

SERVED: March 24, 2008

NTSB Order No. EA-5374

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 20<sup>th</sup> day of March, 2008

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ROBERT A. STURGELL,		)	
Acting Administrator,		)	
Federal Aviation Administration,		)	
		)	
Complainant,		)	
		)	Docket SE-17547
v.		)	
		)	
TOMMY HUE NIX,		)	
		)	
Respondent.		)	
		)	
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**OPINION AND ORDER**

The Administrator appeals the oral initial decision of Administrative Law Judge William A. Pope, issued on August 23, 2007, at the conclusion of an evidentiary hearing.<sup>1</sup> By that decision, the law judge granted respondent's appeal and dismissed the Administrator's complaint. We remand the case to the law judge.

The July 26, 2005 order of suspension contained, primarily,

<sup>1</sup> A copy of the initial decision, an excerpt from the hearing transcript, is attached.

allegations of violations of the Federal Aviation Regulations regarding air carriers and operations for compensation or hire under Title 14 C.F.R. parts 119 and 135. The order also alleged, however, that respondent operated a flight with three intoxicated passengers on board, in violation of § 91.17(b), which states that a pilot of a civil aircraft may not allow a person who appears to be intoxicated to be carried in the aircraft. The Administrator ordered a 180-day suspension of respondent's commercial pilot certificate.

The law judge found that the evidence did not support the allegations that the flights were performed for compensation or hire, as charged. He found that § 91.17(b) was "inapplicable," and dismissed the Administrator's complaint.

The sole issue on appeal is the law judge's dismissal of the § 91.17(b) charge of carrying intoxicated passengers.<sup>2</sup> At the hearing, the Administrator presented evidence that passengers who boarded respondent's aircraft were intoxicated. Through cross-examination of witnesses and in his own testimony, respondent sought to show that the passengers were not intoxicated or that he was not aware that they were intoxicated.

The Administrator called James Fox, an FAA aviation safety inspector and principal operations inspector, who said that, during a race weekend that included Sunday, September 28, 2003, he participated in a surveillance program at the airport at Talladega, Alabama, which is adjacent to the Talladega Speedway.

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<sup>2</sup> The Administrator does not appeal the law judge's dismissals of allegations as to air carriers and operations for compensation or hire under parts 119 and 135.

He said the FAA categorizes the race as a special aviation event due to the volume of aircraft involved in the short timeframe over the weekend.<sup>3</sup> Mr. Fox testified that, at the end of the race day, he spoke with one of respondent's passengers, Mr. A,<sup>4</sup> who appeared to be "kind of disheveled," and on whom he could smell alcohol. Mr. Fox said that Mr. A did not have trouble speaking, nor did he have slurred speech, but that it was obvious "he had a couple of drinks during the day," based on "just general demeanor ... very happy, loud, boisterous." Mr. Fox also saw another of respondent's passengers, Ms. B,<sup>5</sup> walking to a portable toilet, "staggering a little bit, swaying." Mr. Fox said she "appeared to have difficulty walking. She was swerving. At one point she stumbled, and when she stumbled she bumped up against the rear fender of our car." He said that Mr. A "came up past us and kind of put his arm around her waist and assisted her back to the aircraft." The inspectors asked if Ms. B was okay; Mr. Fox testified that Mr. A said, "She's just []-faced." Mr. Fox said that Ms. B continued to have trouble walking even with the assistance of Mr. A, and that another passenger "kind of grabbed her by the arms and Mr. [A] was behind her and they kind of pushed and pulled her into the aircraft...." Mr. Fox made a notation at the time, "Pax [passengers] drunk." Mr. Fox "thought

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<sup>3</sup> Clay Perkins, the other FAA aviation safety inspector and principal operations inspector to testify at the hearing, said that, "[a]t several points during that day, that airport is the busiest one in the United States."

<sup>4</sup> Name omitted.

<sup>5</sup> Name omitted.

that the passengers that [respondent] just allowed to go aboard his airplane were intoxicated." Mr. Fox said that the "young lady's appearance and demeanor and everything, she was pretty well inebriated." Mr. Fox testified that the regulation "that you can't fly with passengers that are obviously intoxicated" exists "due to the endangerment of other persons on the aircraft." On cross-examination, Mr. Fox admitted that he did not perform "any kind of alcohol test" on Mr. A, that he was not close enough to Ms. B to smell alcohol on her, and that he did not see Ms. B drinking alcohol.

