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NTSB Order No. EA-4081

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 3rd day of February, 1994

DAVID R. HINSON, Administrator, Federal Aviation Administration, Complainant, v. JOHN EDWARD WAGNER, Respondent.	Docket SE-12188

OPINION AND ORDER

Respondent has appealed from the oral initial decision issued by Administrative Law Judge William R. Mullins at the conclusion of an evidentiary hearing held in this case on March 24, 1992.[1] In that decision, the law judge affirmed an order suspending respondent's airline transport pilot certificate for 90 days based on his having served as required second in command

[1] Attached is an excerpt from the hearing transcript containing the oral initial decision.

of a round-trip flight in a Lear jet allegedly conducted under Part 135 of the Federal Aviation Regulations, in violation of 14 C.F.R. 135.293(a) and (b).[2] On appeal, respondent challenges the law judge's conclusion that the flight was subject to Part 135. He also argues that the law judge should have granted respondent's pre-trial motion to terminate the proceeding or preclude the Administrator's evidence, in its entirety. For the reasons discussed below, respondent's appeal is denied and the initial decision is affirmed.

It is undisputed that on March 7, 1991, respondent served as the required second in command of a Lear Model 24 jet which was chartered by Sun World International to carry some of its business executives from Bermuda Dunes, California, to Bakersfield, California, for a meeting there, and return them to Bermuda Dunes later that day. It is also undisputed that at the time of that flight respondent was not qualified to serve as a pilot in the Lear 24 on flights conducted under Part 135 because he had not passed the required tests and competency checks. The key issue in this case is whether the flight was governed by Part 135, as alleged by the Administrator, or whether, as respondent maintains, it was a flight "for the demonstration of an airplane to prospective customers" and thus, by virtue of section 91.501(b)(3),[3] subject only to Part 91. We agree with the law

[2] The pertinent regulations are reproduced in an appendix to this opinion and order.

[3] Section 91.501 sets forth several types of "[o]perations that may be conducted under [Subpart F of Part 91, pertaining to

judge's conclusion that the preponderance of the evidence indicates the flight was governed by Part 135, not Part 91.

The testimony in this case establishes that, prior to the flight here at issue, Sun World had often contacted Desert Airlines[4] to arrange for charter flights to meet its business travel needs, and that -- except for the substitution of a Lear jet in place of the King Air customarily used for Sun World's flights -- Sun World personnel perceived the flight here at issue to be no different from prior charters. Sun World personnel testified that they were told that the King Air was unavailable for this particular flight due to maintenance problems, but they were assured by Desert Airlines, both on the day of the flight and in subsequent discussions regarding the invoice for the flight, that Sun World was being billed only for the cost of a King Air. After verifying with Desert Airlines that the flight

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Large and Turbine-Powered Multiengine Airplanes] instead of those in parts 121, 129, 135, and 137 . . . when common carriage is not involved," including "[f]lights for the demonstration of an airplane to prospective customers when no charge is made except for those specified in paragraph (d) of this section [e.g., fuel, crew expenses, hangar costs, insurance, etc.]." 14 C.F.R. 91.501(b)(3). The full text of this section is set forth in the appendix.

[4] Although respondent testified that Sun World arranged the flight directly through him, the law judge apparently credited the testimony of the Sun World employee responsible for arranging this flight that she contacted Mr. Yskamp of Desert Airlines. The law judge stated in his initial decision, "Sun World doesn't call Mr. Wagner they call Desert Airlines." (Tr. 113.)

The nature of respondent's relationship with Desert Airlines is not clear from the record. Although respondent submitted into evidence a tax document indicating he was compensated as a "nonemployee," he does not deny that he often piloted charter flights arranged through Desert Airlines.

had indeed been billed at the proper rate, the invoice (for $1658.11) was paid by Sun World.[5]

Respondent testified that, upon learning that a Lear jet was being used for the flight and that he was going to serve as required second in command,[6] he telephoned the owner of the Lear jet to "make sure what was going on." (Tr. 72.) When it became apparent that respondent was not qualified to serve as a required crewmember in the Lear on a Part 135 flight, respondent and the aircraft's owner decided, the night before the flight was to occur, that the flight would be operated under Part 91 and not under Part 135.[7] Specifically, it was determined that respondent might be interested in purchasing the Lear jet for servicing future Sun World charter flights, and that the flight could lawfully be conducted under section 91.501(b)(3), which allows operation of "[f]lights for the demonstration of an airplane to prospective customers when no charge is made except for

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[5] Although the invoice (Exhibit C-1) does not show the date of the flight and shows that the aircraft was a King Air, the passenger list on the invoice correlated with this trip. (Tr. 24, 33-4.) Indeed, subsequent discussions between Sun World and Desert Airlines confirmed that, although Sun World was only billed for the cost of a King Air, this invoice pertained to the trip in the Lear jet.

