision here.[5/]

The basis for the Administrator's contention that he was denied an opportunity to present argument on the section 91.11 charges is the law judge's statement, after inviting counsel for both sides to offer closing argument, that "I don't need to hear any argument on the drinking issues" (Tr. at 370). Although this statement, on its face, could be read as suggesting only that the law judge thought argument on the alcohol issues was unnecessary, we think it clear that the law judge intended to convey the message that she would not allow argument on the "drinking issues". Any doubt in this connection is laid to rest by the law judge's remarks to counsel for the respondent after he began his closing argument (Tr. at 377-378):

4/ Respondent, represented by counsel, filed a notice of appeal from the law judge's decision. He has not, however, filed a brief in support of his appeal, and he has not filed a reply to the Administrator's appeal brief. Respondent's appeal will therefore be dismissed under Rule 48(a), 49 CFR 821.48(a).

5/ In view of the necessity for a limited remand, we will not consider at this time the Administrator's argument that the law judge should have imposed revocation notwithstanding her dismissal of several of the charges against the respondent, including those related to alcohol.

"MR. STAPLETON: Thank you, Judge Capps. Before I make my brief comments, I just want to make sure that I understand where we are. Am I correct in assuming that you are going to dismiss the alleged violation of 91.11, subsections (a)(1) and (a)(2), which concern the alcoholic beverages?"

"JUDGE CAPPS: You read me right. I'm not satisfied with the proof of those charges and I will state my rationale in my decision."

Rule 39 of the Board's Rules of Practice in Air Safety Proceedings, 49 CFR 821.39, provides that:

"§821.39 Argument and submissions.

At the hearing, the law judge shall give the parties adequate opportunity for the presentation of arguments in support of, or in opposition to, motions, objections, and rulings. Prior to the initial decision, the parties shall be afforded a reasonable opportunity to submit for consideration proposed findings and conclusions and supporting reasons therefor."

It is clear from the language of the rule that a law judge has no discretion to deny or, as occurred in this instance, abridge a party's right, before decision is entered, "to submit for consideration proposed findings and conclusions and supporting reasons". 6/ We recognize that a law judge may well have reached some tentative, perhaps even strongly held, views on the charges in a proceeding before the parties have concluded their presentations. That possibility, however, does not undermine the necessity for compliance with the rule, for the rule presumes that the hearing officer will not form an unalterable view of the charges, or the evidence submitted with respect to them, until after the parties have been fully heard. 7/

6/ As the Administrator points out in his brief, citing Administrator v. Enright, NTSB Order EA-993, (1977) and Administrator v. McElroy, 2 NTSB 444 (1973), the Board has held that providing the parties with an opportunity for oral argument satisfies the requirements of the rule.

7/ We do not mean to suggest that we believe the law judge had arrived at an unalterable view here. We simply have no way of knowing whether the arguments on the evidence the Administrator has presented to us would have influenced her to arrive at a different decision.

In some cases the Board on appeal might be able to rectify any prejudice a party may have suffered from a failure to comply with Rule 39. This is not such a case. The evidence on the "drinking issues" in this case was diverse and conflicting, and it required, for its proper resolution, credibility determinations with respect to witnesses sponsored by both sides. The law judge did, in fact, make a credibility finding on the matter in respondent's favor. The Administrator contends in effect, however, that the law judge, in making that finding, may have overlooked the testimony of one of his witnesses - a Mr. Snider - because that testimony was not discussed by the law judge. Ordinarily, we would not be receptive to such an argument. A law judge need not specifically mention or refer to each and every piece of evidence or testimony if the initial decision reasonably demonstrates that all relevant evidence has been considered. But this is not the ordinary case. In this instance the Administrator's argument must be evaluated in light of the fact that he was not given the opportunity to argue <u>any</u> of the evidence bearing on the section 91.11 charges.

