

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

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LANCHORNE M. BOND, ADMINISTRATOR  
FEDERAL AVIATION ADMINISTRATION

Complainant

vs.

JOSEPH J. DEPTULA

Respondent

\*\*\*\*\*

Thomas C. Halloran, Esq. for the Administrator

Robert D. Powell, Esq. for the Respondent

ORAL INITIAL DECISION

See attached sheets



*Hess  
USS  
KANT*

Docket SE-4415  
Circuit IV  
Philadelphia, PA  
April 17, 1980



1           It's further alleged at the time of that inci-  
2 dent he had not established radio communications with  
3 the appropriate FAA Air Traffic Control facility and he  
4 had not notified the nearest FAA Air Traffic Control  
5 facility or Flight Service Station of the planned para-  
6 chute jump.

7           By reason of the facts alleged in the com-  
8 plaint it is alleged he violated certain Federal  
9 Aviation Regulations: Section 105.23(a), allowing a  
10 parachute jump to be made without having notified the  
11 nearest FAA Air Traffic Control facility or Flight  
12 Service Station at least one hour before the jump;  
13 Section 105.14(a)(1)(ii), allowing parachute jumps in  
14 controlled airspace without establishing radio communi-  
15 cations between his aircraft and the nearest FAA Air  
16 Traffic Control facility or Flight Service Station at  
17 least five minutes before the jump; Section 105.14(a)(2)  
18 (i), allowing parachute jumps to be made without main-  
19 taining a continuous watch on the appropriate radio  
20 frequency; Section 105.13, allowing parachute jumps  
21 which created a hazard to air traffic; 91.15(b),  
22 allowing a parachute jump to be made other than in  
23 accordance with the requirements of Part 105 of the  
24 FAR's; Section 91.71(c), operating an aircraft in acro-  
25 batic flight within the confines of a Federal Airway;

1 and Section 91.9, allegedly operating aircraft in a  
2 careless or reckless manner so as to endanger the lives  
3 and properties of others.

4 At the outset of this proceeding pursuant to  
5 a request of FAA counsel, I took judicial notice of the  
6 fact that Federal Airway 433, a Victor airway, was six  
7 miles wide and there was a transition area in that area,  
8 and that the subject area is controlled airspace and  
9 there is no real dispute about that.

10 The FAA produced five evidentiary exhibits  
11 and four witnesses.

12 FAA Exhibit 1 is a transcript of the radio  
13 communications between the New York Center, specifi-  
14 cally the Sector 19 radar control, and Allegheny 564 on  
15 October 29, 1978, from about 1818 to 1830 Zulu time.  
16 This briefly advised Allegheny 564 that there was an  
17 aircraft in his vicinity at 12,200 feet, indicating  
18 that the aircraft giving this indication had not only a  
19 transponder but an altitude encoder on board.

20 Let me say at this point that I find insuffi-  
21 cient connection with <sup>the</sup> subject aircraft with regard to  
22 that exhibit, particularly in view of the approach con-  
23 troller's later testimony that two targets could appear  
24 as one on the scope, particularly if they were close to  
25 each other. So I don't find that particular exhibit

1 controlling on the question of the altitude of the  
2 Skyvan.

picture of a

3 A-2 is a Short Brothers Skyvan, showing its  
4 general appearance and its distinctive look, having  
5 twin tails, a radome and rear exit doors.

6 Exhibit A-3 is a transcript of the radio  
7 communications between Philadelphia Approach Control  
8 and Allegheny 564, specifically the radar controller  
9 for the Philadelphia south arrival control sector, also  
10 on October 29, 1978 from about 1828 to 1836 Zulu time.

11 Exhibit A-4 was a short narrative statement  
12 of the incident signed by the FAA Approach Controller  
13 Calamia.

14 FAA Exhibit A-5 was a copy of a brief check-  
15 list of procedures for relief of radar controllers from  
16 their positions and turning over the position to a new  
17 controller, indicating with regard to this case that  
18 parachute jump activity, among other things, informa-  
19 tion regarding that, is supposed to be passed on to the  
20 new controller coming on duty.

21 I have considered all the testimony and I am,  
22 therefore, not referring now to just the testimony that  
23 convinces me of my final decision, but I will just give  
24 some highlights of the testimony.

25 The first FAA witness was Wayne Fischer, Air

1 Traffic Control Specialist, New York Center. He testi-  
2 fied that around 1:30 p.m. Allegheny 564 was handed off  
3 from Washington Center to New York Center, and it was  
4 within a mile or two of the center of the Airway Victor  
5 433 at 9,000 feet, and at about 18 southeast of the New  
6 Castle VOR Allegheny 564 crossed into New York Center  
7 airspace.

