SERVED: August 24, 2010

NTSB Order No. EA-5541

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 23rd day of August, 2010

J. RANDOLPH BABBITT, Administrator, Federal Aviation Administration, Complainant, v. MARVIN RAY GRIMMETT, Respondent.	)	Docket SE-18693

OPINION AND ORDER

Respondent appeals the oral initial decision of Administrative Law Judge Patrick G. Geraghty, issued January 20, 2010, in this matter.[1] By that decision, the law judge affirmed

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

the Administrator's complaint and found that respondent had operated two flights under 14 C.F.R. part 135 instrument flight rules (IFR), although respondent conceded that he had not fulfilled the requirements for part 135 IFR operations. The law judge found, as a consequence, that respondent violated 14 C.F.R. §§ 135.297(a),[2] 135.63(d),[3] and 91.13(a).[4] We deny respondent's appeal.

The Administrator issued the suspension order, which became the complaint in this case, on September 11, 2009. The complaint alleged that respondent operated a King Air, model C-90 aircraft, on April 5, 2009, as pilot-in-command on flights from Long Beach, California, to Cabo San Lucas, Mexico, and from Henderson, Nevada, to Long Beach, California, as part of an air ambulance operation.[5] The complaint further alleged that

[2] Section 135.297(a) provides that no person may serve as a pilot-in-command of an aircraft under IFR unless, since the beginning of the 6th calendar month before that service, that pilot has passed an instrument proficiency check administered by the Administrator or an authorized check pilot.

[3] Section 135.63(d) provides that the pilot-in-command of an aircraft shall carry a copy of the completed load manifest in the aircraft to its destination, and the certificate holder shall keep copies of completed load manifests for at least 30 days at its principal operations base, or at another location used by it and approved by the Administrator.

[4] Section 91.13(a) states that no person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

[5] The air ambulance trip consisted of three flights: (1) Long

respondent, on behalf of Rainbow Air Charter, Inc. (hereinafter "Rainbow Air"), operated the flights "[t]ransporting medical personnel under 14 C.F.R. part 135 ... [u]nder instrument flight rules." Compl. at ¶ 2. At the time of the flights, respondent had not, since the beginning of the 6th calendar month before the flights, passed an appropriate instrument proficiency check. The complaint also alleged that respondent did not carry a completed load manifest in the aircraft to its destination on each of the flights at issue. Based on these allegations, the Administrator ordered suspension of respondent's airline transport pilot (ATP) certificate, and any other airman pilot certificate held by respondent, for a period of 120 days. The law judge affirmed the Administrator's complaint, but reduced the suspension period from 120 days to 100 days.

At the hearing, the Administrator called Inspector Deborah Fallica, a principal operations inspector (POI) from the Long Beach Flight Standards District Office (FSDO), to testify. Inspector Fallica testified that she was the POI assigned to Rainbow Air, respondent's business, which is an air ambulance operator for hire. Inspector Fallica stated that she sent a letter to respondent dated November 18, 2008, regarding the

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(..continued)
Beach, California, to Cabo San Lucas, Mexico; (2) Cabo San Lucas, Mexico, to Henderson, Nevada, the actual patient transport flight; and (3) Henderson, Nevada, to Long Beach, California.

logging of training time during part 135 flights. In the letter, Inspector Fallica provided as follows:

> According to Rainbow Air Charter's General Operations Manual, section T, page 7, medical personnel are not considered crew members. Therefore, all flights conducted with non-crewmember medical personnel on board the aircraft are considered 135 flights. Any flight time acquired with non-crewmember medical personnel on board may not be used to fulfill the flight training hour requirements under Rainbow Air Charter's FAA approved training program.

Exh. A-1. Inspector Fallica testified that she received a response, dated February 2, 2009, to the November 18, 2008 letter from respondent explaining why he did not agree with her letter.[6]

Inspector Fallica further stated that she reviewed several records as part of the investigation of the April 5, 2009 flights. During Inspector Fallica's testimony, the Administrator and respondent stipulated that respondent had not completed, at the time of the flights in question, a current check for part 135 IFR operations. Tr. at 21. Inspector

[6] Respondent's reply stated that he was not paid by the medical personnel for the flights, and that he billed only for the patient flight of the trip. In the reply, he further stated that Mr. Ray Evans, his former POI, confirmed that the flight to pick up a patient and the flight after a patient was dropped off could be operated under part 91. Respondent described an incident that took place in 2004 where he was conducting training on a flight after dropping off a patient, and asserted that the principal maintenance inspector agreed that this was a part 91 flight. He also stated that he believed he had the right to train on any "dead leg" of the trip for which he was not being compensated. Exh. A-2.