It is entirely possible that the law judge's credibility finding embraced consideration of all the testimony in the record. That, however, is a question we are unwilling to resolve in view of the Rule 39 issue. Although the Administrator appears to believe that the failure to comply with Rule 39 here provides justification for withholding deference to the law judge's credibility finding altogether, we think the more appropriate course is to remand the case to the law judge for further proceedings limited to the section 91.11 allegations. A law judge's credibility findings, even those not fully articulated, should not be lightly disregarded, for they involve judgments concerning demeanor which cannot be made on a cold record. On remand the law judge,

after hearing argument on the section 91.11 issues, shall issue a supplemental initial decision explaining her reasons for either affirming her original disposition of those charges or reaching any different result.[8/]

ACCORDINGLY, IT IS ORDERED THAT:

The record is remanded to the law judge for further proceedings consistent with this opinion and order.

BURNETT, Acting Chairman, McADAMS, and BURSLEY, Members of the Board, concurred in the above opinion and order. GOLDMAN, Member, did not participate.

8/ Whether the parties' argument on remand should be submitted in writing or orally is a matter we leave to the law judge's discretion.

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD

J. LYNN HELMS, ADMINISTRATOR, FEDERAL AVIATION ADMINISTRATION, Complainant,	
v.	Docket No. SE-5326
CURTIS FRANK SIMONYE, Respondent.	

Superior Courtroom 14,
Third Floor,
Tippecanoe County Courthouse,
Lafayette, Indiana,

Friday, September 25, 1981.

ORAL INITIAL DECISION AND ORDER

JOYCE CAPPS, Administrative Law Judge:

The proceeding comes before the National Transportation Safety Board pursuant to the provisions of Section 609 of the Federal Aviation Act of 1958, as amended, on the appeal of Curtis Frank Simonye, respondent herein, from the Emergency Order of Revocation dated August 27, 1981, filed herein as the complaint on behalf of the Administrator of the Federal Aviation Administration, revoking respondent's Airman's Certificate, including his Commercial Pilot Certificate No. 143441472 due to his alleged violation of the following FAR's: 91.9, 91.11 (a) (1) and (2), 91.79 (a) and

(b), 91.73 (a), and 91.85 (b).

After due notice to the parties, this matter came on for formal hearing on September 24 and 25, 1981, in Lafayette, Indiana, at which time the Administrator was represented by Eileen A. Weikel, Esq., and Alan G. Sumberg, Esq., and respondent was represented by Michael J. Stapleton, Esq.

This case involves a series of operations of a hot-air balloon on July 29, 1981, with respondent as the pilot in command, which series of flights were conducted over the city of Lafayette, Indiana, and within the airport traffic area of the Purdue Airport which serves the city of Lafayette.

One of the charges in this case, namely 91.85 (b), was that respondent did operate within the airport traffic area without prior authorization to do so. In support of that charge, the Government put on the Chief of the control tower at Purdue Airport who testified that a search of his common records revealed no such contact from anyone advising that they would be operating a balloon within the airport traffic area on that date. He conceded, in his testimony, that an aircraft not being equipped with a radio often called in such information to the control tower to let them know that they will be in the traffic area for a certain period or at a certain period of time. There is no permanent record of those phone calls.

Two of the traffic controllers who were on duty during the pertinent time frame on this issue testified that they recalled having received such a call from a balloonist saying he would have his balloon in the traffic area on that evening. So, for that reason, I have already dismissed Section 91.85 (b).

Two of the charges here deal with the subject of alcohol, namely 91.11 (a) (1) and (2), one having to do with imbibing alcoholic beverage within eight hours of flight and the other having to do with operating an aircraft while under the influence of alcohol.

The only credible evidence received on these two charges was that when the balloon made its final landing in this case, the police officers talked to respondent face to face and close up approximately 20 minutes after the landing and, at that time, both men testified that they smelled the odor of alcohol coming from the respondent's breath.

