

SERVED: July 2, 1998

NTSB Order No. EA-4679

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 2nd day of July, 1998

JANE F. GARVEY,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-15216
v.)	
)	
FRED MEAD TSOSIE,)	
)	
Respondent.)	
)	

OPINION AND ORDER

The Administrator has appealed from the oral initial decision rendered by Administrative Law Judge William R. Mullins in this proceeding, immediately following a hearing on May 27-28, 1998.¹ By that decision, the law judge, while affirming all but

¹The initial decision is attached. The Administrator has filed a brief on appeal, to which respondent has replied. Respondent has filed two motions to dismiss, contesting the timeliness of the Administrator's notice of appeal and appeal brief. Both documents were timely filed and, thus, both motions are denied.

one of the charges alleged in the Administrator's emergency order of revocation (complaint), reduced the sanction from revocation of respondent's commercial pilot certificate to a 30-day suspension.² The Administrator appeals the dismissal of the 91.13(a) charge and the change in sanction. As discussed below, we will grant the Administrator's appeal, in part.

The complaint read, as pertinent:

1. You are now, and at all times mentioned herein were, the holder of Commercial Pilot Certificate 527842361.
2. On March 11, 1998, you were pilot in command of civil aircraft N2676B, a Cessna 340A aircraft on a round trip passenger-carrying flight from Window Rock, AZ, to Phoenix Sky Harbor International Airport, Phoenix, AZ.
3. You were paid \$650.00 for the flights referenced in paragraph 2, above.
4. On November 24, 1997, you were pilot in command of civil aircraft N2676B, a Cessna 340A aircraft on a

(..continued)

²The Administrator alleged that respondent violated sections 119.5(g), 135.95(b), 135.251(a), 135.255(b), 135.293(a) and (b), 135.299(a), and 91.13(a) of the Federal Aviation Regulations (FAR), 14 C.F.R. Parts 91, 119, and 135. These regulations appear in the Appendix, attached.

The law judge dismissed the section 91.13(a) charge. We note that in the recitation of his order, the law judge omitted (we believe inadvertently) one of the charges. He specifically found no violation of section 91.13(a), found a violation of FAR sections 119.5(g), 135.95(b), 135.251(a), 135.255(b), 135.293(a) and (b), but did not mention 135.299(a). (Transcript (Tr.) at 315.) It appears that this was an oversight since, in the body of the initial decision, he concluded that respondent had violated FAR 119.5(g) and "the different regulatory violations alleged under FAR 135," but stated that he did not find a violation of section 91.13(a). (Tr. at 314.) Therefore, our order will be corrected to include the section 135.299(a) violation.

round trip passenger-carrying flight from Window Rock, AZ, to Phoenix Sky Harbor International Airport, Phoenix, AZ.

5. You were paid \$650.00 for the flights referenced in paragraph 4, above.
6. On December 5, 1997, you were pilot in command of civil aircraft N2676B, a Cessna 340A aircraft on a round trip passenger-carrying flight from Window Rock, AZ, to Phoenix Sky Harbor International Airport, Phoenix, AZ.
7. You were paid \$650.00 for the flights referenced in paragraph 6, above.
8. On December 8, 1997, returning December 10, 1997, you were pilot in command of civil aircraft N2676B, a Cessna 340A aircraft on a round trip passenger-carrying flight from Window Rock, AZ, to Phoenix Sky Harbor International Airport, Phoenix, AZ.
9. You were paid \$350.00 for the flights referenced in paragraph 8, above.
10. You operated the flights referenced above when you had not:
 - a. obtained an appropriate certificate;
 - b. obtain[ed] operations specifications appropriate to each kind of operation conducted;
 - c. been through an appropriate drug testing program;
 - d. been subject to an appropriate alcohol testing program;
 - e. passed a required annual knowledge check given by the Administrator or an approved check airman;
 - f. passed an annual flight competency check given by the Administrator or an approved check airman;
[or]
 - g. passed an annual route check given by the Administrator or an approved check airman.
11. Your intentional and repeated operation of N2676B in flights for compensation or hire when you and your aircraft were not operating under the provisions of an appropriate operating certificate and operations specifications of the Federal Aviation Regulations was careless or reckless so as to endanger the lives and/or property of others.

Respondent admitted paragraphs 1-9, but maintained that he did not hold himself out as a Part 135 operator, that he was reasonable in believing the flights qualified as demonstration flights, and that the amounts charged were permissible.