Fallica also testified that respondent only completed a load manifest for the flight from Cabo San Lucas to Henderson, the actual patient transport flight, but not for the other flights in the trip. Tr. at 26. Inspector Fallica stated that, according to a Rainbow Air invoice, respondent billed Med-Care International (Med-Care) $14,400 for the April 5, 2009 transport from Cabo San Lucas to Henderson. Exh. A-6. The Flight Plan, Load Manifest and Dispatch Sheet, which came into evidence at the hearing, indicated that the patient transport flight was approximately 4 hours in duration. Exh. A-5. Inspector Fallica also testified that, based upon her own research, the industry rate for operating a C-90 on an air ambulance operation is "as little as $1,000 to $1,600" per hour. Tr. at 33. On cross-examination, Inspector Fallica stated that she considered all three flights of the subject air ambulance trip, (1) Long Beach to Cabo San Lucas, (2) Cabo San Lucas to Henderson, and (3) Henderson to Long Beach, to be part 135 flights because all flights carried passengers on board. Tr. at 43.

The Administrator also called Ms. Karen Hoffman, owner of, and chief flight nurse at, Flight Mates, Inc., to testify. Ms. Hoffman testified that both she and her husband, another flight nurse, were aboard all three flights of the air ambulance operation. The parties had previously stipulated that the flight nurses were passengers, and not crew, on all three

flights. Exh. ALJ-1 at 1. They were hired by Med-Care to provide services for a patient being transported from Cabo San Lucas, Mexico, to Henderson, Nevada; however, Ms. Hoffman and her husband boarded the plane in Long Beach and were returned to Long Beach after the patient was transported. Ms. Hoffman stated that she did not pay respondent anything for the trip. Ms. Hoffman also testified that her company, Flight Mates, Inc., customarily bills for the duration of the entire trip; therefore, she billed for all three flights of the April 5, 2009 trip. Tr. at 66–67. She further testified that, in the past, she had directly hired respondent as an air ambulance operator for $850 to $1,100 per flight hour. Tr. at 69.

In response to the Administrator's case, respondent testified on his own behalf. He stated that Rainbow Air has operated air ambulance flights for hire from Mexico since 2002, and that Rainbow Air charges only for the patient flight of the trip and not the flights to pick up the passenger and to return to the place of origin. Tr. at 80. Respondent further testified that he uses these deadhead flights to conduct training because it is cost-effective. Respondent stated that he has been engaging in this practice since 2002, and that he sought the advice of his POI at that time, Mr. Ray Evans, prior to doing so. Respondent testified that Mr. Evans told him it was acceptable to conduct training on the deadhead flights, even

with flight nurses on board, under part 91. Respondent also stated that another former POI, Mr. Robert Woods, told him this practice was acceptable. Respondent testified that he relied on the advice of his prior POIs and a letter of guidance he received from Inspector Fallica and Nathan Morrissey, assistant POI.[7] Tr. at 93.

Respondent also testified that it was not his normal practice to carry nurses from the United States to Mexico when conducting air ambulance flights. Usually, the nurses would board the flight at the same point of departure as the patient. Respondent stated that, on the occasions when he did transport nurses from the United States, he charged no difference in price. Tr. at 84. He further stated that he did not know at the time of making price quotes whether nurses were going to be transported from the United States. Respondent testified that there was no additional charge for the April 5, 2009 flights for transporting the flight nurses from the United States to Mexico. Respondent also testified that he provided training to co-pilot Anthony Morgan on the flight from Long Beach to Cabo San Lucas

[7] Respondent did not give any details regarding the letter other than to say it did not cover his situation. Tr. at 86. In rebuttal, the Administrator called Inspector Morrissey to testify. Mr. Morrissey stated that he never gave advice to respondent regarding training during deadhead flights. Tr. at 102. The letter referenced by respondent was not entered into evidence as it was apparently dated April 9, 2009, after the incident in question.

and the flight from Henderson to Long Beach, and that he logged the flights as part 91 flights.

