

SERVED: February 5, 2008

NTSB Order No. EA-5360

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 31st day of January, 2008

_____)	
ROBERT A. STURGELL,)	
Acting Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-17865
v.)	
)	
JOHN WAYNE FERGUSON,)	
)	
Respondent.)	
_____)	

OPINION AND ORDER

Respondent appeals the oral initial decision of Administrative Law Judge Patrick G. Geraghty, issued June 7, 2007.¹ The Administrator's order suspended respondent's airline transport pilot certificate for 90 days, based on alleged

¹ A copy of the initial decision, an excerpt from the hearing transcript, is attached.

violations of 14 C.F.R. §§ 135.293(a)² and (b),³ 135.299(a),⁴ and 91.13(a).⁵ The law judge determined that respondent had violated the regulations, as alleged, but concluded that respondent had attempted to determine whether the flights at issue had occurred under 49 C.F.R. part 135, as the Administrator alleged; based on

² Section 135.293(a) states that, "[n]o certificate holder may use a pilot, nor may any person serve as a pilot, unless, since the beginning of the 12th calendar month before that service, that pilot has passed a written or oral test, given by the Administrator or an authorized check pilot," regarding the pilot's knowledge of several subjects, such as the type of aircraft, air traffic control procedures, meteorology, and the like.

³ The pertinent portion of section 135.293(b) provides as follows:

No certificate holder may use a pilot, nor may any person serve as a pilot, in any aircraft unless, since the beginning of the 12th calendar month before that service, that pilot has passed a competency check given by the Administrator or an authorized check pilot in that class of aircraft, if single-engine airplane other than turbojet, or that type of aircraft, if helicopter, multiengine airplane, or turbojet airplane, to determine the pilot's competence in practical skills and techniques in that aircraft or class of aircraft.

⁴ Section 135.299(a) states that, "[n]o certificate holder may use a pilot, nor may any person serve, as a pilot in command of a flight unless, since the beginning of the 12th calendar month before that service, that pilot has passed a flight check in one of the types of aircraft which that pilot is to fly." Section 135.299(a) specifies that an approved check pilot participate in the flight check, that the flight check consist of at least one flight over one route segment, and that the flight check include takeoffs and landings at one or more representative airports.

⁵ Section 91.13(a) states that, "[n]o person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another."

respondent's efforts, the law judge reduced the suspension period to 85 days. Respondent appeals the law judge's decision, and argues that the law judge committed prejudicial error in not allowing certain questions during respondent's counsel's cross-examination of two of the Administrator's witnesses at the hearing. We deny respondent's appeal.

The Administrator issued the suspension order, which became the complaint in this case, on October 6, 2006. The complaint alleged that respondent operated a Bell helicopter as pilot-in-command on three passenger-carrying flights on June 26, 2005, on behalf of his corporation, Wine Country Helicopters, Inc. The Administrator's complaint stated that for each of the three flights, respondent neither met the requisite pilot testing requirements, nor fulfilled the competency and flight checks that §§ 135.293 and 135.299 require. The complaint also alleged that respondent's conduct was careless and reckless, and therefore resulted in a violation of § 91.13(a). The complaint ordered a suspension period of 90 days.

At the hearing, the Administrator called Ms. Virginia Bamford to testify. Ms. Bamford stated that she observed respondent operating the helicopter on the flights in question, and took photographs from her location in a car on the helipad at Infineon Raceway. Tr. at 19, 22, 31. Ms. Bamford testified that she observed many other helicopters performing revenue

flights to the same location on the day in question, because a large NASCAR race was scheduled on June 26, 2005, at Infineon Raceway. Ms. Bamford also testified that respondent is not a named pilot on the operating certificate for Wine Country Helicopters, and that she expected that Allen Wayne Lackey, who owns the company, would be operating the helicopter on the revenue flights. Tr. at 28. The Administrator presented five photographs that Ms. Bamford had taken while observing respondent's operation of the helicopter, and each photograph depicts passengers on board the helicopter. Tr. at 30, 33-37; Exhs. C-1 - C-5. The Administrator also called Mr. Edward Winchester, who observed respondent departing from Napa Airport on June 26, 2005, with passengers. Tr. at 50-51, 54-55. Mr. Winchester also took photographs of respondent's operation of the helicopter at issue, each of which depicts passengers embarking or on board the helicopter respondent operated. Tr. at 56-58; Exhs. C-6, C-7. Finally, the Administrator called Aviation Safety Inspector Richard Conte to testify regarding Inspector Conte's investigation into respondent's alleged violations. Inspector Conte has served as the Principal Operations Inspector for Wine Country Helicopters since 2004, and is generally familiar with the operations of Wine Country Helicopters as an operator under Part 135 of the Federal Aviation Regulations (FAR). Tr. at 63-64. Inspector Conte

testified that he had received a complaint from someone indicating that Wine Country Helicopters was operating "illegal" flights under Part 135. Tr. at 67. Inspector Conte also testified that he reviewed the flight maintenance log for the helicopter in question, which indicates that the flights that occurred June 26, 2005, were "charter" flights. Tr. at 70-71; Exh. C-9. Inspector Conte also reviewed copies of an invoice for \$8,670, listing flights that occurred on June 23-26, 2005, that Wine Country Helicopters sent to Mr. Steve Henry of Henry Aviation. Tr. at 72; Exh. C-10 at 2-3. Inspector Conte also received a copy of a check that Henry Aviation sent to Wine Country Helicopters. Tr. at 76; Exh. C-11. Based on these records, and on Inspector Conte's discussions with Mr. Lackey, Inspector Conte testified that he determined that respondent had violated §§ 135.293(a) and (b), 135.299(a), and 91.13(a), as alleged.

