SERVED: February 18, 2010

NTSB Order No. EA-5507

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 17th day of February, 2010

J. RANDOLPH BABBIT, Administrator, Federal Aviation Administration, Complainant, v. APEL AIR, INC., Respondent.	)	Docket SE-18582

OPINION AND ORDER

Respondent appeals the order of Administrative Law Judge William A. Pope, II, served in this proceeding on September 29, 2009.[1] By that decision, the law judge granted partial summary judgment to the Administrator, affirmed the emergency[2] order

[1] A copy of the law judge's order is attached.

[2] Respondent waived the expedited procedures normally applicable to emergency proceedings.

revoking respondent's air carrier certificate, and terminated the proceeding. We deny respondent's appeal.

The Administrator served the revocation order on April 13, 2009, based on alleged violations of the Federal Aviation Regulations (FARs), 14 C.F.R. §§ 119.5(g),[3] 135.25(a)(2),[4] 135.25(b),[5] 135.145(a) and (d),[6] and 91.13(a),[7] and finding that respondent lacked the qualifications necessary to hold an air carrier certificate. Respondent appealed, and the Administrator filed the revocation order as the complaint. Respondent's answer admitted that it applied for Department of Transportation Economic Authority on or about September 4, 2007, listing a Douglas DC-3 aircraft, N86553; that N86553 was never added to its

[3] Section 119.5(g) prohibits operating as a direct air carrier or commercial operator without, or in violation of, an appropriate certificate and appropriate operations specifications.

[4] Section 135.25(a)(2) prohibits a certificate holder from operating an aircraft under Part 135 unless that aircraft is in an airworthy condition and meets the applicable airworthiness requirements of this chapter, including those relating to identification and equipment.

[5] Section 135.25(b) provides that each certificate holder must have the exclusive use of at least one aircraft that meets the requirements for at least one kind of operation authorized in the certificate holder's operations specifications.

[6] Section 135.145(a) prohibits a certificate holder from operating an aircraft, other than a turbojet, for which two pilots are required by this chapter for operations under VFR, if the certificate holder has not previously proved such an aircraft in operations under Part 135 in at least 25 hours of proving tests acceptable to the Administrator. Section 135.145(d) requires validation testing for certain authorizations to determine that a certificate holder is capable of conducting operations safely and in compliance with applicable regulatory standards.

[7] Section 91.13(a) prohibits operating an aircraft in a careless or reckless manner so as to endanger the life or property of another.

operations specifications; and that, at the time of alleged violative flights between August 7, 2008, and December 18, 2008, the aircraft was not listed on its operations specifications. Respondent further admitted that, at the time of those flights, the aircraft had not undergone validations tests or proving flights, and that respondent was not authorized by the FAA to operate that aircraft under its certificate. Finally, respondent admitted that, at the time of the alleged violative flights, the only aircraft listed on its operations specifications as an aircraft for use in its operations was a Britten-Norman BN2AMkIII Trislander, N650LP.

On July 20, 2009, the Administrator moved for summary judgment, stating that respondent's answer to the complaint established that there are no material issues of fact to be resolved. The Administrator attached an affidavit from Aviation Safety Inspector Radames Naveira, respondent's principal operations inspector, stating that respondent had no aircraft on its operations specifications and that, to Inspector Naveira's knowledge, respondent was no longer conducting operations under Part 135.[8] The Administrator reiterated in the motion for

[8] In December 2008, the BN2AMkIII Trislander, N650LP, the only aircraft on respondent's operations specifications, was reported by Luis A. Perez, the president of Linea Aerea Puertorriquena, Inc., the owner of the aircraft, to have been involved in a fatal accident. On March 5, 2009, because of that report, and because it had been 80 days since the aircraft's last known flight, Inspector Naveira advised respondent that the Trislander should be removed from respondent's air carrier certificate. On March 12, 2009, respondent formally requested that the Trislander be removed from its certificate, and Inspector Naveira did so. Since the date of that removal, respondent has had no aircraft on its operations specifications.

summary judgment that respondent claimed, as an affirmative defense in its answer, that it was not conducting any Part 135 operations with the Douglas DC-3.

