

SERVED: April 23, 2014

NTSB Order No. EA-5714

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 22nd day of April, 2014

_____)	
MICHAEL P. HUERTA,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-19373
v.)	
)	
EXECJET CHARTER, INC.,)	
)	
Respondent.)	
)	
_____)	

OPINION AND ORDER

1. Background

Respondent, who proceeds *pro se*, appeals the written order of Administrative Law Judge Patrick G. Geraghty, issued February 6, 2013.¹ By that order, the law judge determined respondent Execjet Charter, Inc. (“Execjet”) lacked the requisite personnel, exclusive use of at least one aircraft, and had allowed its insurance to lapse, which led the Administrator to terminate respondent’s economic authority. As a result, the law judge concluded respondent

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

violated 14 C.F.R. §§ 119.5(i), 119.61(c), 119.69(a)(3) and 135.25(b).² For the reasons stated below, we deny respondent's appeal.

A. Facts

On September 13, 2012, the Administrator issued an order of revocation of respondent's Air Carrier Certificate No. E5JA2511. While respondent's operating specifications originally listed two aircraft, as of March 2010, respondent only had one aircraft, Learjet N408MG, listed on its operating specifications. In November 2009, the Federal Aviation Administration (FAA) assigned Tracey L. Egan to be the Principal Maintenance Inspector (PMI) for respondent.

On or about August 31, 2011, Mike Katzmann, respondent's Director of Maintenance (DOM), notified Ms. Egan that he was no longer respondent's DOM. Mr. Katzmann sent an email to Ms. Egan on October 3, 2011 stating "[e]ffective immediately, I am no longer DOM for Execjet Charter, Inc."³ As of the date of the hearing, the Administrator had not approved a new DOM for respondent.

On or about December 15, 2011, respondent's Director of Operations, Hadi Falahati, notified FAA Principal Operations Inspector (POI) James Piccoli that Learjet N408MG was "no

² Title 14 C.F.R. § 119.5(i) prohibits any person from operating as a direct air carrier without holding "appropriate economic authority" from the U.S. Department of Transportation. Title 14 C.F.R. § 119.61(c) requires a certificate holder who terminates operations under 14 C.F.R. part 135 to surrender the operating certificate and operations specifications to the FAA within 30 days after termination of operations. Title 14 C.F.R. § 119.69(a) requires each certificate holder to have sufficient qualified management and technical personnel to ensure the safety of its operations, such as a Director of Operations, Chief Pilot, and Director of Maintenance. Title 14 C.F.R. § 135.25(b) requires each certificate holder to 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.

³ Exh. C-1.

longer...under operational control of Execjet Charter Inc.”⁴ At the hearing, Mr. Falahati, who represented respondent *pro se* and testified on behalf of respondent as its Director of Operations, stated the aircraft had been repossessed by the bank in 2011.⁵ Also during the hearing, Mr. Falahati testified the last time N408MG was operated on a part 135 flight was at the end of July 2011.⁶

On or about November 15, 2011, respondent’s insurance coverage on N408MG lapsed.⁷ On or about March 1, 2012, the FAA Air Transportation Division (ATD) sent a letter to respondent stating respondent’s economic authority was terminated, due to respondent’s lapse in insurance for N408MG.⁸ Based on respondent’s lack of a DOM, lapse of insurance, lack of an aircraft on respondent’s operations specifications and loss of economic authority, the Administrator issued an order revoking respondent’s air carrier certificate. Respondent appealed the order, and the case proceeded to hearing.

B. Law Judge’s Oral Initial Decision

At the outset of the hearing, the law judge distilled the complaint into three main issues: (1) whether respondent had exclusive use of at least one aircraft; (2) whether respondent had a DOM; and (3) whether respondent had insurance on an aircraft.⁹ At the hearing, the law judge

⁴ Ex. C-4.

⁵ Tr. 51.

⁶ Tr. 50.

⁷ Exh. C-2; Tr. 51.

⁸ Tr. 51.

⁹ Initial Decision at 129.

found Ms. Egan's testimony credible.¹⁰ In his decision, the law judge addressed each allegation in turn and made specific findings as to fact and credibility of the witnesses. The law judge found respondent did not have exclusive use of at least one aircraft, in violation of 14 C.F.R. § 135.25, and did not have a DOM, in violation of 14 C.F.R. § 119.69. The law judge further found respondent had terminated operations.

In his decision, the law judge stated respondent did not dispute the lack of a DOM, lack of exclusive use of at least one aircraft, loss of insurance and removal of economic authority to operate. The law judge considered the confusion as to the dates certain events occurred, such as the loss of insurance, the lack of exclusive control of an aircraft and the departure of the DOM. However, he did not find the date issue relevant to this proceeding. For example, although respondent did not object to the email messages the Administrator offered into evidence from Mr. Katzmann and to POI Piccoli, respondent later questioned the authenticity of the email messages due to alleged discrepancies in the dates of the messages. In each case, the law judge concluded the precise date was not determinative. Rather, the law judge focused on the underlying issues of whether or not respondent had insurance, whether or not respondent had exclusive control of an aircraft, and whether or not respondent had a DOM. For each issue, the law judge determined the evidence supported the allegations; in addition, the law judge stated respondent did not deny these allegations.

Regarding respondent's affirmative defenses of "arbitrary and capricious" actions, "bad faith" and "lies" by the Administrator, the law judge determined respondent failed to meet its

¹⁰ Id. at 132, 135, 136.

burden of proof.¹¹ The law judge stated respondent had not shown “any arbitrary or bias on the part of the Administrator.”¹² The law judge also concluded “the Board does not address the Administrator’s conduct of its investigations, other than it would be a showing of a denial of due process. In the evidence in front of me, there has been no such showing.”¹³ As a result, the law judge found respondent’s argument that the Administrator’s staff was intent on bringing action against its certificate was not an appropriate affirmative defense.