Respondent claims that he did not intend for Sun World to be billed and he has no knowledge of why Desert Airlines sent the invoice to Sun World.

[6] The record does not reveal who served as pilot in command of the subject flight. Sun World's president, also a passenger on the flight, testified only that the pilot was someone he'd "never seen before." (Tr. 30.)

[7] Both respondent and the Lear's owner indicated that they initially assumed the flight would be conducted under Part 135.

[specified allowable charges]." Significantly, Sun World (the purported "customer") was not informed that the flight was a "sales demonstration" flight, rather than an ordinary charter flight. Sun World personnel testified that the company was not interested in buying a Lear jet, and that they had no idea the flight was a sales demonstration flight.

Respondent's creative interpretation of section 91.501(b)(3) does not comport with the intended scope of that rule. The regulatory history makes clear that the "prospective customers" to whom demonstration of an airplane may be made refers to prospective purchasers of the aircraft, and not, as respondent would have us believe, to prospective purchasers of air service from an owner of the aircraft.[8] However, even if respondent's interpretation of the phrase "prospective customers" were correct, this flight still would not qualify as a flight under section 91.501 because that section applies only "when common carriage is not involved."[9] It is abundantly clear from the

[8] In adopting the current language of section 91.501(b)(3) [then codified as 91.181(b)(3)], the FAA explained that the authorization to conduct demonstration flights for prospective customers under Part 91 -- which had previously been granted to aircraft manufacturers and aircraft sales companies -- "should be equally applicable to the owner of the aircraft regardless of whether he is a manufacturer or aircraft salesman." Therefore, the rule "permits such customer demonstrations by the owner of the airplane as well as the manufacturer, or sales company." 37 Fed. Reg. 14758, 14760 (July 25, 1972). In light of this history, it is clear that the only demonstrations permitted under this rule are demonstrations to prospective purchasers of the aircraft.

[9] See Administrator v. Woolsey, NTSB Order No. EA-3391 at 6 (1991), aff'd, Woolsey v. NTSB, 993 F.2d 516 (5th Cir. 1993) (notwithstanding the respondent's claims that he strived to

record that, but for the substitution of the Lear jet for the usual King Air, this flight was indistinguishable from the other "common carriage" flights chartered by Sun World and conducted under Part 135.[10]

The "common carriage" nature of the flight was not changed simply because respondent might have been interested in purchasing the Lear jet and using it to conduct future flights for Sun World. Nor is it altered by respondent's claim that he did not intend for Sun World to be billed for the flight.[11] Sun World believed it was chartering a flight which would be governed by the stringent safety standards of Part 135. Respondent's clandestine decision to conduct the flight under the more lenient standards of Part 91 did not alter its true nature. Any

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conform to the requirements of section 91.501, the operations were nonetheless governed by Part 135 because they "failed to meet the threshold requirement of not being 'common carriage'").

[10] The elements of common carriage are: 1) a holding out of a willingness to 2) transport persons or property 3) from place to place 4) for compensation. See Administrator v. Woolsey, NTSB Order No. EA-3391 (1991), citing FAA Advisory Circular No. 120-12A, Para. 4. "On-demand" charter flights, such as those made by Desert Air in this case, meet all of these criteria.

[11] It is well-established that "compensation," which is one of the elements of "common carriage," need not be monetary. Intangible rewards such as good will or the expectation of future economic benefits -- both of which would likely have resulted from the flight if Sun World had not been charged -- can also constitute "compensation." See Administrator v. Blackburn, 4 NTSB 409 (1982), aff'd. Blackburn v. NTSB, 709 F.2d 1514 (9th Cir. 1983); Administrator v. Pingel, NTSB Order No. EA-3265, at n. 4 (1991); and Administrator v. Mims, NTSB Order No. EA-3284 (1991). See also Administrator v. Southeast Air, Inc., et al., 4 NTSB 517, 519 (1982) (when customer was not told flight would be free, and reasonably assumed it would be billed, fact that customer was never billed did not remove flights from requirements of Part 135).

forfeiture by Sun World of the protection provided by Part 135 must be made knowingly.[12] In sum, we agree with the law judge that when Sun World chartered the flight here at issue, it could "reasonably expect . . . [to] get what the FAA told them that they would get when they charter an airplane, and that is a fully qualified flight crew to fly this specific airplane." (Tr. 113.)

