

SERVED: December 8, 2011

NTSB Order No. EA-5607

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 6th day of December, 2011

_____)	
MICHAEL P. HUERTA,)	
Acting Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-18890
v.)	
)	
WCA TRANSPORTATION, INC.,)	
)	
Respondent.)	
_____)	

OPINION AND ORDER

1. Background

Respondent appeals the March 15, 2011 written order of Administrative Law Judge Alfonso J. Montano, granting the Administrator’s motion for summary judgment.¹ In his order, the law judge affirmed the Administrator’s revocation of respondent’s air carrier certificate,

¹ A copy of the law judge’s decisional order is attached.

based on respondent's alleged violations of 14 C.F.R. §§ 119.39(a)(2) and (3),² 119.61(c),³ 119.69(a)(2),⁴ and 135.25(b).⁵ We deny respondent's appeal.

a. Administrator's Enforcement Actions

The Administrator issued the revocation order, which became the complaint in this case, on June 10, 2010. The complaint alleged WCA Transportation, Inc. (WCA), as an air carrier conducting operations under 14 C.F.R. part 135, terminated operations under part 135 on or about June 22, 2009, but failed to surrender the operating certificate and operations

² Sections 119.39(a)(2) and (3) state as follows:

An applicant may be issued an Air Carrier Certificate or Operating Certificate if, after investigation, the Administrator finds that the applicant ...

(2) Holds the economic authority applicable to the kinds of operations to be conducted, issued by the Department of Transportation, if required; and

(3) Is properly and adequately equipped in accordance with the requirements of this chapter and is able to conduct a safe operation under appropriate provisions of part 121 or part 135 of this chapter and operations specifications issued under this part.

³ Section 119.61(c) states: “[w]ithin 30 days after a certificate holder terminates operations under part 135 of this chapter, the operating certificate and operations specifications must be surrendered by the certificate holder to the certificate-holding district office.”

⁴ Section 119.69(a) requires each certificate holder to “have sufficient qualified management and technical personnel to ensure the safety of its operations.” Section 119.69(a) further states, “[e]xcept for a certificate holder using only one pilot in its operations, the certificate holder must have qualified personnel serving in the following or equivalent positions ...

(2) Chief Pilot.”

⁵ Section 135.25(b) provides as follows:

Each certificate holder must have the exclusive use of at least one aircraft that meets the requirements for at least one kind of operation authorized in the certificate holder's operations specifications. In addition, for each kind of operation for which the certificate holder does not have the exclusive use of an aircraft, the certificate holder must have available for use under a written agreement (including arrangements for performing required maintenance) at least one aircraft that meets the requirements for that kind of operation. However, this paragraph does not prohibit the operator from using or authorizing the use of the aircraft for other than operations under this part and does not require the certificate holder to have exclusive use of all aircraft that the certificate holder uses.

specifications to the South Florida Flight Standards District Office (FSDO). The complaint further stated respondent: is not currently equipped in accordance with 14 C.F.R. parts 119 and 135; has not had any aircraft listed on its operations specifications under 14 C.F.R. part 135 since June 22, 2009; does not currently hold the required economic authority under 14 C.F.R. part 119, and has not held such authority since October 13, 2009; and does not currently employ any pilots, including a chief pilot. Respondent submitted an answer, in which it denied the majority of the complaint, but did not present any affirmative defenses.

The Administrator submitted a motion for summary judgment, accompanied by six exhibits, alleging no factual issues existed for resolution at a hearing because respondent had not listed any aircraft on its operations specifications since June 22, 2009, did not employ a pilot, and did not hold the requisite economic authority. The Administrator's motion further stated respondent had failed to surrender its air carrier certificate to the FAA.

