

SERVED: July 7, 2011

NTSB Order No. EA-5590

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 7th day of July, 2011

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J. RANDOLPH BABBITT,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-17865RM
v.)	
)	
JOHN WAYNE FERGUSON,)	
)	
Respondent.)	
)	
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OPINION AND ORDER

Respondent appeals the second oral initial decision¹ of Administrative Law Judge Patrick G. Geraghty, in which he affirmed the Administrator's order of suspension of respondent's airline transport pilot (ATP) certificate, based on respondent's

¹ Copies of both initial decisions, which are excerpts from the hearing transcripts, are attached.

alleged violations of 14 C.F.R. §§ 135.293(a) and (b),² 135.299(a),³ and 91.13(a).⁴ We deny respondent's appeal.

We revisit this case after having remanded it to the law judge to provide respondent the opportunity to further cross-examine an FAA witness. In Administrator v. Ferguson, NTSB Order No. EA-5505 at 7-8 (2010), in response to a remand from the Court of Appeals to the Ninth Circuit, we stated as follows:

[W]e recognize that the Ninth Circuit believes that the law judge should have allowed respondent's counsel to question Inspector Conte more fully in this case. As such, we are compelled to remand this case to the law judge so that he may oversee an additional hearing at which respondent's counsel may again cross-examine Inspector Conte.

In this aforementioned opinion, we summarized the case in detail, and believe it necessary only to cite the pertinent facts herein. The Administrator charged respondent with the

² Section 135.293(a) requires regular written or oral tests given by the Administrator or an authorized check pilot on a variety of subjects. Section 135.293(b) requires additional competency checks in a particular aircraft or class of aircraft.

³ 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." The section further requires checks on certain aspects of flight, such as takeoffs, landings, and flights over one route segment.

⁴ 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."

above-cited regulations after respondent operated a Bell helicopter (hereinafter N62HF) on three passenger-carrying flights on June 26, 2005—the day of a NASCAR race—from Napa Airport to the nearby Infineon Raceway. The Administrator presented several witnesses and exhibits to prove respondent operated the helicopter with passengers on behalf of Wine Country Helicopters on the day in question. In particular, the Administrator produced an invoice from Wine Country Helicopters to Henry Aviation for \$8,670; a copy of a check from Henry Aviation for payment to Wine Country Helicopters for \$8,670; photographs of passengers aboard the aircraft, on which the name of Wine Country Helicopters was painted; and a flight maintenance log reflecting the June 26, 2005 flights, among other exhibits. The Administrator also called several witnesses, including Wayne Lackey, the owner and chief pilot of Wine Country Helicopters, who testified that he planned to dedicate use of N62HF to Henry Aviation for the day on June 25 and 26. At the hearing in 2007, the Administrator concluded the case-in-chief by calling FAA Aviation Safety Inspector Richard Conte, who investigated the flights at issue and opined respondent violated the regulations, as charged.

Respondent appealed the law judge's 2007 oral initial decision. In his original appeal, respondent had argued the law

judge erred in not allowing respondent's counsel to cross-examine Inspector Conte concerning how much weight Inspector Conte placed on the different types of evidence he gathered in forming his opinion regarding the alleged violations.

Respondent also argued the law judge erred in not allowing certain other questions on cross-examination of Inspector Conte. In our 2008 opinion and order, NTSB Order No. EA-5360 (2008), we found these arguments concerning the law judge's evidentiary rulings without merit, based principally on our long-held case law that we review law judges' evidentiary rulings under an abuse of discretion standard, provided the respondent can also show he or she suffered prejudice as a result of the rulings at issue. Therefore, we originally affirmed the law judge's decision.