C. Issues on Appeal

Respondent raised several issues on appeal. Respondent challenges the sufficiency of the evidence presented in support of each of the allegations which remained in dispute at the hearing, specifically allegations 2, 3(a), 4(a), 5 and 6 of the complaint.¹⁴ Although the parties agreed respondent admitted it did not have a DOM, on appeal respondent argues the Administrator did

¹¹ Id. at 138, 141.

¹² Id. at 141.

¹³ Id.

¹⁴ The remaining allegations in dispute were:

Allegation 2: On or about January 31, 2012, the Federal Aviation Administration's ATD terminated Execjet's Economic Authority effective November 15, 2011, the date Execjet's insurance for N408MG lapsed.

Allegation 3(a): On or about August 3, 2011, Execjet terminated operations.

Allegation 4(a): Execjet's most recent DOM resigned October 3, 2011.

Allegation 5: Execjet did not have the exclusive use of at least one aircraft that meets the requirements for at least one kind of operation authorized in its operations specifications.

Allegation 6: By reason of the foregoing, Execjet lacked the qualifications to be the holder of an Air Carrier certificate.

not prove that allegation. Respondent also expressly appeals the law judge's decision allowing the FAA to amend the complaint at the beginning of the hearing, alleging respondent was denied the notice provisions of 49 U.S.C. § 44709(c). Respondent further alleges procedural error by the law judge in preventing respondent from admitting evidence about the FAA enforcement investigative process. Respondent claims to have a number of affirmative defenses based on alleged bad faith by the FAA. Finally, respondent alleged the law judge failed to act in an impartial manner in deciding the case.

2. Decision

On appeal, we review the law judge's decision *de novo*, as our precedent requires.¹⁵

A. Sufficiency of the Evidence

1. Economic Authority

Respondent argues the FAA improperly amended the charge in the complaint regarding respondent's lack of economic authority. As a result, respondent contends the Administrator cannot proceed with this charge. Respondent's basis for its argument is the language of the original complaint, which stated the FAA gave notice of the termination to respondent "on or about January 31, 2012." The FAA amended this date of the notice from March 1, 2012, to January 31, 2012, at the beginning of the hearing. Respondent objected to the amendment, but the law judge allowed it.

To the extent respondent contends the law judge erred in allowing the Administrator's attorney to amend the complaint at the hearing, we review such procedural issues under an abuse

¹⁵ Administrator v. Smith, NTSB Order No. EA-5646 at 8 (2013); Administrator v. Frohmuth and Dworak, NTSB Order No. EA-3816 at 2 n.5 (1993); Administrator v. Wolf, NTSB Order No. EA-3450 (1991); Administrator v. Schneider, 1 N.T.S.B. 1550 (1972) (in making factual findings, the Board is not bound by the law judge's findings).

of discretion standard.¹⁶ Our Rules of Procedure address amendments to complaints by stating, “[a]mendments to complaints shall be consistent with the requirements of 49 U.S.C. §§ 44709(c) and 44710(c).”¹⁷ Section 44709(c) provides:

(c) Advice to Certificate Holders and Opportunity To Answer.—Before acting under subsection (b) of this section, the Administrator shall advise the holder of the certificate of the charges or other reasons on which the Administrator relies for the proposed action. Except in an emergency, the Administrator shall provide the holder an opportunity to answer the charges and be heard why the certificate should not be amended, modified, suspended, or revoked.

Respondent alleges the Administrator’s amendment to the complaint at the hearing denied it the notice § 44709(c) requires. In support of this position, respondent cites Oceanair of Florida, Inc. v. NTSB.¹⁸ In Oceanair, the FAA amended its complaint shortly before the hearing to add additional allegations and changed the sanction sought from suspension of an operating certificate to revocation of the certificate.

We find the present case is distinguishable from Oceanair. The amendment the law judge permitted in the case *sub judice* did not add any new substantive allegations and did not change the proposed sanction. Instead, the amendment changed the alleged date the FAA sent respondent the required notice of termination—from March 1, 2012 to January 31, 2012. Throughout the proceedings, respondent was aware the FAA alleged respondent’s economic authority had been terminated effective November 15, 2011. A change of one month in the

¹⁶ Administrator v. Jeanmaire and McMath, NTSB Order No. EA-5346 at 16 n.13 (2007) (citing Administrator v. Van Ovost, NTSB Order No. EA-4681 at 2 (1998)).

¹⁷ 49 C.F.R. § 821.12(a). While § 821.12(a) cites 49 U.S.C. § 44710, that citation is inapplicable to the case *sub judice*, because § 44710 is only relevant to allegations of controlled substance violations.

¹⁸ 888 F.2d 767 (11th Cir. 1989).

timeframe within which the FAA gave notice was not substantive and did not alter the underlying issues in this case. Respondent was not prejudiced in any way by this non-substantive amendment.

Moreover, the evidence the Administrator presented at the hearing demonstrated respondent's economic authority was clearly terminated effective November 15, 2011. This notice of termination of economic authority resulted from respondent's insurance company's statement showing the required coverage expired on November 15, 2011. At the hearing, respondent admitted the insurance coverage had expired and testified it received a letter from the FAA staff dated March 1, 2012, advising respondent its economic authority had been terminated.¹⁹ Finally, during the hearing, respondent stipulated the company lacked economic authority at the time of the hearing.²⁰

2. Termination of Operations

Regarding whether respondent had terminated operations at the time the Administrator sought revocation of its certificate, we find the evidence the Administrator's attorney offered at the hearing unequivocally establishes respondent had terminated operations, as alleged. During his testimony, Mr. Falahati admitted Execjet had not operated N408MG on a part 135 flight since July 2011.²¹ On appeal, respondent argues Mr. Falahati was testifying he, personally, had

¹⁹ Tr. 51-52.

