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NTSB Order No. EA-4791

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 September, 1999

_____)	
JANE F. GARVEY,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-15284
v.)	
)	
PETER DERKAZARIAN,)	
)	
Respondent.)	
_____)	

OPINION AND ORDER

Respondent has appealed from the oral initial decision of Administrative Law Judge William E. Fowler, Jr., issued on September 2, 1998, following an evidentiary hearing.¹ The law judge, by that decision, affirmed the Administrator's order in part, finding that respondent, among other things, operated an aircraft for hire on three flights when he did not have a

¹The initial decision is attached. Respondent filed a brief on appeal and the Administrator filed a reply.

commercial pilot certificate. He found that respondent received neither compensation nor benefits for the flight, yet nevertheless determined that respondent violated sections 61.118, 135.243(b)(1), 135.293(a) and (b), and 135.299 of the Federal Aviation Regulations (FAR), 14 C.F.R. Parts 61 and 135. He also concluded that the Administrator had not proven a violation of FAR section 91.13(a), 14 C.F.R. Part 91.² Finally, the law judge reduced the sanction from a 365-day suspension of respondent's private pilot certificate to a 180-day suspension.³ As discussed below, we grant respondent's appeal and dismiss the complaint.

On August 30 and 31, 1996, the Friday and Saturday of a Labor Day weekend, respondent operated his aircraft, a Piper Lance, on three passenger-carrying flights between Worcester, Massachusetts and Block Island, Rhode Island. He did this at the request of John Keenan, who at that time was the aviation site manager for Life Flight, an air medical transportation service operated by Rocky Mountain Helicopters from the University of Massachusetts, Worcester.⁴ Life Flight had two helicopters which it operated as air ambulances.

Mr. Keenan learned late Friday afternoon that one of the helicopters had a mechanical problem and was grounded on Block

²The pertinent sections of the regulations are reproduced in the attached appendix.

³The Administrator appealed no aspect of the law judge's decision.

⁴Mr. Keenan is now an FAA Aviation Safety Inspector.

Island. The only witness for the Administrator, he testified that he then tried to arrange air transportation for his mechanic from Worcester to Block Island.⁵ Mr. Keenan "made a couple of calls around," to find someone to make the trip, and intended to employ an air carrier certificated under Part 135 of the FAR. (Transcript (Tr.) at 16-17.) Because it was a holiday weekend, he had difficulty finding anyone available.

Eventually, he called Arthur Arakelian, a longtime acquaintance who he believed held a Part 135 operating certificate.⁶ (Tr. at 18.) Although Mr. Keenan could not remember specifically whether they discussed price for the flight, he stated that he could not imagine taking a flight without getting a price quote in advance. (Tr. at 19.) He then stated that, while Mr. Arakelian said he was not available to conduct the flight himself, he would nevertheless try to get someone to do it. That person turned out to be respondent.⁷

Respondent testified that he was a friend of Arthur Arakelian. He stated that he advised Mr. Keenan in their initial

⁵In addition to the helicopter pilot, Mr. Keenan anticipated that the flight physician and nurse would also need transportation back to Worcester. As it happened, the doctor and nurse returned by other means.

⁶Apparently, although Mr. Arakelian was once a Part 135 operator, he no longer was at the time of these flights.

⁷The recollections of Mr. Keenan and respondent differ over when Mr. Keenan spoke to respondent and who initiated the call. The law judge did not make a specific ruling on that issue and it is not determinative to the outcome of the case. He found that Mr. Keenan "ended up speaking with the respondent." (Tr. at 141.)

telephone conversation that, although he did not do charter flights, he would take the flight.⁸ (Tr. at 92.) He said he also told Mr. Keenan that he would not take any money for the flight.⁹ (Tr. at 93.) On Friday, respondent, operating his own aircraft, flew the mechanic to Block Island and back with the pilot. The next morning, he brought Mr. Keenan and the mechanic to Block Island to repair the helicopter. Mr. Keenan offered to pay respondent for the aircraft fuel, but respondent declined.¹⁰

