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NTSB Order No. EA-5181

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 7th day of October, 2005

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MARION C. BLAKEY)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	
v.)	Dockets SE-17514
)	SE-17515
)	SE-17516
CLAIR AERO, INC.,)	
NEVILLE C. BRATHWAITE, SR.,)	
NEVILLE C. BRATHWAITE, JR.,)	
)	
Respondents.)	
)	
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OPINION AND ORDER

Respondents appeal the oral initial decision of Administrative Law Judge William A. Pope, II, issued in this emergency revocation proceeding on September 8, 2005.¹ By that decision, the law judge upheld the Administrator's emergency revocation of respondent Clair Aero, Inc.'s air carrier operating

¹ An excerpt of the hearing transcript containing the law judge's decision is attached.

certificate, and all airmen certificates held by respondents Neville Brathwaite, Sr., and Neville Brathwaite, Jr. We deny the appeals.

Clair Aero, Inc. ("Clair Aero") is a small, family-run company certificated by the Federal Aviation Administration ("FAA") to operate on-demand commercial passenger service. Hearing Transcript ("Tr.") at 160. Respondent Neville Brathwaite, Sr., is a shareholder, and director of operations and director of maintenance of Clair Aero. Tr. at 205, 232. Respondent Brathwaite, Jr., is also a shareholder, and vice president and chief pilot of Clair Aero. Tr. at 232, 234, 247, 272.²

The factual allegations in the Administrator's August 17, 2005, complaint against Clair Aero stated:

2. On August 3, 2005, the Administrator issued an Emergency Order of Suspension suspending your air carrier certificate.³
3. Your agent received said Emergency Order of Suspension on August 4, 2005[5].

² Valencia Brathwaite, the wife of respondent Neville Brathwaite, Sr., and the mother of respondent Neville Brathwaite, Jr., is president of Clair Aero. Tr. at 272.

³ The emergency suspension is apparently based on Clair Aero's alleged failure to have its base of operations in the United States or one of its territories, and is the subject of a separate proceeding currently pending before the Board. According to testimony in this record, the FAA inspectors were at Beef Island on August 10, 2005, at the request of local aviation authorities to help confirm whether or not certain Part 135 operators, including, but not limited to, Clair Aero, "were operating with the principal base of operations outside of the United States contrary to their operation[s] specifications." Tr. at 25-28.

4. On or about August 10, 2005, you operated civil aircraft N89NB on a passenger carrying flight from Anegoda, [British Virgin Islands ("BVI")] to Beef Island Airport, Tortola, BVI.
5. The flight described above was in operation as a direct air carrier or commercial operator.
6. At the time you conducted the above described flight you did not hold an air carrier or commercial operators certificate issued by the Administrator.
7. At the time you conducted the above-described flight you did not hold an operating permit issued by the [United Kingdom] Department for Transport, said permit having been suspended on August 5, 2005.
8. When your pilot, Neville Clairmonte Brathwaite, Jr., taxied N89NB to the ramp at the conclusion of said flight you discharged nine passengers and the co-pilot. Immediately after this an [FAA] Aviation Safety Inspector approached N89NB while your pilot was seated in the left pilot seat of the aircraft. After the Inspector showed your pilot his credentials but before the Inspector could continue with his inspection your pilot started the aircraft engines and taxied off with the passengers' baggage still onboard N89NB. As a result the Inspector could not complete his inspection and your passengers were left without their baggage.

The Administrator's complaints against respondents Neville Brathwaite, Sr., and Neville Brathwaite, Jr., are substantively almost identical, with only minor differences to indicate their respective roles in the alleged circumstances. The Administrator charged that all three respondents violated sections 91.13(a), 119.5(g) and 135.3(a)(2) of the Federal Aviation Regulations

(FARs), and that respondents Neville Brathwaite, Sr., and Neville Brathwaite, Jr., also violated FAR section 135.73.⁴