In his defense, respondent testified at the hearing, and stated that he did not receive any payment from Mr. Lackey for the flights he operated, and believed that the flights were "non-revenue Part 91 flights." Tr. at 117. Respondent confirmed that he flew three flights on June 26, 2005, and that each flight transported passengers, but that he believed they were not flights under Part 135 of the FAR. Tr. at 120, 122-23. Respondent testified that he would not have operated the flights

if the flights were under Part 135 of the FAR. Tr. at 127. Respondent also called Mr. Alan Lackey to testify. Mr. Lackey stated that he owns Wine Country Helicopters, which has been an on-demand air taxi "commercial charter operator" since 2003. Tr. at 131. Mr. Lackey testified that the helicopter respondent operated (N62HF) did not transport passengers for compensation or hire, but that another helicopter from Wine Country Helicopters (N25AJ) transported passengers under Part 135 of the FAR. Tr. at 137. Mr. Lackey stated that the invoice that Wine Country Helicopters sent to Henry Aviation, and the payment that it received in return, did not reflect any time that respondent flew the helicopter at issue, but reflected other flights. Tr. at 141. Mr. Lackey testified that if the flights were conducted under Part 135, Mr. Lackey would not have asked respondent to assist in operating the flights. Tr. at 142-43. Mr. Lackey also testified that the designation of the flight as "charter" on the helicopter's flight maintenance log was a mistake. Tr. at 150-51.

On rebuttal, the Administrator's counsel again called Ms. Bamford and Inspector Conte to testify. Ms. Bamford testified that she observed Mr. Lackey operating another helicopter with no passengers, but that she photographed respondent operating a helicopter that had passengers. Tr. at 155. Inspector Conte testified that the Administrator's

regulations require Mr. Lackey to ensure that the logbooks accurately differentiate between flights under Parts 91 and 135. Tr. at 156.

The law judge held that the Administrator had presented sufficient evidence showing that respondent had violated the regulations as charged. The law judge described all evidence in the record, and concluded that the testimony of Ms. Bamford and Mr. Winchester was undisputed, and that the photographs the Administrator provided were also persuasive. Initial Decision at 175-186. In addition, the law judge stated that the maintenance log was influential, despite Mr. Lackey's contention that the list of the flights as "charter" was incorrect. Id. at 186-87. The law judge opined that respondent should have known that the passengers he was transporting were paying customers, and that the fact that respondent personally may not have received payment for the flights was inconsequential under Board precedent. Id. at 189-190. The law judge also concluded that intent is not an element of the offenses that the Administrator charged; therefore, the fact that respondent may have made an honest mistake in discerning the type of flight he was conducting could not constitute a legitimate defense. Id. at 189. Therefore, the law judge held that respondent had violated the regulations as charged, but reduced the sanction to 85 days,

given respondent's attempts to confirm that the flights would not take place under Part 135 of the FAR. Id. at 192.

Respondent now appeals the law judge's decision, and presents two issues, both of which concern the law judge's evidentiary rulings at the hearing. First, respondent argues that the law judge erred in disallowing respondent's counsel's inquiry into how much weight Inspector Conte placed on the different types of evidence that Inspector Conte gathered in forming his opinion regarding the alleged violations. In this regard, respondent argues that the Federal Rules of Evidence only allow an expert witness to provide an opinion after the expert explains the facts on which he or she has relied to provide the opinion, but that the law judge did not allow respondent's counsel to explore such a factual basis. Respondent recognizes that the law judge allowed Inspector Conte to respond to questions regarding the overall reasons for his opinion, but argues that the law judge should not have halted further questions regarding those reasons.⁶ In addition,

⁶ Respondent's argument arises out of the following exchange during Inspector Conte's testimony at the hearing:

Q. Sir, give me each reason, if there's more than one, that you decided this was a 135 operation as opposed to a Part 91 operation.

A. With the information I received, and my conversation with Mr. Lackey, Mr. Lackey himself told me that he was planning on providing his helicopter for compensation or hire with Mr. Steve Henry during

respondent argues that the law judge erred in: not allowing Inspector Conte to define "for compensation or hire"; not permitting questions regarding Inspector Conte's understanding of flight maintenance logs; not allowing a question regarding

(..continued)

that day. Based on the bills, based on the Flight Maintenance Log, based on the pictures and testimony from all the witnesses, those were 135 flights.

Q. Now the pictures simply depict passengers on the helicopter, right?

[Discussion regarding Administrator's counsel's objection omitted]

A. There were persons getting on-board the helicopter.

Q. Okay. Now, from that alone, could you conclude that was a 135 operation?

Administrator's Counsel: Objection, misstates testimony.

Administrative Law Judge: Sustained. He did not say "on that alone." He gave you a list of things that he based his conclusion on.

Respondent's Counsel: I understand exactly, Your Honor. I'm just trying to separate so that we can get to the meat of it.

Administrative Law Judge: No, you're not going to piecemeal it.

Respondent's Counsel: How else can we understand it?

Administrative Law Judge: I understand it, Counsel. No, we're not going to pull it apart. You asked what he based his opinion on, and he gave you the items that he based his opinion on. He didn't say he based it on any one thing, he said all those things.

Respondent's Counsel: Is the Court ruling that I cannot inquire to the basis for his opinion?

Administrative Law Judge: You already did, and it's been asked and answered.

Tr. at 84-85.