8 This controller testified that he later  
9 observed an uncontrolled, unidentified aircraft target  
10 cross the airway at altitude 12,200 feet, which indi-  
11 cated there was an altitude encoder and transponder on  
12 that unidentified aircraft.

13 As I said before, I don't find this completely  
14 convincing as to the identification of that particular  
15 aircraft such, that is, to contradict the Respondent's  
16 later testimony that he climbed only to around 9,500  
17 feet when he was surprised by the parachute jumpers  
18 jumping out.

19 The number two witness for the FAA was Mr.  
20 James C. Giannotti, an Allegheny Airline First Officer,  
21 Allegheny now known as U. S. Air. He was the captain  
22 on the date in question on the particular Nord 262,  
23 that is, Allegheny Flight 564.

24 He was flying together with First Officer  
25 George Olson on that Allegheny flight, and in fact his

1 testimony showed, and so did First Officer Olson's, that  
2 Mr. Olson was flying at the time, that is, operating  
3 the controls while Captain Giannotti was operating the  
4 radios, and they were enroute to a landing at Philadel-  
5 phia.

6 Captain Giannotti testified that he saw  
7 jumpers coming out of the back of the aircraft; and  
8 when he first saw the Skyvan, his Allegheny Nord was at  
9 9,000 feet level, doing about 180 knots, and that it  
10 appeared that the Skyvan was slightly higher than the  
11 Allegheny flight was, ahead of them, in a slightly nose-  
12 up attitude but not climbing and going slower than the  
13 Allegheny flight. So there was a closure between the  
14 two aircraft, and he spotted the Skyvan when it was one  
15 to two miles ahead of him.

16 Two sets of jumpers were seen to exit from  
17 the Skyvan. When the first set of jumpers came out,  
18 the Allegheny crew turned their aircraft to the left  
19 slightly; and then when the second set of jumpers came  
20 out, the second set being a total some 8 to 10 jumpers,  
21 the Allegheny crew made an abrupt, more abrupt turn to  
22 the left and descended, and Captain Giannotti testified  
23 that a few seconds later that Skyvan made an abrupt  
24 left diving turn in what appeared to be a "split-S"  
25 maneuver.

1 He testified that the Allegheny aircraft came  
2 within 100 feet of the jumpers, about 100 feet off to  
3 their right, the Allegheny's right wing, and that they  
4 also came within about 100 feet of the Skyvan aircraft.

5 The Allegheny flight was in a steep left diving  
6 bank during its evasive maneuver, and the other air-  
7 craft was in a head-on, nose-to-nose position with its  
8 left wing down at that time.

9 Captain Giannotti testified that the Allegheny  
10 flight ended up below the Skyvan and at an altitude of  
11 about 6500 feet. The Allegheny flight was monitoring  
12 126.1, he testified, the Philadelphia Approach Control,  
13 but later testimony indicated that Philadelphia  
14 Approach Control is 126.6, I don't find that differ-  
15 ence to be of major significance, however. But, in any  
16 event, Allegheny was monitoring the Philadelphia  
17 Approach Control, was in fact in contact with them and  
18 they heard no communications from the Skyvan to  
19 Philadelphia Approach.

20 The Allegheny crew complained to Philadelphia  
21 Approach of the near miss. They did this while in the  
22 air on the radio and on the ground they complained to  
23 the FAA watch supervisor and then to Allegheny's own  
24 company dispatcher.

25 Captain Giannotti testified that passengers

1 had complained to a flight attendant who, in turn,  
2 relayed the complaint to him.

3 First Officer George Olson of Allegheny, now  
4 U. S. Air, also testified that he stated that he was  
5 operating the controls and flying the aircraft. He  
6 corroborated Captain Giannotti's testimony about the  
7 converging courses, and he testified that he saw about  
8 a half a dozen parachutists coming out of the Skyvan  
9 in two sets of about half a dozen each time. There  
10 were only a few seconds between the two sets of jumpers.

11 He testified that the Skyvan was slightly  
12 above the Allegheny when he first saw it and at about  
13 approximately the 12:30 clock position and less than a  
14 mile away when the first set of jumpers came out.

15 The Allegheny flight then turned left,  
16 according to First Officer Olson, and down when the  
17 first set of jumpers came out and steepened the turn  
18 when the second set came out. The second set of  
19 jumpers came within only about 100 feet away from the  
20 Allegheny aircraft, and the Skyvan only about 100 feet  
21 away off to the right of the Allegheny Nord aircraft.