The Administrator called Mr. A, who testified that the passengers did have a few drinks and "had a big time" at the race, which was "the reason we went." He said that he tried to be in a condition to drive a car because he had to drive home. He did not know whether other passengers were in a condition to drive. Mr. A thought that Ms. B "was more wore out from not ever going to a race," and believed she was exhausted after attending the race and walking to and from the racetrack, but that she also might have had a lot to drink. Mr. A did not remember telling anybody that Ms. B was "[ ]-faced," and that it was not a term he would use. Mr. A said that everybody had beer and that some "might not have needed to be driving when we got back." In response to whether he drank on the aircraft coming back from the race, Mr. A said, "I might have had one or two."

Mr. Perkins talked to Mr. A before he boarded the aircraft for the flight home and concluded that Mr. A had consumed some alcoholic beverages, testifying that Mr. A's speech was slurred,

his eyes were glassy and there was alcohol on his breath. Mr. Perkins wrote a note at the time that Mr. A was "drunk as a coot." Mr. Perkins said that Ms. B appeared to be "quite intoxicated," that she was staggering, and that she stumbled into the inspectors' car. Mr. Perkins said that Ms. B had to be held by Mr. A to maintain her balance and she was unable to enter the airplane under her own power, and that one of the passengers pulled her up and another pushed her and got her in the airplane. Mr. Perkins testified that he believed that Mr. A and Ms. B were the only two intoxicated passengers on the airplane. On cross-examination, Mr. Perkins admitted that he did not ask Ms. B if, nor did he investigate whether, Ms. B had any medical problems. Mr. Perkins also did not investigate whether any of the passengers suffered from heat exhaustion that day. Mr. Perkins said that he was not close enough to Ms. B to look in her eyes or smell her breath.

Respondent testified that he did not notice whether anybody on the flight was intoxicated. Also, respondent did not observe anything in particular about Ms. B, but saw her walk to the portable toilet and noticed she was gone for "what seemed to be a considerable amount of time." Respondent said that Mr. A went to see if Ms. B was OK. Respondent testified that he didn't have any passengers who he "would consider intoxicated." He explained that the passengers had walked back to the airplane from the race on a 90 to 100 degree day, and that Ms. B appeared to be hot and exhausted from being out in the sun. Respondent did not smell alcohol on her breath, and he said that Ms. B seemed to be fine

when they deplaned. Respondent did not see Mr. A drink anything on the flight back from Talladega.

The Administrator argues that, regardless of whether the flights were operated for compensation or hire, § 91.17(b) is applicable and, therefore, the law judge erred in ruling that § 91.17(b) was inapplicable. The Administrator further argues that the overwhelming weight of the evidence shows that the passengers were intoxicated. Respondent argues "that all allegations asserted in the Administrator's Complaint rest on the question of whether the flight in question was a 135 Flight." Respondent's Reply Br. at 8. However, respondent provides no support for his position,<sup>6</sup> and devotes the bulk of his reply brief to a discussion of whether the Administrator proved his case by a preponderance of the evidence.

We conclude that the law judge must further explain his ruling. Although there was a great deal of evidence regarding whether certain passengers appeared to be intoxicated,<sup>7</sup> the law judge simply found that § 91.17(b) was inapplicable, without explaining his reasoning. He made some credibility determinations, but did not apply those to the § 91.17(b) allegation. In discussing the part 119 and 135 allegations, the law judge found the FAA inspectors to be credible, but did not

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<sup>6</sup> Respondent simply argues: "If the flight was not a 135 Flight then clearly, all subsequent allegations, including 91.17b have no foundation and must be dismissed. Absent the requisite proof that the flight was a 135 Flight, all other allegations or findings were properly dismissed." Id.

<sup>7</sup> The Administrator argues that the evidence shows that the passengers were "intoxicated." We note, however, that the precise language of § 91.17(b) is "appeared to be intoxicated."

find the testimony of one of the passengers to be credible on those allegations. The law judge's discussion spoke only to the Part 135 offenses, not the intoxication issue. We therefore remand this case to the law judge for findings and conclusions as to the § 91.17(b) allegation and a more expansive explanation of his legal ruling thereon.

**ACCORDINGLY, IT IS ORDERED THAT:**

This case is remanded to the law judge for further findings and explanation consistent with this opinion and order.

ROSENKER, Chairman, SUMWALT, Vice Chairman, and HERSMAN, HIGGINS, and CHEALANDER, 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: \*

MARION C. BLAKEY, \*  
ADMINISTRATOR, \*  
Federal Aviation Administration, \*

Complainant, \*

v. \* Docket No.: SE-17547

JUDGE POPE

TOMMY H. NIX, \*

Respondent. \*

\* \* \* \* \*

McCoy Federal Building  
100 West Capitol Street  
Conference Room 501-B, Fifth Floor  
Jackson, Mississippi

Thursday,  
August 23, 2007

The above-entitled matter came on for hearing, pursuant  
to Notice, at 9:40 a.m.