Inspector Conte's internal deliberations concerning his investigation into respondent's conduct; and in not allowing questions regarding Inspector Conte's experience. In addition, respondent argues that the credibility of Ms. Bamford's testimony is questionable, because Ms. Bamford was engaged in an ongoing legal dispute with Mr. Lackey. As such, respondent argues that the law judge erred in not allowing respondent's counsel to question Ms. Bamford regarding details of the ongoing litigation. Based on these alleged errors, respondent requests that we grant his appeal and order a new hearing. The Administrator contests respondent's arguments, and urges us to affirm the law judge's decision.⁷

We have long held that we review law judges' evidentiary rulings under an abuse of discretion standard.⁸ In addition, we allow law judges significant discretion in overseeing hearings.⁹ When resolving issues involving the admission of evidence, the Board considers the Federal Rules of Evidence to be "non-binding

⁷ The Administrator does not contest the law judge's reduction in sanction.

⁸ See, e.g., Administrator v. Raab, NTSB Order No. EA-5300 at 9-10 (2007); Administrator v. Zink, NTSB Order No. EA-5262 at 7-8 (2006); Administrator v. Seyb, NTSB Order No. EA-5024 at 5-6 (2003); Administrator v. Van Dyke, NTSB Order No. EA-4883 at 5 (2001).

⁹ See, e.g., Administrator v. Simmons, NTSB Order No. EA-5275 at 9-10 (2007) (citing 49 C.F.R. § 821.35(b)); Administrator v. Kachalsky, NTSB Order No. EA-4847 at n.4 (2000); and Administrator v. Reese, NTSB Order No. EA-4896 at n.4 (2001)).

guidance.”¹⁰ Moreover, the Board’s Rules of Practice, at 49 C.F.R. § 821.49(a), provide that the standard for reviewing issues on appeal includes evaluating the law judge’s findings of fact and conclusions of law, asking whether the law judge committed any prejudicial errors, and determining whether either party has presented substantial questions on appeal. As such, the Board will only entertain evidentiary questions when they amount to prejudicial error.¹¹ Given this precedent, we will review arguments regarding evidentiary rulings to determine whether the law judge has abused his broad discretion, and whether the alleged error resulted in prejudice against the party that allegedly suffered harm as a result of the ruling.

In the instant case, respondent has neither established that the law judge abused his discretion, nor demonstrated that the law judge’s alleged errors resulted in prejudice. A careful review of the transcript reveals that the law judge allowed Inspector Conte to explain the basis for his opinion in detail (Tr. at 79-80), and allowed respondent’s counsel to ask

¹⁰ Petition of Cary A. Neihans, NTSB Order No. EA-5166 at 9 n.9 (2005) (citing Administrator v. Comer, NTSB Order No. EA-3967 at 3 (1993)).

¹¹ See generally Administrator v. Blair, NTSB Order No. EA-4253 at 7 n.10 (1994) (stating that the law judge had improperly excluded evidence, but that the error was harmless). Moreover, an error is considered *prejudicial* when it “actually [affects] the outcome of the proceedings.” United States v. Hastings, 134 F.3d 235, 240 (4th Cir. 1998).

questions of Inspector Conte on cross-examination regarding the opinion (Tr. at 80-81, 84). The law judge did not abuse his discretion in determining that subsequent questions on the same issue would have been redundant, and would not have influenced the outcome of the case. In addition, we reject respondent's other arguments regarding the law judge's rulings concerning Inspector Conte's testimony: in particular, neither Inspector Conte's understanding of "compensation or hire," nor his general perception of flight maintenance logs were directly relevant to the evidence that Inspector Conte reviewed concerning respondent's alleged violations. Also without merit is respondent's argument that it is error to exclude testimony from inspectors regarding the deliberative process in their investigations. Respondent does not establish that the inspector's opinions during the course of his investigation or his discussions with other investigators are relevant to the issue of whether he violated the regulations as charged. We also disagree with respondent's argument that the law judge erred in not allowing questions regarding Inspector Conte's experience, as Inspector Conte described his experience at length at the commencement of his testimony. Tr. at 63-65.

We reach the same conclusion with regard to respondent's arguments concerning Ms. Bamford's testimony. While respondent argues that the law judge should have afforded Ms. Bamford's

testimony little weight due to her involvement in litigation with Mr. Lackey, such an argument does not alter the outcome of the case, or persuade us that a new hearing is in order. We have long held that credibility determinations are "within the exclusive province of the law judge," unless the law judge has made the determinations "in an arbitrary or capricious manner."¹² Respondent has not established that the law judge's credibility determinations were arbitrary or capricious. In fact, the law judge expressly acknowledged that Ms. Bamford was not a disinterested witness. Initial Decision at 175-76. While the law judge indicated that he considered Ms. Bamford's testimony, he based his final decision on the variety of other evidence indicating that respondent operated the aircraft in question in violation of §§ 135.293(a) and (b), 135.299(a), and 91.13(a). Id. at 177-78 (discussion of photographs), 179 (summary of testimony of Edward Winchester, and additional photographs), 179-81, 186 (discussion of flight maintenance log, invoice, and check). Respondent does not impeach or dispute this evidence on appeal.

Based on the foregoing, we conclude that respondent has neither shown that the law judge's evidentiary rulings were an

¹² Administrator v. Nickl, NTSB Order No. EA-5287 at 6 (2007) (citing Administrator v. Kocsis, 4 NTSB 461, 465 n.23 (1982); see also Administrator v. Smith, 5 NTSB 1560, 1563 (1986); Administrator v. Sanders, 4 NTSB 1062 (1983)).

abuse of discretion, nor that such rulings resulted in prejudice. Given that respondent operated an aircraft while out of compliance with 14 C.F.R. §§ 135.293(a) and (b) and 135.299, we find that respondent has violated these sections of the Federal Aviation Regulations, as well as 14 C.F.R. § 91.13(a), and we affirm the law judge's decision.¹³

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;
2. The law judge's initial decision, including the reduction in sanction from 90 to 85 days, is affirmed; and
3. The 85-day suspension of respondent's airline transport pilot certificate shall begin 30 days after the service date indicated on this opinion and order.¹⁴

ROSENKER, Chairman, SUMWALT, Vice Chairman, and HERSMAN, HIGGINS, and CHEALANDER, Members of the Board, concurred in the above opinion and order.