At the conclusion of the hearing, the law judge issued an oral initial decision, in which he determined the Administrator had presented persuasive evidence to prove each of the alleged violations. The law judge's decision clearly articulated that the issues at stake were whether the flights from Long Beach, California, to Cabo San Lucas, Mexico, and from Henderson, Nevada, to Long Beach, California, were flights for compensation or hire and required to be conducted under part 135; and whether training can be conducted on part 135 flights when non-crewmembers are on board. The law judge did not find respondent's argument that he relied on the advice of former POIs to be persuasive, as he concluded "the testimony [was] hearsay."[8] Furthermore, the law judge stated that POIs are not authorized to provide legal interpretations, and their opinions are not binding on the Administrator. The law judge concluded respondent conducted the flights for compensation or hire

[8] Initial Decision at 122. We note that hearsay is admissible in administrative adjudications. 49 C.F.R. § 821.38; see, e.g., Administrator v. Branum & Alford, NTSB Order No. EA-4849 at 7 (2000). Although hearsay is admissible at our hearings, a law judge has the discretion to afford it the weight the judge deems appropriate. In this case, while the law judge permitted respondent to testify about the conversations respondent allegedly had with former POIs, the law judge afforded little weight to the testimony.

because the $14,400 charge by respondent included expenses for all three flights of the trip and, at a minimum, respondent had an expectation of receiving future business.[9] The law judge further found a pilot cannot conduct training with non-crewmembers aboard an aircraft being operated under part 135. The law judge concluded respondent violated the regulations, as charged.

On appeal, respondent contends the law judge erred in three respects: concluding that the flights could not be properly conducted under part 91; finding that the flights were for compensation or hire; and determining that respondent's conduct was careless under § 91.13(a). In particular, respondent argues part 135 provides an exemption for ferry or training flights, which allows the flights to be conducted under part 91. Respondent also argues the regulations are ambiguous regarding whether air ambulance positioning flights are required to be conducted under part 135 or part 91; therefore, he asserts the FAA did not provide fair and adequate notice to him. Respondent further contends that the evidence the Administrator provided does not support the conclusion that the $14,400 charge was for

[9] The law judge noted Board precedent dictating that compensation or hire encompasses the receipt of money or goods, goodwill, and expectation of future business; the law judge cited Administrator v. Rountree, 2 NTSB 1712 (1975), in support of his conclusion on this issue. In Rountree, we stated, "it is well settled that there can be compensation where the payment covers only costs and no actual profit is shown." Id. at 1713—14.

all three flights of the trip, and that the law judge erred when he noted that respondent's invoices state, "[w]e appreciate your business and look forward to serving you again," because the Administrator's attorney did not mention this statement. Finally, respondent argues the Administrator did not provide evidence to prove that his behavior was "careless" under § 91.13. The Administrator contests each of respondent's arguments, and urges us to affirm the law judge's decision.[10]

With regard to respondent's argument that the law judge erred in finding that the flights could not be properly conducted under part 91, we first note that we have previously held, when the purpose of a flight is to provide both training and transportation, part 135 may apply.[11] Further, we find respondent's reliance on Administrator v. O'Keefe, 5 NTSB 558 (1985), to be unfounded. Unlike the present case, in O'Keefe, the positioning flights at issue were conducted without any passengers or non-crewmembers aboard the aircraft. In this case, the question of whether the flights could be properly conducted under part 91 turns upon the issue of whether respondent conducted them for compensation or hire.

[10] The Administrator did not appeal the law judge's reduction in sanction.

[11] Administrator v. Excalibur Aviation, NTSB Order No. EA-4465 (1996).

We find respondent's argument that the law judge erred in finding the flights were for compensation or hire unpersuasive. In Administrator v. Clair Aero, Inc., NTSB Order No. EA-5181 at 11 (2005), we stated, "intangible benefits, such as the expectation of future economic benefit or business, are sufficient to render a flight one 'for compensation or hire.'" We also cited several cases in which we had previously recognized this interpretation, including Administrator v. Blackburn, 4 NTSB 409 (1982), which the Ninth Circuit subsequently affirmed.[12] We also note that, in Administrator v. Wagner, NTSB Order No. EA-4081 at 6 n.11 (1994), we stated as follows:

> 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 [the respondent] had not been charged——can also constitute "compensation."

The law judge's conclusion that the $14,400 respondent billed Med-Care included charges for all three flights was based upon sufficient evidence. The law judge heard the testimony of Inspector Fallica that respondent's charge was higher than the average industry rate for a flight of similar length, as well as the testimony of Ms. Hoffman regarding respondent's typical rate. Even had the law judge not concluded that the $14,400 was

[12] Blackburn v. NTSB, 709 F.2d 1514 (9th Cir. 1983).

a charge for all three flights of the trip, we still believe sufficient evidence exists in this record to establish the flights were conducted for compensation or hire, as respondent testified he had an ongoing business relationship with Med-Care. Tr. at 99. Such a finding was appropriate even had the law judge not taken into consideration the fact that each invoice from respondent to Med-Care stated, "[w]e appreciate your business and look forward to serving you again." Respondent also admitted he would not have conducted the flights from Long Beach to Cabo San Lucas and from Henderson to Long Beach with the nurses on board but for the air ambulance operation that he was hired to perform. Tr. at 100. This evidence establishes, at a minimum, that respondent conducted the two positioning flights with the flight nurses on board for the purpose of goodwill with Med-Care, and in expectation of future business. Based on the aforementioned precedent, we reject respondent's argument that the law judge erred in finding the April 5, 2009 flights occurred under part 135.

