SERVED: June 9, 1992

NTSB Order No. EA-3579

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 19th day of May, 1992

BARRY LAMBERT HARRIS,
Acting Administrator,
Federal Aviation Administration,

Complainant,

v.

Docket SE-8790

ORCO AVIATION, INC., d/b/a
RIVERSIDE AIR SERVICE,

Respondent.

OPINION AND ORDER

The Administrator is appealing from the initial decision that Administrative Law Judge Jerrell R. Davis issued from the bench on January 13, 1989, at the conclusion of an evidentiary hearing.[1] We deny the appeal.

At issue here is an order the Administrator issued charging respondent ORCO Aviation, Inc. , d/b/a Riverside Air Service

[1]A copy of the initial decision, an excerpt from the transcript, is attached. This matter and another (SE-8746) involving Paul Mardirosian, were consolidated for hearing. Mr. Mardirosian's appeal was decided in NTSB Order EA-3216, served November 16, 1990.

("Riverside"), with various violations of Part 135 of the Federal Aviation Regulations (FAR) based on the use of a second-in-command (Mr. Mardirosian) who did not meet certain requirements of that Part. The complaint also alleged careless operation in the conduct of a landing at Lake Tahoe that terminated in a runway overshoot.[2] The flight at issue took place November 1, 1986, in a Lear Model 24, carrying passengers from Los Angeles on behalf of Caesar's Tahoe, a gambling casino. The law judge ruled that the second-in-command was unqualified, but was not responsible for the overshoot. These aspects of the complaint are not on appeal here, but the facts surrounding the incident are important to an understanding of the remaining charges.

The only issue still pending before the Board is whether respondent Riverside should be held responsible for that flight's use of an unqualified second-in-command. The law judge found that Riverside should not.

The law judge reasoned that Riverside had a right to delegate responsibility to a corporation known as Jet Charter International ("Jet Charter"). "It appears to be uncontested that Riverside had a right to establish a satellite base of operation through Jet Charter.'? Initial decision at 666. The judge determined that, while Riverside remained accountable for the safety of the flying public, a serious breach of the express

[2]The pilot-in-command, Mr. Fagerholm, was also cited in an enforcement action. According to the record, initial charges against him included claims under Part 135 of a lack of qualification. Ultimately, Fagerholm did not contest a 90-day suspension for violating Section 91.9. Tr. at 399.

agreement between Riverside and Jet Charter (i.e., the use of an unqualified second-in-command) was unanticipated and unforeseeable. He concluded that there was an insufficient evidentiary basis to support a finding that Riverside violated any provisions of the FAR.

The Administrator's appeal focusses on the perceived safety implications of such a result. He suggests that carriers would then be able to abdicate their responsibility simply by establishing satellite operations. In the Administrator's view, Riverside is responsible for the acts of omission and commission of its agent, Jet Charter. He considers Riverside to have failed adequately to supervise the operation to ensure its safety. He argues that finding Riverside liable is consistent with. Board precedent.[3] Respondent, on the other hand, argues that it should not be held responsible because the violations were due solely to actions beyond the scope of employment and not caused by respondent's failure adequately to supervise.

We agree with the Administrator that establishing a satellite operation should not permit carriers to avoid safety obligations, and our decision here does not so permit. Indeed, our decision would be the same whether it were a Jet Charter or a Riverside employee involved. The principles that apply are the same. We have reviewed the noted cases, as well as Administrator

[3]The Administrator cites Admiral Air Service, 36 CAB 1033 (1962); Turner Aviation Corporation, 29 CAB 1398 (1959); Regina Cargo Airlines, Air Carrier Certificate, 13 CAB 213 (1951); and Conner, Air Carrier Certificate, 13 CAB 178 (1949).

v. Reeves Aviation, NTSB Order EA-2675 (1988). Each case applies recognized principles of agency, superimposing a requirement of added care for aviation safety.[4]

Reeves, the most recent, exemplifies many of the earlier cases. We there held the corporate employer responsible for shortcomings of employees “barring intentional and deliberate acts” outside the scope of their employment. We found a continuing pattern of extensive maintenance failures that reflected respondent’s failure of adequate supervision. In Admiral, we added that:

> Transcending its responsibility under principles of agency is its [the company's] positive duty to place in key positions affecting air safety men of responsibility and integrity and to exercise the degree of supervision over them that will *insure* the high degree of safety required of a commercial operator.