Respondent appealed our order to the Ninth Circuit Court of Appeals. The Ninth Circuit disagreed with our opinion, holding that we abused our discretion in affirming the law judge's initial decision, because Inspector Conte "was the FAA's lone witness as to the revenue-generating nature of the disputed flights," and that the law judge erred in "[curtailing] Ferguson's cross-examination of Conte on so many aspects of his testimony as to this central issue." Ferguson v. FAA, 352 Fed.Appx. 192, 193 (9th Cir. 2009). The Ninth Circuit stated

that the law judge's "reliance on [Inspector Conte's] testimony, particularly as to the contents of the flight logs, makes clear that the error was prejudicial." Id. The court vacated our decision and remanded the case to us. As a result of this remand, we remanded the case to the law judge with direction to hold an additional hearing, to allow respondent to cross-examine Inspector Conte again.

Pursuant to our opinion and order, the law judge held a hearing on January 20, 2011, at which Inspector Conte again testified. The law judge did not accept any additional evidence, other than Inspector Conte's testimony.⁵ At the hearing, respondent's counsel engaged in a lengthy cross-examination, but did not inquire about how Inspector Conte weighed the variety of evidence in determining whether respondent operated N62HF for compensation or hire on June 26, 2005. Inspector Conte confirmed he did not know whether the time on the invoice Wine Country Helicopters sent to Henry

⁵ The law judge's limiting of the hearing occurred by way of a pretrial order in response to respondent's motion for clarification of the law judge's order scheduling the hearing. Respondent's motion sought to compel the Administrator to file discovery responses. The law judge denied the motion on the basis that the Ninth Circuit's opinion, and the Board's opinion on remand, indicated the law judge erred only in curtailing respondent's cross-examination of Inspector Conte. At the hearing, respondent did not object to or mention the law judge's limitation of the scope of the hearing, nor did he attempt to introduce any additional evidence or witnesses.

Aviation, Exh. C-10, reflected time for one, two, three, four, or more helicopters, but that he believed all the time reflected was time charged for operation of N62HF. Inspector Conte stated he did not know how many helicopters Wine Country Helicopters operated on June 26, 2005. Even though he stated he does not believe respondent was an employee of Wine Country Helicopters, Inspector Conte opined that respondent operated N62HF on behalf of Wine Country Helicopters on the day in question, as Mr. Lackey stated such to Inspector Conte. Tr. at 25-26. Inspector Conte also stated it is not necessary for a pilot to know personally all passengers he or she is transporting in order for a flight to be considered operated under 14 C.F.R. part 91.

Following re-direct examination by the Administrator's attorney, counsel for both parties presented closing arguments, after which the law judge issued his oral initial decision. The law judge cited several cases in which the Board held "compensation or hire need not involve a profit. Expectation of future business or goodwill is sufficient." Initial Decision at 60. The law judge cited Administrator v. Rountree, 2 NTSB 1712 (1975), pet. for rev. denied, Rountree v. NTSB, 556 F.2d 588 (9th Cir. 1977), for the notion that, when no common purpose exists concerning a flight (i.e., "where the flight is for a different

purpose of that of the pilot from that of the passengers"), then the flight is for compensation or hire. Id. The law judge further cited Administrator v. Brown, NTSB Order No. EA-3698 (1992), for the proposition that, once the Administrator produces sufficient evidence to show a flight was conducted under part 135, the burden shifts to the respondent to establish the flight was actually one conducted under part 91.

Using the test from Rountree, the law judge found the flights respondent conducted were for compensation or hire. Specifically, the law judge stated:

[I]n this instance ... there were three flights. None of [the passengers] were known to Mr. Ferguson. And there was no common purpose. He was flying them from Napa to the raceway. He was not attending the races. He was dropping these people off. It was their purpose to go to the raceway. There was no common purpose.