Similarly, we find respondent's argument that he did not have fair and adequate notice of the meaning of the regulations to be unpersuasive, especially in light of the letter respondent received from Inspector Fallica several months before the flights in question alerting him that part 135 applied to such flights. This letter should have put respondent on notice

regarding his potential regulatory violations; if respondent disagreed with or doubted the opinion of Inspector Fallica, respondent had ample opportunity to seek a legal interpretation from the FAA. Furthermore, respondent provided no evidence, except his own testimony, that previous POIs provided competing opinions; therefore, respondent's assertions regarding this matter are not persuasive.[13] To the extent respondent argues that the regulations are void due to ambiguity, we note we have previously rejected this argument.[14]

Finally, respondent's argument that he did not violate § 91.13(a) because the Administrator did not provide evidence of training maneuvers or potential endangerment is also unavailing. We have long recognized that the Administrator consistently includes a § 91.13(a) charge in complaints alleging a violation of an operational regulation. We have held, "[u]nder the

[13] We note that, even if prior POIs did express contrary opinions, the Administrator is free to pursue the current action. We have previously indicated that an inspector's opinions are not binding on the Administrator. Administrator v. Darby, NTSB Order No. EA-5159 at 25 (2005) ("[w]e disagree with [the] assertion that the … FSDO's view should prevail in this case. The Administrator can, and indeed should, overrule a FSDO's position if she believes it is incorrect or may be inconsistent with safety.").

[14] See Administrator v. Jablon, NTSB Order No. EA-5460 at 11–12 (2009) (stating that, consistent with 49 U.S.C. § 44709(d)(3), we will defer to the Administrator's interpretation of the Federal Aviation Regulations, and that, when a respondent seeks to challenge the *enforceability* of a regulation, he or she must do so under the Administrative Procedure Act).

Administrator's interpretation of [her own] regulations, a charge of carelessness or recklessness under § 91.13(a) is proven when an operational violation has been charged and proven."[15] The fact that respondent conducted the flights without incident does not obviate the fact that the flights were indeed part 135 flights, when respondent was not authorized to conduct such flights. The law judge's conclusion that respondent therefore violated § 91.13(a) was not erroneous, based on the operational violations that the Administrator proved.

Respondent argues that, even if we find he violated the applicable regulations, a further reduction in sanction is appropriate, based on his good-faith belief he was complying with the regulations. The circumstances of this case and the evidence provided indicate a sanction of 100 days is appropriate; the sanction also lies within the applicable range of the Sanction Guidance Table.[16] Additionally, by reducing the Administrator's chosen sanction of 120 days to 100 days, the law judge gave respondent some benefit of the doubt regarding his

[15] Administrator v. Seyb, NTSB Order No. EA-5024 at 4 (2003) (citing Administrator v. Nix, NTSB Order No. EA-5000 at 3 (2002), and Administrator v. Pierce, NTSB Order No. EA-4965 at 1 n.2 (2002)).

[16] The law judge took judicial notice of the FAA Sanction Guidance Table. Tr. at 76.

stated understanding of the regulations. We decline to further reduce the sanction.

Based on the record before us, we find respondent violated 14 C.F.R. §§ 135.297(a), 135.63(d), and 91.13(a), and we affirm the law judge's decision.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;

2. The law judge's decision, including the reduction in sanction from 120 to 100 days, is affirmed; and

3. The 100-day suspension of respondent's ATP certificate, and any other airman pilot certificate held by respondent, shall begin 30 days after the service date indicated on this opinion and order.[17]

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

[17] 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:	*	
	*	
J. RANDOLPH BABBITT,	*	
ADMINISTRATOR,	*	
Federal Aviation Administration,	*	
	*	Docket No.: SE-18693
Complainant,	*	JUDGE GERAGHTY
v.	*	
	*	
MARVIN R. GRIMMETT,	*	
	*	
Respondent.	*	

National Transportation Safety
Board Courtroom
1515 West 190th Street
Courtroom 555
Gardena, California

Wednesday,
January 20, 2010

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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On behalf of the Respondent:

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ORAL INITIAL DECISION AND ORDER

ADMINISTRATIVE LAW JUDGE GERAGHTY: This has been a proceeding before the National Transportation Safety Board on the Appeal of Marvin R. Grimmett, herein, Respondent, from an Order of Suspension, which serves as a Complaint, herein, which seeks to

suspend his Airline Transport Pilot's Certificate for a period of 120 days. The Order of Suspension serves, herein, as a Complaint and was filed on behalf of the Administrator Federal Aviation Administration herein Complainant.