22 Captain Giannotti chopped the power,  
23 according to First Officer Olson, and also this is con-  
24 sistent with Captain Giannotti's testimony, to steepen  
25 the descent when the second set of jumpers came out of

1 the Skyvan.

2 First Officer Olson remembers that the Skyvan  
3 was close enough to see its windshield clearly. After  
4 both sets of jumpers released, the Skyvan did what  
5 appeared to be a "split-S" maneuver, that is, losing  
6 altitude and reversing direction. First Officer Olson  
7 could not estimate the degree of bank of the Skyvan in  
8 clearing this apparent "split-S" maneuver.

9 While their aircraft was monitoring the  
10 Philadelphia Approach Control facility, they never  
11 heard any communication from Skyvan or any other air-  
12 craft reporting parachute jump activities.

13 He estimated that if the Allegheny flight was  
14 8500 feet when they first saw the Skyvan, that the  
15 Skyvan could have been at 9500 feet. He admitted on  
16 cross-examination that neither he nor Captain Giannotti  
17 would have any knowledge of whether the Skyvan crew was  
18 monitoring Philadelphia Approach Control or New York  
19 Center or whether the so-called "split-S" maneuver was an  
20 intentional maneuver or whether the Skyvan crew had  
21 given a signal to the jumpers to jump or if the jumpers  
22 had jumped without a signal from the Skyvan flight crew.

23 The fourth FAA witness, Mr. Calamia, was a  
24 Philadelphia Approach Controller. He took the radar  
25 handoff from New York Center to Philadelphia Approach

1 Control, regarding Allegheny Flight 564, and he also  
2 issued a descent clearance to Allegheny 564.

3 He testified there were some communication  
4 difficulties with Allegheny 564 and that shortly there-  
5 after he received a report of a near-miss from Allegheny  
6 564.

7 He also testified that he did not see a  
8 second target near the Allegheny aircraft. He also  
9 testified that when two aircraft are in close proximity  
10 to each other it's possible that he would only see one  
11 target upon the radar scope, particularly if one of  
12 them, as was Allegheny 564, showing a return that  
13 included altitude data information and a discrete code.

14 Controller Calamia does not recall receiving  
15 any radio communications from any aircraft involved in  
16 parachute jumping activities and does not recall  
17 receiving any such information from the prior controller  
18 on that position. He did not see any transponder type  
19 of radar target in the vicinity of the Allegheny 564;  
20 but, as I said before, he testified if they are close  
21 they could appear as one target.

22 He also testified that if a transponder and  
23 altitude encoder equipped aircraft is at 8,000 feet or  
24 below he would probably see it on his scope, but if that  
25 aircraft was above 8,000 feet, then he would probably

1 not see that target.

2 At the end of the FAA case I granted the  
3 Respondent's motion to strike out the charge of acro-  
4 batics on the Federal Airway. That violation would be  
5 under FAR 91.71(c) and was stricken by me on the ground  
6 that the FAA had failed to make out a prima facie case.

7 At the end of the entire case and after the  
8 Respondent, Mr. Deptula, testified, FAA counsel in  
9 effect requested that I reconsider that ruling. I will  
10 stick to the original ruling on that because I don't  
11 think that there is anything in Mr. Deptula's testimony  
12 that added evidence that convinces me that acrobatics  
13 were performed by the Skyvan in this situation, and I  
14 do not find that a complete course reversal in the process of losing

15 500 or a thousand feet of altitude necessarily estab-  
16 lishes acrobatics. I think on the basis of the whole  
17 record there is insufficient evidence to establish that  
18 acrobatics occurred.

19 Mr. Deptula testified, and he is a 30-year  
20 old full-time professional pilot, a young man early in  
21 his aviation career. He is dependent on his certifi-  
22 cate for his livelihood as are his wife and two young  
23 children. His wife is not employed and they have a  
24 mortgaged home, car, et cetera, and the usual heavy  
25 bills for a small, growing, young family.

1 Mr. Deptula has been in the employ of Summit  
2 Airlines for seven years, flying for eight years, and  
3 up to the point of these charges he was an exemplary  
4 pilot apparently. He has had no previous violations or  
5 even charges of such violations in over 6,200-flight  
6 hours.

7 He holds an Airline Transport Pilot's Certifi-  
8 cate, of course, which is the subject of this proceeding.

9 He testified that he conducted three lifts  
10 for the purpose of parachute jumping on the day in ques-  
11 tion and that for the first jump -- by the way, we are  
12 most concerned with the second jump here -- but he tes-  
13 tified that for the first jump he was monitoring  
14 Philadelphia Approach Control on 126.6 and New York  
15 Center on 127.7 and that he contacted New York Center  
16 when he reached 10,000 feet, intending to release  
17 jumpers at 12,500, and that the New York Center gave him  
18 a discreet transponder code and told him to report at  
19 least one minute before actual jump time and he did so,  
20 and he testified that he further told them there would  
21 be more jumps throughout the day.