²⁰ Tr. 72.

²¹ The testimony at the hearing included the following colloquy:

Administrator: When did you last operate N408MG on a part 135 flight?

Respondent: I believe it was end of July 2011.

Administrator: You have not operated it since then, correct?

not operated the aircraft on a part 135 flight since July, 2011, but his testimony did not prove the company had not done so.

We find respondent's argument without merit. Mr. Falahati testified as the director of operations for respondent. As respondent's representative at the hearing, he clearly understood the entire proceeding was for the purpose of determining the existence of operations, personnel and economic authority of respondent. The Administrator did not ask Mr. Falahati a single question regarding his personal activities, experiences, qualifications or any other matter which could have led Mr. Falahati to reasonably believe the Administrator was asking when he, as opposed to respondent, had last operated the aircraft on a part 135 flight. Moreover, Mr. Falahati's answers to the Administrator's attorney's questions demonstrate Mr. Falahati spoke on behalf of respondent, not on behalf of himself.²² Furthermore, when questioned on the issue of

(.continued)

Respondent: That's correct.

Tr. 50.

²² The other questions and answers during the Administrator's direct examination of Mr. Falahati:

Administrator: "Do you have any insurance at this point...on this aircraft?"

Respondent: "...at this moment, we do not have insurance on the aircraft."

Administrator: "Okay. Did you receive a letter from the Administrator advising you that...your economic authority had been cancelled?"

...

Respondent: "Yes, I did."

...

Administrator: "So you knew you didn't have economic authority, correct?"

Respondent: "As of the beginning of March, 2012, correct."

Tr. 51-52.

termination of operations, Mr. Falahati explained, “I did not say I terminated operations on July – I said we did not fly the airplane.”²³ The ease with which Mr. Falahati interchanges “I” and “we” demonstrates as he testified, Mr. Falahati believed he was speaking on behalf of respondent, not on behalf of himself personally.

Respondent also argued on appeal he had not terminated operations but had merely suspended them, in much the same way an aerial spraying operation for agricultural purposes suspends operations in the off season when no crops need to be sprayed. This argument is not persuasive because respondent did not conduct the types of operations which would be considered seasonal or would have expected periods of inactivity. As well, respondent did not present any evidence the company engaged in such seasonal or infrequent operations.

Therefore, we find the evidence supports the law judge’s conclusion respondent had not operated a part 135 flight since at least July 2011. This finding, combined with the absence of a DOM and the lack of exclusive use of an aircraft, demonstrates respondent terminated operations sometime between July 2011 and October 2011.

3. Director of Maintenance

Likewise, we find no evidence in the record supporting the assertion respondent proposed, or sought the Administrator’s approval for, a new DOM as of the date of the hearing.²⁴ Moreover, we find respondent waived raising this issue on appeal as respondent had admitted

²³ Tr. 78. Had Mr. Falahati been speaking on behalf of himself, as he later argued in his appeal brief, he would have said “I did not say we terminated operations...” This is underscored by Mr. Falahati reverting immediately to “we” when he said “I said we did not fly the airplane.”

²⁴ Tr. 47-48 (Inspector Egan’s testimony, which includes statements she did not receive any notification or locate any records indicating respondent obtained a DOM after Mr. Katzmann’s departure).

this allegation in the answer to the complaint.²⁵ At the beginning of the hearing, the law judge reviewed which allegations in the complaint had been admitted and which remained in dispute. Among respondent's admissions was allegation 4(b), which states, "to date, Execjet does not have a required Director of Maintenance." Respondent failed to object to the law judge's characterization of allegation 4(b) as admitted, and did not deny this allegation in its answer. As a result, we consider the issue waived for purposes of this appeal.

Even assuming *arguendo*, respondent did not waive this issue for appeal, we find the evidence in the record supports the Administrator's allegation respondent failed to have a DOM. Title 14 C.F.R. § 119.69 requires, among other management personnel, each certificate holder have a qualified DOM. Respondent's most recent DOM, Mike Katzmann, twice notified the Administrator he was no longer respondent's DOM. Respondent concedes in its appeal brief "as of October 1st 2011, Mr. Mike Katzmann was not Director of Maintenance for ECI."²⁶ Moreover, respondent presents no evidence he obtained a DOM following Mr. Katzmann's departure from Execjet. Upon questioning by the law judge, respondent confirmed, as of the date of the hearing, respondent did not have a DOM on the payroll,²⁷ and specifically stipulated at the hearing that Execjet did not have a DOM at the time of the hearing.²⁸

4. *Exclusive use of an Aircraft*

We find the Administrator proved respondent failed to have exclusive use of an aircraft.

²⁵ Our Rules of Practice require respondents to admit, deny or otherwise respond to all allegations in the Administrator's complaints. 49 C.F.R. § 821.31(b).

²⁶ Appeal Br. at 11.

²⁷ Tr. 39.

²⁸ Tr. 72.

Among other things, 14 C.F.R. § 135.25 requires a certificate holder to have 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.

Under direct examination by the Administrator, Mr. Falahati admitted N408MG had been repossessed by the bank that financed respondent's acquisition of the aircraft.²⁹ N408MG was the only aircraft listed on respondent's operating specifications. The record is devoid of evidence suggesting respondent had acquired exclusive use of any other aircraft. Moreover, during the hearing, respondent admitted "if the case here is, does Execjet have an aircraft which is on [its] 135 certificate of specs, the answer is no."³⁰ Based on respondent's stipulation and the lack of any evidence indicating compliance with § 135.25, the Administrator has established respondent's violation of § 135.25, as charged.

B. Evidence on FAA Enforcement Investigative Process

Respondent alleges procedural error by the law judge in preventing respondent from admitting evidence about the Administrator's enforcement investigative process. Under our jurisprudence, law judges have significant discretion in overseeing testimony and evidence at hearings. The Board reviews a law judge's evidentiary rulings under an abuse of discretion standard, after a party has shown that such a ruling prejudiced him or her.³¹ We carefully have

²⁹ Tr. 50-51.

