

SERVED: July 9, 2009

NTSB Order No. EA-5461

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 6<sup>th</sup> day of July, 2009

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J. RANDOLPH BABBITT,		)	
Administrator,		)	
Federal Aviation Administration,		)	
		)	
Complainant,		)	
		)	Dockets SE-18428
v.		)	and SE-18429
		)	
ROBERT EARL WALLACE and		)	
GLOBAL AIR CHARTER OF KY, LLC,		)	
		)	
Respondents.		)	
		)	
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**OPINION AND ORDER**

Respondents have appealed from the written initial decision and order of Administrative Law Judge William A. Pope, II, issued on January 23, 2009, following an evidentiary hearing held on December 18-19, 2008, and written closing arguments that

the parties submitted after the hearing.<sup>1</sup> The law judge denied respondents' appeal and found that Respondent Wallace had operated a flight under 14 C.F.R. part 135, rather than part 91, and therefore violated 14 C.F.R. §§ 135.293(a) and (b),<sup>2</sup> 61.59(a)(2),<sup>3</sup> 119.5(1),<sup>4</sup> and 91.13(a).<sup>5</sup> The law judge also revoked the air carrier certificate of Global Air Charter of Kentucky, LLC (Global), on the same basis. We deny respondents' appeal.

The Administrator issued emergency orders of revocation

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<sup>1</sup> A copy of the written initial decision is attached. Respondents' appeals were consolidated for hearing.

<sup>2</sup> Section 135.293(a) provides that, "[n]o certificate holder may use a pilot, nor may any person serve as a pilot, unless, since the beginning of the 12th calendar month before that service, that pilot has passed a written or oral test, given by the Administrator or an authorized check pilot, on that pilot's knowledge" in several areas. Similarly, § 135.293(b) requires certificate holders to participate in competency checks during the same time period.

<sup>3</sup> Section 61.59(a)(2) prohibits any person from making or causing to be made, "[a]ny fraudulent or intentionally false entry in any logbook, record, or report that is required to be kept, made, or used to show compliance with any requirement for the issuance or exercise of the privileges of any certificate, rating, or authorization under this part."

<sup>4</sup> Section 119.5(1) provides that, "[n]o person may operate an aircraft under this part, part 121 of this chapter, or part 135 of this chapter in violation of an air carrier operating certificate, operating certificate, or appropriate operations specifications issued under this part."

<sup>5</sup> Section 91.13(a) states that no person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

concerning both respondents on November 6, 2008,<sup>6</sup> alleging that Respondent Wallace, who is the owner of Global, had conducted a passenger-carrying flight for compensation on February 21, 2008, under 14 C.F.R. part 135. The order alleged that Respondent Wallace falsified a flight manifest form in that the form specified that "D. DiLoreto" was the second-in-command (SIC) of a flight from Orlando, Florida, to Teterboro, New Jersey, when Mr. DiLoreto was not on the flight. The Administrator's order further alleged that Respondent Wallace had falsified a request for flight release form regarding the same flight in that the form erroneously showed that Mr. Daniel Showalter had determined the aircraft to be airworthy and released the aircraft for flight, when Mr. Showalter had not done so. The order also stated that Respondent Wallace was required to have a SIC on the flight who was currently qualified to operate a part 135 flight, but that Mr. Dick Lechtrecker, who was not currently qualified under part 135, acted as SIC on the flight, rather than Mr. DiLoreto. Based on these allegations, the Administrator ordered revocation of Respondent Wallace's airline transport pilot (ATP) certificate, as well as revocation of the air carrier operating certificate that Global holds.

At the hearing, the Administrator called the aviation

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<sup>6</sup> Respondents subsequently waived the expedited procedures normally applicable to emergency cases.

safety inspector, the principal operations inspector, and the principal maintenance inspector from the Louisville, Kentucky Flight Standards District Office, all of whom were involved in the certification of Global and the investigation of the February 21, 2008 flight. Each inspector testified that they attended a meeting on April 14, 2008, at which Respondent Wallace and other Global employees were present. At the meeting, Respondent Wallace stated that he knew that Mr. Lechtrecker was not "current" to conduct a flight under part 135, and that other Global employees who were current under part 135 were unavailable, because respondent had short notice for the flight. Respondent told the inspectors that he consequently chose to conduct the flight under 14 C.F.R. part 91, rather than part 135. The inspectors also stated that Mr. Showalter, who was the director of maintenance at Global, told the inspectors at the meeting that he did not release the aircraft for flight on February 21, 2008, and that he never saw paperwork indicating that the flight was under part 135. The inspectors further testified that Mr. DiLoreto told them that the flight manifest form did not contain his signature, and that someone else had signed his name. Each inspector also stated that they believed that Respondent Wallace had conducted the flight under part 135, because he received compensation for it.