22 The first lift and, in fact, each lift  
23 apparently involved 14 to 15 jumpers. The jumps were  
24 somewhat south of the New Castle VOR. He testified  
25 that he had previously arranged with the skydivers to

1 give thumbs up signal to commence the jumps.

2 On the second jump he again intended to go to  
3 12,500 feet for a jump, but at 9,500 feet he testified  
4 that before he could contact Air Traffic Control, and  
5 since he usually did this at 10,000 feet he had not  
6 contacted them, when the jumpers suddenly jumped with-  
7 out a signal from him or a warning to him. He said the  
8 skydivers left the aircraft prematurely, and in his  
9 position, being the sole crew member in the aircraft,  
10 some 20-odd feet from the rear of the aircraft where  
11 the jumpers were exiting, that he was not in a position  
12 to leave the controls and prevent them from doing what  
13 they surprised him by doing.

14 He testified that on Saturday, the day before  
15 the jump, he asked Mr. Pat Mulhearn as an official of  
16 the jumpers' club if the area had been NOTAMed, and he  
17 was assured it was provided to Millville Flight Service  
18 Station involving parachute jumping from sundown Friday  
19 to sundown Sunday that weekend. The date in question,  
20 by the way, was a Sunday.

21 He testified that during the second jump, the  
22 jump in question, he was monitoring Philadelphia  
23 Approach Control on 126.6 and New York Center on 127.7  
24 and he heard no communications regarding an Allegheny  
25 flight.

1 He says he personally confirmed by telephone  
2 call to Millville Flight Service Station a few days  
3 after the jumps, when the jump and the near-miss had  
4 received some notoriety, that a NOTAM indeed had been  
5 filed regarding the jump activity with respect to his  
6 aircraft.

7 However, I must say at this point that with  
8 competent counsel representing him I would expect that  
9 an affirmative defense of this kind after appropriate  
10 discovery would result in some documentary evidence  
11 that a NOTAM had, indeed, been filed; and I find that  
12 no NOTAM had been filed as a matter of fact. At least  
13 there is no evidence establishing that one had been  
14 filed and published.

15 Mr. Deptula testified that he was in a nose-  
16 high attitude and had a 30-degree bank caused by a  
17 climbing turn toward the intended 12,500-foot jump  
18 altitude when the sudden loss of 3,000 to 3500 pounds  
19 of parachute jumpers with their equipment, some 15 of  
20 them, caused some buffeting and a stall with a 30-  
21 degree bank to the left. There was hence an altitude  
22 loss, but he does not remember how much because he had  
23 his hands full at the time recovering from his stall.

24 At this point I must also say that I have  
25 some problem seeing that the loss of almost two tons of

1 weight would cause a stall. However, a group of people  
2 standing at the rear of the aircraft and then jumping,  
3 the combination of those two activities could cause  
4 some sort of abrupt control forces that would be  
5 unexpected to the pilot if, in fact, he didn't expect  
6 the jumpers to be in that position, to leave the air-  
7 craft without his warning..

8 I also don't find anything wrong with the  
9 pilot, after this happens, being concerned for the loca-  
10 tion of some 15 jumpers that just left the aircraft as  
11 they float to the earth. I think that's a plus factor  
12 for the pilot and not something absurd for him to do.  
13 With all the concerns he has at that time, I think  
14 that's probably a very appropriate one.

15 After reviewing all the evidence, that is,  
16 after due consideration of all the evidence I find that  
17 the Administrator has met his burden of proof and has  
18 proven by a clear preponderance of the reliable, proba-  
19 tive and credible evidence that violations of certain  
20 of these charges, FAR's, should be affirmed; that is, I  
21 find that Section 105.23(a) has been proven, that is,  
22 allowing a parachute jump to be made from an aircraft  
23 into airspace without having notified the nearest FAA  
24 Air Traffic Control facility or FAA Flight Service  
25 Station.