³⁰ Tr. 72.

³¹ See Administrator v. Morrison, NTSB Order No. EA-5619 (2012); Administrator v. Ledwell, NTSB Order No. EA-5582 (2011); Administrator v. Ochionne, NTSB Order No. EA-5537 at 11 (2010); Administrator v. Giffin, NTSB Order No. EA-5390 at 12 (2008) (citing Administrator v. Bennett, NTSB Order No. EA-5258 (2006)) (we will not overturn a law judge's evidentiary ruling unless we determine the ruling was an abuse of discretion). Cf. Administrator v. Ferguson, 352 Fed.Appx. 192, 2009 WL 3747426 (9th Cir. 2009) (holding law judge erred in curtailing the

reviewed the record for this case, and determined the law judge did not err in limiting the hearing to the facts concerning the allegations contained in the complaint and respondent's affirmative defenses.

On appeal, respondent asserts the law judge erred in disallowing questions and testimony concerning the Administrator's enforcement investigation. The manner in which the Administrator chooses to pursue enforcement action is not within the scope of the Board's authority unless the actions are arbitrary or capricious or otherwise contrary to law.³² This jurisprudence further indicates the law judge's evidentiary rulings were proper.

C. Affirmative Defenses

Respondent asserted a number of purported affirmative defenses prior to the hearing. Following the Administrator's motion *in limine*, the law judge struck all but two asserted affirmative defenses. The remaining affirmative defenses were:

- 1) The Administrator's acts and/or omissions are arbitrary and capricious, constitute an abuse of discretion, and are otherwise not in accordance with law and/or violate 5 U.S.C. § 706(2)(A) [of] the Administrative Procedure Act³³; and

(..continued)

cross-examination of FAA witness because the witness was central to the Administrator's case and the ruling was therefore prejudicial).

³² See Administrator v. Moore, NTSB Order No. EA-4929 (2001) ("We fail to see how respondent would have us remedy this perceived error. The Board has no direct authority over the FAA's prosecutorial discretion or the quality of its investigations. See, e.g., Administrator v. Kaolian, 5 NTSB 2193, 2194 (1987), and Administrator v. Crist, NTSB Order No. EA-4512 at 5-6 (1996).")

³³ Section 706(2)(A) of the Administrator Procedure Act permits an agency action to be set aside if the action is found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." As discussed herein, the law judge found respondent failed to meet its burden of proof showing the Administrator's actions were arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

2) The Administrator's bad faith and lack of substantial justification for wrongfully filing this complaint, and/or continuing this proceeding.

In allowing these two affirmative defenses to stand, the law judge reminded respondent of its burden to prove these defenses. At the conclusion of the hearing, the law judge found "the burden of proof is on [r]espondent with an affirmative defense, and there has simply been a failure of establishing and fulfilling that burden."³⁴

Respondent's arguments at the hearing and on appeal merge the two affirmative defenses. While respondent made numerous allegations of "arbitrary and capricious" actions, "bad faith" and "lies," it offered no evidence to support these allegations. Although section 706(2)(A) of the Administrative Procedure Act permits agency action to be set aside if it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, the burden rests on the asserting party to prove agency action was improper. Respondent failed to meet that burden. Respondent undoubtedly disagrees with the manner in which the Administrator pursued the enforcement action. However, such an argument does not amount to an affirmative defense. The Administrator's obligation to enforce the Federal Aviation Regulations includes the duty to promulgate charges against a respondent and provide the respondent the opportunity to dispute the charges.³⁵ In this case, respondent's disagreement with the manner in which the Administrator pursued action against it does not in any way excuse respondent's admitted

³⁴ Tr. 139. The law judge's statement concerning the burden of proof is a correct summary of our jurisprudence. See Administrator v. Kalberg, NTSB Order No. EA-5240 at 7 (2006) (citing Administrator v. Tsegaye, NTSB Order No. EA-4205 at n.7 (1994)). In addition, the law judge reminded respondent of its burden to prove the affirmative defenses many times throughout the hearing, and clearly informed respondent the burden had not been met. Tr. 33, 68, 70, 73-74, 93, 108.

³⁵ 49 U.S.C. § 44709.

violations. As a result, the contention that the Administrator's flight standards district office staff incorrectly chose to pursue action against respondent, or in any way acted in "bad faith" is not an affirmative defense under our jurisprudence. On appeal, we find no evidence in the record supporting respondent's asserted affirmative defenses. We find no merit in the allegations of bad faith or arbitrary or capricious actions by the FAA.

D. Judicial Impartiality

Finally, respondent alleged the law judge failed to act in an impartial manner in deciding the case. As noted above, NTSB administrative law judges have significant discretion in their oversight of hearings and evaluation of procedural issues.³⁶ With regard to the general argument of bias, we have long held, in order to disqualify a law judge for bias or prejudice, "the bias or prejudice must stem from an extra-judicial source and result in an opinion on the merits on some basis other than what the judge has learned from his or her participation in the case."³⁷

We thoroughly have reviewed the hearing transcript and pre-hearing orders in the record for this case, and find no evidence of any lack of impartiality on the part of the law judge. The law judge's conduct and oversight of the facts presented at the hearing were appropriate and allowed respondent the opportunity to dispute the charges and present affirmative defenses.

Respondent has not established the law judge maintained a bias stemming from an extra-judicial source, that resulted in an opinion on a basis other than the facts presented at the hearing and in

³⁶ See, e.g., Administrator v. Wheeler, NTSB Order No. EA-5208 at 9 (2006) (stating law judges are allowed to inquire on issues they believe require clarification at hearings, and citing 49 C.F.R. § 821.35(b), Administrator v. Reese, NTSB Order No. EA-4896 at n.4 (2001), and Administrator v. Kachalsky, NTSB Order No. EA-4847 at n.4 (2000)).