The law judge found respondent and his witnesses credible. It was established through their testimony that, since 1996, respondent had been trying to interest various officials within the Navajo Nation in "FareShare," an idea of joint ownership of aircraft. He had recently purchased a Cessna 340A and was seeking to sell shares in the aircraft, with each shareholder becoming a registered owner. Over time, respondent made presentations about the concept to Navajo Nation officials and several, including the president of the Navajo Nation, became interested in the idea. The passengers transported on the flights at issue were all officials or employees of the Navajo Nation. At the time of those flights, no deal had been struck.

Respondent testified that he believed the flights legitimately were demonstration flights (as referenced in FAR section 91.501), as he was actively trying to interest the Navajo Nation in his FareShare program, and also believed the flights fell under an exemption granted by the FAA to members of the National Business Aircraft Association (NBAA).³ He thought that the amounts he charged were permissible under the regulations and the exemption. The law judge upheld the Part 135 violations,

³The exemption, among other things, applies only to operations listed in FAR section 91.501(b)(1) through (7) and (9). (Exhibit R-1.)

thereby concluding that the flights were carriage of passengers for compensation and thus, regulated by Part 135. He specifically credited, however, respondent's explanation and found that respondent did not believe he needed a Part 135 certificate to undertake the flights. (Tr. at 302.) The Administrator offers us no persuasive reason to disturb the law judge's credibility findings. Unless arbitrary and capricious, the credibility determinations of the law judge will not be disturbed, as he is in the best position to assess witness demeanor. See Administrator v. Smith, 5 NTSB 1560, 1563 (1987).

The law judge dismissed the section 91.13(a) charge, stating that "there was no suggestion that there was anything unsafe about the operation [of the aircraft]." (Tr. at 312.) With this conclusion, we must disagree. Board precedent is clear that a residual violation of FAR section 91.13(a) is warranted in tandem with the Part 135 violations. See Administrator v. Mardirosian, 7 NTSB 561, 563 (1990), aff'd 962 F.2d 14 (9th Cir. 1992) (residual 91.9 violation (now 91.13(a)) upheld where the respondent had violated sections 135.293(a) and (b) and 135.343); Administrator v. Ferguson, 4 NTSB 488 (1982). In Mardirosian, we noted that the Part 135 regulations identified "were promulgated for the express purpose of imposing a high standard of care on those who act as required crewmembers in commercial operations." Id. Operating an aircraft in Part 135 service without having passed the required flight checks is an inherently careless act

and, as such, supports a violation of section 91.13(a).⁴

Regarding sanction, the law judge changed the revocation to a 30-day suspension. The Administrator argues that the 30-day suspension imposed by the law judge, in lieu of revocation, is inconsistent with law, precedent, and policy.⁵ We agree that the 30-day suspension is not in keeping with precedent; however, we do not believe the evidence supports a finding that respondent lacks the qualifications to hold a commercial pilot certificate.

We are mindful that, under the Civil Penalty Act, the Board is "bound by ... written agency guidance available to the public relating to sanctions to be imposed ... unless the Board finds that any such interpretation is arbitrary, capricious, or otherwise not in accordance with law." 49 U.S.C. § 44709(d). Nonetheless, "it is the Administrator's burden under the [Civil Penalty] Act to clearly articulate the sanction she wishes, and to specifically ask the Board to defer to that determination, supporting her request with evidence showing that the sanction has not been selected arbitrarily, capriciously, or contrary to law." Administrator v. Peacon, NTSB Order No. EA-4607 at 10

⁴The law judge, in his initial decision, despite his dismissal of the section 91.13(a) charge, stated to respondent, "there were several factors ... that would indicate to me that you hadn't done the appropriate research and the study of the requirements to make the kind of flight you believe you were making." (Tr. at 314.) The law judge's comments appear to support a determination that respondent acted in a careless manner.

⁵The Administrator also argues that the flights were not demonstration flights. This argument is, however, irrelevant since the law judge found them to be flights conducted under Part 135.

(1997). The Administrator offers no Board precedent or information from the Sanction Guidance Table to support revocation in the instant case.⁶

To determine the appropriate sanction, a look at precedent is in order. Sanctions in cases involving the unauthorized operation of flights under Part 135 have fluctuated greatly, depending on the specific facts of each case.⁷ In Administrator v. Briggs, NTSB Order No. EA-4502 (1996), the respondent violated sections 119.5(g) and 61.3(c) by operating several helicopter flights for his brother's logging business without charge. He believed, erroneously, as it turns out, that the flights were not subject to the regulations of Part 135. The Administrator sought emergency revocation of the respondent's ATP certificate, the law judge affirmed the violations but reduced the sanction to an eight-month suspension, and the Board reduced the sanction to a 60-day suspension. In evaluating the appropriateness of the sanction, we noted: "The law judge in effect determined that

⁶She cites only to Application of Briggs, NTSB Order No. EA-4614 at 3, n.3 (1998), an Equal Access to Justice Act (EAJA) case where we discussed whether the Administrator was substantially justified in seeking revocation, i.e., whether the Administrator's legal theory was reasonable, not whether revocation was the appropriate sanction in that particular instance. In the underlying case, an emergency order of revocation of the respondent's airline transport pilot (ATP) certificate was modified to a 60-day suspension. Administrator v. Briggs, NTSB Order No. EA-4502 (1996).