In its opposition to summary judgment, respondent contended that it had exclusive use of the DC-3 pursuant to a March 2009 contract with Linea Aerea Puertorriquena, Inc.; that respondent had been in the process of adding the Douglas DC-3 to its operations specifications for over 2 years; and that the FAA requested that respondent remove the Trislander from its operations specifications in order to continue the certification of the DC-3. Respondent indicated that an FAA inspector told respondent that the FAA would not revoke its air carrier certificate while respondent was in the process of adding the Douglas DC-3 to its operations specifications, and respondent contended in its opposition to summary judgment that such a scenario reflects misrepresentation, bad faith, and entrapment on the part of the FAA. Respondent also argued that the Trislander was stolen and that customs agents were in the process of recovering it, but that the "process [] has been kept in confidentiality" in order "to prevent damage of the investigation."[9] Respondent's Mot. In Opp. To Summ. Judgment at para. 7.

The law judge affirmed the Administrator's motion for summary judgment on the charge of violation of § 119.5(g), finding that there were "no genuine issues of material fact

[9] Respondent did not explain in its opposition why the owner of the aircraft earlier reported that the aircraft was involved in a fatal crash in the waters off the Bahamas.

remaining in this case with regard to the violation of" that paragraph, which "prohibits and precludes" respondent from conducting Part 135 operations. Order Granting Partial Summ. Judgment at 3. The law judge dismissed the other alleged violations.

Respondent's appeal brief primarily repeats the arguments in its opposition to summary judgment, but provides further insight into the missing Trislander, indicating that it was stolen during a pre-buy inspection and that the Coast Guard notified the FAA that the aircraft was not involved in an accident. Respondent also indicates that a Customs Enforcement Agent "reported that the aircraft landed in Providenciales [an island in the Turks and Caicos Islands], were [sic] the passengers disembarked, the aircraft was re-fueled and continue [sic] its flight to Cali, Colombia, where it is presently." Respondent's unnumbered App. Br. at 3. Respondent indicates that, although the FAA was notified, "no written report was sent to prevent the purity of the investigation."[10] Id. Respondent also attaches a copy of a March 11, 2009 "exclusive lease for the use of the DC-3," and argues that the lease establishes that respondent has exclusive use of an aircraft for purposes of the FAA's regulations.[11] Id.

[10] Respondent submitted no evidence to establish that the aircraft was stolen, but merely makes these statements in its appeal brief.

[11] The lease is signed by Luis A. Perez Gonzalez in his capacity as president of Linea Aerea Puertorriquena, as lessor, and by Milagros Pietri in her capacity as President of Apelair, Inc., as lessee. The lease indicates that Linea Aerea Puertorriquena is the owner of the Douglas DC-3 aircraft. (It appears, from reviewing the administrative record, that Luis A. Perez Gonzalez, president of Linea Aerea Puertorriquena, and Luis A. Perez, owner

Respondent asserts that it did not conduct any of the flights as alleged in the complaint, but rather that the aircraft was operated in an airworthy condition under Part 91, and not by respondent, but by the owner, Linea Aerea Puertorriquena. Respondent attaches to its appeal brief two affidavits from individuals associated with Avon Products, Inc., who requested those flights. Respondent also presents argument regarding other allegations in the complaint. Based on our resolution of this case, it is not necessary to address these arguments.

Respondent contends that, "the penalty of a revocation is grossly exaggerated," arguing that, "[t]his is a demonstration on how the force and government positions can be used to harm honest people that work for living instead of giving or receiving brides [sic]" (emphasis in original), and requesting that sanction be reduced to a suspension until the DC-3 is added to the operations specifications. Respondent's unnumbered App. Br. at 13-14. Respondent seemingly infers that the delay in the process of adding the DC-3 to the operations specifications is either the fault of the FAA or is a plot by the FAA, and suggests, "[t]hat [if] this case is not seen everyone will become part of this persecution and conspiracy, where the agencies are used with lies to destroy companies that operates [sic] in good faith." Id. at 14.