b. Law Judge's Order Entering Summary Judgment in favor of the Administrator

The law judge granted the motion in his March 15, 2011 order. In his order, the law judge summarized the relevant facts and determined respondent had not conducted operations since June 2009. The law judge noted respondent argued the sluggish economy caused its construction business to slow to the point that respondent no longer needed to utilize an aircraft to fly between Florida and the Bahamas. Nevertheless, the law judge found no legal basis for this rationale to excuse respondent's failure to list any aircraft on the operations specifications of which respondent had exclusive use, obtain the requisite economic authority, and surrender the air carrier certificate.

c. Respondent's Appeal

On appeal, respondent argues the law judge erred in determining respondent did not have exclusive use of an aircraft, had terminated operations, and did not maintain the requisite economic authority.⁶ Respondent contends it currently has exclusive ownership rights to N411FT, a King Air 90. Respondent asserts the Administrator has no authority to support the contention that the aircraft must be listed on respondent's operations specifications to comply with § 135.25(b). In this regard, respondent argues N411FT was originally listed on respondent's operations specifications, and that inspectors from the South Florida FSDO could easily reinspect the aircraft and again list it on the operations specifications. Secondly, respondent argues it has not *literally* terminated operations, and has no intent to terminate operations. Respondent contends its business is to provide transportation from Florida to the Bahamas for constructions projects. Due to the slowing economy in the construction industry, such transportation has not been necessary. Respondent argues we should consider this ebb and flow of work opportunities in the construction industry as analogous to the agricultural industry, wherein the Administrator permits crop dusting flights to occur on an irregular basis, based on the cyclical nature of agriculture. Finally, respondent contends it can obtain economic authority for N411FT immediately, as obtaining such authority only involves placing the aircraft on an insurance policy and engaging in a process to guarantee insurance coverage. The Administrator opposes each of respondent's arguments, and urges us to affirm the law judge's order.

2. Decision

Under the Board's Rules of Practice, a party may file a motion for summary judgment on the basis that the pleadings and other supporting documents establish that no factual issues exist,

⁶ Respondent's brief does not address the allegation that respondent did not have a chief pilot, as required under 14 C.F.R. § 119.69(a)(2).

and the party is therefore entitled to judgment as a matter of law.⁷ We consider the Federal Rules of Civil Procedure instructive in determining whether disposition of a case via summary judgment is appropriate.⁸ In this regard, we recognize Federal courts have granted summary judgment when no genuine issues of material fact exist.⁹ In order to defeat a motion for summary judgment, a party must provide more than a general denial of the allegations.¹⁰

We find no reason to disturb the law judge's order granting summary judgment.

a. *Exclusive Use*

Respondent concedes no aircraft are listed on its operations specifications. We are not persuaded by the argument that failure to list an aircraft on the operations specifications does not violate the FAR. In order to list an aircraft on operations specifications, an FAA aviation safety inspector must inspect the aircraft. Although N411FT previously was listed on respondent's operations specifications, respondent's assertion that N411FT automatically would pass FAA inspection and be placed on the operations specifications over two years later is unsupported by any evidence. In addition, respondent provides no authority for its assertion that the *potential* of an aircraft being listed on the operations specifications is sufficient to prove an air carrier has

⁷ 49 C.F.R. § 821.17(d).

⁸ Administrator v. Wilkie, NTSB Order No. EA-5565 at 5 (2011); Administrator v. Doll, 7 NTSB 1294, 1296 n.14 (1991) (citing Fed. R. Civ. P. 56(e)); see also Administrator v. Giannola, NTSB Order No. EA-5426 (2009).

⁹ Celotex Corp. v. Catrett, 477 U.S. 317, 322-24 (1986). A *genuine* issue exists if the evidence is sufficient for a reasonable fact-finder to return a verdict for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255-56 (1986). An issue is *material* when it is relevant or necessary to the ultimate conclusion of the case. Id. at 248.

¹⁰ Administrator v. Hendrix, NTSB Order No. EA-5363 at 5-6 n.8 (2008) (citing Doll, supra note 8, at 1296).

exclusive use of the aircraft. We further note § 135.25(b) requires a written agreement when an air carrier does not have exclusive use of an aircraft:

In addition, for each kind of operation for which the certificate holder does not have the exclusive use of an aircraft, the certificate holder must have available for use under a written agreement (including arrangements for performing required maintenance) at least one aircraft that meets the requirements for that kind of operation.