Initial Decision at 60. The law judge further found the Administrator presented a solid case showing the June 26, 2005 flights were conducted under part 135. The law judge stated the additional cross-examination of Inspector Conte did not serve to rebut the evidence the Administrator had already provided. The law judge determined respondent presented only his own self-serving letter to Inspector Conte in support of his broad assertion that he did not conduct the flights under part 135. Exh. R-1. The law judge stated that, even though respondent

himself may not have been personally compensated for conducting the flights, he was operating N62HF on behalf of Wine Country Helicopters, which did receive compensation. The law judge stated he was not concerned with whether Wine Country Helicopters was operating an additional helicopter on June 26, 2005, because the morning flights that respondent operated in N62HF were the only flights at issue.⁶ The law judge also quoted an exhibit indicating Mr. Lackey sought to engender goodwill with Henry Aviation by providing transportation services to Henry Aviation for the popular NASCAR race. Initial Decision at 66; Exh. C-10 at 4. As a result of these findings, the law judge upheld his original decision, in which he ordered suspension of respondent's ATP certificate for a period of 85 days.

On appeal, respondent argues the law judge erred in limiting the evidence at the hearing to Inspector Conte's cross-examination after our remand. Respondent also contends the evidence does not support Inspector Conte's opinion that respondent's June 26, 2005 flights were for compensation or hire. Lastly, respondent argues the law judge erred in

⁶ The law judge also elaborated on the evidence by stating the flight maintenance log for N62HF and the invoice from Wine Country Helicopters to Henry Aviation both showed 2.6 hours of charter flight time occurred for morning flights on June 26, 2005.

"inject[ing] [him]self" into the hearing, such that he became an advocate for the Administrator. Appeal Br. at 15. The Administrator contests each of respondent's arguments, and urges us to affirm the law judge's decision.

Respondent's argument concerning the scope of the remand presents an issue of first impression for us. In this unique case, the Ninth Circuit held the law judge committed a prejudicial error when he curtailed the cross-examination of Inspector Conte. The Ninth Circuit's opinion did not address respondent's other arguments on appeal, including his argument that the law judge erred in prohibiting respondent from cross-examining one of the FAA's witnesses, Ms. Bamford, concerning her personal litigation with Mr. Lackey. We believe the court's silence on all other aspects of the case indicates the court determined the only area of the case that warranted reexamination was the law judge's limiting of the cross-examination of Inspector Conte. Based on the court's opinion, we remanded the case to the law judge for the purpose of allowing respondent to cross-examine Inspector Conte again.

In support of his argument that a court's vacatur and remand of a case "place[s] the parties in the position of no trial having taken place at all," respondent cites United States v. Williams, 904 F.2d 7, 8 (7th Cir. 1990). Appeal Br. at 6.

Respondent's reliance on Williams is misplaced, as the Seventh Circuit's statement concerning the effect of a vacated judgment refers to the losing defendant's position in a criminal case concerning a new trial rather than a resentencing hearing.

Similarly, respondent's citation to Lahoti v. Vericheck, 586 F.3d 1190 (9th Cir. 2009) is not helpful, as it does not address the scope of evidence allowed as the result of a remand.

In the case at issue here, the court's brief opinion simply explained why the court believed the law judge's halting of respondent's cross-examination of Inspector Conte was erroneous. We believe the court *vacated* the case because, if further cross-examination of Inspector Conte functioned to impugn any part of the Administrator's case-in-chief, we would be free to reverse our original finding that the Administrator fulfilled the burden of proof. We do not read the court's opinion or use of the term *vacated* to mean the parties must engage in discovery anew and a completely new hearing. As described above, the Administrator presented much evidence at the hearing that occurred in 2007, and the parties exchanged multiple records and a variety of evidence during discovery. Issuing an order directing the parties to undertake such discovery again would be contrary to the language of the Ninth Circuit's opinion, as well as basic tenants of judicial economy.

We further find unpersuasive respondent's argument that Inspector Conte erred in opining the evidence established respondent conducted the June 26, 2005 flights "for compensation or hire." We do not believe Inspector Conte's opinion on this issue was dispositive. The Administrator presented more than enough evidence that the June 26, 2005 flights respondent operated were for compensation or hire, and Inspector Conte's opinion⁷ on this matter, while certainly relevant, was inessential. In June 2005, N62HF was the only helicopter Wine Country had to operate under its part 135 operations specifications, and the flight maintenance log for N62HF indicated that, the morning of June 26, 2005, respondent operated N62HF on round-trip flights from Napa Airport to Infineon Raceway, as charter flights for Henry Aviation. The evidence further indicates Mr. Lackey had committed the use of N62HF to Henry Aviation for the week of June 26, 2005. The Administrator then provided evidence establishing that Wine Country billed Henry Aviation \$8,670 for flights that occurred on June 23-26, 2005, and that Henry Aviation paid the bill. This evidence is compelling.