At the hearing, the Administrator presented testimony and written statements by percipient FAA inspectors that on August 10, 2005, they were at Beef Island Airport, Tortola, British Virgin Islands, and observed a Clair Aero Cessna 402 aircraft, N89NB, arrive at the terminal and disembark passengers.⁵ Tr. at 40-41. They were aware that, at that time, Clair Aero's Part 135 commercial operating certificate was suspended. When one of the inspectors, Thomas Sowers, approached the aircraft as the passengers were gathering on the ramp, he identified himself to the pilot, respondent Neville Brathwaite, Jr., and indicated his desire to perform an inspection.⁶ Inspector Sowers testified

⁴ FAR section 91.13, charged by the Administrator as a residual violation (i.e., on the basis of another operational violation, and not as a stand-alone charge), prohibits operating an aircraft in a careless or reckless manner so as to endanger the life or property of another. FAR section 119.5(g) prohibits operating as a direct air carrier or as a commercial operator without, or in violation of, an appropriate certificate. FAR section 135.3(a)(2) requires, in relevant part, that for aircraft operations under Part 135, operations outside of the United States must conform to the regulations of the foreign country. Finally, FAR section 135.73 requires, in relevant part, that any certificate holder or person employed by the certificate holder shall allow the Administrator, at any time or place, to conduct inspections or tests to determine the certificate holder's compliance with its operating certificate and the FARs.

⁵ It is undisputed that this flight arrived from Anegoda, BVI, as alleged in the Administrator's complaints. Although not an allegation in the Administrator's complaints, it appears that the passengers, mostly tourists, were returning after flying to Anegoda Island earlier that morning from Beef Island aboard N89NB.

⁶ The inspectors, earlier that morning, had attempted to inspect N89NB, but, after noting some deficiencies, they were

that, next, while he (Sowers) was near the left wing tip, respondent Neville Brathwaite, Jr.:

immediately started the left engine. I again asked him to shut it down, that I was the FAA, and I wanted to conduct an inspection on his aircraft. He never broke eye contact with me, started [the right engine]⁷, and started taxiing off....⁸ We had direct eye contact, Your Honor. Never broke it. He was giving me a death stare.... You could tell that he was somewhat upset.

Tr. at 55-56.⁹ A short time later, the inspectors inquired of the passengers whether they had paid for the flight. According to Inspector Sowers, the passengers collectively indicated that they had paid for the flight, and two specifically said that they did not have a receipt or ticket

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told by respondent Brathwaite, Jr., to leave Clair Aero's private hangar. Tr. at 29-37.

⁷ The hearing transcript records "started writing," rather than "started the right engine." Although not of consequence to our opinion, we note that it appears, from context and other similar, apparent transcription errors in the hearing transcript, that the likely words were "started the right engine."

⁸ Inspector Sowers also testified that when N89NB taxied away, the main cabin door, located on the aft, left side of the aircraft, was still open, and the passengers that had disembarked responded with surprise and indicated to respondent Brathwaite, Sr., that the aircraft was leaving without them having retrieved all of their possessions. According to Sowers, respondent Brathwaite, Sr., who was assisting the passengers on the ramp, replied to the passengers to the effect that they should ignore Sowers and come with him into the terminal building. Tr. at 55, 60-61.

⁹ Inspector Sowers testified that he had lawful authority to inspect N89NB, a U.S.-registered aircraft, regardless of the status of Clair Aero's then-suspended Part 135 operating certificate. Tr. 35-36.

for the flight; and one of these passengers also told the inspectors that they had paid cash. Tr. at 62-64.

The Administrator also presented testimony from Anthony Porter, a flight operations inspector for Air Safety Support International ("ASSI"), a subordinate arm of the United Kingdom's Civil Aviation Authority. Inspector Porter explained that ASSI has, among other things, regulatory oversight responsibility for aviation operations in the BVI. Tr. at 172-175. He testified that in accordance with the Air Navigation Overseas Territories Order, Clair Aero had been authorized by ASSI to operate within the BVI, and between the BVI and the United States, pursuant to "an Article 113" authorization. Tr. at 183-185. The Article 113 authority is required for Clair Aero, as a foreign-certificated entity, to lawfully operate in the BVI as a commercial carrier. Tr. at 185. Inspector Porter testified further that:

[t]he Article 113 authority is dependent upon the holder having a valid certificate from a foreign authority. So as soon as the suspension of Part 135 certificate took place, it automatically invalidated the Article 113 permission which the company held. In addition to that, the Department for Transport issued a suspension to the Article 113 permission on the 5th of August.... It was a written suspension which was faxed to the company, I believe to Mr. Irizarry in San Juan as the agent for service.... [I]t was issued by the Department for Transport in London who are the people who issue long term Article 113 permissions.