The Administrator also called Mr. Showalter to testify.

Mr. Showalter stated that he did not see the flight release form on February 21, 2008, and that he would not have released a flight under part 135 with Mr. Lechtrecker as SIC. Tr. at 86-87. Mr. Showalter stated that Respondent Wallace told him that he had changed the paperwork to indicate that the flight was conducted under part 91. Finally, Mr. Showalter testified that he was the only person who could have released the February 21 flight, because Global's Operations Manual requires that Respondent Wallace, Mr. Lechtrecker, and Mr. Showalter are the only employees who may release flights, and that the person releasing a flight cannot be part of the crew for the flight.

In support of the Administrator's case-in-chief, the Administrator's counsel provided several exhibits, including a portion of the Operations Specifications that authorizes Global to conduct flights under part 91 for certain activities, provided that such flights are not conducted for compensation or hire. Exh. A-1. The Administrator's counsel also provided the daily flight control log from February 21, 2008, which shows that the flights were conducted under part 135 (Exh. A-7), and the request for flight release form for the February 21 flight, which reflects that the flight at issue was conducted under part 135, that Mr. Showalter released the flight, and that Mr. DiLoreto was SIC for the flight (Exh. A-8). The Administrator's counsel also offered the flight manifest form

for the same flight, which indicates that Respondent Wallace was pilot-in-command (PIC) for the flight and that Mr. DiLoreto was SIC (Exh. A-9), as well as the passenger manifest form, which also lists Respondent Wallace and Mr. DiLoreto as PIC and SIC (Exh. A-10). In addition, the invoice from Global to Freedom Jets, which was the customer of Global, also came into evidence; the invoice indicates that Global billed Freedom Jets for various charges that totaled \$12,001 for the flight, but states "Part. 91" under the column entitled "Type." Exh. A-11. The Administrator's counsel also submitted Respondent Wallace's response to the Letter of Investigation that he received from the aviation safety inspector concerning the February 21 flight, in which Respondent Wallace stated that it was the common practice at Global for the PIC to sign on behalf of the SIC, "in the interest of expediting the dispatch process, but never without the SICs' knowledge and concurrence." Exh. A-20 at 3. The response also stated that Respondent Wallace had elected to re-dispatch the flight under part 91 with Mr. Lechtrecker serving as SIC, and that Mr. Showalter concurred with this change. Id.

In response to the Administrator's case, respondents renewed their motion to dismiss, stating that they had suffered prejudice because the Administrator's complaint was stale, that the allegations did not constitute an emergency, and that

equitable estoppel barred the Administrator from pursuing the case.<sup>7</sup> Tr. at 145-47. The law judge denied the motion, but offered to continue the hearing to allow respondents to prepare their defense, based on respondents' equitable estoppel argument. Tr. at 148-52.

During respondents' response to the Administrator's case, Respondent Wallace testified that he had received a call from his friend, Dan Bailey at Freedom Jets, who asked Respondent Wallace to transport passengers the following morning from Orlando to Teterboro. Respondent Wallace agreed to conduct the flight, but stated that one of his employees, Jeremy Birch, was sick both of the days that Respondent Wallace contacted him, so he could not serve as SIC for the flight. Respondent Wallace further testified that he asked Mr. DiLoreto whether he could serve as SIC for the flight, but that Mr. DiLoreto declined, because he needed to attend a birthday event for his son. Respondent Wallace then informed Mr. Bailey that he could not conduct the flight under part 135 "because of the crewing," and that Mr. Bailey "was not very happy." Tr. at 160. Respondent Wallace testified that he then realized that Mr. Lechtrecker

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<sup>7</sup> We have previously recognized that equitable estoppel is a legal doctrine that prevents a person from adopting a new position that contradicts a previous position when allowing the new position would unfairly harm another person who has relied on the previous position to his or her detriment. Administrator v. Coughlan, NTSB Order No. EA-5197 at 10 n.10 (2005) (citing Merriam-Webster's Dictionary of Law (1996)).

could serve as SIC on the flight if he conducted the flight under part 91, and re-categorized the flight as such.