Section 135.25(b) also specifically references the air carrier's operations specifications.

To the extent respondent contends it owns N411FT, we note, as the text of § 135.25(b) indicates, ownership is not dispositive on the issue of exclusive use. Overall, respondent did not provide any evidence to establish it has exclusive use of N411FT pursuant to § 135.25(b).

b. Respondent's Termination of Operations and lack of Economic Authority

We also find meritless respondent's argument that it has not terminated operations. Respondent's comparison of air carrier operations under 14 C.F.R. part 135 to crop dusting operations under 14 C.F.R. part 137 is a novel one. Respondent concedes it has not conducted operations under part 135 since June 2009. Nevertheless, respondent claims amnesty from complying with the requirements of part 135 due to a sluggish economy.¹¹ We agree with the law judge that this argument has no basis in law as respondent has provided no evidence that the construction industry is cyclical in the same way the agricultural industry is cyclical. We find the predictable seasonally-based cyclical nature of agriculture is clearly distinguishable from the unpredictable nature of an economic downturn which could last for years.

Furthermore, we reject respondent's contentions about obtaining economic authority. Respondent has not had economic authority for any aircraft since October 13, 2009. The fact that respondent contends obtaining economic authority is a simple procedure does not rebut the

¹¹ Respondent does not suggest how long it should be excused, under this theory, from conducting operations under part 135.

Administrator's allegation that respondent currently does not have economic authority as required under 14 C.F.R. § 119.39(a)(2).

Finally, we find each of respondent's arguments is legal rather than factual. The law judge correctly analyzed the issues respondent presented under our summary judgment standard, and appropriately granted summary judgment in favor of the Administrator. We find the law judge's sanction of revocation appropriate under the circumstances. We previously have held that violations of these regulations form a basis for revocation.¹²

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;
2. The law judge's order is affirmed; and
3. The Administrator's revocation of respondent's air carrier certificate is affirmed.

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

¹² Administrator v. Sunworld Int'l Airlines, Inc., NTSB Order No. EA-5357 at 6 (2008) (affirming revocation for lack of economic authority from DOT to operate as a direct air carrier and lack of qualified full-time personnel, among other regulations, and stating, "[t]he Board has long held that revocation of an air carrier's operating certificate is the appropriate sanction when the carrier lacks an acceptable aircraft, is no longer conducting any operations under its certificate, and has effectively terminated its operations").

Served: March 15, 2011

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

J. RANDOLPH BABBITT,
ADMINISTRATOR,
FEDERAL AVIATION ADMINISTRATION,

Complainant,

v.

Docket SE-18890

WCA TRANSPORTATION SERVICES INC.

Respondent.

**ORDER ENTERING SUMMARY
JUDGMENT IN FAVOR OF THE ADMINISTRATOR**

Served: Michael Moulis, Esq.
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On June 10, 2010, the Administrator of the Federal Aviation Administration (FAA) issued an order revoking the air carrier certificate of respondent WCA Transportation Services Inc., (WCA), for failure to comply with the requirements of §§ 119.39(a)(2), 119.32(a)(3), 119.61(c), 119.69(a)(2), and 135.25(b) of the Federal Aviation Regulation ("FAR," codified at 14 C.F.R.).¹

¹ See Attachment 1, Order of Revocation, pgs. 1-2, allegations, and pgs. 2-3 for provisions of the cited FARs.