Id. at 1040. Regina and Turner also reflect the requirement of "the highest degree of care in the supervision of air carrier operations." Regina is, perhaps, most similar to the instant case in that respondent there argued that it was unaware of certain key events and a FAR violation resulted from actions taken in disregard of specific instructions.[5] Turner, as here, involved use of an unauthorized (non-company] aircraft, arguably constituting action outside the scope of employment. In finding

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[4]In Turner, after finding that the employee's unlawful conduct was within the scope of his "apparent" authority, the CAB noted that the carrier's responsibility is broader than rules of agency law. Yet, as respondent notes, rules of strict liability do not apply.

[5]In Regina, however, the Board declined to credit respondent’s professed ignorance.

respondent liable, however, the Board found that respondent's knowledge and its lack of action to prevent the situation from recurring brought the activity within the scope of employment. The Board thus concluded that respondent had failed to exercise the supervisory responsibility of "prudent" management. Turner at 1399. In all these cases, authority was revoked upon the Administrator's order.[6]

The cited cases involved actual employees. Nevertheless, as noted above, they are equally applicable, as a result of the agency relationship to situations such as the one before us, where the individuals were apparently not, in the legal sense, employees of Riverside.

Applying the precedent to the case at hand, finding respondent responsible for Mr. Mardirosian's presence in the cockpit on November lst would require that we find either that Riverside's supervision was insufficient or that Jet Charter acted within the scope of its authority (employment) in using an unauthorized pilot. On this record, we are unprepared to make either finding.

Jet Charter provided flight service to Caesar's for important patrons of its Tahoe casino. Service was initiated by an employee of Caesar's, who worked with two pilots named LaCava and Joyce. LaCava and Joyce established Jet Charter to provide the service, and were president and vice president, respectively.

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[6]We note that here the Administrator is only seeking a 30-day suspension.

Because these pilots owned no aircraft and had no operating authority, they advised Caesar's that they would be contracting the plane from Riverside, and would be operating under the latter's authority.

The contract between Caesar's and Jet Charter provided that a Lear 25 would be used.[7] Jet Charter and Riverside orally agreed that the former would pay a monthly fee and an hourly rate for use of the aircraft.[8] All understood and agreed that, as a legal matter, the Caesar's flight services were being provided by Riverside.

The President, Chief Pilot, and Director of Operations of Riverside, Joseph Pagan, viewed the Caesar's flight operation as an opportunity to establish a charter service in the San Francisco area:

> [W]e reached an agreement wherein, instead of us having to hire employees and a marketing program in the Bay Area, Mr. LaCava, i.e., Jet Charter, had those facilities and arrangements there available . . . .

Tr. at 447.

Mr. Pagan trained LaCava and Joyce, and gave them and Fagerholm checkrides. Tr. at 450. LaCava also was authorized to use Riverside facilities (at considerable expense to Riverside)

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[7]The Lear 24 was not assigned to the Caesar's flights; it was coincidentally in the area on November 1st only fair servicing. The 24 was occasionally made available for Caesar's flights as a back-up, but only if piloted by LaCava or Joyce.

[8]A monthly fee was paid. for the right to operate under Riverside's certificate. An hourly rate was paid Riverside for use of the Lear 24. The Lear 25 was owned by GoodAir, a separate company and leased by Riverside. Jet Charter payments for use of the Lear 25 went to GoodAir. Tr. 222-3.

to train Fagerholm. Pagan recognized his overall responsibility for operations under Riverside's authority. LaCava testified that Pagan was fully apprised of the day-to-day workings of Jet Charter. Exercising his responsibility and knowledge of the pilots' abilities, Pagan authorized only LaCava and Joyce to act as pilots-in-command of both the Lear 24 and 25.

Pagan testified that LaCava and Joyce were delegated dispatch responsibility for the Caesar's flights, but noted:

> [W]e certainly did not give the authority to the dispatcher to just go out and wholesale pick pilots . . . . The dispatchers have very specific instructions written in the manual and authority, and that authority does not include them using someone other than those designated by me.

Tr. at 463.

LaCava confirmed that only the Lear 25 was to be used for the Caesar's flights, and that only he and Joyce were authorized to operate as pilots-in-command on them. Pagan severed all ties with Jet Charter after the incident because his specific instructions had been violated. Pagan had not considered Fagerholm sufficiently experienced in the Lear 24 to be the pilot-in-command of that aircraft (nor was he qualified for instrument flight rules operation). Pagan had therefore advised LaCava not to permit him so to operate that aircraft. Pagan had never heard of the second-in-command, Mardirosian, as he had done no flying for Riverside.[9]

The law judge did not determine exactly how Messrs.

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[9]He had worked, freelance, as co-pilot for Jet Charter on some Part 91 demonstration flights.

