

SERVED: November 27, 1996

NTSB Order No. EA-4502

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 27th day of November, 1996

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LINDA HALL DASCHLE,	)	
Acting Administrator,	)	
Federal Aviation Administration,	)	
	)	
Complainant,	)	
	)	Docket SE-14648
v.	)	
	)	
ROBERT M. BRIGGS,	)	
	)	
Respondent.	)	
	)	

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**OPINION AND ORDER**

The respondent has appealed from the oral initial decision Administrative Law Judge Patrick G. Geraghty rendered in this proceeding on October 24, 1996, at the conclusion of an evidentiary hearing.<sup>1</sup> The law judge affirmed the Administrator's charges, in an emergency order issued on September 11, 1996, that the respondent had violated sections 119.5(g) and 61.3(c) of the

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

Federal Aviation Regulations ("FAR," 14 CFR Parts 119 and 61),<sup>2</sup> but modified the sanction to provide for an eight-month suspension of respondent's airman certificate, rather than revocation.<sup>3</sup> For the reasons discussed below, we will grant the appeal in part, by reducing the sanction to a 60-day suspension.<sup>4</sup>

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<sup>2</sup>FAR sections 119.5(g) and 61.3(c) provide as follows:

**§ 119.5 Certifications, authorizations, and prohibitions.**  
 \* \* \* \* \*

(g) No person may operate as a direct air carrier or as a commercial operator without, or in violation of, an appropriate certificate and appropriate operations specifications. No person may operate as a direct air carrier or as a commercial operator in violation of any deviation or exemption authority, if issued to that person or that person's representative.

The Administrator's position, not actually stated in his revocation order, is that this regulation was violated because the respondent, at a time when he was not the holder of a commercial operator's certificate issued under FAR Part 135, conducted operations for which a Part 135 certificate was required. FAR Section 135.1(3) states that the Part applies to, insofar as is relevant in this case, "[t]he carriage in air commerce of persons or property for compensation or hire as a commercial operator (not an air carrier) in aircraft" that can seat no more than 20 passengers nor carry more than a 6,000 pound payload.

**§ 61.3 Requirement for certificates, rating, and authorizations.**  
 \* \* \* \* \*

(c) Medical certificate. Except for free balloon pilots piloting balloons and glider pilots piloting gliders, no person may act as pilot in command or in any other capacity as a required pilot flight crewmember of an aircraft under a certificate issued to him under this part, unless he has in his personal possession an appropriate current medical certificate issued under part 67 of this chapter....

<sup>3</sup>The Administrator did not appeal the sanction reduction. He has, however, filed a reply opposing the respondent's appeal.

<sup>4</sup>A significant procedural matter warrants comment before we

The Administrator's emergency order of revocation alleged, among other things, the following facts and circumstances concerning the respondent:

1. You are now, and at all times mentioned herein were, the holder of Airline Transport Pilot Certificate No. 518088166.
2. On or about July 21, 1996, you, as pilot-in-command, and doing business in the name of Briggs Helicopter Support Services, operated civil aircraft N750LT, a Bell Model 206B helicopter, on approximately 10 passenger-carrying flights for compensation or hire approximately 8 miles south of Warren, Idaho, in the vicinity of Pony Creek.
3. On or about July 22, 1996, you, as pilot-in-command, and doing business in the name of Briggs Helicopter

(..continued)

turn to the substance of the respondent's appeal. Because of the statutory deadline within which the Board by law must decide an emergency case, i.e., 60 days from the filing here of the emergency or immediately effective order as a complaint for the scheduling and conduct of an evidentiary hearing and for the briefing and resolution by the full Board of any objections to the law judge's decision at the hearing, Subpart I of our Rules of Practice, entitled "Rules Applicable to Emergency Proceedings and Other Immediately Effective Orders", the amount of time we can allow the parties for submitting various documents is limited. However, in an effort to afford the parties additional briefing time, without diminishing the time available to the Board for its review, we recently revised our rules to extend the deadlines for filing appeal and reply briefs, but directed, in order to save the time lost to mailing, that all briefs must "be served via overnight delivery or facsimile confirmed by first class mail." See Section 821.57(b), 49 CFR Part 821 (1995).

The respondent did not comply with this requirement in serving his appeal brief on October 31; he utilized first class mail alone. As a result, the Board did not have his appeal brief, which we should have received no later than November 1, until November 6. Any unjustified delay, in a review process as compressed as this one can be for both the parties and the agency alike, is unacceptable. We therefore give notice that the Board will hereafter treat any brief whose receipt by us is delayed through lack of compliance with our rule on service as untimely and, absent good cause for the failure to comply, subject to dismissal on the motion of the other party or on the Board's own initiative.