WCA, through counsel, filed an appeal of that order on June 15, 2010. The Administrator subsequently reissued the revocation order as the complaint in this case, and the respondent subsequently filed an answer to the complaint.²

On November, 24, 2010, the Administrator filed a motion for summary judgment supported by six (6) exhibits. The Administrator's exhibits have been admitted into evidence without objection from respondent and are referenced as Admin. Ex. 1 through 6. In his motion the Administrator argues that the admissions to the factual allegations appearing in the complaint, standing alone, or such admissions combined with supporting documentation (in the form of exhibits accompanying the motion for summary judgment) established that there are no material issue of fact to be resolved. The Administrator therefore maintains that he is entitled to judgment as a matter of law. The complaint, in relevant part, alleges the following:

In paragraph 2.b. the Administrator alleges that respondent has not conducted operations under Part 135 since on or about June 22, 2009.

In paragraph 3.a. the Administrator alleges that respondent currently is not properly and adequately equipped in accordance with the requirements of Parts 119 and 135 of the Federal Aviation Regulations. In paragraph 3.b. the Administrator alleges that respondent has not had any aircraft listed on the operations specifications for operations under Part 135 since on or about June 22, 2009.

In paragraph 4.a. the Administrator alleges that respondent does not currently hold the required Economic Authority in accordance with the requirements of Part 119 of the Federal Aviation Regulations. In paragraph 4.b. the Administrator alleges that respondent has not held the required Economic Authority since on or about October 13, 2009.

In paragraph 5.a. the Administrator alleges that respondent does not currently employ any pilots in accordance with the requirements of Part 119 of the Federal Aviation Regulations, including a Chief Pilot. In paragraph 5.b. the Administrator alleges that the respondent has not employed a pilot since on or about June 23, 2009.

In paragraph 6 the Administrator alleges that respondent terminated operations on or before June 22, 2009, and as of the date of the complaint respondent has failed to surrender the operating certificate and operations specifications to the South Florida Flight Standards District Office.

Administrator's Exhibit 1.

² This was scheduled for hearing in Miami, Florida for December 15 and 16, 2010. The hearing was cancelled after the parties had briefed their respective positions relative to the motion for summary judgment.

In the answer to the complaint, the respondent admitted paragraphs 1 and 2 but denied paragraphs 3 through 8. No affirmative defenses were advanced by respondent in its answer. Admin. Ex.1.

The Administrator argues that despite respondent's denials, Summary Judgment is appropriate based on several facts.

First, respondent is not properly and adequately equipped in accordance with Parts 119 and 135 of the FARs. The Administrator relies upon a June 22, 2009 letter from the respondent to the FAA in which it asks the Administrator to remove aircraft N411FT from its certificate. Admin. Ex. 3. That aircraft was the only aircraft on the respondent's certificate. Furthermore, the Administrator argues that the respondent's Operations Specifications reveal that respondent does not have the exclusive use of at least one aircraft, and is thus in violation of 14 C.F.R. § 119.39(a)(3). The appropriate sanction for this failure, according to the Administrator, is revocation. Admin. Ex. 4.

Second, the Administrator maintains that the respondent admits in the answer to the complaint that it has not conducted operations under Part 135 since June of 2009. Respondent did not surrender its operating certificate within thirty (30) days of ceasing operations under Part 135. Thus, the Administrator maintains that it has been established that respondent has violated 14 C.F.R § 119.61(c).

Third, the Administrator references a letter from the Air Transportation Division of the Department of Transportation, (DOT), dated October 13, 2009 which cancelled respondent's Economic Authority. Admin. Ex. 5. Thus, the Administrator maintains that it cannot be factually disputed that respondent has not had Economic Authority to operate since October 13, 2009. The Administrator argues that revocation of the respondent's air carrier certificate is appropriate as no company or individual may hold an air carrier certificate issued by the FAA with the required DOT Economic Authority.

The Administrator argues that the Board has held that revocation of an air carrier certificate is the appropriate sanction when a carrier has terminated its operations, lacks the qualifications necessary to hold its certificate, or is no longer conducting operations under its certificate. The standard for the holder of an air carrier certificate provides that the holder must exhibit qualification by exhibiting a high degree of care, judgment and responsibility in his conduct of the operations. The Administrator maintains that the undisputed facts establish that respondent has not met the applicable standard. Therefore, the Administrator argues that based on the respondent's answer to the complaint and the Exhibits attached to the Administrator's motion, there are no genuine issues of fact in dispute relevant to the alleged violations. The Administrator therefore, asserts entitlement to judgment as a matter of law.

