

SERVED: January 30, 2012

NTSB Order No. EA-5613

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 27th day of January, 2012

_____)	
MICHAEL P. HUERTA,)	
Acting Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-19045
v.)	
)	
JOHN D. KOELBEL,)	
)	
Respondent.)	
_____)	

OPINION AND ORDER

1. Background

Respondent appeals the June 29, 2011 oral initial decision of Administrative Law Judge Patrick G. Geraghty.¹ In his decision, the law judge denied respondent’s appeal of the Administrator’s emergency order revoking respondent’s airline transport pilot (ATP) certificate,

¹ A copy of the law judge’s decision, an excerpt from the hearing transcript, is attached.

based on violations of 14 C.F.R. §§ 61.2(a)(1)² and 91.13(a).³ We affirm the law judge's decision.

A. Complaint

The Administrator issued the emergency revocation order,⁴ which became the complaint in this case, on February 14, 2011. The complaint alleged on April 16, 2010, the Administrator notified respondent through an emergency order of suspension that the Administrator was immediately suspending respondent's ATP certificate for failure to submit to or successfully complete a required reexamination of his pilot skills pursuant to 49 U.S.C. § 44709.⁵ The Federal Aviation Administration (FAA) served the April 2010 suspension order on respondent via overnight, certified, and regular mail at his permanent mailing address of record in St. Maries, Idaho, as well as at a relative's house where respondent reportedly was staying in Baltimore, Maryland. The certified and overnight letters to both addresses were returned unclaimed, but the letters sent via regular mail were not returned. Between January 31, 2010, the date on which respondent submitted to the FAA an application for renewal of his ATP certificate, and April 16, 2010, the date of service of the FAA suspension order, respondent had not notified the Administrator of any change in his address of record. The complaint also described letters the Administrator allegedly sent to respondent on May 7, 2010 and July 14,

² Section 61.2(a)(1) provides no person may "[e]xercise privileges of a certificate, rating, endorsement, or authorization issued under this part if the certificate, rating or authorization is surrendered, suspended, revoked or expired."

³ Section 91.13(a) prohibits operation of an aircraft in a careless or reckless manner, so as to endanger the life or property of another.

⁴ Respondent waived the expedited procedures normally applicable to emergency cases.

⁵ Title 49 U.S.C. § 44709(a) provides, "[t]he Administrator of the Federal Aviation Administration may ... reexamine an airman holding a certificate issued under section 44703 of this title."

2010, notifying respondent he needed to surrender his ATP certificate, or would be subject to a civil penalty. On August 19, 2010, respondent's attorney contacted the FAA regional office to request certain records, and the FAA advised respondent's attorney that respondent needed to surrender his certificate. The FAA received no reply from respondent or his attorney. On January 11, 2011, an FAA inspector from the Spokane Flight Standards District Office (FSDO) conducted a records inspection of Inter-State Aviation (ISA) records and discovered aircraft flight logs showing respondent operated "various CE-182 aircraft ... on various dates between May 21, 2010 and September 8, 2010." Compl. at ¶ 9. The FAA then sent a letter of investigation to respondent, to addresses in both Maryland and Idaho, advising respondent the FAA believed he operated, as pilot-in-command (PIC), aircraft between May and September 2010, while his ATP certificate was suspended. Thereafter, respondent's attorney responded to the letter of investigation, stating respondent had not received notice of the suspension of his ATP certificate.

Respondent admitted a few allegations contained in the complaint, but denied the majority of the allegations. The Administrator filed a motion for summary judgment, which the law judge denied due to the existence of factual issues. In his order denying summary judgment, the law judge stated the Administrator had "presented a prima facie case on the issue of service," and "at trial[, the Administrator's] initial presentation shall be directed to the issues of aircraft status, i.e. 'public aircraft' at the time of [r]espondent's flights and whether [r]espondent was [the PIC] on said flight operations." Order at 1.

B. Evidence Presented at Hearing

Shane Bak, a smoke jumper pilot for the United States Forest Service (USFS), certifies vendor pilots whose services the USFS uses on a contract basis. Mr. Bak testified he conducts

tactical pilot evaluations to determine whether pilots are able to fly to a fire scene and manage the global positioning system equipment necessary to achieve the USFS's mission. Tr. at 22. Mr. Bak clarified these vendor pilots are the PICs on such tactical evaluation flights, and identified an evaluation form respondent signed concerning a May 21, 2010 flight, indicating respondent was the PIC. See Exh. C-4. Mr. Bak stated respondent did not question or object to this designation as PIC at the time of the May 21 flight. Mr. Bak also identified a contract between ISA and the USFS for on-demand services, and opined the tactical evaluation flight with respondent on May 21, 2010 was "absolutely not" a public-use flight. Tr. at 27-29. Mr. Bak testified ISA does not have an exclusive use contract with the USFS.

The Administrator also introduced a deposition transcript of the testimony of Joel Myers, a check airman who accompanied respondent on a part 135 evaluation flight on July 28, 2010. See Joint Exh. 1. In his deposition testimony, Mr. Myers stated respondent did not object to being designated as PIC on the July 28 flight, after Mr. Myers informed him of this designation.

In rebuttal, respondent testified he did not find out about the FAA's emergency order suspending his certificate, pending compliance with a check ride under 49 U.S.C. § 44709, until September 7, 2010. Respondent opined both flights he conducted at issue here were on public aircraft because a USFS examiner was onboard with him and the aircraft was on lease to the USFS. Tr. at 54. Regarding the July 28, 2010 flight, respondent claimed he was not the PIC because he was undergoing the check ride, and denies the conversation with Mr. Myers concerning respondent's status as PIC occurred. Respondent also testified he was living in Towson, Maryland, on April 16, 2010, although his official address was in St. Maries, Idaho. Tr. at 61.