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.

Pursuant to Notice this matter came on for trial on January 20, 2010, in Gardena, California. The Complainant was represented by one of the Staff Counsel, Courtney Adolph, Esquire, of the Western Pacific Region, Federal Aviation Administration. The Respondent was present at all times and was represented by his Counsel, Jonathan S. Morse, Esquire, of Santa Monica, California.

Parties have been afforded full opportunities to offer evidence, to call, examine and cross-examine witnesses, and to make argument in respect of their positions.

In discussing the evidence, I will summarize the evidence only to the highlights which lead to the conclusion I reach herein. I have, however, considered all of the evidence both oral and documentary, and that that I do not specifically mention is viewed by me as not materially affecting the outcome of the decision or essentially to be corroborative.

By pleading it was agreed there was no dispute as to the following paragraphs of allegations in the Complaint: Paragraphs 1, 2, 2-A, 2-C, 2-D, 3, therefore, the matters contained in those

Paragraphs are taken as having been established for purposes of the decision.

There was also a stipulation entered into between the parties which, as pertinent, herein, agreed that there were three separate legs: Long Beach to Cabo San Lucas; Cabo San Lucas back to Henderson, Nevada; and Henderson, Nevada to Long Beach, California. It was further agreed in the stipulation that there were two individuals aboard who were, as it turned out on the evidence, flight nurses, and they were, as stipulated, passengers and not crew members aboard the flight in question. That stipulation also is accepted as establishing those facts for purposes of the Decision.

DISCUSSION

As noted, the Complaint seeks to suspend the Respondent's Airline Transport Pilot's Certificate for a period of 120 days. That is based upon the allegation that -- as a consequence of the facts alleged in the Complaint that the Respondent operated in regulatory violation of the provisions of Sections 135.297(a), and Section 135.63(d), and lastly Section 91.13(a) of the Federal Aviation Regulations. The specific requirements of those Sections will be referred to subsequently where appropriate.

Complainant's evidence was made through six exhibits and the testimony of three witnesses, first of whom was Ms. Deborah Fallica. She is an Aviation Safety Inspector, Principal

Operations Inspector stationed at the Long Beach Flight Standards District Office, which is known as a FSDO, F-S-D-O. She has a Bachelor of Aeronautical Science from Embry-Riddle. She's held various positions in aviation industry. She's been with the FAA about three and a half years, holds an ATP, Commercial Privileges and CFII.

She wrote a letter on her testimony to the Respondent, and the date of that letter is significant. It's dated November 18, 2008, and it is pertinent here. It cautions the Respondent in her position as a POI for Rainbow Air Charter, which is the Respondent's company that conducts air ambulance flights and holds himself out as a charter authorized to conduct such type of flights. And in this letter Ms. Fallica, which was addressed to the Respondent as Director of Operations for Rainbow Air Charter, cautioning him that Rainbow Air Charter GOM, General Operations Manual, says that medical personnel are not considered crew members, and that is already stipulated to, but then goes on to say that any flights or all flights conducting with non-crew member medical personnel onboard the aircraft are considered Part 135 flights. Any flight time acquired by non-crew member medical personnel may not be used to fulfill flight training hour requirements under the charters' approved FAA Training Program or FAA-approved training program.

There was a reply to that letter by the Respondent back to Ms. Fallica. It replies to her letter of November 18, 2008.

However, the response was not made until February 2nd, 2009, and in that letter -- to summarize it -- the Respondent disputes the interpretation given by Ms. Fallica and points out that, according to the Respondent, that he had prior discussions with prior POIs and PMIs which was contrary to that expressed by Ms. Fallica, also talking about a specific flight that occurred in July 13, 2004. So, clearly, there was, on the Respondent's part, a disagreement with Ms. Fallica's position.

There is no indication in the evidence that the Respondent did anything beyond writing this letter back to his current POI, and it's the current POI that he has to operate with not the prior POIs or PMIs. And in any event, neither the POIs or PMIs are authorized or are they in a position, to offer legal interpretations. They can give their opinion, but it's not an interpretation binding upon the Administrator.