BEFORE: WILLIAM A. POPE, II  
Administrative Law Judge

APPEARANCES:On behalf of the Administrator:

RUSSELL B. CHRISTENSEN, ESQ., Regional Counsel  
JILL SAUSSER, ESQ.  
Federal Aviation Administration  
Southern Region  
P.O. Box 20636  
Atlanta, Georgia 30320

On behalf of the Respondent:

WAYNE E. FERRELL, JR., ESQ.  
P.O. Box 24448  
Jackson, Mississippi 39225

1 ORAL INITIAL DECISION AND ORDER

2 ADMINISTRATIVE LAW JUDGE POPE: The following is my Oral  
3 Initial Decision in the Matter of the Administrator Federal  
4 Aviation Administration, Complainant, versus Tommy Hugh Nix, the  
5 Respondent, Docket Number SE-17547. This is a proceeding under  
6 the provisions of the 49 U.S.C. Section 44709, formerly Section  
7 609 of the Federal Aviation Administration Act and Provisions of  
8 the Rules of Practice in Air Safety Proceedings of the National  
9 Transportation Safety Board. Tommy Hugh Nix, the Respondent, has  
10 appealed the Administrator's Order of Suspension, dated July 26,  
11 2005, which, pursuant to Section 821.31(a) of the Board's rules,  
12 serves as the Complaint in which the Administrator ordered the  
13 suspension of any and all commercial pilot certificates held by  
14 him, including commercial pilot Certificate Number (omitted), for  
15 180 days because he had allegedly violated F.A.R. Section 91.17(b)  
16 and Section 91.5(g), Section 119.5(k), Section 119.33(a)(2),  
17 Section 119.33(b)(2), Section 135.7 and Section 135.63(d). In his  
18 answer to the Complaint, the Respondent admitted paragraphs 1 and  
19 4 of the Complaint, portions of paragraph 5 and 7 and denied all  
20 other allegations in the Complaint. The Respondent admitted that  
21 he is the holder of Pilot Certificate Number (omitted) and that at  
22 all times material Marleen Nix was and still is his wife. He  
23 admitted so much at Paragraph 4, as alleges that he operated Nix  
24 Flying Service. And so much at Paragraph 7 as alleged that he was  
25 the pilot-in-command of a flight to and from Talladega airport on

1 September 28, 2003. He denied that, one, at all times material,  
2 he was not authorized to conduct passenger-carrying flights for  
3 compensation or hire; two, that at all times material, civil  
4 aircraft N57543, a Piper Navajo. The Piper PA was registered to  
5 his wife, Marleen Nix, through the Nix Flying Service which was  
6 located at 20 Airport Road, Belmont, Mississippi; four, that Nix  
7 Flying Services advertises and holds out as providing pilot  
8 services; five, that the flight that ended at Talladega, Alabama  
9 airport at approximately 9:00 a.m. and departed from the  
10 Talladega, Alabama airport at approximately 6:00 p.m. carrying six  
11 passengers onboard; six, that he and/or Nix Flying Service was  
12 paid for operating those flights; seven, that at the conclusion of  
13 the flight that landed at Talladega, Alabama airport on September  
14 28, 2003, a representative of the Administrator conducted a ramp  
15 inspection of N57543; eight, that at all times material he was  
16 unable to provide a copy of the completed load manifest for the  
17 flight that landed at Talladega, Alabama airport on 9:00 a.m.,  
18 September 28, 2003; nine, that prior to the flight, on return he  
19 allowed three intoxicated passengers to board N57543; ten, that he  
20 operated the flight with the three intoxicated passengers onboard.  
21 I note for the record that this makes the third time the  
22 Respondent has appeared before me on a complaint charging him with  
23 violations of the Federal Aviation Regulations. In both of the  
24 preceding cases, I found that the Respondent had violated Federal  
25 Aviation Regulations and affirmed the Administrator in substantial

1 part. See Administrator v. Nix, NTSB Order Number EA-4825, 2000,  
2 and Administrator v. Nix, NTSB Order Number EA-5000, 2002.  
3 Further, in a related proceeding I denied an application by  
4 Mr. Nix for recovery in EAJA fees, Administrator v. Nix, NTSB EA-  
5 4930, 2002. This matter is unrelated factually to any of the  
6 proceeding matters and will stand or fall solely on the discourse  
7 adduced by the parties at this hearing.