C. Law Judge's Oral Initial Decision

Following the hearing, the law judge issued an oral initial decision, in which he determined respondent constructively was served with the emergency suspension order on April 16, 2010. In reaching this finding, the law judge cited Administrator v. Carlos,⁶ in which the Board stated certified mail returned unclaimed still constitutes constructive service of the document, and Administrator v. Mazufri,⁷ in which the Board stated it is a respondent's duty to ensure his or her address of record with the FAA is correct. The law judge also found: (1) on May 21, 2010, respondent was the PIC on a flight on a civil aircraft; and (2) on July 28, 2010, respondent was PIC on a flight on a civil aircraft. Citing to Administrator v. DeChant,⁸ the law judge stated, "the Board has repeatedly held that even where flights are paid for by the United States government, such does not compel a conclusion as to whether it is a civil or a public status of the aircraft since it is well settled that many of the Federal Aviation Regulations apply to both civil and public aircraft." Initial Decision at 92. Based on the aforementioned findings, the law judge determined respondent had violated §§ 61.2(a)(1) and 91.13(a), and affirmed the Administrator's sanction of revocation.

E. Issues on Appeal

On appeal, respondent contends the law judge erred in: determining the flights at issue (particularly the May 21, 2010 flight) were not public aircraft operations; finding respondent acted as PIC on the July 28, 2010 flight; and affirming the Administrator's choice of sanction. Specifically, respondent contends the May 21 flight only served a governmental purpose because

⁶ NTSB Order No. EA-7936 (2002).

⁷ NTSB Order No. EA-5289 (2007).

⁸ 2 NTSB 2183 (1976).

the aircraft was on lease to the USFS. As a result, respondent argues the flight was not subject to § 61.2. Similarly, respondent argues the July 28 flight was conducted under an exclusive use contract between ISA and the USFS, and therefore did not occur on a civil aircraft. With regard to the sanction, respondent contends he is not a risk to aviation safety, as he successfully completed the check rides on May 21 and July 28, and thus, the sanction of revocation is too severe. Respondent concedes, however, he should have made arrangements to obtain his mail from the FAA. Appeal Br. at 9. The Administrator disputes each of respondent's arguments, and urges us to affirm the law judge's decision.

2. Decision

The law judge did not err in determining respondent violated §§ 61.2(a)(1) and 91.13(a). The complaint simply alleges respondent conducted at least two flights after the Administrator served the April 16, 2010 emergency suspension order. Respondent admits he conducted the flights on May 21 and July 28, 2010. Therefore, respondent's contentions concerning whether the flights were on public aircraft and whether he acted as the PIC amount to affirmative defenses. We previously have held "[i]n asserting an affirmative defense, the respondent must fulfill his or her burden of proving the factual basis for the affirmative defense, as well as the legal justification."⁹ We find respondent failed to fulfill his burden on either of his affirmative defenses.

A. Public Use Aircraft

The May 21 and July 28 flights occurred in aircraft owned by ISA, not the USFS or any other Government agency. The Federal Aviation Regulations provide public use operations are

⁹ Administrator v. Nadal, NTSB Order No. EA-5308 at 10 (2007) (citing Administrator v. Gibbs, NTSB Order No. EA-5291 at 2 (2007); Administrator v. Kalberg, NTSB Order No. EA-5240 at 3 (2006); Administrator v. Tsegaye, NTSB Order No. EA-4205 at n.7 (1994)).

flights conducted in an aircraft “used only” for a government function, which is “an activity undertaken by a government.” See 14 C.F.R. § 1.1(1). Section 1.1(1)(ii) includes firefighting, but does not include checks or evaluations. Neither the May 21 nor the July 28 flight were conducted in government-owned aircraft, and respondent admits ISA owns both aircraft in which he conducted flights. Prior Board cases fully support this narrow reading of public use operations under § 1.1(1).¹⁰

B. *Pilot-in-Command*

As part of respondent’s contention he was not the PIC on the July 28 flight, respondent challenges the law judge’s credibility determination that, in part, resulted in the law judge concluding respondent acted as PIC. In particular, respondent contends the law judge could not make a credibility determination in favor of Mr. Myers when the law judge did not observe Mr. Myers’s live testimony. Based on the evidence in the record, we do not believe the law judge’s credibility determination solely was dispositive of the issue of whether respondent acted as PIC. Both parties agree Mr. Myers was the check airman for the July 28 flight. In general, the pilot acting as the check airman is *not* the PIC.¹¹ This definition is the Administrator’s interpretation of PIC, and we will defer to the Administrator’s interpretation of the FAR unless such interpretation is arbitrary, capricious, or not in accordance with law.¹² With regard to this

¹⁰ Administrator v. Sexauer, 5 NTSB 246 (1987) (stating a public official’s presence on a flight did not fulfill the test of “exclusive use” for the contracting governmental entity). In addition, we note respondent’s argument the aircraft were for public use, rather than civil, is not a defense to the Administrator’s allegation that he also violated 14 C.F.R. § 91.13(a). Administrator v. Porter, 4 NTSB 667, 668-69 (1982).

¹¹ See 14 C.F.R. § 135.299(b) (stating the pilot who conducts a line check must determine whether the pilot being checked satisfactorily performs the duties and responsibilities of a PIC in operations under part 135); accord 14 C.F.R. § 135.337(a).

¹² 49 U.S.C. § 44709(d)(3); Hinson v. NTSB, 57 F.3d 1144, 1151 (D.C. Cir. 1995); see also Petition of Seaquist, NTSB Order No. EA-5176 at 4 (2005) (stating Board is bound by FAA

definition of PIC, we do not find the Administrator’s interpretation is contrary to this standard, especially when read with other portions of the FAR concerning the status of a PIC.¹³ In reaching the conclusion that respondent served as the PIC, we need not address the issue of whether the law judge’s credibility determination, which was unfavorable to respondent, is entitled to deference.¹⁴ Overall, respondent has not carried his burden to prove his affirmative defense that he was not acting as the PIC on the July 28 flight, and therefore could not have violated § 61.2(a)(1).