³⁷ Administrator v. Lackey, NTSB Order No. EA-5419 at 11 (2008), aff'd, Lackey v. FAA, 386 Fed. Appx. 689, 2010 WL 2781583 (9th Cir. 2010); see also Administrator v. Steel, 5 NTSB 239, 243 n.8 (1985).

the record. Overall, respondent has not established the law judge was biased.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;
2. The law judge's decision is affirmed; and
3. The Administrator's order revoking 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.

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

* * * * *

In the matter of: *

MICHAEL P. HUERTA, *

ADMINISTRATOR, *

FEDERAL AVIATION ADMINISTRATION, *

Complainant, *

and * Docket No.: SE-19373

JUDGE GERAGHTY *

EXECJET CHARTER, INC. (E5JA), *

Respondent. *

* * * * *

NTSB Courtroom
1515 West 190th Street
Suite 555
Gardena, California

Wednesday,
February 6, 2013

The above-entitled matter came on for hearing, pursuant
to Notice of Hearing, at 9:18 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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1 ORAL INITIAL DECISION AND ORDER

2 ADMINISTRATIVE LAW JUDGE GERAGHTY: This has been a
3 proceeding before the National Transportation Safety Board on the
4 Appeal of ExecJet Charter, Inc. (E5JA), as represented by its
5 Director of Operations, Mr. Hadi Falahati, herein after referred
6 to as Respondent. It is an appeal from an Order of Revocation,
7 which was served on behalf of the Administrator, Federal Aviation
8 Administration, which seeks to revoke the Air Carrier Certificate
9 Number E5JA2511 for alleged violation of Sections 119.5(i),
10 119.61(c), 119.69(a)(3) and 135.25(b) of the Federal Aviation
11 Regulations. The Order of Revocation serves herein as the
12 Complaint.

13 Pursuant to notice, this matter came on for trial on
14 February 6 in Gardena, California. The Complainant was
15 represented by one of its Staff Counsel, Lierre Green, Esquire, of
16 the Regional Counsel's Office, Western Pacific Region. The
17 Respondent, the ExecJet Charter, Inc., was represented by Mr. Hadi
18 Falahati. Parties were present at all times and were afforded the
19 opportunity to offer evidence, to examine and cross-examine
20 witnesses and to make argument in support of their respective
21 positions.

22 I have considered all the evidence, both oral and
23 documentary, and the evidence that I summarize is that which leads
24 to the conclusion herein. Evidence that I do not mention is

1 viewed by me as being essentially corroborative or not materially
2 affecting the outcome of the decision.

3 ADMISSIONS

4 By pleading, it was agreed there was no dispute as to
5 the following numbered paragraphs of the Complaint: Paragraph 1,
6 Paragraph 3(b), Paragraph 4(b). Those matters are therefore taken
7 as having been established for purposes of this Decision.

8 DISCUSSION

9 As noted above, the Complainant seeks the revocation of
10 Respondent's Air Carrier Certificate for the alleged violations of
11 Sections of the Federal Aviation Regulations, which I have
12 previously cited. To simply summarize those, it is essentially
13 alleged that the Respondent no longer meets the FAR requirements
14 to be the possessor of an Air Carrier Certificate in that he no
15 longer has the requisite personnel, exclusive use of at least one
16 aircraft, and has lapse of economic authority and lapse of
17 insurance. So without reciting the long verbiage of the
18 Regulations, that is the gist of the basis of the action to be
19 sought by the Complainant.

20 The Complainant's case is made through documents and the
21 testimony of essentially the FAA employee, Ms. Tracey Egan. She
22 gave in her opening testimony her background and experience, and
23 it is clear from her testimony that she has a wealth of experience
24 in aviation maintenance and was well-qualified to act in her

1 position as a Principal Maintenance Inspector or an Aviation
2 Safety Inspector, Maintenance, for the Federal Aviation
3 Administration.

4 She was the investigator or individual who was assigned
5 to action in this case by the manager in the Flight Standards
6 District Office. As I understand it, that was in, I believe,
7 Miramar, Florida, or maybe that's where they moved from Fort
8 Lauderdale to Miramar. But anyway, this essentially was where the
9 Certificate was being held. It was in Florida, and as I
10 understand on the testimony, the operations are being essentially
11 conducted in California. So there was a question about where the
12 operational control should be lodged and which Flight Standards
13 District Office, since there was action being taken in Florida but
14 the actual Part 135 operations were apparently taking place
15 essentially on the west coast. So that led to a question about
16 transferring the supervision of the authority to the appropriate
17 Flight Standards District Office.

18 In any event, Ms. Egan testified she was the Principal
19 Maintenance Inspector for ExecJet for about two years, having the
20 assignment made to her in November of 2009. But actually, because
21 of other ongoing activities, she didn't actually start in that
22 supervisory position until approximately January of 2010.

23 She testified that as of August 2011, ExecJet, the
24 Respondent, held an on-demand Part 135 Operation Specification,

1 and that on the Op Specs for the Respondent there were originally
2 two aircraft, but as of March 2010, the only aircraft was N408MG.
3 Subsequent to August 2011, according to this witness, and there
4 was no testimony to dispute it, there were no other aircraft on
5 the ExecJet certificate.

6 Ms. Egan testified also that on August 31, 2011, the
7 Director of Maintenance for ExecJet, the Respondent, resigned.
8 There were some question as to the accuracy of the date,
9 questioning the credibility of the witness. However, C-1 does
10 show, apparently, e-mail. It appears at the bottom, there is a
11 cut off e-mail to Mr. Katzmann, who was on the evidence the
12 Director of Maintenance at one time for the Respondent. In that,
13 in the second paragraph, it tells Mr. Katzmann that effective as
14 of October 1, 2011, you, Mr. Katzmann, are no longer required to
15 act as ExecJet Charter's Director of Maintenance. So as of
16 October 1, he was being advised and thanked in the last sentence
17 for his services.