¹³ Given our disposition of this case and our recent disposition of a related case, Administrator v. Lackey, NTSB Order No. EA-5348 (2007), we deny as moot both the Administrator's pending motion to expedite the disposition of the case and respondent's apparent request to consolidate three related cases.

¹⁴ For the purpose of this order, respondent must physically surrender his certificate to a representative of the Federal Aviation Administration pursuant to 14 C.F.R. § 61.19(g).

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
OFFICE OF ADMINISTRATIVE LAW JUDGES

* * * * *

In the matter of: *

MARION C. BLAKEY, *

ADMINISTRATOR, *

Federal Aviation Administration, *

Complainant, *

v. * Docket No.: SE-17865

* JUDGE GERAGHTY

JOHN WAYNE FERGUSON, *

Respondent. *

* * * * *

Federal Building
450 Golden Gate Avenue
Courtroom D
San Francisco, California

Thursday,
June 7, 2007

The above-entitled matter came on for hearing,
pursuant to Notice, at 9:30 a.m.

BEFORE: PATRICK G. GERAGHTY,
Administrative Law Judge

APPEARANCES:

On behalf of the Administrator:

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Western Pacific Region
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On behalf of the Respondent:

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ORAL INITIAL DECISION AND ORDER

This has been a proceeding before the National Transportation Safety Board on the appeal of John Wayne Ferguson, hereinafter referred to as Respondent, from an Order of Suspension which seeks to suspend his Airline Transport Pilot's Certificate for a period of 90 days. The Order of Suspension serves herein as the Complaint, and was filed on behalf of the Administrator, Federal Aviation Administration, herein the Complainant, through one of her Staff Counsel.

The matter has been heard before this Judge, and, as provided by the Board's rules, I am issuing a bench decision in the proceeding.

1 Pursuant to Notice, this matter came on for trial on
2 June 7, 2007, in San Francisco, California. The Complainant was
3 represented by Staff Counsel, Lisa Toscano, Esq., of the Federal
4 Aviation Administration, Western Pacific Region. Respondent was
5 present at all times and was represented by his counsel, Philip
6 L. Johnson, Esq., of Los Angeles, California.

7 Parties have been afforded full opportunity to offer
8 evidence, to call, examine, and cross-examine witnesses, and to
9 make argument in support of their respective positions.

10 I've considered all of the evidence, both oral and
11 documentary, and evidence which I do not specifically mention as
12 viewed by me as being essentially corroborative or not
13 materially affecting the outcome of the decision.

14 AGREEMENT

15 By pleading, it was agreed that there was no dispute
16 as to the factual allegations contained in the Complaint in
17 Paragraphs 1, 2, and 3. Therefore, those matters are taken as
18 having been established for this Decision.

19 Further, in open session, it was agreed between the
20 Parties that so much of Paragraph 4 of the Complaint was also
21 not in dispute, and that section of paragraph 4 of the Complaint
22 is as follows, and I quote: "On or about June 26, 2005, you,"
23 referring to the Respondent, "operated N62HF as pilot in command
24 on three passenger-carrying flights." The remainder of that
25 portion of Paragraph 4 remains in dispute. However, the agreed-

1 to section is taken also as having been established for purposes
2 of the decision.

3 DISCUSSION

4 As stated above, the Complainant seeks a suspension of
5 90 days against the Respondent's Airline Transport Pilot's
6 Certificate, predicated upon the factual allegations in the
7 Complaint, which go on to charge that the Respondent operated
8 flights under Part 135 of the Federal Aviation Regulations,
9 when, in fact, he was not properly qualified to do so by reason
10 of required recurrent pilot testing, as set forth in the
11 Sections of Part 135, and in particular Part 135.299(a), and
12 Sections 135.293(a), (b), of the Federal Aviation Regulations.
13 In addition, it is alleged that the Respondent operated in
14 regulatory violation of Section 91.13(a) of the Regulations.

15 The Complainant's case is made through the testimony
16 of witnesses, and also various Exhibits which were offered and
17 received into evidence.

18 The first witness is a Ms. Virginia Bamford. She has
19 been apparently been engaged in a dispute with Mr. Lackey, who
20 is the owner, on the evidence in front of me, of Wine Country
21 Helicopters, the 135 operator whose helicopter, N62HF, is the
22 named aircraft as being operated by the Respondent on June 26th,
23 2005. So I have taken into account that, on the undisputed
24 testimony in front of me, there is, at least, some animosity
25 resulting in litigation between Ms. Bamford and Mr. Lackey, and

1 I've taken that into account in evaluating their testimony.

2 In any event, she undertook, because there was some
3 information she had that Wine Country Helicopters was going to
4 be operating from Napa Airport into the raceway, and I believe
5 that's Infineon Raceway, for, apparently, NASCAR races that were
6 going to be taking place at that raceway. And on the evidence,
7 also it appears that this is a major event, over 100,000 people
8 apparently attend this, and it's an annual event sponsored by
9 various automotive companies or makers. In any event, she
10 stated that she arrived early on the particular date, June 26th,
11 2005, and was actually seated in an automobile at the helipad.
12 And on her testimony, she remained there, possibly getting out
13 of the car, but never leaving the helipad. She indicated she
14 flew in early on the date in question, 7:00 or 8:00 o'clock in
15 the morning, and stayed there continuously until late afternoon.