C. Sanction

Finally, with regard to sanction, respondent provides no compelling reason why his certificate should not be revoked. The Administrator’s Sanction Guidance Table clearly states revocation is the only appropriate sanction for operating an aircraft while one’s pilot certificate is suspended.¹⁵ The Administrator fulfilled the standard under Administrator v. Peacon, entitling deference to the Administrator’s choice of sanction.¹⁶ While we consider aggravating and mitigating factors in evaluating an imposed sanction, respondent did not articulate any mitigating

(..continued)

reasonable interpretation of regulations and citing Garvey v. NTSB, 190 F.3d 571 (D.C. Cir. 1999); NVE v. HHS, 436 F.3d 182, 186 (3rd Cir. 2006); Chevron v. Nat’l Res. Def. Council, 467 U.S. 837, 842-43 (1984)).

¹³ Supra note 11.

¹⁴ Although the credibility issue is not dispositive here, we note as an ancillary matter respondent does not present any evidence indicating Mr. Myers was not credible, but instead suggests we should reject any mentioning of Mr. Myers’s testimony as a matter of law.

¹⁵ FAA Order 2150.3B, Appendix B, Figure B-3-h(1)(b).

¹⁶ NTSB Order No. EA-4607 at 2 (1997) (stating, “where the Administrator establishes before the law judge the existence of validly adopted written policy guidelines, the law judge must impose a sanction that falls within the range of sanctions suggested therein, unless he finds that application of the guidelines by the Administrator was arbitrary, capricious, or otherwise not in accordance with law”).

factors that counseled in favor of reducing the sanction.¹⁷ Respondent did not provide a reason why he allegedly did not receive the Administrator's April 16, 2010 emergency order of suspension. While he asks us to consider the fact that he passed the two check rides as mitigation, we find these check rides do not serve as a substitute for completing a reexamination under 49 U.S.C. § 44709, and respondent's statements concerning his violation-free history do not constitute mitigating factors.¹⁸

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied; and
2. The law judge's oral initial decision is affirmed.

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

¹⁷ See Administrator v. Hackshaw, NTSB Order No. EA-5501 (2010) (recon. denied, NTSB Order No. EA-5522 (2010)).

¹⁸ See, e.g., Administrator v. Mize, NTSB Order No. EA-5580 at n.19 (2011) (citing Administrator v. Hart, 5536 (2010); Administrator v. Rezendes, NTSB Order No. EA-5127 (2004); and Administrator v. Thompson, 7 NTSB 714 (1991)).

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

* * * * *

In the matter of: *

J. RANDOLPH BABBITT, *
ADMINISTRATOR, *
Federal Aviation Administration, *

Complainant, *

v. * Docket No.: SE-19045

JUDGE GERAGHTY

JAMES KOELBEL, *

Respondent. *

* * * * *

Spokane County Courthouse
1116 West Broadway Ave.
Courtroom 400
Spokane, Washington

Wednesday,
June 29, 2011

The above-entitled matter came on for hearing, pursuant
to Notice, at 9:21 a.m.

BEFORE: PATRICK G. GERAGHTY
Administrative Law Judge

APPEARANCES:

On behalf of the Administrator:

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On behalf of the Respondent:

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ORAL INITIAL DECISION AND ORDER

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ADMINISTRATIVE LAW JUDGE GERAGHTY: This has been a proceeding before the National Transportation Safety Board on the appeal of John D. Koelbel, herein after Respondent, from an Emergency Order of Revocation which seeks to revoke his airline transport pilot's certificate number 2077218. The Emergency Order of Revocation serves herein as the complaint and was filed on behalf of the Administrator, Federal Aviation Administration, herein the Complainant.

12

The matter has been heard before this Judge, and as provided by the Board's Rules of Practice, I am issuing a bench decision in the proceeding.

15

Pursuant to notice, this matter came on for trial in Spokane, Washington, on June 29, 2011. The Respondent was present at all times and was represented by his counsel Mr. John M. Heida of Omaha, Nebraska. The Complainant was represented by one of their staff counsel, David Shayne, Esquire, of the Northwest Mountain Regional. The parties were afforded full opportunity to offer evidence, to call, examine, and cross-examine witnesses, and to make argument in support of their respective positions.

23

I have considered all of the evidence, both oral and documentary, and in discussing the evidence I will simply summarize that to that which I utilized in reaching a conclusion

24

25

1 reached herein. However, I have considered all evidence, and that
2 which I do not mention is viewed by me as essentially being
3 corroborative or not materially affecting the outcome of the
4 decision.

5 AGREEMENTS

6 By pleading, it was stipulated between the parties that
7 paragraphs numbers 1, 4, 8 as amended, 10, and 11 were not in
8 dispute. Therefore, those matters are taken as having been
9 established for purposes of this decision.

10 DISCUSSION

11 As noted, the Complainant seeks through his Emergency
12 Order of Revocation to revoke the Respondent's airline transport
13 pilot's certificate. That is predicated upon the allegation made
14 in the complaint that, by reason of the issuance and effectiveness
15 of an Emergency Order of Suspension which was issued by the
16 Complainant on April 16, 2010, the Respondent's airline transport
17 pilot's certificate was, since it was an emergency order,
18 immediately suspended. And as no further action was taken by the
19 Respondent to challenge that order, that order, therefore, as a
20 matter of law, became effective and that consequently that when
21 the Respondent engaged in two flights in May and July of 2010,
22 while his pilot's certificate was under the Emergency Order of
23 Suspension, that he operated in regulatory violation of the
24 provisions of Section 61.2(a)(1) of the Federal Aviation
25 Regulations, which states that: "No person may exercise the

1 privileges of a certificate, rating, endorsement, or authorization
2 issued under this part -- and an ATP certificate is issued under
3 Part 61 -- "if the certificate" -- and that's what we're talking
4 about here -- "is surrendered, suspended, revoked, or expired."