I ruled on a motion to dismiss at the end of the Government's case, that I thought a prima facie case with respect to these two charges had been made, at least enough to defeat a motion to dismiss. However, after hearing all of the evidence on this point I credit the testimony of the respondent and the testimony of Mr. Swift, who was called on behalf of respondent, that the police officers did, no doubt, smell the odor of alcohol on Mr. Simonye. But I further

find that this was 20 minutes after he had landed and it was caused by his taking quite a big swig of beer when he got to the back portion of the envelope during the process of deflation.

I know the police officers both testified that they had Mr. Simonye in their eyesight the entire time, from landing up until they got within conversational distance with him. But both of them also testified that they did talk to someone else in the meantime, and I just can't believe that their attention was riveted on Mr. Simonye the entire 100 per cent amount of time. I think that Mr. Simonye did have time to take a drink of beer after landing in the manner in which he described it, so I make a credibility finding in his favor on those two charges and find, further, that those two charges were not established by a preponderence of the evidence by the Government.

The flights in this case were occasioned as a promotional enterprise pursuant to a contract between respondent and John Shaver Pontiac dealership which is located in Lafayette, Indiana.

Mr. Simonye has been a pilot for a good many years in view of his age of 28. He is self-employed and, in addition to being an agricultural pilot for the past three years, he has also been engaged in promotional balloon flights. And it was in that connection that the flights in question

1 arose.

2 The balloon, which was a propane gas type hot-air

3 balloon, lifted off from the John Shaver Pontiac dealership

4 lot at about 6:45 p.m. on July 29th, 1981. In addition to

5 Mr. Simonye, who was the operator of the balloon, there were

6 two passengers aboard, Mr. Shaver and Mr. Risdale, who was

7 a visiting Pontiac official from St. Louis.

8 As the balloon lifted off, three chase vehicles

9 followed it. These vehicles contained personnel from John

10 Shaver Pontiac, as well as people who served as crew members

11 for the balloon.

12 The balloon proceeded from there to the Jefferson

13 High School baseball field, which was about three-quarter's

14 of a mile away. At that place the balloon landed, discharged

15 Mr. Shaver and Mr. Risdale, and took on two new passengers,

16 Mr. French, the sales manager of John Shaver Pontiac, and

17 Mr. John Wilzie, who was a visiting Pontiac official. That

18 was the first landing.

19 Then the balloon proceeded from the Jefferson High

20 School baseball field to where it landed for the second time,

21 on a church lot located at Winthrop and Edgelea Streets.

22 This church lot is across the street, sideways, and two

23 houses from the home of Mrs. Keen, who testified.

24 She described seeing the hot-air balloon as she

25 came out of the front of her house, and it was about 30 feet

1 above her one-story house when she first saw it. It was
2 slowly descending from her left to her right, down toward
3 the corner where the church was. In the process of going
4 past her house, it went through her front tree and she told
5 the operator of the balloon about that, and he just said,
6 "Yes, I know", and continued on.
7 She described her house as being in a residential
8 area with houses on both side of the street. There were
9 trees, there were power lines serving these houses, but the
10 power lines were on her side of the street behind her house
11 and the path of the balloon was the front part of her house.
12 The balloon, at that point, discharged Mr. French
13 and Mr. Wilzie as passengers and took on, as new passengers,
14 Robert Lawson, who was parts manager at John Shaver Pontiac,
15 and a Mr. Chuck Fischer, another visiting Pontiac official.
16 The balloon then proceeded to where it made its
17 third landing, which was in the back yard of Ms. April Mason,
18 whose house is located at Crestview and Sarasota. Her at-
19 tention was drawn to the balloon by her dog, who started
20 barking. She went out on her back porch and looked up and
21 saw this balloon descending down in her back yard, and she
22 said at first she thought it must be in some sort of trou-
23 ble. The guy that was operating the balloon leaned over and
24 said something to the effect, "do you mind if we land here?"
25 And she said, "Well, do I have any choice?" And he said,

"No". So she said, "Well, all right, I guess". And he proceeded to do just that.