The Administrator, in a succinct reply brief, argues that, to be qualified to hold a Part 135 operating certificate, the

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(..continued)
of respondent Apel Air, are one and the same. Also, Apel Air is identified in the record variously as Apelair and Apel Air.

applicant must have the exclusive use of at least one aircraft that meets the requirements of at least one kind of operation authorized in the certificate holder's operations specifications, and that the law judge found that respondent did not have any aircraft on its certificate for use in Part 135 operations. The Administrator also points out that the lease attached to the appeal brief is for an indefinite term and can be terminated at any time and, therefore, would not provide exclusive use of the aircraft for at least 6 consecutive months as required by § 135.25(c). The Administrator argues that the failure to have an aircraft on its operations specifications is an issue of qualification to hold an air carrier certificate, and that the appropriate sanction for this violation is revocation, citing Administrator v. Sunworld, NTSB Order No. EA-5357 (2008); Administrator v. Air Illinois, 6 NTSB 436 (1988); and Administrator v. Sun Airlines, 1 NTSB 1859 (1972).

The Board's Rules of Practice provide that a party may move for summary judgment when the pleadings and other supporting documentation establish that there are no material issues of fact to be resolved and that party is entitled to judgment as a matter of law. See 49 C.F.R. § 821.17(d). The record establishes that respondent has had no aircraft authorized for Part 135 operations on its operations specifications since March 2009, that the DC-3 aircraft was never on the operations specifications, and that the only operations conducted with the DC-3 were pilot training and check rides. The record also establishes that the only other aircraft that was on respondent's operations specifications, the

Trislander, was removed in March 2009. These admitted facts establish that respondent is not qualified to hold an air carrier certificate. While respondent may, at some point in the future, be able to demonstrate its qualifications to hold a certificate, either by the certification of the Douglas DC-3 or by leasing another aircraft, this is not an issue before us in this proceeding. We must render an opinion on the record before us, which clearly shows a lack of qualifications. If and when respondent's capabilities and qualifications change, respondent may take up the matter again with the Administrator. On the other hand, if respondent's claims regarding the Administrator's alleged orchestrations to maliciously prevent respondent from adding a suitable aircraft to its operations specifications are actionable, the remedy does not lie in this forum.

Although § 135.25(c) is not alleged as having been violated by respondent, and neither that violation nor any alleged violation of § 135.25(b) is before us, because the law judge dismissed it, we note that § 135.25(c) specifically states, in pertinent part, that, "[f]or the purposes of paragraph (b) of this section [which is an alleged violation], a person has exclusive use of an aircraft if that person has the sole possession, control, and use of it for flight, as owner, or has a written agreement ... in effect when the aircraft is operated, giving the person that possession, control, and use for at least 6 consecutive months." Although these violations are not before us, the language of § 135.25(c) is relevant in that it establishes the requirement for exclusive use of an aircraft for

purposes of § 119.5(g), which is the violation that the law judge affirmed. That paragraph requires that an air carrier may not operate as a direct air carrier or as a commercial operator without appropriate operations specifications. Because respondent does not have appropriate operations specifications, listing at least one aircraft capable of performing at least one of the operations listed in its operations specifications, respondent is not qualified to hold an air carrier certificate.[12] In such a case, revocation is the appropriate sanction.[13]

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;

2. The law judge's order granting partial summary judgment is affirmed; and

3. The Administrator's revocation of respondent's air carrier certificate is affirmed.

HERSMAN, Chairman, HART, Vice Chairman, and SUMWALT, Member of the Board, concurred in the above opinion and order.

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[12] We note that the argument that any of the violative flights were conducted, not by respondent but by Aerea Puertorriquena, belies respondent's contention that it had exclusive use of the aircraft. Although the record is not complete regarding the evidence of whether the alleged violative flights were conducted for compensation under Part 135 or as Part 91 demonstration flights by the owner, such a determination is not relevant for purposes of this appeal, because the law judge dismissed those allegations. (We note, however, that the affidavits submitted by respondent, stating that the Avon customers paid Linea Aerea Puertorriquena for the alleged flights, may be problematic for respondent's agents. The affidavits would seem to indicate that the flights were commercial flights for compensation, and other evidence in the record indicates that the aircraft was in an unairworthy condition for commercial flights.)

[13] Sunworld, supra; Air Illinois, supra; and Sun Airlines, supra.