We turn now to respondent's procedural challenge. He argues that in light of the Administrator's delayed compliance with the law judge's pre-trial order, the law judge should have granted, in full, respondent's motion to terminate the proceeding or to preclude the Administrator's evidence. Although we agree that the Administrator was delinquent in providing respondent with the required discovery responses, we disagree with respondent's assertion that he was prejudiced by the law judge's denial of his motion.

The law judge's pre-trial order directed the parties to, among other things, exchange witness lists and copies of exhibits at least fifteen days prior to trial, i.e., by March 9, 1992. On that day, the Administrator's attorney apparently conveyed to respondent's attorney in a telephone call who she planned to call as witnesses, described at least some of the exhibits the Administrator planned to present, and assured him that follow-up

[12] Cf. Administrator v. Cunningham, 5 NTSB 516, 519 (1985) (purported conversion of flight from Part 135 to Part 91 in mid-flight held invalid because, even though passengers did not object, it was unlikely they had the free will to make a reasoned and informed decision and it was not clear they understood fully the consequences of the conversion).

documents would be sent. However, the list of witnesses and exhibits was not sent until March 11,[13] and copies of the exhibits themselves were not sent until March 20. Respondent apparently received both envelopes on March 23 -- the day before the hearing.

At the hearing, respondent's attorney first stated he had "no problem" with his delayed receipt of the earlier-dated mailing, as that delay was apparently due, in part, to a change in his address. (Tr. 6.) However, he later retreated from this position, stating that, although he had no problem with it at the time, due to the "cumulative effect" of the second late mailing he now also objected to the first. (Tr. 8.) After listening to argument from both parties, the law judge granted respondent's motion in part by precluding from evidence all of the exhibits not previously identified to respondent (i.e., all except the invoice for the flight at issue). The Administrator's attorney had informed respondent during the March 9 phone call that an invoice existed and that it would be forwarded as soon as Sun World provided it to the Administrator. (Tr. 14.)[14]

In our judgment, the law judge did not abuse his discretion

[13] The certificate of service states that it was sent on March 10, but the Administrator's attorney conceded that she apparently missed the mail deadline that day and it was not actually mailed until March 11. (Tr. 13.)

[14] It appears that the invoice was "faxed" to the FAA on March 16, 1991. (See Exhibit C-1.) The Administrator's attorney asserted that she was out of the office until March 19th, and that she sent it to respondent's attorney March 20th. (Tr. 10-11.)

in denying outright respondent's motion to terminate the proceeding and denying in part (as to the invoice), his motion to preclude the Administrator's evidence. While it is true, as respondent points out, that our law judges have the inherent authority to sanction a party's noncompliance with a discovery order when such noncompliance results in prejudice,[15] the law judge apparently concluded that no prejudice occurred in this case so as to justify the draconian measures requested by respondent, and we are not persuaded otherwise. We note that, although respondent claims in his brief that he was deprived of sufficient time to investigate and prepare rebuttal to the Administrator's late-sent evidence (specifically the invoice), he did not pursue the logical avenue of requesting a continuance so that he might do so.

Regarding the first mailing (the witness and exhibit list), it is clear to us that respondent objects to its lateness primarily as a matter of principle, and not because he suffered any prejudice. We do not condone the Administrator's delay in this case, and continue to expect that all parties will timely comply with pre-trial discovery orders. We note, however, that we are constrained by our rules to consider on appeal only whether "any *prejudicial* errors" have occurred. 49 C.F.R.

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[15] Petition of Seiler, 3 NTSB 3327, 3329 (1981).

We note that Seiler involved the Administrator's noncompliance with an order compelling him to comply with the airman's discovery request. In our judgment, noncompliance with such an order is more egregious than noncompliance with a general pre-trial order directing the parties to exchange information, such as was involved in this case.

821.49(d) (emphasis added).

As for the second mailing (the exhibits themselves), only the invoice is relevant at this stage since the law judge granted respondent's motion for preclusion as to the other exhibits. Again, it does not appear to us that respondent suffered any prejudice because of his late receipt of the invoice, the existence of which he was timely made aware of on March 9. Although he claims in his brief that he was unable to investigate the circumstances of its issuance and payment, he does not explain why he could not have pursued those issues as of March 9, or why he did not request a continuance to pursue those issues.

In any event, we do not view the invoice as critical to this case, and we would have reached the same result even if it had been excluded from evidence. Even if Sun World had not been billed at all for this trip, it would nonetheless have been "common carriage" and subject to Part 135. See footnote 11, above.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;

2. The initial decision is affirmed; and

3. The 90-day suspension of respondent's pilot certificate shall commence 30 days after the service of this opinion and order.[16]

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HAMMERSCHMIDT, and HALL, Members of the Board, concurred in the above opinion and order.

[16] For the purpose of this opinion and order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to FAR § 61.19(f).