5 In addition, it is alleged that as a consequence of the
6 operation by the Respondent, as alleged, while his certificate was
7 under suspension, that he operated in regulatory violation of
8 Section 91.13(a) of the Federal Aviation Regulations, which states
9 that: "An individual may not operate an aircraft in either a
10 careless or reckless manner so as to endanger the life or property
11 of another." And the complaints says careless and reckless. It
12 has to be one or the other, and the regulation does put it in the
13 disjunctive.

14 The Complainant's case is made through various exhibits
15 and through the testimony of one witness in person and by the
16 deposition testimony of Mr. Myers, which was also received as
17 Joint Exhibit 1.

18 Mr. Bak is employed by the United States Forest Service.
19 He is a pilot, and as it's pertinent herein, he was acting in May
20 of 2010, and specifically May 21st, 2010, as a check pilot with
21 respect to the Respondent for purposes of qualifying the
22 Respondent to be a contract pilot for the United States Forest
23 Service. Apparently the Forest Service requires, I believe every
24 3 years, that one of their contract pilots must take a type of
25 evaluation ride, receive a card showing that the ride has been

1 successfully accomplished, and have that card with him on his
2 person, so that if the individual is called out on a mission for
3 the Forest Service, that he can show the card to any passenger or
4 U.S. Forest Service personnel prior to that individual getting in
5 the airplane to be operated by the contract pilot.

6 As pertinent here, Mr. Bak stated that when giving of
7 this type of evaluation or card evaluation ride the pilot-in-
8 command for that particular operation is the vendor pilot. In
9 this case, that would be the Respondent, Mr. Koelbel. And I would
10 indicate that the most usual or general operation of a check ride
11 is that the pilot-in-command is the pilot being evaluated because
12 the whole purpose of a check ride is to evaluate that individual's
13 ability to safely perform the duties of a pilot to act as a pilot-
14 in-command. So if he's not acting as pilot-in-command, how is he
15 to be evaluated as such?

16 But in any event, Mr. Bak clearly stated in these type
17 of rides that he conducts, and did conduct with Mr. Koelbel, the
18 Respondent, that Mr. Koelbel was, in fact, the pilot-in-command as
19 he was the vendor pilot. The witness reiterated this several
20 times, stating clearly that on May 21st, 2010, the pilot-in-
21 command for the flight was Mr. Koelbel and pointing out on C-4,
22 and C-4 does show that the evaluation form is signed by Mr. Bak as
23 the check pilot, and on the lower left-hand side there is a box
24 with language above it that indicates that the pilot being
25 evaluated, in this case Mr. Koelbel, is acknowledging that he is

1 to be the pilot-in-command for that flight. And Mr. Koelbel, the
2 Respondent, signed that form. So he indicated that he was
3 accepting that he was the pilot-in-command.

4 Mr. Bak further indicated along these lines that he, in
5 fact, had discussed the status of himself and the Respondent for
6 this flight and stated, "We discussed it"; he and the Respondent
7 discussed who was to be pilot-in-command and that he, Mr. Bak, had
8 Mr. Koelbel sign that form, C-4, prior to the flight and that the
9 Respondent, after signing that he would be pilot-in-command, never
10 raised any objection, and further indicating that he had the
11 Respondent exhibit to him, Mr. Bak, the Respondent's pilot's
12 certificate to show that it was valid, that he also had to show a
13 current Part 135 check ride, and also a valid and current airman
14 medical certificate, and without those forms a check ride would
15 have not taken place.

16 As to the status of the aircraft itself, Mr. Bak
17 indicated he was familiar with the contract, which was Exhibit
18 C-3. It's a call-as-needed type contract. There is an on-demand
19 or a call-as-needed, indicating that the U.S. Forest Service has a
20 contract with Inter-State Aviation, which means that the Forest
21 Service calls Inter-State when they have need for an aircraft and
22 a pilot, and they can call them to supply the aircraft and the
23 pilot as needed for a particular Forest Service mission. However,
24 Mr. Bak was quite clear that a pilot evaluation such as given to
25 the Respondent was not a public use operation. Further, that

1 Inter-State Aviation can use their aircraft for any other purpose
2 of their own when it is not being called out on demand by the U.S.
3 Forest Service.

4 On cross-examination, Mr. Bak testified that with
5 respect to the evaluation form that if the results aren't
6 satisfactory, the end result is that the U.S. Forest Service card
7 is not issued. I just mention that as part of the cross-
8 examination. And the evaluation is given every 3 years for U.S.
9 Forest Service purposes to show that the pilot can do what? That
10 is, use the equipment in the aircraft, input longitude and
11 latitude, use the GPS, the radios, that sort of thing. However,
12 it was clear that this was not a mission for the Forest Service.
13 They were not going out to survey a fire or to look for fires. It
14 was an evaluation ride. And, lastly, on cross-examination,
15 Mr. Bak reiterated that it was not an exclusive use contract with
16 Inter-State, only as a call-as-needed.

17 With respect to other evidence offered by the
18 Complainant, C-1 does show that on July 28th, 2010, the Respondent
19 undertook a Part 135.293 check ride and completed it
20 satisfactorily. It was part of one of the requirements to be able
21 to operate as a contract pilot for the Forest Service.

22 There is also Exhibit C-5, which is a supplement to an
23 affidavit filed by a Ms. Sherry Brown, which indicates that on
24 April 16th, she, as a secretary in the regional counsel's office,
25 issued, through mailing, the Emergency Order of Suspension by

1 overnight certified mail and regular mail and then she mailed
2 those documents to both the Idaho address as given by the
3 Respondent and the Maryland, Baltimore, or Towson, which I take
4 notice of is, in fact, a suburb. And the parties can simply look
5 at a Rand McNally road map or a postal service directory and see
6 that Towson is simply part of the greater Baltimore area. In any
7 event, Ms. Brown's affidavit goes on to indicate that the
8 certified mailings were returned unclaimed but that the regular
9 mailings were not returned.