Support Services, operated civil aircraft N750LT on approximately 10 passenger-carrying flights for compensation or hire approximately 8 miles south of Warren, Idaho, in the vicinity of Pony Creek.

4. On or about July 23, 1996, you, as pilot-in-command, and doing business in the name of Briggs Helicopter Support Services, operated civil aircraft N750LT on approximately 10 passenger-carrying flights for compensation or hire approximately 8 miles south of Warren, Idaho, in the vicinity of Pony Creek.
5. On or about July 24, 1996, you, as pilot-in-command, and doing business in the name of Briggs Helicopter Support Services, operated civil aircraft N750LT on approximately 8 passenger-carrying flights for compensation or hire approximately 8 miles south of Warren, Idaho, in the vicinity of Pony Creek. The final flight on this day terminated in an accident during takeoff which was fatal to one passenger, and resulted in minor injuries to yourself and the other passenger.
6. On the occasion of the flights set forth in paragraphs 2 through 5 above, neither you nor Briggs Helicopter Support Services were [sic] the holder of an appropriate certificate or appropriate operations specifications issued under the provisions of Part 119 of the Federal Aviation Regulations.
7. On the occasion of the flights set forth in paragraphs 2 through 5 above, the first and second class privileges of your medical certificate had expired, and you therefore were not the holder of an appropriate current medical certificate authorizing you to serve as pilot-in-command on those flights.

The respondent does not dispute that the flights referenced in paragraphs 2 through 5 would have to be performed by a Part 135 certificate holder if they had been operated for compensation or hire. He does dispute the law judge's conclusion that they were so operated, and, in addition, he argues that, assuming any violations occurred, a lesser suspension should have been imposed. To understand the respondent's position, the context in which the flights were made must be examined.

Respondent, while still a helicopter pilot in the U.S. Army in Texas, initiated steps to fulfill a longtime desire<sup>5</sup> to operate a single-pilot helicopter business in his home state of Idaho, where there is a market for, among other aviation-related services, flight support for logging operations. Respondent's brother, Charlie Johnson, was the logging manager for a potential customer, Carson Services, Inc., in Jacksonville, Oregon. His company, after respondent had separated from the military in early 1996 and had begun, with his wife, raising money to purchase, inter alia, a helicopter and necessary equipment, directly facilitated this capitalization effort by providing respondent with documentation to show lenders that essentially reflected Carson's intent to contract with him for the provision of helicopter support services.

Although respondent's application for a Part 135 certificate was filed with the FAA in mid-May, 1996, at which time he received advice that led him to believe he would have the necessary authorization within a few months, he had still not been certificated when Carson, having difficulty locating helicopter support for a particular logging operation, sought to have respondent commence contract work on a project that it had, essentially, by virtue of his connection to Charlie Johnson, been holding for him. Respondent, wanting neither to disappoint, or expose to embarrassment, his brother, nor pass on any of the

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<sup>5</sup>On this point, the respondent testified: "Actually it's been the same objective my whole life, I've wanted to have my own flying business with a helicopter" (Tr. at 100).

logging work immediately available, decided to perform the work without charging Carson.<sup>6</sup> He did so, according to testimony the law judge credited notwithstanding circumstances that could have justified a contrary assessment, believing that he did not need a Part 135 certificate, which he thought would be issued to him soon, to do the job without payment.

The law judge correctly noted that Board precedent establishes that even where no actual compensation has been received for the performance of flight services in a commercial setting, the expectation of future economic gain may be sufficient to warrant a finding that the services were performed for compensation or hire. See, e.g., Administrator v. Blackburn, 4 NTSB 409 (1982), aff'd, 709 F.2d 1514 (1983), citing, at 4 NTSB 412, n. 12, Administrator v. Motley, 2 NTSB 178 (1973), Administrator v. Perkins, 2 NTSB 2383 (1976), and Administrator v. Henderson, 3 NTSB 4029 (1981); and Administrator v. Platt, NTSB Order No. EA-4012 (1993), citing, at n. 10, Administrator v. Pingel, NTSB Order No. EA-3265 (1991) and Administrator v. Mims, NTSB Order No. EA-3284 (1991). The law judge reasonably concluded that respondent harbored such an expectation here. At the same time, the law judge determined that the respondent's belief, albeit mistaken, that he could help his brother and himself, so long as no charges were billed, precluded a judgment that his conduct was reflective of a lack of qualification that

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<sup>6</sup>To do the work for Carson, respondent had to borrow, at no small expense, a helicopter from the company from which he had purchased one, as his was not yet ready for delivery.

would justify revocation.<sup>7</sup> The high number of flights respondent conducted during the four-day period in July before the accident, however, apparently persuaded the law judge that a lengthy suspension was appropriate. We find ourselves in basic agreement with the law judge's disposition as to liability, but believe that only a minimal sanction should be affirmed for each regulation respondent is alleged to have violated.