Mr. Lechtrecker then arrived for the flight, which was already late, and they spoke with Mr. Showalter about conducting the flight under part 91. Respondent Wallace stated that Mr. Showalter told him, "well I'm not dispatching a part 91 flight," to which Respondent Wallace replied, "fine, it doesn't require one." Tr. at 160. Respondent Wallace testified that he had nevertheless started to fill out the flight log the night before the flight, which was his practice, and that the log showed that the flight was to occur under part 135. Respondent Wallace stated that he intended to use the log to record the times, and then complete a corrected log showing the flight as one under part 91, after the flight. Respondent Wallace stated that his son, Kevin Wallace, keeps the paperwork for his flights, and accidentally discarded the corrected paperwork showing that the flight occurred under part 91, because he believed the paperwork was an unnecessary duplicate. Respondent Wallace testified that he was "shocked" to see the part 135 paperwork at the April 14, 2008 meeting with the FAA inspectors, because he believed that his son had retained only the part 91 paperwork. Tr. at 178-79. Respondent Wallace suggested that the FAA contact Mr. Bailey to confirm that he expressed his

intention to conduct the flight under part 91, not part 135.<sup>8</sup>

Respondent Wallace also stated that he informed the passengers on the flight that the flight was not a charter, and that he was transporting them only on a "cost basis." Tr. at 163. Respondent Wallace stated that he billed Freedom Jets \$12,001 for the flight, which covered the actual costs of the flight; he testified that, if he had conducted it under part 135, he would have billed Freedom Jets approximately \$20,000.

On cross-examination, Respondent Wallace stated that his son, Kevin Wallace, told respondent that the son had signed Mr. DiLoreto's name on the form requesting the flight release. Tr. at 192; Exh. A-8. Respondent Wallace also stated that he personally signed Mr. DiLoreto's name on the flight manifest. Tr. at 193; Exh. A-9. Respondent Wallace further contended that his son had made an "honest mistake" by discarding the "revised" paperwork that indicated that the flight was conducted under part 91. Tr. at 200.

Kevin Wallace also testified on behalf of respondents. Mr. Wallace stated that he had signed Mr. DiLoreto's name on the

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<sup>8</sup> At the hearing, Respondent Wallace submitted a letter from Mr. Bailey, which the law judge accepted as a stipulation of expected testimony of Mr. Bailey. Exh. R-1. The letter states that Respondent Wallace initially informed him that he was "short a pilot," but then called Mr. Bailey again and informed him that, "he had solved the problem and would be on his way to cover the trip." Id. The letter does not mention whether Respondent Wallace informed him that he intended to conduct the flight under part 91.

request for flight release form. Mr. Wallace also testified that Mr. Showalter told him that the paperwork "looked fine," and that he assumed that he did not have additional paperwork for the flight, which he usually keeps for part 135 flights, because the crew had forgotten. Tr. at 210. Mr. Wallace stated that he was the one who had typed the invoice for the flight, which showed that the flight was conducted under part 91, and that this invoice was the only one created for the flight. Tr. at 216, 222; Exh. A-11.

Respondents also provided the testimony of Messrs. Lechtrecker and DiLoreto. Mr. Lechtrecker testified that Respondent Wallace had called him the morning of February 21, 2008, concerning the flight; Mr. Lechtrecker stated that he told Respondent Wallace during this conversation that he was not "current" for a part 135 flight, to which Respondent Wallace responded that they would conduct the flight under part 91. Mr. Lechtrecker also testified that their routine was to fill out paperwork prior to each flight, and then complete a new log sheet at the conclusion of each flight, once the crew was back at the office. Mr. DiLoreto testified that he did not serve as SIC on the February 21 flight, and did not know who placed his signature on the paperwork for the flight. Mr. DiLoreto, however, acknowledged that it was commonplace for the PIC to fill out the paperwork and sign the name for the SIC

on behalf of the SIC.