On December 6, 2010, respondent filed an answer in opposition to the Administrator's motion for summary judgment. Respondent also subsequently filed an affidavit in support of that answer on December 20, 2010. The affidavit has been marked as Respondent's Exhibit 1 and referenced as Resp. Ex. 1. Respondent's

exhibit has been admitted into evidence without objection by the Administrator. In its reply, respondent argues that it is in compliance with three of the requirements that the Administrator alleges it has not complied.

First, respondent asserts that it has not surrendered its certificate since it has not terminated operations, it has simply fallen victim to the sluggish economy. Furthermore, the sluggish economy simply slowed the process of purchasing another aircraft to submit for approval for operation.

Second, respondent claims that it currently has exclusive use of an aircraft that was previously on the Operations Specifications and approved by the FAA for operations. Respondent maintains that it shall place the previously approved aircraft on the certificate, which, respondent asserts, the FAA must accept. Respondent filed an affidavit from Mr. Tim Lang, owner of WCA, in which he avers that he is the owner of and has the exclusive use of an aircraft that was "previously listed" on WCA's Operations Specifications. Resp. Ex. 1.

Finally, respondent indicates that it was not aware that its DOT Economic Authority had expired and it will recommence the process of once securing the Economic Authority. According to respondent, obtaining the Economic Authority from DOT is effectively a paperwork approval process.

The Administrator filed a response to respondent's answer. The Administrator maintains that respondent admits it does not have the exclusive use of an aircraft as there is no aircraft listed on respondent's Operations Specifications and no aircraft has been on the Operations Specifications since June of 2009. Administrator's Exhibit 4. According to the Administrator, the fact that respondent may be in the process of securing an aircraft does not establish that it currently has the exclusive use of an aircraft as required by 14 C.F.R. § 135.25(b). The Administrator further maintains that even if respondent secures an aircraft or places the previously approved aircraft back on the operations certificate, either aircraft must be inspected by the Administrator to determine if it can be approved to be placed on the certificate.

The Administrator further points out that respondent admitted in its answer to Paragraph 2.b. of the complaint that it has not conducted operations under Part 135 since June of 2009. Administrator's Exhibit 2. Therefore respondent cannot claim it has conducted operations in the last year and a half, and was required by 14 C.F.R. § 11.61(c) to surrender its certificate within 30 days of the end of June 2009.

Finally, the Administrator makes reference to Administrator's Exhibit 5 to establish that respondent was aware that it was without DOT Economic Authority to operate. Administrator's Exhibit 5 is a copy of the letter mailed to respondent dated October 13, 2009, which specifically informs respondent that its Economic Authority

was cancelled. In that letter, the respondent was instructed to cease operations until it had the proper authority from the DOT.

Respondent filed a final response brief on December 17, 2010 in which essentially argues that it would take the Administrator a matter of an afternoon to re-inspect aircraft N411FT which was previously approved for the same identical operations specifications. Respondent again argues that it is a victim of a sluggish economy and it has no intention of terminating operations. However, respondent does not address its admission in its response to the Administrator's complaint that it had not conducted operations under Part 135 since June of 2009. Finally respondent again maintains that the DOT Economic Authority can be obtained in a matter of hours.

I.

Under Rule 17(d) of the Board's Rules of Practice in Air Safety Proceedings (codified at 49 C.F.R. § 821.17(d), "[a] party may file a motion for summary judgment on the basis that the pleadings and other supporting documentation establish that there are no material issues of fact to be resolved and the party is entitled to judgment as a matter of law.

II.