⁷ We note Inspector Conte was the principal operations inspector for Wine Country Helicopters, and therefore familiar with Wine Country's operating specifications, aircraft, and operations, in general.

Respondent's defense that Mr. Lackey told him the flights were non-revenue operations under part 91 is not persuasive, as we have previously held a respondent's failure to inquire into the status of a flight and its passengers does not serve as an excuse for impermissible operations under part 135.⁸ Furthermore, in his appeal brief, respondent does not attempt to distinguish this case from those the law judge cited concerning the fact that a lack of common purpose indicates a flight is for compensation or hire. In particular, respondent does not articulate what purpose he and his passengers had in flying from Napa Airport to Infineon Raceway. The law judge's analysis in this regard is correct, and consistent with our long-held precedent.⁹ Respondent provides no reason on appeal to disturb this finding.

In addition, the evidence shows Mr. Lackey's provision of respondent's piloting services to Henry Aviation on the day at issue was not only for compensation in the amount of \$8,670, but also was in furtherance of a business relationship with Henry Aviation. We have long held that, for purposes of the

⁸ Administrator v. Croy, NTSB Order No. EA-4306 at 5 (1994).

⁹ In addition to the cases the law judge cited, see Administrator v. Hagerty, NTSB Order No. EA-3549 (1992); Administrator v. Chadwell, NTSB Order No. EA-3699 (1992); Administrator v. Reimer, 3 NTSB 2306 (1980).

applicability of part 135, compensation need not be monetary, but may be in the form of goodwill or solidifying a business relationship.¹⁰ Overall, we believe respondent has failed to show how the law judge's decision on this issue was incorrect.

Finally, respondent appears to argue the law judge was biased in conducting the hearing on January 20, 2011.

Respondent indicates he is disappointed our Rules of Practice do not require recusal of a law judge post-remand, as a remand likely causes the law judge to feel that he should defend his prior opinion. In this regard, we note our Rules of Practice provide as follows:

Disqualification. A law judge shall withdraw from a proceeding if, at any time, he or she deems himself or herself disqualified. If the law judge does not withdraw, and if an appeal from the law judge's initial decision is filed, the Board will, on motion of a party, determine whether the law judge should have withdrawn and, if so, order appropriate relief.

49 C.F.R. § 821.35(c). Respondent did not file a motion to request withdrawal of the law judge in this case.

First, we note that law judges have significant discretion in their oversight of hearings and evaluation of procedural

¹⁰ See, e.g., Administrator v. Wallace, NTSB Order No. EA-5461 (2009) at 16 (quoting Administrator v. Clair Aero, Inc., NTSB Order No. EA-5181 at 11 (2005), in which 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'").

issues.¹¹ With regard to the general argument of bias, we have long held that, in order to disqualify a law judge for bias or prejudice, "the bias or prejudice must stem from an extra-judicial source and result in an opinion on the merits on some basis other than what the judge has learned from his or her participation in the case."¹²

Respondent's appeal brief includes carefully selected excerpts of text from the transcript, in an attempt to establish the law judge had pre-judged the case. We have carefully reviewed the record, and do not agree the law judge was biased. First, the law judge's statements to respondent's counsel concerning his understanding of certain evidence were actually helpful, as they functioned to explain the law judge's thought process during the hearing. Tr. at 18, 24-25. The law judge also allowed, over the Administrator's attorney's objection, questions concerning the testimony at the first hearing. Tr. at 21. Concerning the hypothetical questions that respondent, on

¹¹ See, e.g., Administrator v. Wheeler, NTSB Order No. EA-5208 at 9 (2006) (stating law judges are allowed to inquire on issues they believe require clarification at hearings, and citing 49 C.F.R. § 821.35(b), Administrator v. Reese, NTSB Order No. EA-4896 at n.4 (2001), and Administrator v. Kachalsky, NTSB Order No. EA-4847 at n.4 (2000)).