#### 8 SUMMARY OF THE EVIDENCE

9 The Administrator called three witnesses during their case in  
10 chief. The first witness was ASI James Philip Fox, Principal  
11 Operations Inspector, who testified that on September 28, 2003, he  
12 and ASI (Aviation Safety Inspector) Clay Perkins were on duty  
13 performing surveillance at the Talladega, Alabama airport during  
14 an automobile racing weekend at a nearby track. On race weekends,  
15 as many as 600 aircraft a day land at the one-runway airport. On  
16 race weekends the tower is manned by air traffic controllers, but  
17 at other times it is an uncontrolled airport. Inspector Fox said  
18 that prior to that weekend, he had never heard of the Respondent  
19 or Nix Flying Service, and was not familiar with Nix's Piper  
20 Navajo aircraft. While seated in their car, about 75 feet away,  
21 they saw a Navajo land and park on the grass strip in the light  
22 twin parking area. It appeared to be heavily loaded, so they  
23 performed a ramp inspection, but the ramp inspection did not  
24 establish that the aircraft was overloaded. They saw the  
25 Respondent and six passengers, one of whom appeared to be a

1 teenager, exit from the Navajo. The Respondent had been seated in  
2 the left front seat. Inspector Fox asked passenger Allen Caldwell  
3 if he owned or had chartered the aircraft. Allen Caldwell said he  
4 had arranged for the aircraft through Nix Flying Service and he  
5 had paid for the flight with a \$1,000 check to Nix Flying Service.  
6 He said he had used the service before, and that Tommy Nix would  
7 fly you anywhere you wanted to go. Inspector Fox said he  
8 attempted to contact Allen Caldwell by telephone several days  
9 later using the telephone number Allen Caldwell had given him, but  
10 Allen Caldwell did not return messages he left. Inspector Fox  
11 said he and Inspector Perkins suspected the flight was a Part 135  
12 charter. He asked the Respondent for a weight and balance  
13 document, which the Respondent said he did not have. He asked the  
14 Respondent to do one, but he was unable to do so. And Inspector  
15 Fox completed one using the data in the aircraft flight manual,  
16 not the factory weight and balance form which was supposed to be,  
17 but was not, onboard the aircraft. Inspector Perkins did not find  
18 that the aircraft was overweight. Respondent told the Inspector  
19 Fox that Allen Caldwell had leased the aircraft from Marleen Nix  
20 and had paid him to be the pilot. He asked the Respondent for a  
21 copy of the lease, which the Respondent was not able to produce,  
22 saying his wife had it. He asked if the Respondent would fax the  
23 lease the next Monday and the Respondent said he would, but did  
24 not. From the aircraft registration, Inspector Fox recorded that  
25 Marleen Nix d/b/a Aircraft Leasing was the owner of the aircraft.

1 About noon or 1:00 p.m., Inspector Fox saw the Respondent in  
2 the pilot pavilion, apparently having lunch. That afternoon at  
3 about 6:00 p.m., he saw the passengers milling about the Piper  
4 Navajo. He wanted Inspector Perkins to be a witness to what  
5 passenger Allen Caldwell had said, and in Inspector Perkins's  
6 presence asked Allen Caldwell how the flight had been arranged.  
7 Allen Caldwell said it was through Nix Flying Service, and that he  
8 would fly you anywhere, anytime. Inspector Fox asked Allen  
9 Caldwell if he had paid for the flight, and Allen Caldwell said he  
10 had paid \$1,000. Inspector Fox said Allen Caldwell smelled of  
11 alcohol, and it was obvious he had been drinking. His demeanor  
12 was happy, loud and boisterous. He saw a female passenger leave  
13 the area of the aircraft, headed for the Port-A-Potty. She was  
14 staggering and bumped into the Inspector's car. She appeared to  
15 have difficulty walking, swayed and stumbled. On the way back,  
16 Allen Caldwell assisted her to stay upright. He and another  
17 passenger had to push and pull her into the aircraft. The  
18 Respondent was in the left front seat, and the aircraft's engines  
19 started, and then taxied out to the runway joining a queue to  
20 depart. That was at about 19:05 local time. A-13(a) and (b),  
21 which were stipulated into evidence, are bank statements and  
22 deposit slips from AmSouth Bank for the account of Tommy Nix d/b/a  
23 Nix Flying Service. 14(a), (b) and (c) are monthly statements from  
24 Spirit Bank for the account of Marleen Nix d/b/a Aircraft Leasing  
25 for July and October of 2003, and deposit slips for the account

1 for those same months. The account addresses on A-13 and A-14 are  
2 the same. A-15 are monthly bank statements from First American  
3 National Bank for the account of Nix Flying Service. The address  
4 for this account is different from that on the accounts in A-13  
5 and A-14. Counsel for the Administrator acknowledged that he  
6 could not point to any entry in the bank records showing a payment  
7 of \$1,000 for the flight on September 28, 2003. On cross-  
8 examination, Inspector Fox said there is no evidence of  
9 compensation other than what Allen Caldwell and the Respondent  
10 said.