⁸In describing his conversation with Mr. Keenan, respondent stated, "I told him we do not do charter flights. I said I would just go over there and do it for him." (Tr. at 92.) Respondent was never asked to clarify what he meant by "we." He further stated: "He had asked how much it would be, and I said I wouldn't take any money." (Tr. at 93.) According to respondent, he agreed to help Mr. Keenan as a favor, not only because it was for Life Flight, but because, "if it ever happened to me, I'd want somebody to help me." (Tr. at 103, 106.)

It was revealed through respondent's testimony that his aircraft had once been owned by Mr. Arakelian. (Tr. at 108.) However, no further details of the sale, including when that sale took place, were elicited or offered into evidence.

Respondent testified that he has had a "service station" ("garage") in Worcester for 32 years. (Tr. at 88.) The record contains no additional information about the business other than it is named "Pete's Service." Respondent also stated that he has been flying since 1988 and has known Mr. Arakelian since then. (Tr. at 91.)

⁹Mr. Keenan did not refute this testimony.

¹⁰This is according to respondent's testimony and as found by the law judge. In contrast, Mr. Keenan stated he did not recall making an offer to respondent to pay for the fuel or discussing a flight fee with him, but recalled respondent saying there would be no charge and that he was doing it as a favor, which Mr. Keenan thought meant there would be no fee for ground (waiting) time. (Tr. at 51-54.) Respondent further testified that he has never received any compensation (including payment, fuel, or credits) for these flights. (Tr. at 105.)

Mr. Keenan received an invoice from Mr. Arakelian for \$300 and paid it in November 1996.¹¹ However, as respondent testified and the law judge found, the evidence did not support a finding that respondent was paid or compensated for the flights, or that he expected to be paid or compensated. The law judge further found that the Administrator failed to prove respondent had been reimbursed for his fuel, and concluded that respondent did not "hold himself out for compensation or hire." (Tr. at 139, 142.) Nevertheless, the law judge determined that respondent was the pilot-in-command (PIC) of a flight for hire and that he violated the cited regulations (with the exception of 91.13(a)).

After review of the record and briefs, we find that the law judge's conclusion is inconsistent with his factual findings. We accept the law judge's factual findings, as we see no reason, nor have we been asked, to discount them.

The Administrator argues that the flights were "for hire," given the circumstances under which they were arranged, and respondent should have known they were commercial flights. For support, she cites Administrator v. Croy and Rich, NTSB EA-4306 at 3 (1994). In Croy, the PIC claimed that he was giving the

¹¹The invoice did not have respondent's name on it. (Tr. at 32.) The Administrator offered into evidence a canceled check for \$300, dated November 4, 1996, made out to Arthur Arakelian, and signed by John Keenan. (Exhibit A-1.) The invoice was not produced at hearing. We do not have the benefit of Mr. Arakelian's testimony regarding the flight arrangements and the \$300 payment.

Mr. Keenan testified that he would have been willing to pay between \$700 and \$750 for the flights. (Tr. at 37, 47-48.)

other respondent flight instruction and had no knowledge of any arrangement with the passengers. He failed to ask questions of the passengers or the other respondent to ascertain why the passengers were on the flight. In that case, the Board concluded that he knew or should have known the flight was subject to Part 135.

The evidence in the instant case, on the other hand, does not support a similar finding. Respondent agreed to transport, in his own aircraft, Flight Line's mechanic in order to help the air ambulance service regain the use of one of its two helicopters during a busy holiday weekend. He testified, and the law judge found, that he advised Mr. Keenan the flight would not be a charter and there would be no charge. He did not allow Mr. Keenan to pay for fuel, and the evidence did not show that he was ever reimbursed by anyone for the fuel he utilized. Further, no evidence was introduced to show that respondent expected any return favor from or sought to build goodwill with Mr. Keenan, and there is no evidence to indicate that respondent worked in any way for or with Mr. Arakelian. There is also no evidence to indicate that respondent knew or should have known that Mr. Arakelian planned to charge Mr. Keenan for the flights. In short, the evidence is insufficient to prove that the flights were operated for compensation or hire.¹²

¹²Given our disposition of the case, the "shared expense" argument need not be addressed.