¹² Administrator v. Lackey, NTSB Order No. EA-5419 at 11 (2008), aff'd, Lackey v. FAA, 386 Fed. Appx. 689, 2010 WL 2781583 (9th Cir. 2010); see also Administrator v. Steel, 5 NTSB 239, 243 n.8 (1985).

appeal, argues the law judge should have allowed, the law judge's remarks concerning the hypothetical scenarios were in response to the Administrator's attorney's objection, and thus were necessary commentary. Tr. at 28-29. Finally, the law judge chastised the Administrator's attorney during redirect, and considerably limited the scope of redirect. Tr. at 49. Overall, we do not agree with respondent that the law judge inserted himself at the hearing such that he became an advocate for the Administrator's case. Even if the law judge appeared impatient at the hearing, respondent still did not show the law judge's conduct at the hearing prejudiced him, as he did not describe any evidence the law judge precluded him from introducing, or any other similar means by which the law judge materially harmed his case. The law judge issued a well-reasoned decision based on the variety of evidence the Administrator provided, and we believe his decision was proper.

ACCORDINGLY, IT IS ORDERED THAT:

The law judge's decision, suspending respondent's ATP certificate for a period of 85 days, is affirmed.

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

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

* * * * *

In the matter of: *

J. RANDOLPH BABBITT, *

ADMINISTRATOR, *

Federal Aviation Administration, *

Complainant, *

v. *

JOHN WAYNE FERGUSON, *

Respondent. *

* * * * *

Docket No.: SE-17865-RM
JUDGE GERAGHTY

Phillip Burton Building
450 Golden Gate Avenue
U.S. Tax Court
Courtroom 2-1350
San Francisco, California 94102

Thursday,
January 20, 2011

The above-entitled matter came on for hearing, pursuant
to notice at 9:25 a.m.

BEFORE: PATRICK G. GERAGHTY
Administrative Law Judge

APPEARANCES:

On behalf of the Complainant:

LISA TOSCANO, ESQ.
Federal Aviation Administration
Office of the Regional Director
P.O. Box 92007
Los Angeles, California 90009-2007

On behalf of the Respondent:

PHILIP L. JOHNSON, ESQ.
Law Offices of Philip L. Johnson
609 Deep Valley Drive, Suite 200
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ORAL INITIAL DECISION AND ORDER

This has been a proceeding on Remand from the Board to conduct additional cross-examination of the Complainant's witness, Inspector Contee, who had testified at the prior proceeding which had been held in this case on June 7th, 2007. And this hearing has so been conducted. Additional cross-examination was obtained from Mr. Contee. And the issue before me, therefore, becomes whether or not anything that was produced today, cross-examination and redirect, ameliorates my view as to the outcome as I expressed it in my original Decision at the conclusion of the Hearing in June of 2007.

Of course, all of the testimony from the other witnesses that testified in that prior proceeding is a matter of record and stands undisputed; it is not to be changed. It's whether or not Mr. Contee's testimony has only ameliorated, changed, or dis-evaluated, if you will, by anything that was brought out today.

Also, I'll take into account what the Board's precedent is with respect to compensation or hire.

So let me first turn to the definition of "compensation or hire," as expressed by the Board in its prior Opinions.

In the case of Administrator v. Motley, which is 2 NTSB

1 178 and 180, where they cite an even earlier case of 16 CAB, and
2 this decision was affirmed 213 F.2d 814, "No actual profit need be
3 shown to constitute compensation or hire." In Administrator v.
4 Roundtree, which is 2 NTSB 1712, which was affirmed at 556 F.2d
5 588, it was stated, "Operation for compensation or hire need not
6 involve a profit. Expectation of future business or goodwill is
7 sufficient." And that was expressly the condition that was at
8 issue in the Roundtree case.