In rebuttal, the Administrator's counsel sought to submit an additional invoice into evidence, which appears almost identical to the invoice indicating that the flight was conducted under part 91, but shows that the flight was a "charter" flight, and lists \$12,000 as the amount due. Exh. A-29(a). The law judge admitted this invoice into evidence, due to its relevance, even though the Administrator's counsel had not provided it to respondents' counsel prior to the hearing, which is apparently contrary to the law judge's pre-hearing order. The law judge offered to continue the hearing or accept closing arguments in writing, in order to allow respondents the opportunity to challenge the authenticity of Exhibit A-29(a). Also in rebuttal, the Administrator again called Randall Sizemore, who was the aviation safety inspector who investigated respondents' alleged violations. Inspector Sizemore stated that, at the April 14, 2008 meeting, Respondent Wallace told the FAA inspectors that he, not his son, was the one who accidentally discarded the paperwork indicating that he had conducted the flight under part 91.

Following the hearing, the parties submitted written closing arguments, and the law judge issued a lengthy, well-reasoned written initial decision. The law judge's decision contained a review of the evidence and further explained his

reasons for allowing Exhibit A-29(a) into evidence; the decision further stated that, given the obvious contradiction between Exhibits A-29(a) and A-11, it was "evident that one of the two invoices is contrived." Initial Decision at 2. The law judge's decision clearly articulated that the issues at stake were whether the February 21, 2008 flight was conducted under part 135 or 91; whether Respondent Wallace made or caused to be made a fraudulent or intentionally false entry on the paperwork indicating that "D. DiLoreto" was the SIC on the flight; and whether Mr. Showalter issued the flight release. The decision concluded that the flight had occurred under part 135, not part 91, because respondents had received compensation for the flight; the decision stated that the Board had previously held that intangible benefits, such as the expectation of future business, are considered "for compensation or hire," and that compensation received does not require the realization of a profit. The law judge further found that Respondent Wallace was not credible, and that he believed Respondent Wallace had conjured paperwork after the FAA began its investigation of the flight to show that the flight occurred under part 91. The law judge concluded that Respondent Wallace had violated 14 C.F.R. §§ 135.249(a) and (b), because the flight occurred under part 135 and Mr. Lechtrecker was admittedly not current to fly a part 135 flight.

The decision further states that the law judge determined that Respondent Wallace violated 14 C.F.R. § 61.59(a)(2) because he was aware that the request for flight release and the flight manifest forms falsely stated that Mr. DiLoreto was SIC on the February 21 flight. Moreover, the law judge found that Respondent Wallace violated 14 C.F.R. § 119.5(1) because Global's operations specifications require that, prior to each flight, the aircraft must be verified as airworthy under Global's approved maintenance, inspection, and airworthiness program. The law judge concluded that Mr. Showalter did not issue the request for flight release form, and that this constitutes a violation of § 119.5(1) because no one else could have released the flight. The law judge affirmed the Administrator's order of revocation of both respondents' certificates, based on the violations of 14 C.F.R. §§ 135.293(a) and (b), 61.59(a)(2), 119.5(1), and 91.13(a), and because a finding of intentional falsification indicates a lack of qualifications to hold a certificate.

On appeal, respondents contend that the law judge erred in: allowing Exhibit A-29(a) into evidence; finding that respondents violated § 61.59(a)(2) by falsifying records; finding that respondents operated the February 21 flight under part 135; and determining that respondents violated § 91.13(a). In particular, respondents argue that the law judge abused his

discretion in admitting Exhibit A-29(a) into evidence because the Administrator did not lay a foundation for the admissibility of the exhibit, and the admission of the exhibit prejudiced respondents. Respondents also argue that they did not falsify any records that contain Mr. DiLoreto's name because Mr. DiLoreto allowed Respondent Wallace to sign the forms on his behalf. Respondents further contend that the flight occurred under part 91, because they conducted the flight in order to bolster their business relationship with Freedom Jets, and that such a flight is allowed under 14 C.F.R. § 91.501(b)(3), which states that, "[f]lights for the demonstration of an airplane to prospective customers when no charge is made" may occur under part 91. Finally, respondents argue that they did not violate § 91.13(a) because they merely made a mistake in the paperwork concerning the February 21 flight. The Administrator contests each of respondents' arguments, and urges us to affirm the law judge's decision.