10 As I indicated, there was also a deposition of testimony
11 taken by both counsel of a Mr. Joe Neal Myers on June 24, 2011.
12 He was the check pilot for the Part 135 check flight of July 28th,
13 2010. As is pertinent here, I refer to the deponent's testimony
14 on page 10 as to what he typically does.

15 The question was: "Before you started flying with
16 Mr. Koelbel, did you provide a briefing?" "Yes."

17 "Is that something you typically do when you give an
18 evaluation?" "Yes."

19 Question: "Was there any discussion as to who would be
20 pilot-in-command of the flight?"

21 "I would not call it a discussion. A briefing I give, I
22 simply state," quoting, and it's in quotation marks here -- "'You
23 are the pilot-in-command,' and I routinely get either a head nod
24 or an answer, 'Yes, I understand.'"

25 And then: "Do you recall Mr. Koelbel doing anything to

1 indicate that he did not agree?" "No."

2 Finally, on page 13, again, Mr. Myers reiterates: "And
3 you stated that you gave a briefing before you went up with
4 Mr. Koelbel, correct?" "Yes."

5 "And you always do that on every Part 135 check ride?"
6 "Yes."

7 With respect to the ride itself, that is the testimony
8 on page 12 of the deposition. There was questioning by
9 Respondent's counsel. There was a question about how many years
10 the Respondent had been with Inter-State. Mr. Myers replied he
11 wasn't sure but he thought it was 4 or 5 years. And then the
12 question was every year during the four or five years, did he have
13 a FAR 135 check ride? "Yes."

14 And reason is because it's required on the op specs?
15 Meaning the operation specifications for Inter-State.

16 Response: "Negative. It is not required by the op
17 specs. It's required by Part 135 of the regulations." The
18 regulations being referenced, the Federal Aviation Regulations.

19 Next question: "Okay. Then it's part of the operations
20 manual that you have over there?" I assume that it was present
21 during the deposition. Response: "No, it is not."

22 And then: There's a training manual that says what
23 needs to be done, and the FAR "Part 135 tells us as a company that
24 every 12 months our pilots have to have a proficiency check."

25 So there's no question on Mr. Myers' testimony that the

1 ride of July 28, 2010, was in fact a Part 135 Federal Aviation
2 Regulation-required check ride. It was not something required
3 either by the United States Forest Service or Inter-State
4 Aviation, other than Inter-State Aviation wanting to use the
5 Respondent would require him to comply with the requirements of
6 the Federal Aviation Regulations Part 135 with the type of
7 operations being conducted by that fixed-base operator.

8 And I would also simply observe here, to interject, that
9 on the testimony of Mr. Myers, I find his testimony as to his
10 usual actions when giving a check ride do fall clearly within
11 Federal Rule of Evidence 406 as habitual actions that he takes
12 with every individual that he gives a check ride.

13 Lastly, in the deposition by Mr. Myers on a redirect or
14 further examination by Complainant's counsel, on page 24 thereof,
15 beginning at line 21, counsel for Complainant asks a question:
16 "Taking you," meaning Mr. Myers, "back to the 135 evaluation
17 flight that you testified about earlier of July 28, isn't it true
18 that while you were conducting this flight you were not on a
19 reconnaissance patrol for the United States Forest Service?"
20 Answer, first line on page 25: "I was not on a patrol."

21 Turning then to the Respondent's case. First witness
22 called by Respondent was Mr. Douglas Gadwa. He states he is the
23 director of operations for Inter-State Aviation and a 50-percent
24 part owner of that fixed-base operation, states that he's in
25 charge of all operations but does have a chief pilot which assists

1 him in the performance of those types of duties. He indicated in
2 his testimony that there were two contracts with the United States
3 Forest Service between his company, Inter-State Aviation, and the
4 United States Forest Service.

5 R-1 is what was defined as a call-as-needed contract and
6 indicating there were nine aircraft listed in that contract,
7 apparently on page 4 thereof, and that aircraft, N92519 is one of
8 the aircraft listed and is used for tactical evaluations. As I
9 understood Mr. Gadwa's testimony, there was a specific call-as-
10 needed contract, which means that the aircraft were there. And as
11 amplified by Mr. Bak in his testimony, what that means is that the
12 aircraft on that contract with the Forest Service are to be
13 available only as needed by the United States Forest Service.
14 They call up as they need it for the aircraft and one of the
15 contract carded pilots.

16 During that period of time as Mr. Gadwa testified, the
17 aircraft can be used for other things, and same with the second
18 type of contract, which is not really an exclusive use but calls
19 for an aircraft to be available within a specified response time.
20 And the call-as-needed, apparently, if the Forest Service calls up
21 and says, "We need the airplane," if the airplane's not available,
22 the Forest Service just calls some other contractor and gets a
23 plane and a pilot from someone else, because the airplane might be
24 in use on a charter or maybe it's in for maintenance with Inter-
25 State Aviation. So that's call-as-needed.

1 With the exclusive use, it's not truly exclusive use.
2 It just means that it can be used for other things, as Mr. Gadwa
3 testified to, if within the contract time provided, calls for a
4 response, we can substitute another aircraft. So even on the
5 second type of contract, it is not really an exclusive use
6 contract because airplanes can be substituted. So that, on the
7 second contract, if the aircraft that's on that contract is not
8 available for use within the time called out in that contract,
9 they can substitute for one of those three aircraft that are
10 listed in that second contract. That is not exclusive use.