She knows that it landed shortly after 8:00 p.m. because before she had gone out on her back porch the 8:00 o'clock movie had begun on television. She estimated that the balloon was in her back yard for a period of ten minutes before it took off.

Mr. French, when he got out of the balloon at Winthrop and Edgelea in the churchyard stop, got in a chase vehicle and followed the balloon to the Crestview and Sarasota landing. Mr. French says that it was still light outside at this time but it was "fading fast". He also testified that he thought that this back yard was very close quarters in which to land a balloon.

I might mention, at this point, that at every place where the balloon landed, there were crowds of people around, not just the chase vehicles that had assumed the responsibility of following this balloon's path, but curious on-lookers such as young Mr. Snider who testified here in this case, the part-time volunteer police officer; people on foot followed the balloon.

By this time, when it got to Crestview and Sarasota, it had even received the attention of the police department, the Lafayette City Police Department, as well as the fire department.

The Captain at the fire department testified that he thought they were going there because of some sort of rescue mission. But when they got there with the fire truck and all that, they could see that there was no rescue mission to be accomplished because when he got on the scene, by the time he got there, the balloon was lifting off again. Everything appeared to be all right to him, so he left.

It was also at that time that the two police officers, Officers Darling and Findley, arrived and had some conversation with one of the four fire department men who were there, and one of the fire deparment men mentioned that they would like to have the name of that guy—the pilot of the balloon.

The Captain of the fire department, when he observed the take-off from the confined area of the backyard, marveled at how good a pilot the operator of that balloon must be to have landed there in the first place, and then to be able to get out of there.

The balloon left Crestview and Sarasota at about 10 to 15 minutes after 8:00, and after it had been airborne for a couple of blocks, Officer Darling, using his loudspeaker apparatus, ordered the balloon to land. He and Officer Findley both testified that they were concerned about the safety of the people of Lafayette with ~~those~~ that low-flying balloon going about in this very residential and concentrated area of the city.

1 The balloon did land in a cleared area about the
2 size of a football field that lies between the Central Catho-
3 lic High School and Bishop's Woods Park. Officer Darling
4 testified that he estimated the landing time to be 8:20 p.m.
5 He testified further that, at the time of the landing, the
6 sun had gone down behind the trees which surrounded, I think
7 it is, the west portion, or one portion of the Bishop's Woods
8 Park.
9 He said that the cleared area was an area of dar-
10 kened shadows, in quotes, because of the surrounding large
11 trees behind which the sun had gone down.
12 Mr. Bailinger testified that he was on this last
13 leg of the trip in the company of two girls and, of course,
14 the respondent, who was operating the balloon. He had boarded
15 the balloon at the churchyard landing when Mr. Lawson and Mr.
16 Fischer left the basket and Mr. Bailinger and the two girls
17 got in the basket.
18 Mr. Bailinger said that [redacted] he could
19 still see the sun at the time of this landing. He was asked
20 specifically, by me, if he had observed, at any time during
21 this leg of the trip, any city lights that were lighted up
22 or any automobile lights, and he said no, he did not. And
23 I think he even added, at one point, it wasn't dark enough
24 for that, for the lights to be on.
25

the balloon going through one of her trees, there was testimony from other witnesses here that the balloon did hit and brush along treetops at various points of the entire flight. Officer Darling specifically testified that he observed the basket brush the tops of some trees that were only 20 feet high.

There was testimony from both police officers who testified that when they voiced their concern to the respondent about his low-flying and where he was landing, he told them that he could fly his balloon anywhere he wanted, and he could land anywhere he wanted.

I'm afraid that Mr. Simonye is under a great misaprehension with that belief. A balloonist, any more than any other aircraft operator, cannot operate his aircraft in any way and in any place he sees fit. All airmen are bound by the Federal Aviation Regulations. There are no exceptions for a balloonist under any of the remaining charges in this case.

We will go first to the aircraft light violation; 91.73 (a) specifies, without exception, that no person may, during the period from sunset to sunrise, operate an aircraft unless it has lighted position lights.

