

SERVED: February 5, 2010

NTSB Order No. EA-5505

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 4<sup>th</sup> day of February, 2010

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

**OPINION AND ORDER**

On remand from the United States Court of Appeals for the Ninth Circuit, we revisit respondent's appeal of the oral initial decision<sup>1</sup> of Administrative Law Judge Patrick G. Geraghty, dismissing respondent's appeal of the Administrator's order that suspended his airline transport pilot certificate for

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

alleged violations of 14 C.F.R. §§ 135.293(a)<sup>2</sup> and (b),<sup>3</sup> 135.299(a),<sup>4</sup> and 91.13(a).<sup>5</sup> The order of suspension, which became the complaint in this case, alleged that respondent operated a Bell helicopter as pilot-in-command on three passenger-carrying flights on June 26, 2005, on behalf of his

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<sup>2</sup> Section 135.293(a) states that, "[n]o 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," regarding the pilot's knowledge of several subjects, such as the type of aircraft, air traffic control procedures, meteorology, and the like.

<sup>3</sup> The pertinent portion of section 135.293(b) provides as follows:

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.

<sup>4</sup> 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." Section 135.299(a) specifies that an approved check pilot participate in the flight check, that the flight check consist of at least one flight over one route segment, and that the flight check include takeoffs and landings at one or more representative airports.

<sup>5</sup> 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."

corporation, Wine Country Helicopters, Inc. The Administrator's complaint stated that, for each of the three flights, respondent neither met the requisite pilot testing requirements, nor fulfilled the competency and flight checks that §§ 135.293 and 135.299 require. The complaint also alleged that respondent's conduct was careless or reckless, and therefore resulted in a violation of § 91.13(a).

At the hearing, the Administrator called Aviation Safety Inspector Richard Conte to testify concerning the alleged violations. Inspector Conte testified that he had received a complaint from someone indicating that Wine Country Helicopters was operating "illegal" flights under Part 135, and that he had reviewed the flight maintenance log for the helicopter in question, which indicated that the flights that occurred on June 26, 2005, were "charter" flights. Tr. at 70-71; Exh. C-9. Inspector Conte also reviewed copies of an invoice for \$8,670, listing flights that occurred on June 23-26, 2005, which Wine Country Helicopters sent to Mr. Steve Henry of Henry Aviation. Tr. at 72; Exh. C-10 at 2-3. Inspector Conte also received a copy of a check that Henry Aviation sent to Wine Country Helicopters. Tr. at 76; Exh. C-11. Inspector Conte opined that respondent had violated §§ 135.293(a) and (b), 135.299(a), and 91.13(a), as alleged.

The law judge concluded that respondent violated the regulations, as charged, based on photographs that the Administrator introduced that showed passengers boarding the aircraft, as well as eyewitness testimony at the hearing of witnesses who observed passengers in the aircraft. The law judge held that respondent should have known that the passengers were paying customers, even though respondent testified that he did not personally receive any payment for the flights at issue. The law judge reduced the suspension period to 85 days, based on the law judge's belief that respondent made some limited effort to confirm that the flights were not flights under 14 C.F.R. part 135.

On appeal, respondent 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 that Inspector Conte gathered in forming his opinion regarding the alleged violations. Respondent acknowledged that the law judge allowed Inspector Conte to respond to questions regarding the overall reasons for his opinion, but argues that the law judge should not have halted further questions regarding those reasons.<sup>6</sup> Respondent

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<sup>6</sup> Respondent's argument arises out of the following exchange during Inspector Conte's testimony at the hearing:

Q. Sir, give me each reason, if there's more than one, that you decided this was a 135 operation as

also argued that the law judge erred in: not allowing Inspector

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(..continued)

opposed to a Part 91 operation.

A. With the information I received, and my conversation with Mr. Lackey, Mr. Lackey himself told me that he was planning on providing his helicopter for compensation or hire with Mr. Steve Henry during that day. Based on the bills, based on the Flight Maintenance Log, based on the pictures and testimony from all the witnesses, those were 135 flights.

Q. Now the pictures simply depict passengers on the helicopter, right?

[Discussion regarding Administrator's counsel's objection omitted]

A. There were persons getting on-board the helicopter.

Q. Okay. Now, from that alone, could you conclude that was a 135 operation?

Administrator's Counsel: Objection, misstates testimony.

Administrative Law Judge: Sustained. He did not say "on that alone." He gave you a list of things that he based his conclusion on.

Respondent's Counsel: I understand exactly, Your Honor. I'm just trying to separate so that we can get to the meat of it.

Administrative Law Judge: No, you're not going to piecemeal it.

Respondent's Counsel: How else can we understand it?

Administrative Law Judge: I understand it, Counsel. No, we're not going to pull it apart. You asked what he based his opinion on, and he gave you the items that he based his opinion on. He didn't say he based it on any one thing, he said all those things.

Respondent's Counsel: Is the Court ruling that I cannot inquire to the basis for his opinion?

Administrative Law Judge: You already did, and it's been asked and answered.

Tr. at 84-85.

Conte to define "for compensation or hire"; not permitting questions regarding Inspector Conte's understanding of flight maintenance logs; not allowing a question regarding Inspector Conte's internal deliberations concerning his investigation into respondent's conduct; and not allowing questions regarding Inspector Conte's experience.

In our previous opinion and order, NTSB Order No. EA-5360 (2008), we dismissed respondent's appeal concerning the law judge's evidentiary rulings, based on our long-held case law that we review law judges' evidentiary rulings under an abuse of discretion standard, that law judges have wide latitude in their oversight of testimony at hearings, that we treat the Federal Rules of Evidence as non-binding guidance, and that we only entertain evidentiary questions when they amount to prejudicial error. We concluded that, in this case, respondent neither established that the law judge abused his discretion, nor demonstrated that the law judge's alleged errors resulted in prejudice. We found that neither Inspector Conte's understanding of "compensation or hire," nor his general perception of flight maintenance logs, were directly relevant to the evidence that he reviewed concerning respondent's alleged violations. Furthermore, we rejected respondent's argument that the law judge erred in excluding testimony from inspectors regarding the deliberative process in their investigations. We

concluded that respondent did not establish that the inspector's opinions during the course of his investigation or his discussions with other investigators were relevant to the issue of whether respondent violated the regulations as charged. We further disagreed with respondent's argument that the law judge erred in not allowing questions regarding Inspector Conte's experience, as a review of the transcript indicated that Inspector Conte described his experience at length at the commencement of his testimony.

The Ninth Circuit Court of Appeals disagreed with our opinion, holding that we abused our discretion in upholding 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, No. 08-71413 at 3 (9<sup>th</sup> Cir. Nov. 9, 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.

Despite our well-established precedent with regard to our law judges' evidentiary rulings, and the reasoning that forms the basis for our deference to such rulings, we 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.

**ACCORDINGLY, IT IS ORDERED THAT:**

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

HERSMAN, Chairman, HART, Vice Chairman, and SUMWALT, Member 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-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  
Los Angeles, CA 90017  
(213) 614-0400

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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

22

ORDER

23

It is, therefore, adjudged and Ordered that:

24

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

25

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.

7

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9 DATED & EDITED ON

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PATRICK G. GERAGHTY, Judge

10 JULY 2, 2007