1           On this point and it fits several of the  
2 other sections of a similar nature, I find that it is  
3 the pilot's responsibility to control the operations of  
4 jumpers in the aircraft; and I don't find that the FAA  
5 must affirmatively prove by a live eyewitness in the  
6 aircraft that he physically or orally gave permission  
7 to the jumpers to jump. I think the evidence is suffi-  
8 cient that 15 parachute jumpers jumped out of the air-  
9 craft, that this professional pilot was flying for the  
10 purpose of parachute jumping, to fulfill the require-  
11 ment of "allowing", as that word is used in the Regula-  
12 tion, and that goes for Section 105.14(a)(1)(11), that  
13 is, in "allowing parachute jumps to be made from an air-  
14 craft in controlled airspace without establishing radio  
15 communications between the aircraft and the nearest FAA  
16 Air Traffic Control facility or FAA Flight Service  
17 Station at least 5 minutes before the jump."

18           There is no evidence that such communications  
19 were established. With regard to FAR Section 105.14(a)  
20 (2)(i), I feel there is insufficient evidence to estab-  
21 lish that this pilot allowed parachute jumps to be made  
22 from that aircraft in controlled airspace without main-  
23 taining a continuous watch on the appropriate radio  
24 frequency, and in view of his testimony I cannot find  
25 any evidence that he was not maintaining a watch on the

1 appropriate radio frequency and I don't think we are in  
2 a position where we should assume that he was not  
3 listening on the frequencies he said he was listening  
4 on, particularly where the Air Traffic Controller, that  
5 is, the Air Traffic Controller for the Philadelphia  
6 Approach Control, admitted that communications with the  
7 Allegheny flight were unreadable prior to the near miss  
8 report from Allegheny.

9 We are put in a position where we really  
10 cannot assume that since the Respondent did not hear  
11 any Allegheny transmissions before the jump, therefore,  
12 that he should have or he must have had that frequency  
13 turned off at the time. We cannot assume that. So I  
14 find no violation of 105.14(a)(2)(i) to have been  
15 proven.

16 As to Section 105.13, allowing parachute  
17 jumps to be made which created a hazard to air traffic,  
18 I think the potential damage is obvious and that sec-  
19 tion has been proven <sup>to have been</sup> in violation.

20 Section 91.15(b), allowing parachute jumps to  
21 be made from an aircraft other than in accordance with  
22 the requirements of Part 105 of the Federal Aviation  
23 Regulations, I likewise find to have been proven.

24 Section 91.71(c), operating an aircraft in  
25 acrobatic flight, I have already ruled that there is

1 insufficient evidence to establish a violation of that  
2 section.

3 With regard to the last section, Section  
4 91.9, I find that in this case to be merely a derivative  
5 section and, therefore, I would not add anything to the  
6 sanction because of that, but I specifically find that  
7 only the "careless" section applies to this, not "reckless".  
8 I think that distinction should be maintained in these  
9 cases.

10 So in view of the sections I find to have  
11 been violated, and particularly in view of the circum-  
12 stances of this pilot's background and position, taking  
13 into consideration that he is a professional pilot  
14 dependent on this certificate for his livelihood as are  
15 his wife and two children and he has no previous viola-  
16 tions in 6,200-flight hours, and comparing it with some  
17 precedent -- and I must say I don't have my library  
18 with me, but there is one case involving acrobatics,  
19 (which I have specifically stricken out of this case)  
20 but the acrobatic case I think gives us some feel for  
21 the severity of sanctions.

22 In the case of the Administrator against Mark  
23 Werner, W-E-R-N-E-R, NTSB Order Number EA-1332, there  
24 was a clear violation of acrobatics on an airway and  
25 within 3,000 feet of another aircraft and, in fact,

1 evasive action had to be taken by four aircraft to  
2 avoid the acrobatics of the subject aircraft in that  
3 case.

4 A suspension of 90 days was given to this  
5 private pilot's certificate in the Werner case.

6 In this particular case, in view of the fact  
7 we have a professional pilot here and the Airline  
8 Transport Pilot Certificate is in issue, in my opinion  
9 a 30-day suspension of a pilot's ATP certificate for a  
10 pilot who flies for a living and has no prior viola-  
11 tions is certainly as severe as a 90-day suspension of  
12 a private pilot's certificate. So a 30-day suspension  
13 is what I will affirm in this particular case.

14 Therefore, the Administrator's order of  
15 suspension is affirmed as modified by reducing the  
16 suspension from 180 days to 30 days, and the Respondent's  
17 Airline Transport Pilot's Certificate is suspended for  
18 30 days starting 20 days from today unless appealed or  
19 starting today if surrendered today; but, in any event,  
20 the 30 days will start when the certificate is actually  
21 surrendered.

22 There being nothing further, these proceedings  
23 are hereby concluded.

24 (Whereupon at 4:05 p.m., the hearing was con-  
25 cluded.)

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 40 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, 1010 Wisconsin, Ave., NW, Suite 301, 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.

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