We do not find respondents' arguments persuasive in light of the evidence establishing that respondents conducted the flight under part 135, that Mr. Showalter did not release the flight, and that the paperwork for the flight contained Mr. DiLoreto's name when respondents do not dispute that Mr. DiLoreto did not serve as SIC on the flight. With regard to respondents' argument that the law judge erred in admitting

Exhibit A-29(a), we first note that law judges have considerable discretion in overseeing discovery procedures and hearings and in admitting evidence. Administrator v. Giffin, NTSB Order No. EA-5390 at 12 (2008) (citing Administrator v. Bennett, NTSB Order No. EA-5258 (2006)). Moreover, we will not overturn a law judge's evidentiary ruling unless we determine that the ruling was an abuse of discretion. See, e.g., Administrator v. Martz, NTSB Order No. EA-5352 (2008); Administrator v. Zink, NTSB Order No. EA-5262 (2006); Administrator v. Van Dyke, NTSB Order No. EA-4883 (2001). When resolving issues involving the admission of evidence, the Board is not bound by the Federal Rules of Evidence, but considers them to be "non-binding guidance." Administrator v. Ferguson, NTSB Order No. EA-5360 at 10-11 (2008) (citing Petition of Cary A. Neihans, NTSB Order No. EA-5166 at 9 n.9 (2005)). In this regard, the Board is not bound by evidentiary or procedural rules that apply in other courts. Furthermore, the Board is aware of the wide latitude that the Administrative Procedure Act provides agencies concerning the admissibility of evidence at administrative hearings. 5 U.S.C. § 556(d) (stating that, "[a]ny oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence").

Respondents' argument that Exhibit A-29(a) is not authentic and that the law judge erred in admitting it into evidence because the Administrator did not lay a foundation to establish the authenticity of the document is unavailing, in light of the law judge's discretion to admit evidence. Moreover, even had the law judge not admitted Exhibit A-29(a) into evidence, we still believe that sufficient evidence exists in this record to establish that respondents violated the regulations, as charged. Whether respondents sent an invoice to Freedom Jets that stated that the flight occurred under part 91 or was a "charter" does not obviate the fact that respondents admitted, and even argue in their appeal brief, that they conducted the flight because they sought to solidify their business relationship with Freedom Jets. According to our case law, such a reason is considered "compensation." In Administrator v. Clair Aero, Inc., NTSB Order No. EA-5181 at 11 (2005), we stated that, "intangible benefits, such as the expectation of future economic benefit or business, are sufficient to render a flight one 'for compensation or hire.'" In Clair Aero, we cited several cases in which we had previously recognized this interpretation, including Administrator v. Blackburn, 4 NTSB 409 (1982), which the Ninth Circuit subsequently affirmed. Blackburn v. NTSB, 709 F.2d 1514 (9th Cir. 1983). We also note that in Administrator

v. Wagner, NTSB Order No. EA-4081 at 6 n.11 (1994), we stated as follows:

It is well-established that "compensation," which is one of the elements of "common carriage," need not be monetary. Intangible rewards such as good will or the expectation of future economic benefits—both of which would likely have resulted from the flight if [the respondent] had not been charged—can also constitute "compensation."

Based on this precedent, we reject respondents' argument that the law judge erred in admitting Exhibit A-29(a) and in finding that the February 21, 2008 flight occurred under part 135. We also do not accept respondents' contention that the flight was permissible under 14 C.F.R. § 91.501(b)(3),<sup>9</sup> as the evidence indicates that Freedom Jets had an expectation to be charged for the flight.