The law judge in effect determined that respondent not only had no intent to violate the law, he chose a course he believed was permitted by law.<sup>8</sup> Thus, the necessity for a sanction of strong deterrent value, either for him or for others, would appear to be lacking. We think it also relevant that, unlike the numerous "compensation or hire" cases we have decided in which the furtherance of economic interest was deemed to be a form of compensation the respondents were not entitled (for want of required commercial certification) to receive, this case does not

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<sup>7</sup>The Administrator asserts that the law judge's favorable credibility findings respecting respondent's claimed understanding of how he could avoid running afoul of the compensation or hire prohibition for someone not holding a commercial operator's certificate is "generous." We intimate no view on the issue.

<sup>8</sup>We reject respondent's argument that the Administrator's regulation does not give adequate notice, in the constitutional sense, of his interpretation, upheld by the Board in numerous cases, that compensation or hire can embrace various intangible economic considerations. Regulatees are chargeable with knowledge of interpretative rulings developed through adjudicative, rather than through rulemaking, processes. This does not mean, however, that we endorse the Administrator's failure, over a span exceeding most of the three decades in which the Board has been involved in reviewing enforcement cases, to amend his regulation in a way that would make its breadth more evident than a literal reading conveys.

involve a purely arm's length transaction between the respondent and Carson. It involves, rather, a quasi-business relationship predicated on both familial obligation and economic opportunity.<sup>9</sup>

Thus, given respondent's at best mixed motivation for the gratis performance of the flights, our precedent cannot be said to clearly dictate the appropriate sanction for his conduct.

Although we cannot judge, with any degree of certainty, how strongly respondent's conduct may have been influenced by noneconomic rather than by pecuniary incentives, it is reasonably clear that nonbusiness factors played a significant role in his decisionmaking. That, coupled with his professed belief, accepted by the law judge, that he could perform the flights lawfully under Part 91 if no compensation were received, convinces us that a 60-day suspension for the two violations charged by the Administrator will adequately sanction respondent for whatever incidental economic benefit he may have achieved by performing the flights before he had been issued the requisite authority.

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<sup>9</sup>At least two factors underscore this view of the matter. First, it is reasonably clear from the record that respondent's acquisition of the contract to do work for Carson stemmed largely, if not exclusively, from his brother's employment there, not from any special or unique practical experience respondent could tout as qualifying him for an award of the business. Second, so long as his brother, with whom he appears to be very close, was the logging manager for Carson, respondent, while perhaps not wanting to forego whatever work pursuant to Carson's then-current project that might remain after he obtained his Part 135 certificate, did not need to undertake an operation at a loss in order to ensure future consideration from that company for its helicopter logging-support needs: his economic prospects with that outfit were fairly assured.

**ACCORDINGLY, IT IS ORDERED THAT:**

1. The respondent's appeal is granted in part, and
2. The initial decision and the emergency order of revocation are affirmed, with a modification to provide for a 60-day suspension of respondent's airline transport pilot certificate.<sup>10</sup>

HALL, Chairman, FRANCIS, Vice Chairman, HAMMERSCHMIDT, GOGLIA, and BLACK, Members of the Board, concurred in the above opinion and order. GOGLIA, Member of the Board, submitted the attached statement.

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<sup>10</sup>Respondent's motion for relief from the emergency nature of the Administrator's order is dismissed as moot, as his certificate will already have been suspended for the required 60-days by the time this opinion is served.

I concur with the opinion and order in this case, but I disagree with some of the language in Footnote 8 on page 7.

The footnote states in part that "Regulatees are chargeable with knowledge of interpretative rulings developed through adjudicative, rather than through rulemaking processes. This does not mean, however, that we endorse the Administrator's failure, over a span exceeding most of the three decades in which the Board has been involved in reviewing enforcement cases, to amend his regulation in a way that would make its breadth more evident than a literal reading conveys."

It is imperative that the Administrator update his regulations to give fair and adequate notice to the public. Regulations must be clear to the persons who look for them for guidance. If the regulations are incomplete or unclear then it is more difficult to obtain the compliance which the Administrator is promoting and this agency helps enforce. In an appropriate case I would urge that an enforcement action be dismissed because the regulation did not give fair and adequate notice despite the existence of interpretative rulings.

Member John Goglia