⁷See, e.g., Administrator v. Wagner, NTSB Order No. EA-4081 (1994)(90 days); Administrator v. Carter, NTSB Order No. EA-3730 (1992)(30 days); Administrator v. Hunter, NTSB Order No. EA-3721 (1992)(revocation); Administrator v. Brown, NTSB Order No. EA-3698 (1992)(120 days); Administrator v. Mardirosian, 7 NTSB 561, 563 (1990), aff'd 962 F.2d 14 (9th Cir. 1992)(15 days).

respondent not only had no intent to violate the law, he chose a course he believed was permitted by law. Thus, the necessity for a sanction of strong deterrent value, either for him or for others, would appear to be lacking." Id. at 7, footnote omitted. We also took into account the "quasi-business relationship predicated on both familial obligation and economic opportunity" that was involved, while noting that it was "reasonably clear that nonbusiness factors played a significant role in [the respondent's] decisionmaking." Id. at 8.

Analogies may be drawn between Briggs and the instant case. Respondent, while he admitted charging a fee for expenses which he believed were allowed for a demonstration flight, nevertheless operated the flight at a loss. (Tr. at 191-92.) Further, he repeatedly stated that, as a Navajo man, he was strongly motivated to help the Navajo Nation and saw the FareShare program as a step in that direction. Revocation is not warranted in the instant case.

Nevertheless, the 30-day suspension imposed by the law judge is not an appropriate sanction, given all the facts. For example, respondent admitted that, although he mailed in an application for membership in the NBAA, he merely assumed the NBAA exemption was "comprehensive," but "didn't really research it" and had never read it. (Tr. at 165, 212.) As for the amounts charged for the flights, respondent stated that he thought the FAA inspector with whom he had met to discuss what would be involved in obtaining a Part 135 operator's certificate

would have helped him in figuring out what charges were allowed. (Tr. at 184.) Yet, despite this hope, respondent did not call the inspector or go to the FSDO to discuss the matter. We find troubling respondent's inaction and failure to insure that he understood the applicable regulations. Thus, given the totality of the circumstances and applicable precedent, a 90-day suspension is warranted in this case.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's Motions to Dismiss are denied;
2. The Administrator's appeal is granted, in part, as to the 91.13(a) violation; and
3. The initial decision and the emergency order of revocation are affirmed, with a modification to suspend respondent's commercial pilot certificate for a period of 90 days.

HALL, Chairman, FRANCIS, Vice Chairman, HAMMERSCHMIDT, GOGLIA, and BLACK, Members of the Board, concurred in the above opinion and order. FRANCIS, Vice Chairman, and Members HAMMERSCHMIDT and GOGLIA submitted the following concurring statements:

Vice Chairman Francis:

I concur with the decision and increased sanction in this case because of the importance of compliance with the higher standards of Part 135 to ensure safe commercial aviation operations. Despite my concurrence, I note our continued reliance on long-standing Board precedent of the residual nature of a "careless and reckless" violation merely because there is a Part 135 violation. While not prepared to argue against that precedent here, it seems curious to have clear evidence of carelessness - the failure to read and comply with the NBAA exemption under which the pilot claimed to operate – and not rely on it as a basis for violation of FAR 91.13(a).

Member Hammerschmidt:

While I concur in the Board's decision on sanction, I, too, am concerned over the appropriateness of a section 91.13(a) charge, although for somewhat different reasons than those expressed by the Vice Chairman and Member Goglia. I am becoming increasingly persuaded that, notwithstanding our traditional approach to the question, the fact that a flight, or series of flights, was not accomplished pursuant to the enhanced level of safety that Part 135 is designed to provide should not, without more, establish a violation of the "careless or reckless" regulation. For that reason, I am not convinced that we should reverse the law judge's decision on that issue in this case, for there is no showing that the actual flights the respondent operated were not conducted safely.