Served: September 29, 2009

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

ACTING ADMINISTRATOR,
FEDERAL AVIATION ADMINISTRATION,

Complainant,

v. Docket No.: SE-18582
APELAIR, INC.,

Respondent.

ORDER GRANTING PARTIAL SUMMARY JUDGMENT TO THE ADMINISTRATOR, AND TERMINATING THE PROCEEDING

Served: Robert B. Dixon, Esq.
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This matter is set for hearing on October 6 and 7, 2009, in San Juan, P.R.

The Respondent has appealed the Administrator's Emergency Order of Revocation, dated April 13, 2009, which, pursuant to §821.31(a) of the Board's Rules, serves as the complaint, in which the Administrator ordered the revocation of the Respondent's Air Carrier Certificate, No. A6PA539W, because it violated FAR § 119.5(g) (operating as an air carrier without or in violation of an appropriate certificate and appropriate operations specifications); FAR § 135.25(a)(2) (operating an aircraft that is not airworthy); FAR § 135.25(b) (does not have exclusive use of an aircraft that meets the requirements for at least one kind of operation authorized by the holder's operations specifications); FAR § 135.145(a) (operating an aircraft for which two pilots are required for operations under VFR, if it has not previously proved such an aircraft in operations under this part in at least 25 hours of proving tests acceptable to the Administrator); FAR § 135.145(d) (absence of required validation testing); and, FAR § 91.13(a) (operating an aircraft in a careless or reckless manner so as to endanger the life or property of another).[1]

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[1] The complaint, which is lengthy, is incorporated by reference, only.

In its answer to the complaint, the Respondent admitted that it is the holder of the air carrier certificate alleged (paragraph 1); that on or about September 4, 2007, it applied for DOT Economic Authority listing aircraft N86553 (paragraph 2); that aircraft N86553 was never added to its operations specifications (paragraph 13); that at the time of the above-described flights (in paragraph 14, which listed 7 flights in the DC-3, N86553, between August 7, 2008, and December 18, 2008), N86553 was not listed on its operations specifications, it had not undergone validations tests or proving flights, and it was not authorized by the FAA to operate N86553 under its certificate (paragraph 16); and, that at the time of the above described flights (paragraph 14) its operations specifications listed only aircraft N650LP, a BN-2AMK3-2 as an aircraft for use in its operations (paragraph 18). All other allegations of the complaint were denied for lack of information or designated as false.

On July 20, 2009, the Administrator filed a "Motion for Summary Judgment, in which he states that the Respondent exercised bad faith in its answer to paragraph 21 of the complaint, by stating, "denied for lack of information or believed (*sic).*" The Administrator contends that the Respondent should know whether or not it has any aircraft on its operations specifications. An affidavit from FAA Aviation Safety Inspector Naveira says that it has no aircraft on its operations specifications. Attached Exhibit D is comprised of a listing sheet (dated 3/12/09) and an aircraft authorization sheet (dated 3/3/09) from Respondent's Operations Specifications which shows no aircraft authorized to conduct Part 135 operations. Therefore, there is no material question of fact as to whether or not Respondent owns any aircraft for use under Part 135.

Further, the Administrator contends, Respondent claimed in its affirmative defenses that it is not conducting any operations with the DC-3 aircraft (N86553), Respondent's only aircraft, other than conducting pilot training and check rides.

These arguments, according to the Administrator, constitute an admission that the Respondent has terminated Part 135 operations. Therefore, there are no material issues of fact to be resolved, and the Administrator is entitled to summary judgment.

In Respondent's "Motion in Opposition to Summary Judgment, filed on August 3, 2009, the Respondent states that it has an exclusive contract signed in March 2009 for use of the DC-3 aircraft and has been in the process of adding it to its air carrier certificate for two years, to replace the BN-2A MK III aircraft that was removed from its operations specifications on March 12, 2009, at the request of Aviation Safety Inspector Eugene Jester, its PMI. Respondent says that it answered all the Administrator's allegations truthfully and in good faith, but the FAA acted in bad faith and entrapped the Respondent by issuing the Order of Revocation 30 days later. The Respondent says that the only basis raised by the Administrator is paragraph 21 of the complaint, but raises the question of what happens to the other allegations of the complaint. The Respondent contends that this case is distinguishable from the Board's decision in *Administrator v. Sunworld*, NTSB Order No. EA-5357 (2008).