Tr. at 185-186.¹⁰

Respondents Neville Brathwaite, Sr., and Neville Brathwaite, Jr., both testified, as did Valencia Brathwaite, the president of Clair Aero. Briefly summarized, their testimony confirmed that they knew that Clair Aero was not authorized to operate in commercial service, but they claimed that the flight with passengers on August 10th was operated as a "complimentary" private flight for the BVI Tourist Board, and not in revenue service.¹¹ Tr. at 224, 250-251, 277. However, their collective testimony also indicated that Clair Aero had long been engaged in a commercial relationship with the BVI Tourist Board, whereby Clair Aero regularly flew tourists, at the behest of the BVI Tourist Board, between Anegado and Beef Islands. Under this "oral contract," Clair Aero flew the tourists, and the BVI Tourist Board paid Clair Aero for its air services. Tr. at 257, 260. Valencia Brathwaite and respondent Neville Brathwaite, Jr., testified that they advised representatives of the Tourist Board on or before August 10th that the flight on August 10th would be complimentary given the status of their FAA operating certificate.¹² Tr. at 252, 277. Valencia Brathwaite also

¹⁰ It is perhaps helpful to note here, for explanatory purposes, that the BVI does not currently certificate any commercial operators or register civil aircraft. See Tr. at 176-178.

¹¹ The law judge's decision contains a thorough recitation of the testimony provided by respondents' witnesses.

¹² Respondent Neville Brathwaite, Jr., testified that he was

testified that she "hope[d]" to continue Clair Aero's charter arrangement with the BVI Tourist Board if and when Clair Aero regained its operating certificate. Tr. at 261-262.

Regarding the FAA's attempted ramp inspection at the Beef Island Airport, respondent Neville Brathwaite, Jr., testified that he was not aware of Inspector Sowers's presence, and that he knew his father had ensured that the passengers were safely away from the aircraft before he taxied away from the terminal.¹³ Tr. at 282-283. Both Brathwaite respondents claimed that when Inspector Sowers approached the aircraft, the right engine was already running, and that respondent Neville Brathwaite, Jr., had his headset on and could not have heard or seen Inspector Sowers. Tr. at 221, 283.

After reviewing all of the evidence in the record, the law judge concluded that the Administrator proved respondents each violated FAR sections 119.5(g) and 135.3(a)(2), by operating N89NB in commercial passenger service on August 10th despite the fact that Clair Aero's Part 135 operating

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contacted by his cousin, Victorine Creque, "who works at the [BVI] Tourist Board," on August 10th requesting that he fly to Anegado to pick up the passengers. Tr. at 277. He testified that he told Creque that the flight would be "complimentary." Id.

¹³ Both Brathwaite respondents denied that the passengers' belongings were still aboard the aircraft, or that the main cabin door was open, when respondent Neville Brathwaite, Jr., taxied the aircraft away. They both testified that respondent Neville Brathwaite, Sr., was not aboard the flight from Anegado, but, rather, he met the aircraft on the ramp and assisted with disembarking the passengers to the terminal.

certificate and ASSI Article 113 authorization were under suspension. As the law judge correctly noted, the critical issue was whether the flight on August 10th from Anegoda Island to Beef Island was operated for compensation or hire. In resolving this question, the law judge credited the testimony of Inspector Sowers that the passengers had paid for their air transportation aboard the Clair Aero aircraft. The law judge further noted that it was a fair inference from the evidence that the passengers had paid the BVI Tourist Board for the flight aboard Clair Aero. The law judge discredited the testimony of Valencia Brathwaite that she informed the BVI Tourist Board that flights would be complimentary before the flight on August 10th; he found the letter Clair Aero allegedly sent to the BVI Tourist Board to be, "an effort to obscure the [commercial] purpose of the [August 10th] flight." Tr. at 373.