18 The second page is missing, but it would appear that
19 this is a communiqué from director of operations, Mr. Falahati,
20 to Mr. Katzmann. Also, the top part of this is an e-mail from
21 Mr. Falahati dated October 3 saying, "Effective immediately, I am
22 no longer Director of Maintenance." Again, there is a date.

23 The whole import of C-1 is that as of the end of August
24 or into the beginning of October, October 1st, Mr. Katzmann was

1 not the Director of Maintenance. On the further evidence, it does
2 show that since that time there has been no Director of
3 Maintenance. So as to any question as to the credibility because
4 the witness said August 31, and apparently it was October 1, the
5 communiqués back and forth, the difference in the dates are not
6 determinative. The question is whether or not there was a
7 Director of Maintenance as required and whether there is one now.

8 On the evidence here, at least of October 3, this is the
9 formal notice. So sometime between the end of August and
10 beginning of October, Mr. Katzmann was no longer the Director of
11 Maintenance, and I so find. I find that there's no issue of
12 credibility on the part of the testimony of this witness.

13 Ms. Egan also went on to testify that as of November 15,
14 2011, the Respondent, ExecJet Charter, no longer had the required
15 insurance. Exhibit C-2 is dated January 31, 2012. It is
16 addressed to ExecJet Charter, and it's a notice of cancellation of
17 insurance. It says that the FAA has been notified that the
18 insurance on N408MG had been terminated as of November 15, 2011.
19 There's no contradictory evidence that the insurance was not
20 terminated on that date. In fact, Mr. Falahati, in his
21 testimony, stated that since 2011, there has been no insurance on
22 this particular aircraft and there is none at this time. So
23 again, that is clearly established.

24 Ms. Egan also testified that ExecJet Charter had lost

1 the exclusive use of the only aircraft that was left on the
2 Operation Specifications. That is N408MG. Exhibit C-4 does show
3 a communication from Mr. Falahati, Director of Operations, to
4 Inspector Piccoli stating, "Effective immediately, please remove
5 Learjet 35A, Type N408MG," [with the serial number] from
6 operations. "It is no longer being operational control of ExecJet
7 Charter."

8 There is some confusion as to the time because it does
9 show various e-mails back and forth, but there is no question
10 that, and that is the crucial thing, whether or not the aircraft
11 is in the exclusive control of the Respondent. It is clear that
12 the Director of Operations is telling the FAA that the Respondent
13 no longer has operational control of this aircraft. That is the
14 determinative issue.

15 The heading on the fax whether somebody was working at
16 1:16 in the morning, an inspector may or may not be working at
17 that time. Unfortunately, sometimes we work outside of normal
18 business hours because of contingencies. As the witness
19 explained, they have communication availability with the type of
20 personal phones that they can carry with them, that you can be
21 contacted at almost any place and any hour. So to me, the
22 determinative thing is that whether or not there was operational
23 control, and there is no question on the evidence in front of me
24 that the Respondent no longer has exclusive use of at least one

1 aircraft.

2 That is at least as of the date of this communiqué from
3 Mr. Falahati to Mr. Piccoli, which is headed here as December 15,
4 2011. That was the official communication. Whether the
5 operational control was lost prior to that doesn't make any
6 difference. That's when, at least as of that date, they had no
7 operational control. As of this date, there is no operational
8 control of an aircraft.

9 Lastly, Ms. Egan testified as to the present location of
10 the aircraft. Again, that is not a determinative issue in this
11 case. The issue is whether or not the Respondent has operational
12 control of at least one aircraft. Ms. Egan testified that the
13 aircraft, she thought, was now presently located in Grand Rapids,
14 and I would take it, that is Grand Rapids, Michigan. It turns
15 out, however, that from C-5 that the aircraft is presently located
16 in Grand Junction, Colorado. Grand Junction, Grand Rapids, this
17 is not a geography quiz. Ms. Egan is stationed in Florida. To
18 me, it is simply a little confusion between Grand Junction, Grand
19 Rapids. It does not make any difference. It is not under the
20 operational control of ExecJet, whether it's in Grand Rapids or
21 Grand Junction. That is not the relevant question. The question
22 is operational control, and there is no question that the bank has
23 repossessed the aircraft. The bank has repossessed it, as
24 Mr. Falahati admitted. The Respondent does not have operational

1 control of the aircraft wherever it is.

2 So with respect to the cross-examination, Ms. Egan was
3 questioned with reference to her statement, which is R-1. Again,
4 there is not specificity in the dates. For example, in Paragraph
5 2, it says approximately 3 August that the aircraft had not been
6 operated. Again, it is an approximation. The issue is not
7 whether it was exactly August 3 or October 3. It's whether or not
8 there is exclusive use and is being operated under the requisite
9 FARs. The same with the question of whether the Director of
10 Maintenance left the Operation on October 1? As I have already
11 indicated, C-1 apparently is an e-mail saying that, "Effective
12 October 1, Mr. Katzmann, you are no longer required to act as
13 Director of Maintenance." So the date used by Ms. Egan in her
14 statement is the date that the Director of Operations was writing
15 to Mr. Katzmann, telling him he was no longer needed. There is no
16 question of credibility raised. There are no lies. I find the
17 evidence reliable, probative and credible.