9 Also in the Roundtree case, it was pointed out that
10 where the flight is for a different purpose of that of the pilot
11 from that of the passengers, where there's no common purpose of
12 the flight, it's a flight for compensation or hire. So on the
13 argument that you don't have to know personally the passengers --
14 and, again, that was a broad statement. I don't know what you
15 mean personally -- you don't have to know their history. The fact
16 that you don't know them is not in and of itself -- you can fly
17 people, obviously, Part 91, that come into a fixed-base operator
18 and want a sightseeing ride. That's a Part 91 operation for the
19 needed Commercial Certificate. It's not a Part 135 operation.

20 But in this instance, as I pointed out in my earlier
21 Decision, there were three flights. None of these people were
22 known to Mr. Ferguson. And there was no common purpose. He was
23 flying them from Napa to the raceway. He was not attending the
24 races. He was dropping these people off. It was their purpose to
25 go to the raceway. There was no common purpose.

1 The fact that he didn't know them personally only adds
2 to it, to the fact that there was no common purpose and the fact
3 that he was flying on three flights at least, and maybe four -- on
4 Ms. Bamford's testimony -- strangers. Which should, as I pointed
5 out in my original Decision, raise the question in my view in the
6 Respondent's mind as to what is going on here? I don't know these
7 people. I'm taking them from one place and dropping them off at
8 another. There's no common purpose. Respondent's an Airline
9 Transport Certificate holder. It should have raised a question in
10 his mind, as I discussed in my earlier Decision.

11 Under these facts and circumstances, in my view there
12 was sufficient there to cause a reasonable and prudent holder of
13 an Airline Transport Pilot Certificate to question what type of
14 operation am I engaging in?

15 You might fly a Boy Scout troop. You don't have to know
16 everybody there. But if the Boy Scout troop is being carried for
17 the idea that you might get some kind of publicity or benefit,
18 that could possibly be compensation or hire.

19 And, in any event, as the Board has also pointed out in
20 the case of Administrator v. Brown, which is EA-3698, and you find
21 it at page 6: "The burden to establish a flight as a Part 91
22 shifts to the Respondent when the Complainant produces sufficient
23 evidence to establish a prima facie case that it was a Part 135
24 operation."

25 In my view, the Administrator in this instance, as

1 pointed out in my original decision and not affected in any way by
2 this additional cross-examination established a prima facie case.
3 And I find that this record, including the additional cross-
4 examination, does not rebut that case.

5 The Respondent has offered nothing other than R-1. And
6 the clear testimony of Mr. Contee is that he asked Mr. Ferguson,
7 the Respondent, for any additional information to show that this
8 was something other than a Part 135 operation. And all we have is
9 R-1. That's not sufficient. There's nothing else in front of me
10 in exhibits or testimony.

11 As I pointed out in my original Decision, Part 135.1 of
12 the Regulations requires anyone who's operating under Part 135 or
13 is used in Part 135 must meet the requirements of Part 135. And
14 it is established, as I so found in the earlier Decision, that
15 Mr. Ferguson did not meet those requirements.

16 Of course, the crux issue, as I indicated, is the
17 classification of the operation. Is it Part 135 or was it a Part
18 91 operation as conducted by Mr. Ferguson?

19 The testimony of record in the prior Hearing showed that
20 Ms. Bamford and Mr. Winchester filmed or took pictures of this. I
21 discussed those photographs. It's clear that Mr. Ferguson is
22 operating the helicopter. It's a Wine Country helicopter. It's
23 written on the side. There are people coming in and out of the
24 helicopter. These are people, on the evidence, unknown to the
25 Respondent. It's admittedly, at least, three operations from Napa

1 over to the raceway. There's no common purpose, as I've already
2 indicated. In my view, the evidence by a preponderance is that
3 this was a Part 135 operation.