11 Allen Caldwell was the next witness called by the  
12 Administrator. He admitted having lunch during the hearing with  
13 the Respondent and his attorney, but said he did not recall what  
14 was said, although he heard them discussing the case. He said he  
15 has known the Respondent for five to eight years and also knows  
16 the Respondent's son, Terry, who is also a pilot. He said he has  
17 flown with each of them a couple of times, twice with Terry Nix to  
18 the races and once with Tommy Nix to Gulf Shores, Alabama, and on  
19 the flight at issue here. He said he had flown with Tommy Nix to  
20 Court the first morning of this hearing. He said he does not know  
21 a lot about the business of Terry or Tommy Nix.

22 They flew from the Belmont, Mississippi airport where the  
23 Respondent keeps his aircraft. He know the Respondent is a pilot  
24 of some sort. He said he does not know who owns the aircraft he  
25 flew in. He said on other occasions he flew to the automobile

1 races with other men, including one named Moore who arranged with  
2 flights with Terry Nix as the pilot. He said that after the  
3 flights he was asked to pay a share of the expenses, usually about  
4 \$150. Moore said that they were getting together money to pay for  
5 this flight. Regarding the flight on September 28, 2003, Moore  
6 was not going to the races that weekend, so Allen Caldwell asked  
7 Terry Nix about getting up a flight. Later, Terry Nix said he  
8 could do that. Allen Caldwell gathered together three friends who  
9 wanted to go. He saw Marleen Nix at the hangar and asked where  
10 Terry was. She said she would contact him and confirm that they  
11 were going on the flight, which Terry Nix later did. There was no  
12 discussion with either Terry Nix or Marleen Nix about the cost of  
13 the flight. The other passengers were Dana Holland, Joel Harget,  
14 Jessie Shotz, and Scott Allen Caldwell, who is Allen Caldwell's  
15 adult son.

16 Allen Caldwell said that Terry Nix did not make the flight to  
17 Talladega, but that Tommy Nix was the pilot and he brought his 13-  
18 year old grandson. Allen Caldwell said he did not recall talking  
19 to anyone that he knew was with the FAA at the Talladega Airport  
20 either after they arrived or before they left. He said he  
21 received a couple of telephone call messages later from someone  
22 who said he was with the FAA but he thought it was a prank and he  
23 did not return the calls. He said he moderated his drinking about  
24 midway through the race because he had to drive home from the  
25 airport in Belmont. He said he may have had several drinks on the

1 airplane on the way back to the Belmont airport. He said he had  
2 flown to the races a couple of times before, possibly with Terry  
3 Nix. He said he would see Terry Nix from time to time at stores.  
4 He said he was surprised he did not have to pay for the flight on  
5 September 28, 2003. He admitted that his telephone number is the  
6 same number as in Inspector Fox's notes. On cross-examination, he  
7 said he made arrangements for the flight only with Terry Nix and  
8 made none with Tommy or Marleen Nix. He said he made no payment  
9 to anyone for the flight. He said he was never asked to pay for  
10 the flight. He said he did not recalling telling anyone from the  
11 FAA that he had paid for the flights with a \$1,000 check. Allen  
12 Caldwell denied that he was intoxicated. He does not remember if  
13 Dana Holland, the female on the flight, was intoxicated. He  
14 denied telling the Inspector that she was shit-faced. He said he  
15 did not see anyone on the aircraft that was a drunk as a coot.

16 On redirect, he said that he had expected that he and the  
17 other four passengers he had arranged would pay \$150 each for the  
18 flight. He did not offer to pay anything and was not asked to pay  
19 anything.