The Administrator makes a compelling argument that there are no genuine issues of material fact to be litigated in this case. The evidence and arguments advanced by the Administrator clearly establish that respondent has not conducted operations under Part 135 since June of 2009, does not presently have the exclusive use of an aircraft and does not have the required Economic Authority from the DOT to conduct operations.

Respondent essentially admits it does not currently have the exclusive use of an aircraft on its certificate. However respondent asserts it can have the previously certified aircraft added to its certificate after an inspection which, respondent asserts, would take in a matter of an afternoon. Respondent does not assert that it currently has the required Economic Authority from the DOT, but rather maintains it was not aware that the Economic Authority had be cancelled and it can obtain the Economic Authority in the future by simply filing paper work and obtain the Economic Authority within hours. Finally, respondent does not argue that it has conducted operations under Part 135 since June of 2009. Instead, respondent only asserts that it has fallen victim to a sluggish economy, but has no intention of terminating operations. Respondent argues that it should be granted the same type of leeway the FAA allows for other cyclical industries and be afforded the opportunity to operate when respondent's industry demands operations. Respondent provides no evidence that it is indeed a cyclical industry or business. Furthermore respondent has in fact admitted that it has not conducted operations since June of 2009. Respondent's brief and arguments do not establish that there is any evidence that any of these critical facts are in dispute or establish any genuine issues of material fact in this case. As of the filing of its final

brief, it did not have the exclusive use of an aircraft, did not have DOT Economic Authority, and does not argue nor produce any evidence that it has conducted operations under Part 135 since June of 2009. These are the genuine issues of material fact that constitute the Administrator's case against respondent. None of these material facts have been shown to be in issue.

Based on the exhibits submitted and arguments advanced by the parties, which I have considered in a light most favorable to the respondent, I cannot find that this case presents any genuine issues of material fact to be litigated. I therefore grant the Administrator's Motion for Summary Judgment, and find entitlement to judgment as a matter of law.

THEREFORE, IT IS ORDERED that the Administrator's Motion for Summary Judgment is GRANTED.

Entered this 15th day of March 2011, at Washington, D.C.

Alfonso J. Montaña
Administrative Law Judge

APPEAL (DISPOSITIONAL ORDER)

Any party to this proceeding may appeal this order by filing a written notice of appeal within 10 days after the date on which it was served (the service date appears on the first page of this order). An original and 3 copies of the notice of appeal must be filed with the:

National Transportation Safety Board
Office of Administrative Law Judges
Room 4704
490 L'Enfant Plaza East, S.W.
Washington D.C. 20594
Telephone: (202) 314-6150 or (800) 854-8758

That party must also perfect the appeal by filing a brief in support of the appeal within 30 days after the date of service of this order. An original and one copy of the brief must be filed directly with the:

National Transportation Safety Board
Office of General Counsel
Room 6401
490 L'Enfant Plaza East, S.W.
Washington, D.C. 20594
Telephone: (202) 314-6080
FAX: (202) 314-6090

The Board may dismiss appeals on its own motion, or the motion of another party, when a party who has filed a notice of appeal fails to perfect the appeal by filing a timely appeal brief.

A brief in reply to the appeal brief may be filed by any other party within 30 days after that party was served with the appeal brief. An original and one copy of the reply brief must be filed directly with the Office of General Counsel in Room 6401.

NOTE: Copies of the notice of appeal and briefs must also be served on all other parties to this proceeding.

An original and one copy of all papers, including motions and replies, submitted thereafter should be filed directly with the Office of General Counsel in Room 6401. Copies of such documents must also be served on the other parties.

The Board directs your attention to Rules 7, 43, 47, 48 and 49 of its Rules of Practice in Air Safety Proceedings (codified at 49 C.F.R. §§ 821.7, 821.43, 821.47, 821.48 and 821.49) for further information regarding appeals.

ABSENT A SHOWING OF GOOD CAUSE, THE BOARD WILL NOT ACCEPT LATE APPEALS OR APPEAL BRIEFS.