18 With respect to R-6, I do not believe it was offered,
19 but there was testimony so I will comment on it. There was
20 something made of the fact that on R-6, Ms. Egan indicating that
21 in August of 2011, there had been a request to transfer. She said
22 that the request to transfer from Florida to Van Nuys was
23 "wonderful". Respondent tried to make something out of the fact
24 that the word, "wonderful", was used. Ms. Egan explained that she

1 thought it was wonderful because the transfer of the supervision
2 to where the operation was actually taking place was a good idea
3 since the inspectors would be in the same location where the
4 operation was happening, rather than having the certificate held
5 in a FSDO on the opposite side of the continent in Florida.
6 Whether we say good idea or wonderful, it means the same thing.
7 She thought it was a good idea that the operation and the
8 supervision be co-located. Frankly, it does seem like a good
9 idea.

10 Ms. Egan, with the last part of it, even in her
11 statement, she explained what she meant, and I'm quoting, "Holding
12 the certificate in Florida and totally operating out of CA
13 [California] was a risk," for the obvious reason, it is not direct
14 supervision. "Identify the risk, mitigate and add value, nice,
15 good idea," with a smiley face. I do not find that this in any
16 way impugns the witness's credibility. It is simply her view that
17 the transfer would enhance safety.

18 Mr. Falahati was called to testify in the Complainant's
19 case. He testified that the last operation by N408MG on a Part
20 135 operation was July of 2011, and there has been no operation
21 since that date. Also, that the aircraft, as I mentioned, has
22 been repossessed by the bank. Therefore, as I have already
23 concluded, that means that the Respondent does not have
24 operational control of that aircraft. The bank has the aircraft,

1 whether it is in Grand Junction or Grand Rapids.

2 Mr. Falahati also admitted that as of 2011, as I have
3 already discussed with Exhibit C-2, there has been no insurance on
4 this particular aircraft and that there is no insurance on this
5 aircraft at the present time. That would seem to follow since he
6 doesn't have possession of the aircraft, the bank does. Lastly,
7 he conceded that he had received a letter from the Federal
8 Aviation Administration that economic authority had been
9 terminated as of March 1, 2012.

10 In the Respondent's case-in-chief, he really is not
11 disputing many of the factual allegations in this Complaint. The
12 four corners on the Complaint is what is presented for resolution
13 in this case. However, there were continual references made to
14 question of possible bias, question of transfer of the
15 certificate, and that was, in my view, an internal question
16 between the Respondent and the FAA. It is not something that the
17 NTSB is involved with. Whether or not the FAA decides to transfer
18 the certificate from one FSDO to another is something within the
19 Administrator's discretion. The Board has no authority to tell or
20 demand that the FAA transfer certificates for air carrier
21 operations from one place to the other.

22 In any event, R-10, which again from my notes does not
23 say it was admitted, however, I will reference it again. It is
24 clear that R-10(A) was a request from Mr. Falahati, as Director

1 of Operations, requesting that their Part 135 certificate be
2 transferred to Van Nuys. As Ms. Egan testified, for a transfer of
3 certificate, which can be done apparently, there are a whole bunch
4 of procedural steps which need to be followed.

5 R-10 appears to be a letter from the Federal Aviation
6 Administration to ExecJet Charter at its base, apparently in
7 Stewart, Florida, a four-page letter setting out, as it says in
8 Paragraph (A), "Establishment or Change of Operation Base
9 Location," and it gives the whole outline of steps from (a)
10 through (g) with subparagraphs that one would have to comply with
11 in order to accomplish this. Whether or not the Respondent has
12 done this, it appears at this time that I am not really sure as to
13 whether or not the Respondent has completed all the requirements
14 to accomplish a transfer. As to whether or not the FAA has been
15 able to conduct an inspection of this aircraft, the aircraft is in
16 Colorado in the possession of the bank, so I do not know who is
17 supposed to give permission to do some sort of inspection of this
18 particular aircraft.

19 In any event, those issues are not relevant to
20 disposition in this case. I simply view that it appears that the
21 FAA was more than willing to consider the request for transfer of
22 the certificate from Florida to Van Nuys. It is simply saying, if
23 you want to do it, here is the letter with all the steps, go
24 through this, and we will process your request. That does not

1 show bias to me. It is the way they do business. You cannot just
2 call up and say, "Transfer my certificate." In any event, I
3 specifically find that on the affirmative defense, the burden of
4 proof is on the Respondent with an affirmative defense and there
5 has simply been a failure of establishing and fulfilling that
6 burden.

7 Turning then to the Order of Revocation itself, with
8 respect to the allegations in the Order of Revocation which were
9 denied, that was Paragraph 2 of the Complaint. However, as the
10 evidence does show, it is admitted on March 1, 2012 that the
11 Respondent was advised by a letter from the Federal Aviation
12 Administration that because the insurance had lapsed on or about
13 November 15, 2011, that the economic authority was no longer
14 effective.

15 With respect to the allegations in Paragraph 3 as to
16 termination of operations on August 3, 2011, the evidence clearly
17 is that, as Mr. Falahati said, in July of 2011 was the last time
18 that the aircraft was operated. So whether it was July 31, July
19 15 is, again, not determinative. If anything, it terminated
20 earlier than what is alleged. The fact is, is that operations
21 terminated in 2011, and there has been no operation since. So the
22 exact date is, again, not a determinative factor. The Respondent
23 admits it is July; there is no specific date given by him. I can
24 infer, therefore, July 31, so we are talking about three days.

1 That does not change anything. The allegation and its importance
2 is that the operation terminated. If there have been no
3 operations since July of 2011, obviously they have terminated. If
4 you are not operating, you have terminated. So Paragraph 3(a) is
5 found to be established on a preponderance of the evidence.

6 Paragraph 4 was denied in that it was alleged that the
7 most recent Director of Maintenance had resigned October 3, 2011.
8 I have already gone through the e-mails, and it shows as of at
9 least October 1, there was an e-mail from, it would appear and I
10 would infer, the Director of Operations telling Mr. Katzmann that
11 his services were no longer required. It clearly says October 1,
12 so whether it was October 1 or October 3 that he resigned -- the
13 top part of the e-mail does show the date of October 3. So again,
14 it is not to quibble about two days, whether it was October 1 or
15 October 3. The fact is as of either the 1st or the 3rd of October
16 2011, there was no longer a Director of Maintenance.