16 Being in the automobile, apparently with one Mr.
17 Henry, she was also able to overhear radio communications
18 between helicopters that were bringing people into the racetrack
19 area. And on the testimony, there were, in addition to the
20 Respondent's aircraft, somewhere around 12 other helicopters
21 that were performing generally the same program, that is,
22 bringing people into the racetrack area for attendance at the
23 race.

24 She stated that she recalled at least five flights
25 being made by the Respondent coming into the raceway, and that

1 each one of those passenger flights she observed the passengers
2 to exit the aircraft. She stated on the first flight she
3 observed about three passengers, one flight four passengers, and
4 then three, and possibly one or two, on the last flight. She
5 was surprised that Mr. Ferguson was the operator, and Mr. Henry
6 had also commented on that, knowing that Mr. Ferguson was not a
7 pilot on the operations specifications for Wine Country
8 Helicopters.

9 Ms. Bamford testified that she took photographs, and
10 there's no contrary testimony as to the nature of the
11 photographs, that they're sequential, that they were taken on
12 the date in question, and were taken during the morning hours
13 with a digital camera. I viewed the photographs, and if one
14 does look at the photographs closely, one can see passengers,
15 and it's not disputed these are passenger flights. However, it
16 is clear from looking at the photographs, that one can actually
17 observe individuals exiting from the aircraft. For example, in
18 Exhibit C-1, you can see one person stepping out of the
19 helicopter with foot on the exit skid. There's an individual
20 that has departed from the left side of the helicopter, there's
21 another individual, apparently with a shopping bag, or some kind
22 of container, just about to exit. And there's a person over on
23 the right side, who's in shorts, who appears also to have been a
24 passenger. Looking at the other photographs, if one looks
25 closely, one can see shapes. Although not being able to

1 identify them, they are clearly individuals. For example, in C-
2 3 you can see a person in the left front seat, and if you look
3 closely, you can see in the Plexiglas for the passenger door a
4 face of an individual who was seated in the back. So the
5 photographs, in my view, do support the testimony of the
6 witness.

7 On cross-examination, she indicated she didn't know
8 the exact time of these flights, but that all of the flights
9 had, in fact, occurred during the morning hours, and that at the
10 time she didn't recognize Mr. Ferguson, and also one Mr. Record,
11 who was assisting, apparently, in loading or unloading the
12 passengers. She conceded that during her observations that the
13 greatest number of passengers that she ever observed exiting
14 from the helicopter were four passengers.

15 Mr. Edward Winchester is a private pilot and,
16 apparently, a friend of Ms. Bamford. He was engaged by Ms.
17 Bamford, who gave him a camera and asked that he stay at Napa
18 Airport and observe what he could of any Wine Country flight
19 operations occurring on that particular date.

20 He testified that he observed at least three or four
21 Wine Country Helicopter flight operations, and then indicated
22 that he may have observed even up to six departures from Napa
23 Airport. But the issue here, of course, is framed by the
24 Complaint. We're dealing with three passenger-carrying flights,
25 which are the admitted number.

1 He stated that he observed passengers getting into the
2 aircraft, and usually the aircraft departing with three to four
3 passengers, and that on every one of the flights that he did
4 observe, that Mr. Ferguson was, in fact, the pilot in command.
5 He also took photographs, and Exhibits C-6 and C-7 are
6 photographs that Mr. Winchester identified as having been taken
7 by him. And again, if one looks at Exhibit C-6, it's clear one
8 individual identified as Mr. Lackey assists in loading, there
9 are two individuals approaching to enter the helicopter, and if
10 you look through the Plexiglas in the door, you can see the face
11 of another individual who is either in the helicopter or
12 entering it from the opposite side. So three passengers. C-7,
13 you can also see a passenger already in the helicopter, in front
14 of Mr. Lackey who is standing outside, and another individual in
15 the left front seat of the helicopter. So the photographs are
16 consistent with the oral testimony given today.

17 Mr. Richard Conte is an Aviation Safety Inspector with
18 the Sacramento Flight Standards District Office, 17 years with
19 the Federal Aviation Administration. He's the Principal
20 Operations Inspector for Wine Country Helicopters, and has been
21 in that position since about 2004. He has in excess of 11,000
22 hours as pilot in command, of which 3,500 are in helicopters,
23 and he has spent about 13 years as a Principal Operations
24 Inspector for Part 135 operators.

25 Mr. Conte identified several Exhibits. The first of

1 those is Exhibit C-9, which is a Flight Maintenance Log. I
2 observed that under the regulations, this is a record that is
3 required to be kept and maintained under the Regulations by Wine
4 Country Helicopters. On this, of significance is the Aircraft
5 Time, indicated as 2.1 hours. The customer is indicated as
6 Henry Aviation, IR outbound. IR is the Infineon Raceway. The
7 Mission is Charter, and it lists departure flights between 8:30
8 a.m. to 11:30 a.m., which again is consistent with the testimony
9 of Ms. Bamford as to observing these operations in the morning
10 hours of the date in question. Also at the top there are
11 initials which, on the evidence, appears to be that of Mr.
12 Lackey, but then the initials also JF, which has not been
13 disputed, refer to the Respondent in this particular case, that
14 is John Ferguson.