Summary judgment is appropriate where "the pleadings and other supporting documents establish that no material issues of fact exist, and that the party is therefore entitled to judgment as a matter of law." *Administrator v. Kizer,* NTSB Order No. EA-5339 (2007), at page 5; 49 C.F.R. § 821.17(d)."

The FAA records submitted by the Administrator, including the sworn statement of Aviation Safety Inspector Naviera, and attached Exhibit D, described above, show that there are no aircraft authorized for Part 135 operations listed on the Respondent's Operations Specifications, as of 3/3/09 and 3/12/09. Other documents submitted with Inspector Naviera's

sworn statement, include a letter from the Respondent's representative, dated March 12, 2009, (Exhibit C), requesting that aircraft N650LP, be removed from Respondent's operations specifications. Exhibit A, also submitted by the Administrator, is a report of accident involving N650LP on or about December 15, 2008, which resulted in fatalities and apparent destruction of the aircraft in the waters of the Bahamas.

As noted above, in its answer to the complaint, the Respondent admitted that N86553, a DC-3, was never added to its operations specifications, and as late as December 18, 2008, had was not listed on its operations specifications and had not undergone validation testing or proving flights necessary for authorization for use in Part 135 operations. Further, the Respondent makes no claim that N86553 is now listed in its operations specifications, but instead in its Motion to Opposition to Summary Judgment appears to suggest that the FAA is to blame for not acting quickly enough to add N86533 to Respondent's operations specifications.

It is the FAA's overriding responsibility to ensure safe operation of air carriers using safe and appropriate aircraft. It is not the Board's responsibility to second guess the Administrator with respect to how long it should take to determine that an aircraft the Respondent wants to add to its operations specification is suitable for the use the Respondent intends to make of it. Alleged delay by the FAA in processing requests to add aircraft to Respondent's operations specifications is not a defense to the charges in this case.

Whether or not the Respondent has an agreement for the exclusive use of N86533 is unclear from the record before me. However, it is clear, and, in fact, undisputed, that neither N86533 nor any other aircraft is currently listed on the Respondent's operations specifications for use in Part 135 operations. Respondent, further, makes no claim that it has conducted any Part 135 operations using N86533.

FAR Section 119.5(g) states, in pertinent part, that, "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."

Without any aircraft listed on its operations specifications for use in Part 135 operations, the Respondent is clearly prohibited by FAR § 119.5(g) from operating as an air carrier, because it lacks the appropriate operations specifications to operate as a direct air carrier or commercial operator, as required by that section of the FARs.

Therefore, I find that the pleadings and supporting documents establish that no genuine material issues of fact exist in this case with respect to the violation of FAR § 119.5(g), which prohibits and precludes the Respondent from conducting Part 135 operations, as alleged in the complaint.

The Board has held that revocation is the appropriate sanction when the certificate holder is no longer qualified to hold its certificate. *Administrator v. Sunworld, supra; Administrator v. Petercraft Aviation Services, Inc.*, 5 NTSB 2360 (1987); *Administrator v. Air Illinois, Inc.,* 6 NTSB 436 (1988), reversed on other grounds, *sub nom*., *Oceanair of Florida, Inc.,* 888 F.2d 767 (11th Cir. 1989). Here, the Respondent is not qualified to hold its air carrier certificate, because it has no aircraft authorized for use in Part 135 operations listed on its operations specifications.

As there are no genuine issues of material fact remaining in this case with regard to the violation of FAR § 119.5(g), and the appropriate sanction for violation of this FAR is revocation

of Respondent's air carrier certificate, a hearing in this matter and the other alleged violations in the complaint would be pointless. The other alleged violations are DISMISSED. The hearing scheduled for October 6 and 7, 2009, in Hato Rey, PR, is cancelled.

The Administrator's Motion for Summary Judgment on the charge of violation of FAR § 119.5(g) is GRANTED, and the Administrator's Order of Revocation is AFFIRMED.

ORDERED this 29th day of September 2009, at Washington, D.C.

WILLIAM A. POPE, II
Judge