17 Mr. Katzmann's services were no longer required and the position
18 was no longer filled. So I find that the allegation in Paragraph
19 4 is established. There is, as of October 2011, no Director of
20 Maintenance.

21 With respect to Paragraph 4(b), it was admitted that as
22 of this date, the Respondent does not have the required Director
23 of Maintenance.

24 Lastly, with respect to Paragraph 5, as I already

1 discussed with my discussion of Exhibit C-4 and the testimony of
2 Mr. Falahati, the bank has repossessed the aircraft, N408MG. C-4,
3 the e-mail to Inspector Piccoli from Mr. Falahati saying that the
4 aircraft is no longer under the operational control of ExecJet
5 Charter, clearly establishes the allegations in Paragraph 5 of the
6 Complaint.

7 I find, therefore, that on the preponderance of the
8 reliable and probative evidence that the Complainant has
9 established all of the factual allegations of the Complaint,
10 either by admission or by documentary and testimonial evidence.

11 I make the specific finding that there has been no
12 showing of sufficient evidence as to a lack of credibility on the
13 part of the Complainant's witness, for reasons I have already
14 discussed, and also, that any variance in the exact specific dates
15 are not determinative. The determinative issue are the facts, not
16 the exact date.

17 Also, there has been in front of me no showing of any
18 arbitrary or bias on the part of the Administrator. The fact that
19 the Administrator takes more rapid action in one case than he
20 might in another case doesn't do anything. Each case is different
21 and how an investigation proceeds, sometimes one takes more time
22 than another. In any event, the Board does not address the
23 Administrator's conduct of its investigations, other than it would
24 be a showing of a denial of due process. In the evidence in front

1 of me, there has been no such showing.

2 I find and conclude, therefore, that on the
3 preponderance of the reliable and probative evidence that the
4 Complainant has established that the Respondent is in regulatory
5 violation of the charged Sections of the Federal Aviation
6 Regulations, which I repeat here is the following Federal Aviation
7 Regulations: Sections 119.5(i), 119.61(c), 119.69(a)(3) and
8 135.25(b), and I so conclude.

9 With respect to the issue of termination, the
10 interpretation from the Office of the Chief Counsel, which is
11 entitled to deference, but in any event, it would simply be common
12 sense. If one no longer has the requisite personnel, is no longer
13 in possession of an aircraft and has not conducted operations for
14 approximately two years, one can only say you have effectively
15 ended operations. You have terminated. So in my view, there is
16 no issue. The use of the word, "terminated", is the correct
17 usage. Whether you say ended, terminated, the Respondent is not
18 operating and he is not in compliance with the Federal Aviation
19 Regulations. On Board precedent, it is clear that the Board views
20 the failure of Respondent to have the requisite aircraft,
21 insurance, operational personnel is an issue that goes to
22 qualifications and the public interest in air safety, and that the
23 appropriate sanction for an entity that no longer meets the
24 requisite qualifications to possess an Air Carrier Certificate,

1 that sanction is that of revocation. I therefore find that upon
2 the preponderance of the evidence and the showing of the
3 establishment of the violations of the cited Federal Aviation
4 Regulations that the public interest in air safety and air
5 commerce does require imposition of the sanction of revocation and
6 that, overall, it does demonstrate that the Respondent presently
7 lacks the qualifications required to be the holder of an Air
8 Carrier Certificate.

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1 ORDER

2 IT IS THEREFORE ORDERED THAT:

3 1. The Order of Revocation, the Complaint herein, be,
4 and the same hereby is, affirmed as issued.

5 2. The Respondent's Air Carrier Certificate E5JA2511
6 be, and the same hereby is, revoked.

7 Entered the 6th day of February 2013 in Gardena,
8 California.

9 _____
10 EDITED ON PATRICK G. GERAGHTY
11 FEBRUARY 28, 2013 Administrative Law Judge

12

13 APPEAL

14 ADMINISTRATIVE LAW JUDGE GERAGHTY: Either party may
15 appeal from this Decision and Order by filing with the Board
16 within 10 days from this date the Notice of Appeal. That document
17 must be served upon the opposing party and the original sent to
18 the National Transportation Safety Board, Washington, D.C. 20594.

19 The appealing party must further, within 50 days from
20 this date, file with the Board a brief in support of that appeal.
21 Those appeals must be filed with the General Counsel of the
22 National Transportation Safety Board, 490 L'Enfant Plaza, S.W.,
23 Washington, D.C. 20594. All documents must be served upon the
24 opposing parties.

1 Parties are further cautioned that the Board, upon its
2 own motion or the motion of the opposing party, may dismiss an
3 appeal for the untimely filing of either the Notice of Appeal or
4 supporting brief by even one day. Time limits are crucial. If
5 extensions of time are required, extensions must be requested from
6 the Office of the General Counsel in Washington, D.C. prior to the
7 expiration of the time limit. You cannot get an extension after
8 it is expired. In the event of an appeal, the effectiveness of
9 the Order is stayed during the pendency of the full Board's
10 review.

11 ADMINISTRATIVE LAW JUDGE GERAGHTY: Anything further for
12 the record?

13 MS. GREEN: No, Your Honor.

14 ADMINISTRATIVE LAW JUDGE GERAGHTY: Nothing further?

15 MR. FALAHATI: No, Your Honor.

16 ADMINISTRATIVE LAW JUDGE GERAGHTY: The proceeding is
17 closed. Thank you.

18 (Whereupon, at 1:25 p.m., the hearing in the above-
19 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: EXECJET CHARTER, INC. (E5JA)

DOCKET NUMBER: SE-19373

PLACE: Gardena, California

DATE: February 6, 2013

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.

John Sullivan
Official Reporter