We also find respondents' argument that the law judge erred in finding that Respondent Wallace violated § 61.59(a)(2) unpersuasive. We have previously held that in intentional falsification cases, the Administrator must prove that a pilot (1) made a false representation, (2) in reference to a material

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<sup>9</sup> Section 91.501(b) states, in pertinent part, that, "[o]perations that may be conducted under the rules in [Part 91, Subpart F] instead of those in parts 121, 129, 135, and 137 of this chapter when common carriage is not involved, include ... (3) Flights for the demonstration of an airplane to prospective customers when no charge is made." We have previously held, and Courts of Appeal have affirmed, that where a passenger has an expectation of being charged for a flight, this expectation indicates that the flight did not occur under the provisions of 14 C.F.R. part 91. Wagner v. NTSB, 86 F.3d 928, 931 (9<sup>th</sup> Cir. 1996).

fact, (3) with knowledge of the falsity of the fact. Hart v. McLucas, 535 F.2d 516, 519 (9<sup>th</sup> Cir. 1976) (citing Pence v. United States, 316 U.S. 332, 338 (1942)). We have also held that a statement is false concerning a material fact under this standard if the alleged false fact could influence the Administrator's decision concerning the certificate. Administrator v. McGonegal, NTSB Order No. EA-5224 at 4 (2006); Administrator v. Reynolds, NTSB Order No. EA-5135 at 7 (2005); see also Janka v. Dep't of Transp., 925 F.2d 1147, 1150 (9<sup>th</sup> Cir. 1991). Moreover, we have stated that the Administrator needs to establish that a respondent specifically intended to falsify a document, but may fulfill the three-prong Hart v. McLucas test by showing that a respondent has made a false statement while cognizant of the falsity of the statement. Administrator v. Dillmon, NTSB Order No. EA-5413 at 10 (2008) (citing Administrator v. Exousia, Inc. and Schweitzer, NTSB Order No. EA-5319 at 8 n.10 (2007); Administrator v. McGonegal, supra at 4; Administrator v. Brassington, NTSB Order No. EA-5180 at 10 (2005)).

Here, Respondent Wallace knew that Mr. DiLoreto did not serve as SIC on the February 21 flight, but still listed his name, or caused his name to appear, on two documents concerning the flight. Moreover, respondents retained these records to show their compliance with the Federal Aviation Regulations. As

such, the documents are material, and Respondent Wallace was aware that they contained incorrect information. Based on our case law concerning intentional falsification allegations, the law judge correctly found that Respondent Wallace violated § 61.59(a)(2).

Finally, respondents' argument that they did not violate § 91.13(a) because they did not act in a careless or reckless manner when they made a "mistake in paperwork" is also unavailing. We have long recognized that the Administrator consistently includes a § 91.13(a) charge in complaints alleging a violation of an operational regulation. We have held that, "[u]nder the Administrator's interpretation of [her own] regulations, a charge of carelessness or recklessness under § 91.13(a) is proven when an operational violation has been charged and proven." Administrator v. Seyb, NTSB Order No. EA-5024 at 4 (2003) (citing Administrator v. Nix, NTSB Order No. EA-5000 at 3 (2002), and Administrator v. Pierce, NTSB Order No. EA-4965 at 1 n.2 (2002)). The fact that Respondent Wallace and Mr. Lechtrecker conducted the February 21 flight without incident does not obviate the fact that the flight occurred under part 135, even though Mr. Lechtrecker was not authorized to conduct such a flight and Mr. Showalter had not released the flight. The law judge's conclusion that respondents therefore violated § 91.13(a) was not erroneous, based on these

operational violations.

**ACCORDINGLY, IT IS ORDERED THAT:**

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

Wallace's ATP certificate and Respondent Global Air Charter's air carrier certificate are affirmed.

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

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

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ACTING ADMINISTRATOR,  
FEDERAL AVIATION ADMINISTRATION,

Complainant,

v.

Docket No.: SE-18428 & SE-18429

ROBERT EARL WALLACE,  
GLOBAL AIR CHARTER OF KY, LLC.,

Respondent.

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WRITTEN INITIAL DECISION AND ORDER

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These cases were consolidated for hearing, on motion by the Acting Administrator on November 26, 2008, and with the Respondent's consent, on December 3, 2008. The hearing was held on December 18 and 19, 2008, in Louisville, Kentucky.

This is a proceeding under the provisions of 49 U.S.C. §44709 (formerly Section 609 of the Federal Aviation Act) and the provisions of the Rules of Practice in Air Safety Proceedings of the National Transportation Safety Board. Robert Earl Wallace and Global Air Charter of KY, Inc., the Respondents, have appealed the Administrator's Emergency Orders of Revocation, dated May 6, 2008, which pursuant to §821.31(a) of the Board's Rules, serve as the complaint, in which the Administrator ordered the revocation of Respondent Wallace's Airline Transport Certificate No. 025448126, and, Respondent Global Air Charter's Air Carrier Certificate No. GJKA9481, because they each allegedly violated Sections 139.293(a), 135.293(b), 91.13(a) 119.5(l), and 61.59(a)(2), of the Federal Aviation Regulations.