4 The Respondent did not get paid. There's no question
5 about that. However, he is an investor or part-owner in Wine
6 Country Helicopters.

7 MR. FERGUSON: No, I'm not.

8 ADMINISTRATIVE LAW JUDGE GERAGHTY: That was the
9 evidence in front of me at the prior hearing.

10 So there would be some benefit there if Wine Country
11 Helicopters got paid in dollars or they got paid in good will or
12 something else.

13 There is also a benefit to Mr. Ferguson. Yes, he's an
14 Airline Transport Pilot Certificate holder. He does not have to
15 log flight time if he doesn't want to, other than for currency.
16 If he's going to fly, he has to meet currency requirements. I
17 hold an ATP and if I want to do a night flight, I'd better have my
18 nighttime currency. And if I get that freebies as a result of
19 operating an aircraft for somebody, I can then log it in my
20 logbook and I'm current for night operation. So there is a
21 benefit.

22 And there's a benefit just for experience. And, again,
23 compensation or hire is a broad definition, as I've already
24 indicated by the Board's Decisions. And whatever the
25 Respondent -- the particular Respondent or pilot's belief is as to

1 Part 91 or 135, that is not the sine qua non of whether or not it
2 was compensation or hire. It's what the facts established.

3 And so let's look at what we have here. As I discussed
4 in my prior opinion or decision, flight maintenance logs are
5 required by the Board and looked at by the Board as required
6 documents. They're required to be kept and they're required to be
7 kept -- or expected to be kept scrupulously, because they're
8 relied upon both by the operator and by the FAA, in supervising
9 any particular operation and, possibly, by somebody else who might
10 want to buy the particular equipment.

11 I know Mr. Lackey testified that charter was a default.
12 But as I pointed out in my earlier Decision, this page is dated
13 6/26/2005. If Mr. Lackey printed this out and looked at it and he
14 decided that charter was wrong, it should have been corrected. He
15 put it in as part of the required records. And what does Exhibit
16 C-9, the maintenance log, show? It shows the date, 6/26, it shows
17 the particular helicopter, and it shows the pilot as Mr. Ferguson.
18 And there's no question Mr. Ferguson was operating this helicopter
19 on the morning of June 26th.

20 And it says, "What is the route? From APC-IR back to
21 APC." That is from Napa to the raceway and back to Napa. Again,
22 no common purpose with these people that were being transported.
23 They were deposited at the raceway. Their purpose was to attend
24 the races. Mr. Ferguson was to transport them. Two different
25 things.

1 And when is the operation listed on this? From 8:30 in
2 the morning to 11:30 a.m. The fact that there was another
3 helicopter flying and at least there was -- excuse me, in the
4 afternoon, Mr. Lackey testified, and there's no question on
5 that he flew some flights in the afternoon. What I'm concerned
6 about is Mr. Ferguson's flights in the morning.

7 So this log shows that Mr. Ferguson flew in the morning
8 on that date and that the mission in the records that are required
9 to be kept by Wine Country, it's a charter operation. And on its
10 face, under the facts, no common purpose. It was compensation or
11 hire. It was a Part 135 operation.

12 And that is also, in my view, supported by Exhibit C-10.
13 On page 3 of C-10 -- and, again, this also shows that there was a
14 deal with Henry Aviation from Wine Country Helicopters to operate
15 for Henry Aviation, apparently, from 6/23/2005 down through 6/26.
16 So there's a series of flights. The ones that are significant to
17 me are the ones that are on the bottom on page 3, 6/26: "APC to
18 IR," dash, "A.M. flights, 2.6."

19 That is consistent with C-9, "Charter APC-IR, APC."
20 When? 8:30 a.m. to 11:30 a.m. Those are the flights that
21 Mr. Ferguson flew. Wine Country Helicopters is billing Henry for
22 those flights. And I went through the break-out of the costs.
23 Whatever portion was charged for the morning flights or for the
24 afternoon flights in another helicopter doesn't make any
25 difference. This was a charter flight and Henry was charged for

1 at least 2.6 hours as a charter Part 135.

