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NTSB Order No. EA-5334

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 1st day of November, 2007

ROBERT A. STURGELL, Acting Administrator, Federal Aviation Administration, Complainant, v. MICHAEL C. GORMAN, Respondent.	Docket SE-18094

OPINION AND ORDER

Respondent has appealed from the oral initial decision of Administrative Law Judge Patrick G. Geraghty, rendered at the conclusion of an evidentiary hearing held on September 25, 2007.[1] The law judge affirmed the Administrator's August 27, 2007 emergency order, which functions as the complaint in this case, and which revoked respondent's commercial pilot certificate and

[1] A copy of the initial decision, an excerpt from the hearing transcript, is attached.

any other airman certificates held by respondent. We deny the appeal.

The Administrator alleged that respondent, after being notified that his cargo operations were in violation of 14 C.F.R Parts 119 and 135, did, 20 times or more, operate a Beechcraft BE-58 and/or a Cessna 182, from Montgomery Field, San Diego, California, to Long Beach Airport, California. The allegations included carrying cargo for compensation or hire, without operations specifications or an appropriate operating certificate and without complying with competency or line check requirements of Part 135 of the Federal Aviation Regulations (FARs).[2] The law

[2] The Administrator alleged violations of 14 C.F.R. §§ 119.5(g); 119.23(b)(1)-(3); 119.33(b)(2) and (3); 135.293(a) and (b); and 135.299(a).

Section 119.5(g) prohibits operating as a commercial operator without, or in violation of, an appropriate certificate and appropriate operations specifications.

Section 119.23(b)(1) and (2) require one who conducts noncommon carriage or private carriage operations for compensation or hire, with airplanes having a passenger-seat configuration of less than 20 seats and a payload capacity of less than 6,000 pounds, to comply with Part 119, Subpart C, certification and operations specifications requirements, and Part 135 operations requirements.

Section 119.33(b)(2) and (3) prohibit a person other than a direct air carrier from conducting any commercial cargo aircraft operation for compensation or hire under Part 121 or Part 135 unless that person obtains an operating certificate and operations specifications that prescribe the authorizations, limitations, and procedures under which each kind of operation must be conducted.

Section 135.293(a) and (b) prohibit a person from serving as a pilot unless, since the beginning of the 12th calendar month before that service, the pilot has passed a test on that pilot's knowledge and a competency check in that class of aircraft.

judge affirmed the order, with the exception of an allegation of a violation of § 119.23(b)(3).[3]

At the hearing, the Administrator established that in March or April 2007, aviation safety inspectors from the Long Beach Flight Standards District Office saw respondent's aircraft at the Long Beach Airport with "Charter advertising" on the fuselage and spoke to respondent about it. Exh. C-4; Tr. at 65. Respondent claimed that his operation did not require an air carrier certificate. Exh. C-4. After this exchange, Inspector Gary Lackey talked to respondent by telephone and told respondent that he might be in violation of Part 119.23(b), "if he was transporting bank checks for hire without an Air Carrier Certificate." Id. Respondent told Mr. Lackey that he was wrong and that 119.23(b) did not apply because respondent was engaged in "private carriage." Id.

Respondent admitted paragraphs 1, 2, 3, 5, and 6 of the complaint. Answer; Tr. at 6-10. He admitted that he received the letter from Mr. Lackey advising respondent that his cargo operations might be in violation of FAR Parts 119 and 135. Id. He admitted that he continued his operations, flying at least 20

(..continued)
Section 135.299(a) prohibits service as a pilot in command (PIC) unless, since the beginning of the 12th calendar month before that service, the pilot has passed a flight check in one of the types of aircraft which that pilot is to fly.

[3] The law judge did not find a violation because § 119.23(b)(3) "simply indicates that ... anybody applying under this regulation [will] be issued operation specifications in accordance with these requirements." Initial Decision at 121. The Administrator does not appeal the law judge's conclusion as to § 119.23(b)(3).

times as PIC. Id. Respondent admitted that he carried cargo for compensation or hire and his operations constituted noncommon carriage or private carriage operations for compensation or hire. Id.

Respondent testified at the hearing that he obtained a Part 135 operating certificate in 2003, starting out in aerial photography and flying cargo routes for a courier company. Tr. at 62-63. His counsel indicated that FAA inspectors in San Antonio, Texas, told respondent he did not need a Part 135 certificate for his operations. Tr. at 91. Respondent testified that he sought the advice of an aviation attorney, Robert Griscom, who "drew up the framework for [him] to operate within the noncommon carriage rules." Tr. at 63. Mr. Griscom provided an opinion letter and requested an opinion on the issue from FAA Regional Counsel Monroe Balton, who indicated that he reviewed Mr. Griscom's opinion and said that it "accurately reflects the ... policy on the issue of private carriage." Respondent decided that he did not need a Part 135 certificate, and gave it up. Tr. at 63. When the FAA began reviewing his operations, respondent produced the 2005 letters from Mr. Griscom and Mr. Balton.

After reviewing those letters, FAA Operations Unit Supervisor Robert Kemp wrote to respondent that respondent's operation appeared to meet the definition of "private carriage," requiring an operator's certificate. Exh. C-5. Mr. Kemp advised that if respondent was engaged in such activity, he could be in

violation of the FARs. Id.