15 Exhibit C-10 consists of three pages. Of significance
16 is an invoice, which shows a balance to be charged for flight
17 charges for dates between June 23 and June 26, 2005, purpose,
18 NASCAR Dodge at Infineon Raceway, a balance due of \$8,670. On
19 page 3 of that Exhibit, it again gives the same subject,
20 although it's stricken over, it does look like an "8", it's
21 6/26/05, and it shows on that date, at the bottom, APC, which is
22 from Napa to IR, a.m. flights, 2.6 hours being charged, for a
23 total of 10.2 hours for the \$8,670.

24 If one breaks down the charge and takes the hours as
25 listed in C-9 and Exhibit C-10, it appears that for the

1 particular flights that it's somewhere, if you round it out to
2 10 hours instead of 10.2, about \$867 an hour, to get that total.
3 If you take 2.1 hours, as shown on C-9, the amount of time for
4 the a.m. flights as listed on C-9 as Charter, that would come
5 down to roughly \$1,820 as charges. If one, and I'll discuss
6 that testimony, the Respondent himself indicating he flew only
7 between 1.1 and 1.2 hours, again that would break down to
8 approximately \$1,012 for those flights in question.

9 I'm also aware of Exhibit C-11, which is a check on
10 the letterhead of Henry Aviation made out to Wine Country in the
11 amount that is reflected on Exhibit C-10, that is, the \$8,670.
12 So clearly, this check refers to the billing that's listed in
13 Exhibit C-10. I am aware that down on the left side of this
14 photocopy of the check, it does say "Helicopter service at the
15 raceway, July 2005." The date of the check is July 20, 2005,
16 and I simply infer that a person writing this check, and it
17 appears to be Henry, simply put down the same date that he was
18 writing, the month that he was writing the check, as the month
19 for the services. But clearly, with the amounts, I believe it
20 is a reasonable inference, which I draw, that that check, as
21 reflected in C-11, refers to the invoice given to Henry Aviation
22 for the operations of June 23 to June 26, in the amount of
23 \$8,670.

24 Mr. Conte also stated that Mr. Ferguson is not
25 qualified under Part 135, and that on cross-examination he

1 conceded he had conversations with Mr. Lackey, the owner of Wine
2 Country Helicopters. There was some discussion as possible
3 operations on the dates in question under Part 119 of the
4 Regulations. However, it is clear, and undisputed on the
5 testimony, that Mr. Conte never gave permission to Wine Country
6 Helicopters to be operating under Part 119 of the Regulations,
7 that, as he indicated, no more than two passengers at any one
8 time could be carried under the provisions of that particular
9 Part of the Regulations, and, in any event, he would have to
10 give specific permission for that type of operation, which he,
11 uncontradicted on his testimony, never did give to Wine Country
12 Helicopters.

13 There was rebuttal testimony on the part of the
14 Complainant, and for continuity I simply refer to the rebuttal
15 testimony so it's in somewhat of a sequence. In rebuttal, Ms.
16 Bamford was recalled, and she testified that on the date in
17 question, that she observed the operations of 62HF in the
18 morning on several flights, and that every time it flew in she
19 took a photograph when it landed, and she photographed every
20 landing and every passenger. She did indicate that she did
21 observe one flight to be conducted in this helicopter, 62HF, by
22 Mr. Lackey, but that that took place at the end of the morning,
23 and that on that one flight no passengers were carried. On
24 cross-examination, she maintained that the flight by Mr. Lackey
25 was about at the end of the morning hour, at about lunch time.

1 She wasn't specific of the exact hour; however, that she again
2 maintained that she never left the helipad at any of the times
3 between the time she arrived there and late in the evening, as
4 I've already discussed.

5 Mr. Conte also testified in rebuttal, and testified
6 that, based upon his experience as Principal Operations
7 Inspector with Wine Country Helicopters, that Wine Country
8 Helicopters does discriminate on its record keeping as to the
9 type of mission, whether it's charter, non-revenue, sight-
10 seeing, whatever the mission happens to be, and also that it's
11 designated either as a Part 91 or a Part 135, and that he bases
12 that conclusion based upon his observation of many of the Wine
13 Country flight logs over the course of his duties as Principal
14 Operations Inspector with Wine Country Helicopters.

15 Coming back, then, to the Respondent's case,
16 Respondent testified on his own behalf. He has about 15,000
17 hours, he holds an Airline Transport Pilot's Certificate,
18 Instrument Rating, Commercial Helicopter, he's typed in the Gulf
19 Stream, and has experience, as he testified, flying in,
20 apparently, all parts of the world, including flying helicopters
21 off various ships. I wasn't sure whether that was oil rig
22 flights or wealthy yachts that might have helicopters, but he
23 does have that experience.

24 I would simply observe here there was no testimony
25 offered as to any violation history, and therefore I simply

1 infer that Mr. Ferguson, the Respondent, does, in fact, have no
2 prior violation history. So I'd simply make the observation
3 that I have drawn that inference.

4 The Respondent testified that his involvement with
5 Wine Country Helicopters came about as an ad he saw, then he
6 contacted Mr. Lackey. They had a meeting, and some contracts,
7 and he essentially became an investor in that organization, and
8 the particular helicopter 62HF. He has no other association
9 with Wine Country Helicopters, and he is not a pilot for them,
10 and he is not listed on their operations certificate.

11 With respect to the June 2005 operations, he testified
12 that Mr. Lackey had contacted him concerning the operations from
13 Napa into the raceway, and that he was asked if he would be
14 interested in helping out. He stated that he knows the
15 difference between operations under Part 135 or Part 91, and he
16 stated that he advised Mr. Lackey that he would only do these as
17 long as they were non-revenue flights, and he was emphatic that
18 at no time had he received any payment from anyone for his work
19 on June 26th of 2005.