There was a dispute. It is not incumbent upon the FAA to seek a legal interpretation to resolve something on the part of the Respondent. It was the Respondent's obligation, if he was going to dispute the opinion of Ms. Fallica, to seek a clarification either from the Regional Counsel of the Western Pacific Region, since that's where he's operating, or from Headquarters Federal Aviation Administration in Washington, D.C. from the legal department. That would have been binding. Yet he did nothing.

So in my view, the affirmative defense that there was a

legal interpretation given by the FAA is not established. Of course, the administrative affirmative defenses must be established by the preponderance of the evidence, and the burden of proof is on the Respondent. That's not carried through here, and I do find in fact that the interpretation by Ms. Fallica is the correct interpretation under Board precedent and under the Federal Aviation Administration, since these flights were in fact flights for compensation or hire, which I will discuss subsequently.

There was a load manifest prepared, but that was for the flight between Cabo San Lucas and back to Henderson carrying the patient. That shows an en route flight time of four hours. So there would have been a flight time from Long Beach down to Cabo San Lucas, even if we say that's another four hours, and then the flight from Long Beach from Henderson back over to Long Beach, which would be under an hour in a C-90. So we have somewhere around eight to nine hours at the most.

The billing for this flight according to the invoice and the Respondent's testimony that's for the -- just for the Cabo San Lucas trip is $14,400. If we say the operation expenses are nine hours for this on the outside, and even at $1,000 an hour of flight time, we're still somewhere over $5,000 in additional expenses. And yes, there are fees for immigration and everything else, but it appears to me that the charge on this invoice from a rational inference also included charges for the trip from

Henderson back over to Long Beach.

A reasonable charge to say $14,000 just for a four-hour trip even adding expenses to me is far in excess of what the industry would tolerate or it would be in a position to engender repeat business. And that's my view of the invoice and the time. I come to the conclusion, therefore, that the invoice for 14,400 was a charge. Respondent intended to cover all of the expenses of the operation of the aircraft for all three legs of this enterprise.

The testimony of Ms. Fallica is also that the load manifest were required for the other two legs in accordance with her expressed opinion that they were Part 135 flights, and at the -- on the load manifest was the one I already had reference to was the one from Long Beach back to Henderson, Nevada, which medical personnel was onboard. However, her testimony, both on direct and cross-examination, was that all legs were in fact legs that were required to be operated under the provisions of Part 135 and, based upon the fact, that medical personnel were aboard all three legs of this trip and, therefore, load manifest were required for the Long Beach/Cabo and the Henderson/Long Beach legs which were accomplished.

And there's no indication that there is any load manifest for either one of those two legs, and I come to that conclusion. Also just observe here as an aside that whether or not the flights were flown in part or all as VFR, it is agreed in

the pleadings that the flights at issue here, which were the two flights from Long Beach to Cabo San Lucas and from Henderson back to Long Beach, were conducted under instrument flight rules. And, therefore, whether or not the actual weather conditions were VFR or IFR, the Respondent was, if it's a Part 135 flight, to conduct that in accordance with all of the requirements for operation under Part 135 of the Federal Aviation Regulations. The actual weather condition is not relevant.

Ms. Karen Hoffman is a flight nurse. She was one of the flight nurse personnel onboard the flights that we are discussing which occurred on April 5 of 2009. And I mentioned the date because the flight is well after the Respondent received the cautionary letter from Ms. Fallica in November of 2008.

So he was on Notice that his current Principal Operations Inspector was not, if in fact -- and the testimony is hearsay; there is nothing to show that any prior POI or PMI actually gave this sort of advice that the Respondent indicates in his letter. That's his statement, but it's hearsay. But in any event, even assuming that prior such information was given by the POI and PMIs, which is -- I've already commented on -- it's not binding on the Administrator.

He knew that his current POI was of the contrary view. The last one would be the one that you should operate under because that's the POI that is supervising your operation. In any event, Ms. Hoffman testified that her charge which was made for

her presence and the presence of apparently her husband, the other flight nurse, was a charge for all legs which would include the legs even after a patient is dropped off. So since they were on board to Long Beach to Cabo, and they were on there from Henderson back to Long Beach, her billing of 1,600-and-some dollars was for the presence of the flight nurses on all three legs, and she reiterated that, of course, on cross-examination.