He also noted that the Administrator presented no evidence that Clair Aero had actually received any compensation from the BVI Tourist Board for the flight. However, weighing all of the evidence, the law judge concluded that, "the only reason that the [r]espondents would have conducted such a flight on August 10, 2005, for no compensation while its [U.S. certification and ASSI operating authorization was] suspended, was the expectation of future charter business and economic gain with the BVI Tourist Board." Tr. at 374-375.

The law judge credited the testimony of Inspector Sowers over the conflicting testimony of the Brathwaite respondents,

and found that respondent Neville Brathwaite, Jr., was aware of Inspector Sowers's desire to inspect N89NB prior to taxiing away from the terminal. Accordingly, he upheld the section 135.73 violation against respondent Neville Brathwaite, Jr. The law judge, however, dismissed the section 135.73 charge against respondent Neville Brathwaite, Sr., because he found that the Administrator had not demonstrated that he acted to refuse the FAA effort to inspect the aircraft.

Finally, with regard to sanction, the law judge contrasted respondents' behavior with the facts in Administrator v. Briggs, NTSB Order No. EA-4502 (1996), and upheld revocation for each respondent because, he concluded, their actions demonstrated a "non-compliance disposition." Tr. at 383.

Respondents have each filed separate appeal briefs, and we discuss their cogent arguments in the appropriate context below. The Administrator filed three separate reply briefs, and argues, essentially, that the appeals are without merit.¹⁴

Refusal to Permit an FAA Inspection

Clair Aero was not charged with violating section 135.73, and, at this stage in the proceeding, only respondent Neville Brathwaite, Jr., is alleged to have violated section 135.73. The law judge specifically credited the testimony of Inspector Sowers

¹⁴ The Administrator did not appeal the law judge's dismissal of the section 135.73 charge she alleged against respondent Neville Brathwaite, Sr.

that respondent was aware of his effort to inspect respondent's aircraft before he started the engines and taxied away from the public ramp. See, e.g., Administrator v. Smith, 5 NTSB 1560, 1563 (1986) (the Board defers to credibility findings of law judges absent a showing that they were clearly erroneous). Aside from reiterating his contrary testimony, and other evidence he presented at the hearing, respondent does not provide a basis for us to overturn the law judge's credibility-based determination that he intentionally impeded Inspector Sowers's attempt to inspect N89NB on the ramp in front of the terminal. We therefore adopt as our own the law judge's rationale for upholding the section 135.73 charge against respondent Neville Brathwaite, Jr.

Compensation or Hire

As the law judge correctly noted, intangible benefits, such as the expectation of future economic benefit or business, are sufficient to render a flight one "for compensation or hire." See, e.g., Administrator v. Platt, NTSB Order No. EA-4012 (1993) at 6; Administrator v. Blackburn, 4 NTSB 409 (1982), aff'd., Blackburn v. NTSB, 709 F.2d 1514 (9th Cir. 1983); Administrator v. Pingel, NTSB Order No. EA-3265, at n.4 (1991); Administrator v. Mims, NTSB Order No. EA-3284 (1991). Prior to the emergency suspension of Clair Aero's Part 135 certificate (and, thereby, its UK Article 113 authority), Clair Aero, and respondents Neville Brathwaite, Sr., and Neville Brathwaite, Jr., were engaged in commercial passenger carrying operations on behalf of

the BVI Tourist Board. As Valencia Brathwaite testified, Clair Aero hoped to resume this commercial relationship with the BVI Tourist Board if and when the suspension of Clair Aero's operating certificate was resolved. Under these circumstances, and notwithstanding the claim that the flights were conducted as a favor to respondent Neville Brathwaite, Jr.'s cousin (who is affiliated with the BVI Tourist Board), the flight from Anegoda on August 10th clearly was, as a matter of law, a flight for compensation or hire. Therefore, the law judge properly sustained against each respondent the violations of sections 135.3(a)(2), 119.5(g) and 91.13(a).¹⁵