20 He stated that he did not talk to anyone at the
21 Federal Aviation Administration concerning the nature of the
22 flights, that is, Part 135 or Part 91. However, he had
23 discussed with them, because the obtaining of a waiver, which is
24 now necessary for flights being conducted into areas where there
25 are large crowds of people, and apparently that waiver was

1 granted.

2 He testified he flew about three flights on the date
3 in question in the morning, indicating he flew somewhere between
4 1.1 and 1.2 hours, and that on any of the flights he never
5 carried more than four passengers. Of course, this is the same
6 testimony Ms. Bamford gave, that she never observed any more
7 than four passengers on any one particular operation.

8 Respondent reiterated that he understood the flight
9 operations to be Part 91 flights, because Mr. Lackey, the owner
10 of Wine Country Helicopters, had maintained to him, or told him,
11 that they were non-revenue flights, and that he, Mr. Ferguson,
12 never collected any money from any of the passengers, and never
13 received any payment or money for flying the operations.

14 On cross-examination he conceded that each group of
15 passengers that he flew consisted of different persons, so on
16 each flight there were different individuals, different
17 passengers, and that he never recognized any of the passengers.
18 He did not know them, personally. And lastly, the only
19 information that he, in fact, relied upon, as to the nature of
20 the flights, was the statement that he obtained from Mr. Lackey
21 that the flights were to be Part 91 flight operations.

22 Mr. Lackey testified on his own behalf. He testified
23 that he has been with this company, and is the owner, in fact,
24 and has been operating since about July of 2003, for on-demand
25 charter work, which really is not in dispute. On the date in

1 question, he indicated that he had chartered a second aircraft,
2 another helicopter, 25AJ, I believe, to fly in addition to the
3 flight operations by 62HF. He maintained that he used the
4 latter aircraft, 62HF, only for non-revenue operations. On
5 cross-examination, he stated that he flew the afternoon flights,
6 as shown on Exhibit C-10, and that those were, in fact, listed
7 on there as flying 2.3 hours. C-11 shows the Revenue Time of
8 2.1, he states that he, in fact, prepared the document C-9,
9 which I've already identified, and stated that he believes that
10 the entry of 2.1 hours is in error, and that the initials up
11 there are meant to indicate that he flew some of the flights on
12 the morning, and that Mr. Ferguson only flew 1.1 or 1.2 hours.

13 That, to me, is the pertinent evidence in the case.

14 Of course, the burden of proof rests with the
15 Complainant throughout. To carry that, she must show it by a
16 preponderance of the reliable and probative evidence.

17 The crucial issue in this case is the classification
18 of the type of operation that the Respondent was engaged in on
19 the morning of June 26, 2005. That is, were they, in fact,
20 being conducted under Part 135 of the Regulations, or as flights
21 under Part 91 of the Federal Aviation Regulations, as is
22 maintained by the Respondent. There is a conflict in the
23 testimony between the Respondent and the Complainant, and
24 necessarily, therefore, I was aware that I would have to make a
25 credibility determination based upon that dispute, and the

1 resolution necessary thereof. Therefore, I have closely
2 observed the demeanor of the witnesses in their testimony, and
3 I've taken close view of the documentary evidence which has been
4 received. And arriving at my credibility determinations, I find
5 that the testimony as to the number of passengers, the flights
6 being observed by Ms. Bamford, and the photographs being taken
7 by both Mr. Winchester and Ms. Bamford, are essentially not
8 disputed, and that the passengers were, in fact, as admittedly,
9 being carried. I also look at Exhibit C-9. There's testimony
10 of the Respondent's witnesses that the document is in error.
11 However, this is a record which is under the Regulations
12 required to be kept and to be maintained. Also, the Board has
13 held repeatedly that these type of records are expected to be
14 maintained in a scrupulous manner, since the Administrator has a
15 right to rely upon them, as does anyone else who might come in
16 contact with this aircraft, to determine flight times, and the
17 number of total hours on components. Here, the document
18 admittedly is prepared by Mr. Lackey, the owner of Wine Country
19 Helicopters. He indicates the morning hours as the operations
20 for this particular flight log. It shows the mission,
21 "Charter." He attempted to say that this was a default
22 indication. However, Mr. Conte says that on other flight logs,
23 there is clear distinguishing between the type of operations:
24 charter, non-revenue, sight-seeing, et cetera. This says
25 plainly on its face, "charter, " prepared, on the evidence in

1 front of me, apparently the next day, June 27th. If it was a
2 default and an error, it could have been corrected. The owner
3 is making this record. And on the customer, it shows "Henry
4 Aviation." So the only inference I can draw from this is that
5 this is a correct record, as it is supposed to be, and that is
6 for a mission including charter, which would have to be under
7 the auspices of Wine Country Helicopters, a Part 135 operation,
8 on the morning hours of June 26th for Henry Aviation into the
9 racetrack, outbound, meaning from Napa to the racetrack.

10 I also take into account the invoice, or memorandum,
11 issued by Wine Country Helicopters to Henry Aviation. That's in
12 the amount of \$8,670. There's some testimony that there was no
13 charge made for these morning flights, but there's no indication
14 of that anywhere to support that some reduction was being made.
15 Having looked through some of the discovery, I'm aware that
16 there was some statement that maybe it was a reduction in the
17 charge, but there's no indication that anything was being done
18 for free. And, of course, there is the check for the total
19 amount, as I've already discussed, as shown in C-11.

20 In sum total, therefore, based upon my evaluation of
21 the evidence, and observation of the witnesses, I do resolve the
22 issue of credibility in favor of the Complainant, and find,
23 therefore, as a matter of fact, that the flight operations on
24 the morning of June 26th, as being flown by Mr. Ferguson, were,
25 in fact, Part 135 flight operations, being flown as charter

1 flights. And I so hold.