Respondent testified on his own behalf. He has no prior violation history, has no prior accident history, and I simply observe here that the lack of a prior violation history is not a mitigating circumstance, as the Board has historically held that this is expected that persons will operate in conformity with the requirements of the regulations applicable to the particular operation and, therefore, will not have a prior violation against them.

If you have a prior violation history, that is something taken into account because then you're a repeat offender. The Respondent's testimony is essentially that he only charged for the trip from Cabo San Lucas back to Henderson; that the leg from Long Beach down to Cabo San Lucas, and from Henderson back to Long Beach was conducted under Part 91; and it was in the accordance with what he believes was information he had got from a prior PMI or POI; and that it was a training flight. And his logbook, which was for a Mr. Morgan, which was received, does show that the Respondent did enter into Mr. Morgan's logbook pages and endorsed

it as a training flight under Part 91. So the Respondent was operating in accordance with what he says is the information he had.

Rebuttal testimony by Mr. Morrissey really didn't add much of anything to the case one way or the other. He did not recall whether or not he had written a letter to the Respondent back in 2008 or whether a Mr. Nash had done so. However, he did state that he never gave any advice to the Respondent concerning whether or not training could be conducted when one was carrying passengers aboard the aircraft and not crew members. That to me is the evidence in the case.

The burden of proof in the case, of course, rests with the Complainant and must be carried by a preponderance of the reliable and probative evidence. The issue here, of course, turns on the resolution of two questions, that is, whether or not the trip from Long Beach to Cabo San Lucas, and the one from Henderson Nevada back to Long Beach were in fact flights conducted for compensation or hire, and, therefore, are also flights that were required to be conducted under Part 135 of the Federal Aviation Regulations. And, also, whether or not training can be conducted on Part 135 flights when passengers are aboard the aircraft, as was stipulated here, who are not crew members or required crew members.

As to whether this -- these flights, the two legs that we were concerned with here, the Long Beach/Cabo and

Henderson/Long Beach were for compensation or hire, on the bottom of each one of the invoices under the box in which breakdown of costs are stated, it states, and I quote, "We appreciate your business and look forward to serving you again." Board precedent is that compensation or hire does not restrict itself simply to the receipt of money or goods. Compensation or hire also encompasses goodwill, expectation of receiving future business, Administrator v. Roundtree, a whole line of cases to that effect. So even if they accept the position that no charge was in fact made in dollars, that the invoice submitted by the Respondent to Med-Care International was only for the portion from Cabo San Lucas to Henderson, based upon all the other invoices, which were to the same company, that whole -- that have the same wording on them, it would appear that, if that was being done gratis, it's also with an expectation that, hey, we're doing you a favor; we're not charging you with an expectation of remaining in good graces with an individual as using Rainbow Air Charter. That would be compensation or hire.

Under the evidence in front of me, I do find that it does support as a reasonable conclusion that the Respondent, as a minimum, conducted the two legs at issue here, if it was in fact done gratis, with a reasonable expectation that that would be taken into account by Med-Care International in expectation of solicitation of future business. However, I also come to the conclusion of reasonable inference that based upon the amount

charged that there was in fact a charge for at least operation of the aircraft to cover the expenses of the two legs at issue here, and, therefore, I do find that compensation or hire did occur for the two legs, that is, Long Beach to Cabo San Lucas and from Henderson back to Long Beach.

Since these flights were conducted for compensation or hire, they were required to be conducted under Part 135 of the Federal Aviation Regulations, and I also further find that as passengers were being carried who were not required crew members, under Board precedent, it would, in any event, still be an operation under Part 135 of the Regulations because this was an overall enterprise as the Board has held. These flight nurses were aboard the flight from Long Beach down to Mexico and from Nevada, after they dropped off the patient, back to Long Beach to bring them back to the origin point as part of the overall operation which was to bring this patient back to Henderson, Nevada.

The Board has specifically addressed that. The fact that nurses in Mexico could have been picked up is irrelevant. This is what happened in this instance. These nurses were aboard the aircraft from the beginning as part of the overall operation of getting this patient in Mexico and bringing him back to Nevada. And, therefore, the flight nurses went down to Mexico and from Henderson, Nevada back to Long Beach in the accomplishment of this entire operation, the entire enterprise. And, therefore, it was a

Part 135 operation.

Again, reiterate that if the Respondent had a dispute with his current POI, the obligation was upon him, not the FAA, to get a legal interpretation from legal personnel of the Federal Aviation Administration. But, in any event, I would find that the POI is correct. You can't do training with non-crew members aboard an aircraft that is being operated under Part 135, which this was.

I find, therefore, that the allegation in Paragraph 2D of the Complaint is clearly established on the preponderance of the evidence.