11 Respondent testified on his own behalf. He states he's
12 been a pilot, and his curriculum vitae was received as Exhibit
13 R-8. In his testimony, he states that he never received any
14 notification from the Federal Aviation Administration concerning
15 his requirement for a reexamination or what is termed a 709
16 reexamination or check ride. He stated that he spoke with a
17 Ms. Audette two times and corresponded once by e-mail; however, I
18 observe that, to the Board's knowledge, the Complainant does not
19 conduct his business with respect to orders of suspension, orders
20 of revocation, request for 709 check rides, by e-mail. They were
21 by certified mail, registered mail, or regular mail or all three,
22 or overnight delivery.

23 In any event, the Respondent stated that he never
24 received the Emergency Order of Suspension and that he did not
25 learn about the Emergency Order of Suspension until September 7,

1 2010, when he learned about it from his counselor, Mr. Heida. He
2 admits that he flew on the following day. However, on his
3 testimony, it was a 5-1/2 hour flight which was for the United
4 States Forest Service; it was a U.S. Forest Service mission.

5 With respect to the evaluation flight with Mr. Bak,
6 Respondent maintained that at that time the aircraft that he was
7 operating was, in fact, a public use aircraft and that the pilot-
8 in-command was Mr. Bak and not him. With respect to the July Part
9 135 check ride, he maintained that the chief pilot, Mr. Myers,
10 was, in fact, the pilot-in-command for that flight, and he
11 referenced the definition as indicated in Exhibit R-7, judicial
12 notice of Part 1. And, yes, people can agree who is to be pilot-
13 in-command on a particular flight; however, this instance, the
14 designation is dependent upon the evaluation of the testimony.
15 However, the Respondent did maintain that he believed that
16 Mr. Myers was, in fact, the pilot-in-command on the Part 135
17 flight.

18 In cross-examination, the Respondent admitted that, as
19 of April 16th, 2010, which is the date of the issuance of the
20 Emergency Order of Suspension, as indicated on the affidavit and
21 the receipts of mailing which are Exhibit C-6, that his official
22 address of record with the Federal Aviation Administration was, in
23 fact, his Idaho address, which is 635 Meadowhurst Drive,
24 St. Maries, Idaho, indicating that he was also staying with
25 relatives at the address in Maryland, which is 521 East Seminary

1 Avenue, stated in the complaint as Baltimore, Maryland. And it
2 shows in documents that were submitted as part of the summary
3 judgment motion that it wasn't until May of 2010 that the
4 Respondent corresponded -- that is the only evidence that is in
5 front of me -- with the Federal Aviation Administration concerning
6 his address of record, and when that document, which is dated by
7 the Respondent and signed by him May 25, 2010, that his new
8 address is to be Towson, Maryland. But in any event, he concedes
9 in his testimony that as of April 16th, 2010, his address of
10 record or permanent address with the Federal Aviation
11 Administration was at the Idaho address.

12 He also concedes that, with respect to Exhibit C-4, that
13 he did sign that document indicating that he was acknowledging
14 that he was to be the pilot-in-command for that flight. He
15 denies, however, that Mr. Myers ever gave him an oral briefing of
16 any type apparently prior to the flight; that is, he doesn't
17 remember any. That, to me, is the evidence in the case.

18 There are several issues to be addressed and resolved in
19 disposing of this matter. Those are: the issue of service of the
20 Emergency Order of Suspension, who was the pilot-in-command on the
21 two flights which took place subsequent to the issue of the
22 Emergency Order of Suspension, and whether the aircraft that were
23 used by the Respondent on those two flights were public use
24 aircraft or civil aircraft. And I will address these in
25 sequence.

1 With respect to service, the Board has clearly held in
2 many cases -- and I will cite just one -- Administrator v. Carlos,
3 Board Order EA-7936 (2002), in which the Board stated that: "A
4 notice sent to the address of record by certified mail returned
5 unclaimed," which is what the affidavit of Ms. Brown says, "or by
6 regular mail and not returned," which is also established and not
7 contested by the evidence, the affidavit of Ms. Brown,
8 "constitutes constructive service." So in the evidence in front
9 of me, the Respondent was at least constructively served with the
10 Emergency Order of Suspension.

11 And as the Board has clearly held in many cases, it is
12 the certificate holder's obligation to ensure -- and that is the
13 word the Board uses -- that his permanent mailing address of
14 record is current. And I simply refer to Administrator v.
15 Mazufri, Board Order EA-18003 (2007).

16 However, the issue of service is also really
17 dispositively made on the Respondent's own concession that, as of
18 April 16th, 2010, that his official address was the Idaho address,
19 and the testimony is, and not contested, that certified mail was
20 sent to that address and returned as unclaimed. Not claiming it
21 doesn't make it ineffective.

22 I refer to 49 United States Code Section 46103,
23 subparagraph (b), "Service. Service may be made," paragraph (C),
24 "by certified or registered mail to the person to be served or the
25 designated agent." In this case the person to be served was the

1 Respondent, and service was made by certified mail. Paragraph
2 number (2): "The date of service made by certified or registered
3 mail is the date of mailing." That is as a matter of law by
4 statute.

5 Therefore, I do find that as the Respondent's official
6 address of record and it does show that at least as late as, I
7 think, January 31 of 2010, on an application for renewal of the
8 certificate, that the Respondent was listing his Idaho address,
9 but in any event he concedes in his testimony that April 16 his
10 address of record was Idaho. The evidence shows that mail was
11 sent there certified mail; therefore, as a matter of law, the
12 Respondent was served with the Emergency Order of Suspension on
13 April 16, 2010.

14 No appeal was taken from that order, which was
15 immediately effective but became finally effective in the absence
16 of any appeal, which means that it continued into the future and
17 was effective on the dates that the Respondent flew in May and
18 July of 2010. And I would simply observe that on the evidence in
19 front of me, I would also find, since the regular mail was not
20 returned, that the Respondent was constructively served both at
21 his Idaho and his Maryland addresses both by the certified mail
22 and the failure to have the regular mail returned. To me, that
23 disposes of the issue of service.