Member Goglia:

I concur with the increase in the sanction to a 90-day suspension, however, there is no basis for a finding of a violation of Section 91.13(a). There are specific standards for finding a "careless and reckless" violation. To automatically include a violation of Section 91.13(a) as a part of any other regulatory violation, dilutes the independent significance of the "careless and reckless" standard.

§135.293 Initial and recurrent pilot testing requirements

(a) No certificate holder may use a pilot, nor may any person serve as a pilot, unless, since the beginning of the 12th calendar month before that service, that pilot has passed a written or oral test, given by the Administrator or an authorized check pilot, on that pilot's knowledge in the following areas-

(1) The appropriate provisions of parts 61, 91, and 135 of this chapter and the operations specifications and the manual of the certificate holder;

(2) For each type of aircraft to be flown by the pilot, the aircraft powerplant, major components and systems, major appliances, performance and operating limitations, standard and emergency operating procedures, and the contents of the approved Aircraft Flight Manual or equivalent, as applicable;

(3) For each type of aircraft to be flown by the pilot, the method of determining compliance with weight and balance limitations for takeoff, landing and en route operations;

(4) Navigation and use of air navigation aids appropriate to the operation or pilot authorization, including, when applicable, instrument approach facilities and procedures;

(6) Air traffic control procedures, including IFR procedures when applicable;

(6) Meteorology in general, including the principles of frontal systems, icing, fog, thunderstorms, and windshear, and, if appropriate for the operation of the certificate holder, high altitude weather;

(7) Procedures for—

(i) Recognizing and avoiding severe weather situations;

(ii) Escaping from severe weather situations, in case of inadvertent encounters, including low-altitude windshear (except that rotorcraft pilots are not required to be tested on escaping from low-altitude windshear); and

(iii) Operating in or near thunderstorms (including best penetrating altitudes), turbulent air (including clear air turbulence), icing, hail, and other potentially hazardous meteorological conditions; and

(8) New equipment, procedures, or techniques, as appropriate.

(b) No certificate holder may use a pilot, nor may any person serve as a pilot, in any aircraft unless, since the beginning of the 12th calendar month before that service, that pilot has passed a competency check given by the Administrator or an authorized check pilot in that class of aircraft, if single-engine airplane other than turbojet, or that type of aircraft, if helicopter, multiengine airplane, or turbojet airplane, to determine the pilot's competence in Practical skills and techniques in that aircraft or class of aircraft. The extent of the competency check shall be determined by the Administrator or authorized check pilot conducting the competency check. The competency check may include any of the maneuvers and procedures currently required for the original issuance of the particular pilot certificate required for the operations authorizing and appropriate to the category, class and type of aircraft involved. For the purposes of this paragraph, type, as to an airplane, means any one of a group of airplanes determined by the Administrator to have a similar means of propulsion, the same manufacturer, and no significantly different handling or flight characteristics. For the purposes

of this paragraph, type, as to a helicopter, means a basic make and model.

§ 135.299 Pilot-in command: Line checks: Routes and airports.

(a) No 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 flight check shall—

(1) Be given by an approved check pilot or by the Administrator

(2) Consist of at least one flight over one route segment; and

(3) Include takeoffs and landings at one or more representative airports. In addition to the requirements of this paragraph, for a pilot authorized to conduct IFR operations, at least one flight shall be flown over a civil airway, an approved off-airway route, or a portion of either of them.

§ 91.13 Careless or reckless operation.

(a) *Aircraft operations for the purpose of air navigation.* No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

§ 119.5 Certifications, authorizations, and prohibitions.

(g) No person may operate as a direct air carrier or as a commercial operator without, or in violation of, an appropriate certificate and appropriate operation specifications. No person may operate as a direct air carrier or as a commercial operator in violation of any deviation or exemption authority, if issued to that person or that person's representative.

§ 135.95 Airmen: Limitations on use of services.

No certificate holder may use the services of any person as an airman unless the person performing those services-

- (a) Holds an appropriate and current airman certificate; and
- (b) Is qualified, under this chapter, for the operation for which the person is to be used.

§ 135.251 Testing for prohibited drugs.

(a) Each certificate holder or operator shall test each of its employees who performs a function listed in appendix I to part 121 of this chapter in accordance with that appendix.

§135.255 Testing for alcohol.

(b) No certificate holder or operator shall use any person who meets the definition of "covered employee" in appendix J to part 121 to perform a safety-sensitive function listed in that appendix unless such person is subject to testing for alcohol misuse in accordance with the provisions of appendix J.

[Amdt. 13548, 59 FR 7397, Feb. 15, 1994]