I further find that on the evidence in front of me, that these were Part 135 operations conducted for compensation or hire, and part of the entire enterprise, and for all those reasons, a Part 135 operation. That load manifests were required to be completed for the two legs Long Beach to Cabo San Lucas, and Henderson, Nevada back to Long Beach. That was not done. There's only one load manifest, and that is from Mexico back to Henderson. Therefore, I do find that on a preponderance of the evidence, the allegation in Paragraph 4 of the Complaint is established by a preponderance of the evidence.

It is also charged that the operation conducted by the Respondent was either careless or reckless as to endanger the life or property of another. That type of operation is banned by the provisions of Section 91.13(a) of the regulation, which state that

no person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

The operation here was not reckless, but I do find that it was careless. We're dealing with an Airline Transport Pilot's Certificate who was on notice that, accepting his testimony, there was a dispute between information he had previously received and the information that he was getting from his current POI, and yet he did nothing to resolve that and simply took his own view as the correct one. That was not a smart move.

Potential endangerment is sufficient as long as it is a reasonable nexus between the operation at issue and the potential endangerment. Conducting training while passengers are aboard the aircraft could lead to endangerment of the people being carried because they're not expecting training maneuvers. I don't know what maneuvers were performed, however, we're not just talking about just simple straight and level flying.

Also, on Board precedent if there's a finding of operational violations, the lesser included offense of a violation of Section 91.13(a) is appropriate and, therefore, I do find that there was in fact a violation of Section 91.13(a) of the Regulations, and I so hold.

Section 135.297(a) prohibits operation of a aircraft under Part 135 by an individual under IFR, and it's admitted that these were conducted under instrument flight rules and, therefore, IFR unless there is a competency check within the proceeding six

months. On the testimony of Ms. Fallica, that was not the case here with the Respondent. He was out of time. I believe it expired in March. We're not going back through the notes, but it was expired on the testimony. There is no contradictory evidence and, therefore, I do find that the Respondent, as indicative of Part 135 operations, did in fact on the two legs which he admits were IFR did operate in regulatory violation of Section 135.297(a) of the Regulations.

Section 135.63(d) requires that completed load manifest be accomplished for each leg of an operation under Part 135, and the manifest be kept for 30 days thereafter. The evidence in front of me is clear that for these two legs of operation under Part 135, no flight manifest were completed, and, therefore, it is established upon the preponderance of the evidence that a violation of this section of the Regulations occurred.

Turning then to the issue of sanction. By statute deference is to be shown to the choice of sanction chosen by the Administrator in the absence of a showing that the choice is either arbitrary and capricious or not in accordance with precedent. There's been no such showing here.

Also the affirmative defense that a legal opinion had been issued has not been established by a preponderance of the evidence. The prior POIs and PMIs cannot issue legal opinions. In accordance, the first affirmative defense, as I've already indicated, these were Part 135 flights.

So, therefore, under the evidence in front of me, these conclusions by the Administrator are factual and the sanction, which provides under the Sanction Guidance Table a 90-day sanction for each one of these separate violations, does fall within a range of sanction which has previously been approved by the Board and is in accordance with the Sanction Guidance Table. And as deference has been requested, and there is no showing that the sanctions sought departs from precedent or is arbitrary or capricious, the penalty does appear appropriate.

However, I am going to take into account that we have, although, hearsay, that the Respondent says he had prior information from prior PMIs or POIs contrary to that expressed by Ms. Fallica, and, although, for the reason I've already stated without reiterating, he fell down in not pursuing in getting a clarification which was his obligation, nonetheless, I will reduce the sanction, minimally, to give him some benefit that at least had a question in his mind. It doesn't excuse him not resolving it, and, therefore, I will reduce the sanction from a period of 120 days to that of 100 days, which I think, under all the circumstances, is appropriate. It will satisfy the public interest in their safety in air commerce and act as a deterrent to any others that might be similarly disposed. And, therefore, with that modification, I will affirm the Order of Suspension of the Complaint herein.

ORDER

IT IS ORDERED THAT:

1. The Order of Suspension, the Complaint, herein, be and said hereby is affirmed as issued.

2. The sanction sought, however, is hereby modified to provide for a period of suspension of 100 days instead of 120 days.

3. The Order of Suspension, the Complaint as has been modified for a period of sanction is hereby affirmed.

Entered this 20th day of January 2010 at Gardena, California.

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EDITED ON
FEBRUARY 22, 2010

PATRICK G. GERAGHTY
Administrative Law Judge