24 With respect to the issue of who was the pilot-in-
25 command on these two flights, the testimony of Mr. Bak and the

1 testimony of the Respondent given in this session were
2 diametrically opposed. However, I have to evaluate the
3 credibility of the witnesses and take into account their demeanor
4 during their testimony, any perceivable interests that the
5 witnesses may have, and the type of testimony or the nature and
6 detail of the testimony given.

7 On my evaluation of the testimony, the weight to be
8 attached to it, I find the testimony of the witness Mr. Bak to be
9 the more persuasive and credible. The Respondent's testimony is
10 self-serving. It doesn't mean it's excludable, but it has to be
11 weighed as self-serving.

12 Also take into account that the evaluation ride was, in
13 fact, an evaluation ride, and the individual being evaluated is
14 the Respondent. He's being evaluated that he can perform duties
15 as a pilot. That of itself doesn't mandate who is the pilot-in-
16 command but at least leans in that direction because, if you're
17 not acting as the pilot-in-command, how are you going to be
18 checked as to whether or not you can safely act as the pilot-in-
19 command?

20 But lastly and more significantly, Exhibit C-4, the
21 Respondent signed the document, acknowledging that he would, in
22 fact, be the pilot-in-command for that flight. Contradicts his
23 oral testimony. There's no evidence he was coerced. He signed
24 it. I find, therefore, that the evidence, by a clear
25 preponderance of the reliable and probative evidence, is that on

1 May 21 when he took the check ride with Mr. Bak, the Respondent,
2 Mr. Koelbel, was, in fact, acting as the pilot-in-command.

3 As to the July 28th, 2010, check ride, we again had the
4 testimony of the Respondent that he was not the pilot-in-command,
5 that Mr. Myers was because he was a chief pilot. The fact that
6 Mr. Myers was the chief pilot does not make him automatically the
7 pilot-in-command, nor does the fact that the Respondent was
8 receiving a check ride ipso facto make him the pilot-in-command,
9 though it leans evidence in that direction because he's being
10 evaluated that he can perform these piloting duties and performing
11 as a pilot-in-command of a flight subsequently. But in any event,
12 again, I have to evaluate the testimony that's being given.

13 There's no indication that Mr. Myers has any adverse
14 interest with the Respondent in this case. He gave him a
15 satisfactory thumbs up on the check ride. There's no evidence of
16 why Mr. Myers would have an adverse position because of some
17 conflict with the Respondent. And in his testimony, which I
18 reviewed in detail in his deposition, he clearly states that it is
19 his habit to brief on every check ride who is to be pilot-in-
20 command and that the pilot being evaluated, be it the Respondent
21 or any other pilot, that individual for that check ride is the
22 pilot-in-command.

23 Again, Respondent's position must be taken in the light
24 of the fact he is the Respondent in the case. Weighing the
25 testimony given by Mr. Myers, the check ride itself, the Part 135

1 check ride, I find that the preponderance of the reliable and
2 probative evidence is that on the July 28th, 2010, Part 135 check
3 ride, it was, in fact, the Respondent who was the pilot-in-command
4 for that flight as a result of.

5 Turning then to the status of the aircraft, as to
6 whether it was public use aircraft on either or both of these
7 check flights when they were conducted by the Respondent.
8 Mr. Bak's testimony was that they were not public use flights,
9 that the aircraft are on-demand and that really, on the testimony
10 in front of me, there is no exclusive use contract, meaning the
11 aircraft sits on the ground unless it's to be used by the United
12 States Forest Service. That's an exclusive use. It's used solely
13 and only by the individual entity, government entity, who must
14 control the use of that aircraft exclusively. Mr. Bak's testimony
15 was that the aircraft can be used for other things.

16 Mr. Gadwa's testimony was to the same effect. You can
17 use it for other things, and even in the so-called quasi-exclusive
18 use -- I don't know what you would call it -- that where the
19 aircraft is supposed to be available within a specific time frame,
20 that if the three aircraft listed in that type of amendment
21 contract is not available, they can substitute another aircraft.
22 So, again, it's not exclusive use of a particular aircraft.

23 I believe the prominent case for the Board on public use
24 is that of Administrator v. Sexauer, at 5 NTSB 246 (1987). And
25 they cite to a court case which is United States v. Aerospace

1 Lines, Inc., which is at 361 F.2d 916 (9th Cir. 1966). And the
2 Board adopts that language and indicates that the case that I just
3 cited from the Ninth Circuit, Aerospace Lines, Inc., is the
4 leading case where a juror's judicial determination was made of
5 the term public aircraft or public use aircraft.

6 Therein, the plane in question was used exclusively by
7 the governmental agency for an extended period -- in that case it
8 was 10 months -- under a contract which provided that the plane
9 and the crew were under the exclusive government's control. And
10 the Board in the Sexauer case found that, under the contract which
11 involved a city of Perryville, that it was not an exclusive use
12 since the city did not exercise exclusive control over the use of
13 the aircraft.

14 And I would also simply observe that the Board has
15 repeatedly held that even where flights are paid for by the United
16 States government, such does not compel a conclusion as to whether
17 it is a civil or a public status of the aircraft since it is well
18 settled that many of the Federal Aviation Regulations apply to
19 both civil and public aircraft. That's in, for example,
20 Administrator v. DeChant, 2 NTSB 2183, a 1976 case.

21 And a later case, whether the aircraft was public or
22 civil is immaterial, and in that case saying that Respondent's
23 behavior without regard to the type of aircraft he operates with
24 respect to FAR 91.9, which is recodified as 91.13, which is at
25 issue here, those FARs apply to civil or public use aircraft. And

1 that's Administrator v. Nutsch, EA-4148, at 8, and it was
2 reviewed, denied, 55 F.3d 684, 1996, D.C. Circuit Court of
3 Appeals.