Then we have to interpret what is meant by the word sunset. Does that mean the official time of sunset which is in evidence in this case as having been, on that

1 date, at 8:05 p.m., or is it used subjectively by the writers
2 of this statute. Should I read into that that it is what
3 the human beings around there or the pilot right there in
4 that area happen to think; has the sun actually set and is
5 no more.
6 I have asked all these questions, and I'll tell you
7 the truth, I don't know the answer. So, in this case, I
8 don't think it is even a close question, though, because if
9 the landing had been, say, at 8:10, just five minutes after
10 the official sunset time I would have thought, that's a lit-
11 tle close, and I would have given the benefit of the doubt
12 to the respondent. But in this case it was 15 minutes after
13 the official sunset time.
14 And I have heard testimony from various people on
15 this, and I will give the respondent the fact that most of
16 the testimony has been favorable to him as far as the number
17 of persons it concerns. However, I credit the testimony of
18 Officer Darling. The sun, he said, had set behind those
19 trees. It was a darkened area. It wasn't pitch-black but
20 it was darkened, it was shadowed. And I find that more logi-
21 cal in view of the fact that the landing time was a full 15
22 minutes after the official sunset time.
23 So, I therefore find that the Government has proven
24 by a preponderence of the evidence that respondent did oper-
25 ate his balloon after sunset, without having lighted position

lights on his balloon.

With respect to the 91.79 (a) charge, there was testimony from Mr. Clark, who is a Principal Aviation Safety Inspector employed by the FAA, that there are potential hazards that can exist during the operation of a balloon. I recognize that Mr. Clark, as he himself admitted, is not an expert in balloons, nor is he the operator of a balloon. He is not certified as such. However, the testimony he gave did not require expert opinion of what can happen to a balloon that is beyond the control of the operator, I don't care how confident an operator the balloonist is.

The balloon can become punctured, the propane cylinder encasement can become punctured or cracked, should there be a collision with something, and there is always the possibility that the pilot light could burn out.

I've mentioned those factors because subsection (a) does provide that no person may operate an aircraft below an altitude allowing, if a power unit fails, an emergency landing without undue hazard to persons or property on the surface. It goes without saying that if any of these things had happened it would have affected the maneuverability of the balloon. I believe Mr. Simonye's testimony that a balloon may be a very safe type of aircraft, relatively speaking, but it is not infallible. As he himself said, there is only a lateral control to within a variance of 25 to 30 feet. There is very good vertical control, provided ~~the power is [illegible]~~ the power unit is effective and is performing.

The thing that struck me here is his own testimony that if the power unit fails and the balloon goes into descent, the rate of that descent is 1,000 feet per minute. And he also said that if the flame burns out they could reignite it and it would take something like 12 seconds before you could start going back up, or 11 seconds, I think, ~~if he just,~~ if there was no unit failure and he just wanted to abort and go back up. I've got it figured out here what

1 that 1,000 feet per minute comes down to per second. It
2 seems to me it was about 16 and a third feet per second,
3 and at no time on this flight did he go over 650 feet up.
4 So I find that at any time during this entire flight, even
5 at the 650 foot altitude, we're on pretty dangerous ground
6 should there be some sort of power unit failure there, with
7 that balloon descending at the rate of 16 and a third feet
8 per second. I think there was definite potential danger and
9 hazard to persons or property on the surface.
10 Going now to 91.79-(b), nothing could be clearer
11 than this FAR. This is one of the clearest FAR's we have.
12 Over any congested area of a city, and by golly, I find that
13 every single bit of the trip here was over a congested area,
14 an altitude of 1,000 feet above the highest obstacle and
15 within a horizontal radius of 2,000 feet must be maintained
16 by the aircraft. This aircraft never got above 650 feet,
17 forget about over 1,000 feet. But there was testimony from
18 Mr. Simonye that this is no big deal, that all of these
19 balloonists around here and elsewhere in the country, this
20 is nothing, to go just 650 feet, to go even lower, down to
21 100 feet above the surface, because a balloon, he says, is
22 so very safe, and let's face it, it travels at such a very
23 slow lateral rate of speed, such as he was doing in this
24 case, no more than a couple of miles per hour. Well, 91.79-(a)
25 and (b) makes no such distinction between slow moving balloons

and what ballonists' customs have been, their traditions, their policies, their practices, 91.79 doesn't care about anything like that.