20 Aviation Safety Inspector Clay Perkins, also a Principal  
21 Operations Inspector, testified next. He said he was present with  
22 Inspector Fox during the ramp inspection of Respondent's aircraft  
23 at the Talladega Airport on September 28, 2003 about 9:00 a.m. in  
24 the morning. He said that prior to that morning, he did not know  
25 the Respondent or Marleen Nix, or who owned the aircraft. After

1 the passengers deplaned, he asked the Respondent to see the  
2 current aircraft manual and the approved weight and balance form  
3 from the factory. He said that the Respondent had the first but  
4 not the latter. The Respondent said he had done a weight and  
5 balance before departure, but he did not have it with him. At  
6 that time, Inspector Fox took over the matter of the weight and  
7 balance form from Inspector Perkins, and Inspector Perkins began a  
8 walk-around of the aircraft, examining it for 10 to 15 minutes.  
9 He said Nix was having difficulty completing the weight and  
10 balance form. The Respondent told him that his wife had leased  
11 the aircraft, and that he is paid separately for flying it.

12 The Respondent was asked for a copy of the lease, but he said  
13 he did not have it. He was asked for his pilot's certificate, the  
14 aircraft airworthiness certificate, and the registration, which he  
15 did produce. The aircraft was registered to Marleen Nix, who the  
16 Respondent said was his wife. Inspector Perkins said he told the  
17 Respondent he thought the operation of the aircraft was close to  
18 Part 135 and he could be in violation. The Respondent denied it  
19 and left. He said he later saw the Respondent having lunch at the  
20 pavilion around noon to one o'clock. Around 6:00 p.m., the  
21 passengers came straggling back to the aircraft. He and Inspector  
22 Fox saw Allen Caldwell come out of the Port-A-Potty, and spoke to  
23 him. Fox asked Allen Caldwell if he had paid for the flight. He  
24 said he had paid by check and always used Tommy to take him to  
25 Talladega, and would use him again. He said that Tommy would take

1 him anywhere he wanted to go. Inspector Perkins said that Allen  
2 Caldwell's speech was slurred, his eyes were glassy and he smelled  
3 of alcohol. Inspector Perkins said he made notes of his  
4 conversation with Allen Caldwell. He recorded that Inspector Fox  
5 had asked Allen Caldwell if he paid for the trip and Allen  
6 Caldwell said, "Yes, \$1,000. Inspector Perkins said he asked if  
7 that was a round-trip, and Allen Caldwell said yes.

8 Inspector Perkins acknowledged that he wrote "Allen Caldwell"  
9 in his notes and that he said, "Drunk as a coot." After the  
10 conversation, Allen Caldwell returned to the aircraft. Inspector  
11 Perkins said he saw a young woman leave the vicinity of the  
12 aircraft, go to the restroom behind their car. She staggered,  
13 stumbled into the Inspector's car and appeared to be intoxicated.  
14 Allen Caldwell came to the Port-A-Potty and escorted the woman to  
15 the aircraft. She had to be steadied by Allen Caldwell to  
16 maintain her balance and had to be helped into the aircraft. He  
17 said he later tried to reach Allen Caldwell by telephone but could  
18 not.

19 The Respondent testified in his own defense. He said that in  
20 September of 2003, he was employed by a company named LHT as a  
21 pilot and he was also a mechanic. Prior to that, he had sold the  
22 property owned by Nix Flying Service located at the Belmont  
23 airport, 20 Airport Road, Belmont, Mississippi to his son Terry  
24 Wayne Nix. The property and equipment included a T-hangar, a  
25 maintenance facility and assorted equipment including fuel trucks.

1 He said his wife still rented space in the hangar. He said that  
2 in September 2003, his wife still owned her aircraft leasing  
3 business but the only aircraft she owned was the Piper Navajo,  
4 which was kept in her son's hangar and was for sale.

5 Subsequently, she closed her business and moved the small  
6 building she used as an office to her home property. The  
7 Respondent said that at the airport facility, his son operated  
8 T.W. Nix Flying Service, which was an FBO and ran a small  
9 aircraft. He obtained the aircraft he rented from Aircraft Rental  
10 & Leasing, a company owned by his wife. Her company did not own  
11 any aircraft. His son was not in the business of renting large  
12 aircraft with pilots. The Respondent said he was not in business  
13 with his son. He said his wife did not rent or lease aircraft to  
14 her son, Terry, or to his wife. The Respondent said he still  
15 operates Nix Flying Service from another address but it is only in  
16 business to maintain aircraft. He worked as a corporate pilot at  
17 the relevant time and did not otherwise fly for hire. At that  
18 time, his wife rented space in her son's hangar for N57543. He  
19 said he billed his wife's leasing company for maintenance on the  
20 aircraft.