Fagerholm and Mardirosian came to be operating the Lear 24 on the November 1st Caesar's flight. Caesar's Tahoe contacted Jet Charter when they had patrons to be flown to the casino, and LaCava had set up an answering service with a list of pilots beginning with himself and Joyce, and apparently including Fagerholm and Mardirosian. LaCava testified that, since he was going to be leaving on an earlier flight, he left the scheduling of the flight to Lake Tahoe to the answering service. He ostensibly asked them to contact Mr. Joyce, intending him to serve as pilot-in-command, and he contacted Mr. Fagerholm, intending him to serve as second-in-command. Apparently, however, the service contacted Mr. Mardirosian (Mr. Joyce was not reached).[10]

Reviewing the matter under principles of agency, Jet Charter employees went beyond the scope of their authority in operating the Lear 24 on the Caesar's flight and doing so with pilots who not only were not qualified, but were not authorized by the certificate holder to operate that aircraft. Although Jet Charter's authority obviously extended to arranging for and operating the flights, it was explicitly constrained in two areas: the pilots and the aircraft to be used. At a minimum, Jet

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[10]There is another version of events also supported in the record by, perhaps, a more disinterested party. The Caesar's hostess who made the flight arrangements with Jet Charter (and was on the November 1st flight) testified that, when she spoke to LaCava to arrange that flight, he told her that a different aircraft and different pilot would be used. Tr. at 126. As noted, the law judge did not resolve this discrepancy, nor are we in a position to do so. Were this testimony true, our conclusion would be even more compelling. See footnote 11, infra.

Charter was negligent in failing to install procedures to ensure compliance with Riverside's instructions and in failing to apprise all employees or other involved personnel of the limitations Riverside had imposed.[11] Jet Charter's actions should not, we think, extend liability to Riverside if the latter had no reason to expect or duty to assume that Jet Charter would act in this fashion. In other words, to avoid liability Riverside's oversight must have been "prudent."

We agree with the Administrator's contention, consistent with Turner, that respondent had a duty to supervise Jet Charter. However, there is no basis in the record to conclude that respondent had not actively done so. Nor is there evidence that Riverside had had compliance problems of any sort with Jet Charter so as to indicate that additional oversight was necessary. Instead, the record supports findings that Pagan was well aware of his responsibility, and exercised it with due diligence and prudence, including speaking frequently with LaCava and being directly involved, for example, in the pilot

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[11]In response to the argument that Riverside should and could have done more to ensure its directions were understood, we are not convinced that it reasonably should be expected to do more. Its directions, which were given the President of the company, were clear. Fagerholm knew or should have known that he was not qualified as pilot-in-command of the Lear 24 under instrument flight rules. In NTSB Order EA-3216, we found that Mardirosian knew or should have known he was not qualified for Part 135 service in the Lear 24. And, if the events were instead as the Caesar's hostess stated, there was nothing Riverside could have done short of disassociating itself from Jet Charter. Clearly, LaCava's disregard of instructions would have been an "intentional and deliberate" action outside the scope of his employment.

qualification process for the two aircraft. Liability based on inadequate supervision is, therefore, inappropriate in this case. Cf. Turner, at 1401-2 (in which there was “little or no supervision") .

Similarly, there is no record support for the premise that Riverside knew that Jet Charter was operating outside the scope of the verbal agreement and, as a result, using unqualified pilots on the Caesar’s flight. Thus , those cases in which responsibility is premised on management's knowledge of (and, possibly, tacit agreement or complicity in) unlawful activity, such as Admiral and Regina, do not support a finding against respondent here.[12]

We stress that, in affirming the law judge in this case, we do not intend to suggest a withdrawal in any degree from the principles of Admiral, Turner, and related cases. Here, however, not only did Jet Charter employees act beyond the scope of their employment (through violation of explicit directions, either deliberately or mistakenly), but we are not convinced that here, in contrast to the cases cited by the Administrator, respondent was negligent or even lax in its oversight responsibilities.

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[12]Although the record suggests that November 1st was not the first time Mr. Fagerholm operated the Lear 24 as pilot-in-command, this matter was not developed in the record and not raised in the Administrator's brief. Moreover, Mr. Fagerholm’s testimony suggests some uncertainty regarding the difference between Part 91 and Part 135 flights, and is irrelevant to the complaint at hand -- Mr. Mardirosian’s one unauthorized and unqualified. flight. It is axiomatic that Riverside had no obligation to direct Jet Charter not to use unqualified pilots.

ACCORDINGLY , IT IS ORDERED THAT:

1. The Administrator’s appeal is denied; and

2. The initial decision is affirmed.

COUGHLIN, Acting Chairman, LAUBER, KOLSTAD, HART, and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.