4 With respect to the status of the aircraft in both
5 instances, there's no indication that the United States Forest
6 Service was exercising exclusive jurisdiction over the aircraft
7 utilized on these check rides on the date they were being flown by
8 the Respondent as pilot-in-command. Aircraft could be substituted
9 and the aircraft could be used for other purposes when they were
10 not being used by the Forest Service for a particular mission.
11 That's on demand. That is not exclusive use.

12 So, therefore, on the precedent and the law and the
13 evidence in front of me, I specifically find that, at the time
14 that the Respondent operated these two flights, that the aircraft
15 in use by him were in fact civil aircraft and did not fall within
16 the definition of public use aircraft. It follows, therefore,
17 since the Emergency Order of Suspension was effectively served and
18 was in full force and effect during that period of time, that the
19 Respondent, as a matter of law, did not have a valid pilot's
20 certificate because it had been suspended and that, therefore, he
21 operated these aircraft when his pilot's certificate was under a
22 valid and effective Order of Suspension.

23 I find, therefore, that, as a consequence of his
24 actions, that he did, in fact, operate in regulatory violation of
25 the provisions of section 61.2(a)(1) of the Federal Aviation

1 Regulations and that he exercised the privileges of his pilot's
2 certificate at a time when it was under a valid Order of
3 Suspension.

4 I find also, as a consequence thereof, that the
5 Respondent did operate in regulatory violation of Section 91.13(a)
6 of the Federal Aviation Regulations that the Respondent -- and I'm
7 giving him the benefit of the doubt that he did not personally
8 know of it, which doesn't make any difference since the order was
9 effective, to say that it was at least a careless operation on
10 both occasions. But in any event, he was in violation of the
11 provisions of this regulation and that he operated on those two
12 occasions in a careless manner, and since he did not have a valid
13 certificate, that it presented as a reasonable nexus a potential
14 endangerment -- and that is all that is necessary, potential --
15 hazard to persons or property. And I so find.

16 With respect to the sanction, Complainant has requested
17 that deference be shown to the choice of sanction, and by statute
18 the Board is required to show deference to the Complainant's
19 choice of sanction unless it is demonstrated -- and that is a
20 burden on the Respondent to show that the choice of sanction is
21 arbitrary, capricious, or not in accord with precedent. That has
22 not been shown here.

23 The Board has always viewed the operation of an aircraft
24 by an individual when his certificates have been under suspension
25 or when he does not possess a valid and current airman medical

1 certificate as an egregious violation. And the sanction guidance
2 table, which the Board takes judicial notice of since it's
3 available to the general public, mandates revocation as the sole
4 consequence for the type of violations herein. By statute,
5 therefore, and Board precedent, I'm required to exercise deference
6 to the Complainant's choice of sanction.

7 I, therefore, do find that, upon the preponderance of
8 the reliable and credible evidence and appropriate precedent, that
9 the Administrator's Emergency Order of Revocation, the complaint
10 herein, must be affirmed as issued and that the appropriate
11 sanction in the public interest in air safety and air commerce for
12 the violations established is revocation of the Respondent's
13 airline transport pilot's certificate.

14 ORDER

15 IT IS THEREFORE ORDERED that:

16 1. The Complainant's Emergency Order of Revocation, the
17 complaint herein, be, and the same hereby is, affirmed as modified
18 and issued.

19 2. That the Respondent's airline transport pilot's
20 certificate number 2077218 be and the same hereby is revoked.

21 Entered this 29th day of June 2010, at Spokane,
22 Washington.

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24 PATRICK G. GERAGHTY

25 Administrative Law Judge

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APPEAL

ADMINISTRATIVE LAW JUDGE GERAGHTY: Either party to this decision and order may appeal from that decision and order by filing with the Board within 10 days from this date a notice of appeal. The appealing party must further, within 50 days from this date, file with the Board a brief in support of that appeal. Those documents must be filed with the docket section, Office of Administrative Law Judges, National Transportation Safety Board, Washington, D.C., with copies of each document served upon the opposing party.

Parties are referred to the Board's Rules of Practice section dealing with appeals for further information on the type of issues that the Board will review upon appeal. Parties are specifically cautioned that the Board takes a very strict and stringent view of the time provisions on appeals and may dismiss an appeal upon its own motion for the untimely filing of a document by even one day.

If an extension of time is required, it must be requested from the General Counsel's office, National Transportation Safety Board, in Washington, D.C. prior to the expiration or tolling of the particular time provision. And of course the opposing party may also move for dismissal for the untimely filing of either the notice or supporting brief. As this is an Emergency Order of Revocation -- although the time provisions were waived and therefore the time provisions for

1 regular docket proceedings are applicable, nonetheless -- as this
2 was an Emergency Order of Revocation, it remains effective during
3 the course of any appeal, and therefore the Respondent's
4 certificate remains revoked during the pendency of any Board
5 review.

6 Is there anything further for the record or any
7 corrections thereof?

8 MR. SHAYNE: Nothing from the FAA, Your Honor.

9 ADMINISTRATIVE LAW JUDGE GERAGHTY: Nothing?

10 MR. HEIDA: Nothing, Judge.

11 ADMINISTRATIVE LAW JUDGE GERAGHTY: The proceeding is
12 closed. Thank you, gentlemen.

13 (Whereupon, at 12:02 p.m., the hearing in the above-
14 entitled matter was adjourned.)

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CERTIFICATE

This is to certify that the attached proceeding before the

NATIONAL TRANSPORTATION SAFETY BOARD

IN THE MATTER OF: John D. Koelbel

DOCKET NUMBER: SE-19045

PLACE: Spokane, Washington

DATE: June 29, 2011

was held according to the record, and that this is the original, complete, true and accurate transcript which has been compared to the recording accomplished at the hearing.

Bonnie L. Martinelli
Official Reporter