21 He said at the time of this incident, the aircraft was used  
22 for business and pleasure. It may have been rented out some, but  
23 he did not fly it on rental flights. He said that the pilots who  
24 flew in N57543 when it was rented were his son and a friend of his  
25 son. The Respondent said he did not have anything to do with

1 arranging for the flights to Talladega on September 28, 2003. He  
2 had been planning to take his grandson to the automobile races  
3 using one of his two single-engine aircraft that he owned. The  
4 night before the flight, his son, Terry, asked him if he would fly  
5 the Piper Navajo to Talladega so his son would not have to fly  
6 passengers he had arranged to fly to the races. His son said he  
7 would pay for the gas, or the fuel. His son did not say what  
8 financial arrangements he had with the other passengers or what  
9 his arrangements were with Marleen Nix for the use of the Piper  
10 Navajo.

11 The Respondent said he received nothing for the flight, and  
12 as far as he knows, neither did his wife, Marleen, as the owner of  
13 the aircraft and Aircraft Leasing. He said the operating cost of  
14 the Navajo were about two hundred dollars per flight hour. The  
15 total flight time there and back to Talladega was about one hour  
16 and fifteen minutes. He said he did not notice anyone intoxicated  
17 board the Navajo at Talladega for the return flight. He recalled  
18 seeing a woman passenger go to the Port-A-Potty and after she had  
19 been gone a long time, Allen Caldwell went to get her. He said  
20 that neither his son nor he held a Part 135 certificate at the  
21 time. He said he did not discuss the financial arrangements for  
22 the flight with his son or his wife. He said he does not know  
23 what his son's financial arrangements were with the passengers.  
24 He said he knew the passengers were friends of his son; he did not  
25 think they were customers. They were waiting in the terminal

1 building when he arrived that Saturday morning and the aircraft  
2 was outside.

3 He said he has no knowledge of a lease for the aircraft that  
4 day made by his wife. He agreed that he told the aviation safety  
5 inspectors during the ramp inspection that he assumed the aircraft  
6 had been leased but he was not privy to any such information. He  
7 said he told the Inspectors that the flight was a Part 91 flight  
8 because he knew of no money changing hands. He said the deposits  
9 to the Nix Flying Service bank accounts were from maintenance work  
10 that he did and his salary as a corporate pilot for LHT. He said  
11 the bank account statements do not show any payments to him for  
12 the flight to Talladega. He said he did not have a load manifest  
13 at the time of the inspection.

14 DISCUSSION

15 Two aviation safety inspectors, Inspector Fox and Inspector  
16 Perkins testified that Allen Caldwell, a passenger on Nix's  
17 aircraft, told them during a ramp check at the Talladega Airport  
18 that he had paid by a \$1,000 check for the flight to Talladega for  
19 the auto race. But on the stand as a witness called by the  
20 Administrator, he recanted. He now claims he did not pay anything  
21 for the flight and does not remember telling the Inspectors that  
22 he did. The Administrator has not produced any corroborating  
23 evidence that Caldwell paid for the flight by check or in cash. I  
24 find the Inspectors to be credible witnesses and I believe their  
25 testimony. I do not find Allen Caldwell to be credible. His

1 testimony was vague and full of claims that he does not remember  
2 events. He gave every appearance of trying avoid an outright  
3 denial by claiming a lapse of memory. He appeared to be a close  
4 friend of the Respondent Nix's son, Terry Nix. He even rode to  
5 the hearing with the Respondent in the Respondent's aircraft, and  
6 had lunch on the first day of the hearing with the Respondent and  
7 his attorney, although Caldwell said he does not recall what was  
8 said during the lunch. He admits to traveling with Terry Nix to  
9 the races twice and once with the Respondent. For the flights  
10 with Terry Nix, the Respondent's son, Caldwell said he paid a  
11 friend of his, who had arranged for the flights, \$150 for a share  
12 of the expenses. He said he did not pay the Nixes directly,  
13 because the flights were not arranged by him. He said he arranged  
14 this flight with Terry Nix, who ultimately did not go on the trip,  
15 and the Respondent was the pilot and took his grandson instead.  
16 Allen Caldwell said he expected to pay about 150 dollars for the  
17 flight, but was never asked for payment after the flight.  
18 Possibly that was because the Inspectors told the Respondent at  
19 the Talladega Airport that they suspected him of conducting a Part  
20 135 flight, and the Respondent was forewarned, "Do not request  
21 payment from the passengers." That, however, is no more than mere  
22 speculation, and there could be other explanations. Further,  
23 Allen Caldwell testified that he initiated arrangements for the  
24 flight in a conversation with Terry Nix, who is a pilot and the  
25 Respondent's son. The Administrator produced no evidence to show