The instant case also may be distinguished from Administrator v. Hagerty, NTSB Order No. EA-3549 (1992), where

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is granted;
2. The initial decision, to the extent that it upheld the Administrator's charges and imposed a 180-day suspension of respondent's private pilot certificate, is reversed; and
3. The Administrator's complaint is dismissed.

HALL, Chairman, FRANCIS, Vice Chairman, HAMMERSCHMIDT, GOGLIA, and BLACK, Members of the Board, concurred in the above opinion and order.

(..continued)

the respondent was employed by the fixed-based operator who arranged and billed for a passenger-carrying flight and that, taken with the other facts of the case, led the Board to conclude that the respondent knew or should have known the "revenue nature of the flight." Even if that respondent thought the flight was to be undertaken for "humanitarian" purposes, we thought he should have verified that with his employer. *Id.* at 4. The facts in the instant case, as determined by the law judge, are notably different. See text, supra.

APPENDIX

§61.118 Private pilot privileges and limitation: Pilot in command.

Except as provided in paragraphs (a) through (d) of this section, a private pilot may not act as Pilot in command of an aircraft that is carrying passengers or property for compensation or hire; nor may he, for compensation or hire, act as pilot in command of an aircraft.

(a) A private pilot may, for compensation or hire, act as pilot in command of an aircraft in connection with any business or employment if the flight is only incidental to that business or employment and the aircraft does not carry passengers or property for compensation or hire.

(b) A private pilot may share the operating expenses of a flight with his passengers.

(c) A private pilot who is an aircraft salesman and who has at least 200 hours of logged flight time may demonstrate an aircraft in flight to a prospective buyer.

(d) A private pilot may act as pilot in command of an aircraft used in a passenger-carrying airlift sponsored by a charitable organization, and for which the passengers make a donation to the organization, if—

(1) The sponsor of the airlift notifies the FAA Flight Standards District Office having jurisdiction over the area concerned, at least 7 days before the flight, and furnishes any essential information that the office requests;

(2) The flight is conducted from a public airport adequate for the aircraft used, or from another airport that has been approved for the operation by an FAA inspector;

(3) He has logged at least 200 hours of flight time;

(4) No acrobatic or formation flights are conducted;

(5) Each aircraft used is certificated in the standard category and complies with the 100-hour inspection requirement of §91.409 of this chapter; and

(6) The flight is made under VFR during the day.

For the purpose of paragraph (d) of this section, a "charitable organization" means an organization listed in Publication No. 78 of the Department of the Treasury called the "Cumulative List of Organizations described in section 170(c) of the Internal Revenue Code of 1954," as amended from time to time by published supplemental lists.

§135.243 Pilot in command qualifications.

(b) Except as provided in paragraph (a) of this section, no certificate holder may use a person, nor may any person serve, as pilot in command of an aircraft under VFR unless that person—

(1) Holds at least a commercial pilot certificate with appropriate category and class ratings and, if required, an appropriate type rating for that aircraft; and

§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.

(b) The pilot who conducts the check shall determine whether the pilot being checked satisfactorily performs the duties and responsibilities of a pilot in command in operations under this part, and shall so certify in the pilot training record.

(c) Each certificate holder shall establish in the manual required by §135.21 a procedure which will ensure that each pilot who has not flown over a route and into an airport within the preceding 90 days will, before beginning the flight, become familiar with all available information required for the safe operation of that flight.

APPENDIX

§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;

(5) 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 authorized 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.