Mr. Kemp also forwarded both 2005 letters to Mr. Balton for clarification; Mr. Balton's reply indicated his earlier "concurrence in Mr. Griscom's opinion was completely in error," but explained that Mr. Griscom "provided misinformation" by inferring that respondent held an air carrier certificate. Exh. C-6. Mr. Balton stated that the FARs require "small airplane operators engaged in private carriage to hold an air carrier certificate and operations specifications issued under Part 119, and they must conduct such operations in accordance with the requirements of FAR Part 135." Id.

Mr. Lackey forwarded Mr. Balton's opinion to respondent, reiterating that continued operations without an air carrier certificate violated Parts 119 and 135, and were subject to enforcement action. Exh. C-7. Respondent replied, stating that it was "one of the stupidest things" he had ever read. Exh. C-8.

On appeal, respondent presents three arguments. First, he argues that the language in 14 C.F.R. § 119.23(b), "an airplane having a passenger seat configuration of less than 20 seats," does not include airplanes with "zero" passenger seats installed, such as "all-cargo" airplanes like the ones he operated. Next, respondent argues that Part 119 does not apply to his operations, given the ambiguity that he argues exists concerning "all-cargo" airplanes. Finally, he argues that the Administrator is not entitled to deference in his interpretation of § 119.23(b). The Administrator contests each of these arguments. Respondent does

not address any regulatory violations other than § 119.23(b), or the sanction, thereby, in effect, conceding the sanction and the remaining regulatory violations if the Board finds a violation of § 119.23(b)(1) and (2).

We must consider on appeal: (1) whether the law judge's findings of fact are supported by a preponderance of reliable, probative, and substantial evidence; and (2) whether his conclusions are in accordance with law, precedent, and policy. 49 C.F.R. § 821.49. While we are not bound by the findings of fact of the Administrator, we are bound by all validly adopted interpretations of laws and regulations that the Administrator carries out, unless we find that an interpretation is arbitrary, capricious, or otherwise not in accordance with law.[4]

Section 119.23(b)(1) and (2) require a person conducting a noncommon carriage flight for compensation or hire to comply with the Administrator's certification and operations specifications requirements for such flights, to conduct those operations in accordance with Part 135, and to obtain operations specifications pursuant to the Administrator's requirements. Supra n.2.

Aviation Safety Inspector Michael Nash testified that respondent did not have a Part 121 or a Part 135 operating certificate or operations specifications during the time in

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

question, and that respondent had not passed a knowledge test, a competency check, or a line check in the 12 months before June 2007. Tr. at 33-34. Respondent argues that, because his airplanes are "all-cargo" airplanes, having "zero" seats, and because there are no seats, there is no "passenger-seat configuration," and, therefore, § 119.23(b), in particular, and Part 119, generally, do not apply to his operations, so he does not have to comply with these requirements. Respondent's Br. at 6; Tr. at 71, 95. The Administrator argues that the meaning of § 119.23(b) is "plain on its face," and that it includes the operations at issue here. Administrator's Reply at 8.

This case is of first impression, turning on interpretation of the word "configuration" in § 119.23(b). Respondent admits he was engaged in "noncommon carriage ... for compensation or hire" and his two airplanes have payload capacities of less than 6,000 pounds. Amended Answer at 1; Tr. at 10, 32; Administrator's Reply at 8. The pivotal issue is whether respondent's airplanes have "a passenger-seat configuration of less than 20 seats, excluding each crewmember seat." The Administrator argues that, "if someone removes all the seats, they now have a passenger-seat configuration of zero," and that zero passenger seats is "less than 20." Administrator's Reply at 10. The law judge found this interpretation of the regulation reasonable, noting that the aircraft is type-certificated with passenger seats, and that respondent merely changed the passenger-seat configuration to zero when he removed the passenger seats. Initial Decision at

117-18.

Deferring to the Administrator's interpretation of his regulation,[5] we affirm the law judge's findings and conclusions. The regulation is clear on its face, and it is not arbitrary, capricious, or contrary to law and precedent. Respondent has identified no error warranting a reversal of the law judge's decision. Respondent operated in violation of §§ 119.5(g) and 119.23(b)(1) and (2). He did not comply with the certificate requirements of Part 119, in violation of § 119.33(b)(2). He did not comply with currency and competency requirements and therefore was in violation of §§ 135.295(a) and (b) and 135.299(a). The Administrator did not charge respondent with violation of the FARs between the date he gave up his air carrier certificate in 2005 and the date he was advised that he might be in violation, but only after June 5, 2007, when he received the letter from Mr. Lackey advising that his operations were in violation of the FARs. Thereafter, respondent deliberately continued his commercial operations on at least 20 occasions, based on his insistence that he was right and the Administrator was wrong. The appropriate sanction is revocation.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied; and

2. The law judge's decision, affirming the Administrator's

[5] See 49 U.S.C. § 44709(d)(3); Administrator v. Law, NTSB Order No. EA-5221 at 2 (2006); Stange, supra; see also Hinson, supra; Seaquist, supra; and NVE, supra.

emergency order or revocation, as modified, is affirmed.

ROSENKER, Chairman, SUMWALT, Vice Chairman, and HERSMAN, HIGGINS, and CHEALANDER, Members of the Board, concurred in the above opinion and order.