1 that Respondent had a business relationship at the time with Terry  
2 Nix, who was operating T.W. Nix Flying Service at the Belmont  
3 airport from the buildings he purportedly bought from the  
4 Respondent. In that sense, the factual situation in this case  
5 appears to differ markedly from that in Administrator v. Nix, NTSB  
6 order, EA-4925, 2000, in which the Board found that the Respondent  
7 was the sole proprietor of Nix Flying Service and was the single  
8 source provider of both aircraft and the pilot. In the absence of  
9 any such evidence, I find that there is insufficient evidence to  
10 warrant application of the Board precedent, that the provision of  
11 both plane and pilot from a single source should be deemed  
12 conclusive proof of carriage or compensation for hire. The  
13 Administrator has not proven by a preponderance of the evidence  
14 that the Respondent acted as an agent or employee of Terry Nix in  
15 making the flight, or that Terry Nix can be considered the single  
16 source of both the aircraft and the pilot in arranging for  
17 transportation by air for Mr. Caldwell and his friends to go to  
18 the car races at Talladega, Alabama on the date charged. What is  
19 clear is that the Administrator has produced no bank records or  
20 anything else tending to corroborate the \$1,000 payment Allen  
21 Caldwell initially said he had made, then subsequently denied  
22 under oath. Without some sort of corroboration of the payment, I  
23 find that the Administrator's case falls short of proof by a  
24 preponderance that the flight was for compensation or hire. To  
25 some extent, the extent to which I cannot determine with any

1 precision from the evidence, the flight appears to be in part to  
2 have been a joint venture, because the Respondent brought his  
3 grandson to attend the automobile races. There might have been  
4 more that the Administrator could have done in the investigation  
5 to gather proof of the payment, but from the evidence of record I  
6 find that the Administrator has not proven by a preponderance that  
7 the flight was for hire or compensation and therefore was subject  
8 to Part 135. Not only is there no evidence corroborating that the  
9 Respondent or anyone else actually received any form of monetary  
10 payment for the trip to Talladega, there is no evidence  
11 substantiating or calling into play the principal that  
12 compensation need not be direct nor in the form of money and that  
13 goodwill is a form of prohibited compensation, Administrator v.  
14 Murray, NTSB Order EA-5061, 2003. There is no evidence that the  
15 Respondent had any stake in his son's business, T.W. Nix Flying  
16 Service, or that he intended to further his son's business  
17 interest by providing free pilot services to his son's customers  
18 in anticipation of future business. There is no evidence, in  
19 fact, of a continuing business arrangement between Terry Nix and  
20 Allen Caldwell and the Respondent. So far as the evidence shows,  
21 Allen Caldwell has never before, himself, arranged for  
22 transportation by aircraft to Talladega to attend the automobile  
23 races with Terry Nix. He acknowledged traveling to Talladega  
24 Airport twice in the past in aircraft piloted by Terry Nix to  
25 attend the automobile races, but they were on flights arranged by

1 someone else, and that is not enough to establish a continuing  
2 business arrangement by him with either Terry Nix or the  
3 Respondent, that the Respondent would try to further by providing  
4 free air transportation in expectation of future economic gain,  
5 Administrator v. Griggs, NTSB Order Number EA-4502, 1996. As  
6 noted before, there is no evidence showing that Terry Nix and the  
7 Respondent were in business together. It's strains credibility  
8 that the Respondent had any expectation of any kind of future  
9 benefit for agreeing to perform the flight without any form of  
10 compensation. Inasmuch as I find that the flight at issue here  
11 was not performed by the Respondent for compensation or hire  
12 without having a Part 135 certificate, therefore I further find  
13 that the Respondent did not violate Section 119.5(g), Section  
14 119.5(k), Section 119.33(a)(2), Section 119.33(b)(2), Section  
15 135.7 as alleged in the complaint. Therefore, I further find that  
16 no load manifest was required under Section 135.63(b) and Section  
17 91.17(b) is inapplicable. Upon consideration of all of the  
18 evidence of record, I find that a preponderance of a substantial,  
19 reliable and probative evidence of record does not establish that  
20 the Respondent violated F.A.R. Section 119.5(g), Section 119.5(k),  
21 Section 119.33(a)(2), Section 119.33(b)(2), Section 135.7, Section  
22 135.63(d) and Section 91.17(b) as alleged in the complaint and  
23 that safety in air commerce and air transportation and the public  
24 interest do not require affirmation of the Administrator's Order  
25 For Suspension dated July 26, 2005.

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ORDER

Accordingly, it is ordered that:

One, the Respondent's appeal is granted;

Two, the complaint is dismissed.

DATED & EDITED ON  
SEPTEMBER 11, 2007

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William A. Pope, II  
Administrative Law Judge