That section starts off with the words "except when necessary for takeoff or landing". The respondent says in this case, "Ah, here we are. I was taking off and landing. My whole trip involved a whole series of takeoffs and landings, so by golly, I didn't violate any statute." But that's not the way this statute has been interpreted by the Board over the years. The words "necessary for takeoff or landing" has been interpreted by the Board whenever a congested area is involved as meaning an emergency has come up and the pilot has no choice, no choice whatsoever, but to land. Then such a landing is called necessary, but only then.

In response to the respondent's contention that these were takeoffs and landings, therefore he doesn't fall within the purview of that statute, the Board has also said that whenever an aircraft is landing in a place other than a designated airport, they can do so if it's a safe type landing, if by landing there it would create no hazard to anybody else.

I find in this case that these landings and takeoffs, three of them involved, were for the sole purpose of taking on passengers to give them a ride on the balloon.

1 I find further that the respondent's choices of
2 landing places was atrocious, very bad judgment. I find, in
3 the first place, it wasn't necessary, he shouldn't have been
4 down below 1,000 feet from the beginning of that trip down to
5 the end of it, shouldn't have been below 1,000 feet the
6 whole time.
7 I further find that his choice of landing sites
8 did not fall within acceptable pilot exercise of good judg-
9 ment. Quite the reverse. All of these sites, except for
10 the last one, I find were inappropriate for a safe landing
11 where there was no potential danger involved.
12 I therefore find that the respondent in this
13 case is in violation of 91.79-(a) and (b).
14 Turning now to the question of sanctions, despite
15 the seriousness of the violations which I have found, I
16 don't think that with the evidence before me that there has
17 been a sufficient indication that respondent lacks the
18 degree of care, judgment and responsibility required of a
19 commercial pilot to warrant the ultimate sanction of revo-
20 cation, nor do I think his conduct in the operation of this
21 balloon on the date in question demonstrates any lack of
22 qualification to operate that balloon. Quite the contrary,
23 I think he's one of the best balloonists I've ever heard
24 about. I think it was miraculous what he did in this case.
25 I'm just appalled that he attempted it and did it; then we

would never be here, probably. So, for these reasons, I don't think that revocation is the appropriate sanction. I think that the appropriate sanction is 120 days, and that's what I'm holding here.

It is concluded that the government has established by a preponderance of the evidence the violations of 91.79-(a) and (b), 91.73-(a), and 91.9; 91.9 is a residual charge as far as sanction is concerned to the low flying violation. So therefore, my finding of 120 daysis exclusive of a 91.9. I haven't tacked on anything, although I do find that the conduct here was even ~~careless, I mean even~~ reckless. It was more than careless, I think it was reckless.

It is further concluded that the appropriate sanction under all of the circumstances, including the fact that respondent earns his living solely through the use of his pilot certificate, is 120 days.

ORDER

IT IS THEREFORE ORDERED:

1. That the emergency order of revocation is hereby modified to provide for a suspension of 120 days.

2. That all of respondent's airman certificates, including his commercial pilot certificate No. 143441472, are hereby suspended for 120 days.

3. That unless stayed by the timely filing of a notice of appeal this oral initial decision and order is

effective immediately.

Entered this 24th day of September, 1981, in Lafayette, Indiana.

Mr. Stapleton, I'm handing you a copy of the emergency appeal rights.

There being nothing further before me, this hearing is closed.

(Whereupon, at 4:15 o'clock p.m., Friday, September 25, 1981, the hearing was closed.)

Joyce Capps
Administrative Law Judge
Edited on Nov. 2, 1981