2 Page 4, to me if you read page 4, Mr. Lackey, on behalf
3 of Wine Country Helicopters, is clearly ingratiating himself with
4 Henry Aviation. He's telling them, "I reduced the flight time by
5 .5. I'm not charging you for that. And I enjoyed working with
6 you." That's quoting from that. "And I appreciate your using it.
7 I was hoping for more time, Thursday, Friday, Sunday, and next
8 year." Clearly there's an expectation here or a hope on his part
9 to engender some good will on the part of Henry Aviation and,
10 maybe, next year when they do the races again, Wine Country
11 Helicopters is going to be used.

12 And, in fact, Mr. Lackey, in this memo to Henry
13 Aviation, says, "Let me know your schedule for the IR race. And
14 if you get back to Napa, we'll have some fun." You know, it all
15 goes, drumming up business in the future. "Let me know if there
16 were any complaints. Anything we can do to make it easier."

17 And then, of course, there was an overall payment to
18 Wine Country Helicopters for \$8,670, some part of which were for
19 the flights on the morning of June 26th, conducted by the
20 Respondent.

21 I've gone through that to point out that the evidence,
22 in my view, clearly satisfies a requirement for the burden of
23 proof on the part of the Complainant. The additional cross-
24 examination by Mr. Contee, in my view, in no way diminishes or
25 devalues his prior testimony given in this matter. And, in fact,

1 based upon that testimony was that he is of the same opinion now
2 as he was in June of 2007, that these, in fact, were Part 135
3 operations. And, based upon Board precedent and the totality of
4 the facts and circumstances, including this additional testimony,
5 I again would resolve any question of credibility and weight of
6 the evidence in favor of the Complainant. These were Part 135
7 operations conducted by the Respondent.

8 I gave credit to Mr. Ferguson's testimony that he, at
9 least, inquired -- on his testimony of Mr. Lackey, and Mr. Lackey
10 may have misled him some. But, as I also pointed out, and I
11 reiterated here, as an ATP holder, flying flights from one point
12 to another, taking people he didn't know and dropping them off
13 there on more than one occasion, should have raised a red flag to
14 a reasonable and prudent ATP that something was amiss with what
15 Mr. Lackey had told him.

16 And, again, his belief, that is, the Respondent's, is
17 not something that would excuse finding these as a Part 135
18 operation, as I've already stated.

19

ORDER

20 I, therefore, on consideration of the entire record,
21 that is, the record made at the prior hearing and the hearing this
22 morning, find, and I so hold, that my prior Decision entered in
23 this case on June 7th, 2007, should be and must be affirmed. And I
24 hereby incorporate by reference that entire Decision and Order as
25 I entered on the conclusion of that Hearing.

1 And to be specific, I, therefore, find that the
2 Respondent did operate in regulatory violation of the Regulations
3 cited in the Complaint and that on the evidence, I would reduce
4 the period of suspension from 90 days to 85 days. That is, I
5 affirm my prior Decision in its entirety and I affirm the
6 Administrator's Complaint, the Order of Suspension, as modified to
7 sanction. And it is so Ordered.

8 Entered this 20th day of January 2011, at San Francisco,
9 California.

10

11

12 Edited on
13 February 15, 2011

PATRICK G. GERAGHTY
Administrative Law Judge

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:

LISA TOSCANO, ESQ.
Federal Aviation Administration
Western Pacific Region
P.O. Box 92007
Los Angeles, CA 90009
(310) 725-7110

On behalf of the Respondent:

PHILIP L. JOHNSON, ESQ.
Shaw, Terhar & LaMontagne LLP
707 Wilshire Boulevard, Suite 3060
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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

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ORDER

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It is, therefore, adjudged and Ordered that:

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

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9 DATED & EDITED ON
10 JULY 2, 2007

PATRICK G. GERAGHTY, Judge