2 As to quid pro quo, or compensation or hire, as
3 pointed out in argument, the Board precedent is that it does not
4 necessarily have to be monetary. The evidence here is not
5 disputed that Mr. Ferguson was never paid. That is not the sine
6 qua non. He flew these flights, whether or not Wine Country
7 Helicopters was actually paid. If these flights were conducted
8 simply for good will, and there's an indication that this is an
9 annual event, revenue-producing, so flights could be for simply
10 good will, expectation of further business in subsequent years,
11 and Mr. Ferguson, of course, was getting the benefit of flying
12 the helicopters. The fact that he's a part-owner, or investor
13 in the helicopter, makes no difference. These were not personal
14 friends of his. These were strange individuals. He didn't know
15 who these people were. And it was a series of passengers, so it
16 should have at least raised the question as to, "Who are these
17 people, that I don't know, being loaded on this helicopter?
18 What's going on here?" In my view, as I've indicated, it does
19 appear, and I draw the inference, that Wine Country Helicopters,
20 if, in fact, they reduced the rates, or, in fact, didn't charge,
21 were still operating these flights as Part 135 operations,
22 regardless of whether actual dollars were charged for those
23 flights, and regardless of whether Mr. Ferguson got paid or not.
24 And I accept on the evidence that Mr. Ferguson obtained no
25 monetary recompense.

1 I find, therefore, that upon the preponderance of the
2 reliable and credible and probative evidence, that it does
3 establish that the Respondent, in fact, operated as pilot in
4 command on at least three flights on the morning of June 26th,
5 2005, for Wine Country Helicopters, and helicopter N62HF, in
6 regulatory violation of Sections 135.293(a), and 135.293(b), and
7 further, that he operated in regulatory violation of Section
8 135.299(a), and that by operating these flights under Part 135
9 on Wine Country Helicopters operations specifications, when he,
10 in fact, did not have the requisite training to so operate.

11 And I would also point out that it is sufficient, if
12 one looks at Part 135.1 of that section of the regulations, it
13 specifically indicates that Part 135 prescribes the rules
14 governing, as pertinent here, each person employed or used, and
15 Mr. Ferguson was clearly used, by a certificate holder, in this
16 case, Wine Country Helicopters, when they're operating under
17 this Part, which Wine Country Helicopters was. Further, that
18 under Section 135.3, it is provided that each person operating
19 an aircraft and operations under Part 135, while operating
20 inside the United States, must comply with the applicable rules
21 of Part 135. That includes the Sections of the Regulations
22 cited in the Complaint.

23 I also find, therefore, that by reason of the fact
24 that the Respondent was operating at a time when he was not
25 properly qualified to do so under Part 135, that he was in

1 regulatory violation of Section 91.13(a) of the Regulations, in
2 that he operated in at least a careless manner so as to
3 potentially endanger the life or property of others.

4 I specifically comment on the issue of belief or
5 intent. In this case, the Respondent indicates that he at least
6 spoke with Mr. Lackey to determine whether they were revenue or
7 non-revenue flights. And on the evidence here, Mr. Lackey
8 apparently maintained to him that these were going to be non-
9 revenue flights. Mr. Ferguson, on his testimony not disputed,
10 contends he never collected money himself from passengers, and
11 he never received any payment. His intent to operate in
12 regulatory violation is not an element of the offense. Intent
13 may come in, determining whether or not to accept an immunity
14 under a NASA Reporting System, or to determine whether or not
15 something is either careless or reckless. But that is the only
16 way intent comes in. If there is a violation, whether or not
17 one intended to is not a necessary element, except to establish,
18 as I've indicated, recklessness or acceptance of a waiver of
19 sanction. Nor is belief. Belief may go somewhat to
20 modification of the penalty to be imposed. Here, at least, the
21 Respondent spoke with Mr. Lackey, at least on the evidence in
22 front of me, but I also must take into account that he's an
23 Airline Transport Pilot Certificate holder.

24 In looking at the operation in question, and carrying
25 on at least three flights people that he didn't know should have

1 at least raised some question as to, "Are these really non-
2 revenue flights?" And again, whether or not the people actually
3 paid, is not, again, an essential element. It could be good
4 will, to be expected from future employment
5 with Henry Aviation.

6 So, that being the case, I simply make that
7 observation as to intent or belief. However, I do take it into
8 account as to mitigation on possible sanction. I take into
9 account that the evidence here is at least Mr. Ferguson did
10 inquire of Mr. Lackey. On the evidence in front of me, it
11 appears to me that Mr. Ferguson was perhaps led astray, and
12 relied upon what he was told, to his detriment. He also ignored
13 some other signals, which I think, to a reasonable and prudent
14 pilot, especially a holder of an ATP, should have raise some
15 questions to cause him to make further inquiries.

16 Be that as it may, I will give him the benefit of a
17 small reduction in the sanction to be imposed, and modify the
18 suspension to be imposed from that of 90 days to 85 days. And
19 with that modification, I will affirm the Administrator's Order
20 of Suspension, the Complaint herein.

21

22

ORDER

23

It is, therefore, adjudged and Ordered that:

24

1) The Order of Suspension, the Complaint herein, be

25

and the same hereby is, modified to provide for suspension of 85

1 days, rather than 90 days, of the Respondent's Airline Transport
2 Pilot's Certificate.

3 2) The Order of Suspension, the Complaint herein, as
4 modified, be, the same hereby is affirmed.

5 Entered this seventh day of June of 2007 at San
6 Francisco, California.

7

8

9 DATED & EDITED ON

PATRICK G. GERAGHTY, Judge

10 JULY 2, 2007