Sanction

Respondents each argue that revocation is too severe a sanction, claiming that our decision in Briggs, supra, compels, at most, a modest suspension. In Briggs, the Board imposed a 60-day suspension for the respondent's illegal operation of numerous flights for compensation or hire, but the modification of the sanction of revocation sought by the Administrator was based on the law judge's specific credibility finding in favor of the respondent's claim that his regulatory transgressions were unintentional in that he genuinely believed it would be legal for

¹⁵ As the law judge stated, the sole basis for the section 91.13(a) violations were the findings of other, separate operational FAR violations, and the section 91.13(a) violation did not impact his sanction determination. Tr. at 380; see, e.g., Administrator v. Richard, NTSB Order No. EA-4223 at n.17 (1994).

him to provide free transportation before issuance of his expected Part 135 certificate. Here, in contrast, after observing the entire hearing and thoroughly reciting all evidence from the hearing in his initial decision, the law judge found that:

the [r]espondents motive in making the flight on August 10 ... was to preserve a charter business relationship with [the] BVI Tourist Board. The [r]espondents knew they could not conduct charter operations for compensation or hire while their U.S. air carrier certificate was suspended, but they made the flight anyway, trying to conceal its true purpose by calling it a Part 91 flight and not accepting compensation, even though it was a flight for which they normally would have received compensation.... I find that these [r]espondents also demonstrated a non-compliance disposition by conducting a charter flight...

Tr. at 381-383.¹⁶ In other words, the law judge clearly made a credibility finding against respondents' claimed belief that the flight on August 10th could be considered a private flight conducted legally. Respondents provide no basis, and we discern none, to overturn this credibility finding.¹⁷ See Smith, supra.

¹⁶ We note in particular that both Brathwaite respondents were intimately involved in, and knowledgeable of, Clair Aero's operations; Neville Brathwaite, Sr., approved of the flight flown by Neville Brathwaite, Jr., on August 10th, and respondent Brathwaite, Sr., met N89NB at the terminal ramp and assisted with passenger disembarkation; and the law judge explicitly discredited a document submitted by respondents to show that Clair Aero formally advised the BVI Tourist Board prior to the August 10th flight that it could not operate a charter flight as, "an effort to obscure the [commercial] purpose of the [August 10th] flight." Tr. at 373.

¹⁷ We note that unlike the respondent in Briggs, respondents are experienced commercial operators who would be expected to know and understand what types of flights could and could not be

Under these circumstances, we agree with the law judge that respondents' demonstrated willingness to disregard the laws and regulations governing commercial passenger operations warrants revocation of their respective certificates. See, e.g., Administrator v. Mastrogiovanni, NTSB Order No. EA-4870 (2000) (revocation for unauthorized commercial flights conducted after respondent surrendered his company's air carrier certificate); Administrator v. Darst, NTSB Order No. EA-4963 at 6-7 (2002) ("Knowingly operating an aircraft while under suspension is one of the most serious violations an airman can commit, for it reveals, perhaps as no other offense does, contempt for the laws that govern the exercise of the privileges granted to the holder of a certificate and for those responsible for enforcing those laws in the interest of air safety.").¹⁸

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conducted without a Part 135 certificate.

¹⁸ In Darst, we also observed that, "respondent's defiant decision to fly when grounded by a suspension the Administrator had issued on an emergency basis, an extraordinary circumstance which underscored the importance the Administrator attached to ... the matter, establishes that she cannot be trusted to conform her behavior to the rule of law." NTSB Order No. EA-4963 at 7.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondents' appeals are denied; and
2. The law judge's decision, upholding the Administrator's emergency orders of revocation, is affirmed.

ROSENKER, Acting Chairman, and ENGLEMAN CONNERS and HERSMAN, Members of the Board, concurred in the above opinion and order.