By Order, dated December 11, 2008, I deemed that Respondent Wallace admitted in his answer to the complaint paragraphs 1, 2, 3a, 4a, 5,6,7, 8, 9, 10, 11, 12,

13, 14, 15, 17, 18, 19, 22, 23, 25a, 27, and 28 of the complaint against him, and denied paragraphs 3b, 3c, 4b, 4c, 16, 20, 21, 24, 25b, 26, 29, and 30.

In its answer to the complaint, Respondent Global Air Charter admitted paragraphs 1, 2a, 3, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 18, 19, 23, 27b, and 28 of the complaint. It denied paragraphs 2b, 2c, 4, 16, 17, 20, 21, 22, 24, 25, 26a, 26b, 27a, 27c, 29, 30, and 31.

The complaints in these two consolidated cases are lengthy, and are similar in many respects, but not identical in all respects. Because of their length, they are incorporated by reference.

The "Administrator's Motion for Reconsideration of the Motions for Judgment on the Pleadings or for Summary Judgment and Supplemental Filing in Support of His Motions for Judgment on the Pleadings or for Summary Judgment," dated December 11, 2008, is DENIED. The issues raised by this motion are fully considered in this initial decision. Therefore, the "Respondents' Motion to Strike Administrator's Motion for Reconsideration and Alternative Response," dated December 11, 2008, is moot.

At the hearing, Administrator's Exhibit A-29(a) was admitted during the Acting Administrator's rebuttal case, over objection by the Respondents. It was obtained from Freedom Jets by an FAA inspector, and purports to be invoice #1007 from Respondent Global Air Charter to Freedom Jets, dated 2/21/08, in the amount of \$12,000, for a charter flight in LR 55 N550AK on 2/21/08 from MCO to TEB. Administrator's Exhibit A-11, obtained by FAA inspectors from the files maintained by Global Air Charter, is also invoice #1007, from Global Air Charter to Freedom Jets, dated 2/21/08, in the amount of \$12,001, for a Part 91 flight in LR 55/N550AK on 2/21/08, from "LEX-MCO-TEB-LEX." The relevance of Exhibit A-29(a) is obvious in the context of Exhibit A-11. Exhibit A-11 is a Global Air Charter invoice obtained from Global Air Charter's files which shows the Global Air Charter flight on 2/21/2008 was a Part 91 flight from LEX-MCO-TEB-LEX, while Exhibit A-29(a) is a Global Air Charter invoice for a charter flight the same day from MCO to TEB, in the same aircraft, in the amount of \$12,000. It is evident that one of the two invoices is contrived.

Exhibit A-29(a) was admitted in rebuttal because its obvious relevance outweighed any prejudice from late disclosure by the Administrator, and the Respondents were granted a continuance of the hearing to December 29, 2008, for the purpose of presenting surrebuttal evidence. If the Respondent chose not to have the hearing, simultaneous written closing arguments were to be submitted by January 5, 2009.

The Respondents' "Motion to Amend Order for Sur-rebuttal Hearing," dated December 22, 2008, was granted on December 23, 2008, and the hearing scheduled for December 29, 2008, was canceled. During a conference call with counsel on December 22, 2008, the Respondents' request to submit their surrebuttal evidence in writing by December 30, 2008, was granted.

In surrebuttal, the Respondents submitted the Declarations of Respondent Robert E. Wallace and witness Kevin Wallace on December 26, 2008. They will be given due consideration in this Written Initial Decision.

On December 30, 2008, the Acting Administrator submitted the written Declaration of FAA Aviation Safety Inspector Susan Fraher, who stated that at relevant times she was the Principal Operations Inspector for Freedom Jets, LL.C, and that she obtained from Brian Sutch, an employee of Freedom Jets, the documents marked as Administrator's Exhibit A-29 in this proceeding, which includes Administrator's Exhibit A-29(a).

On January 2, 2009, the Respondent filed "Respondents' Objections to Admission of Exhibit A-29 and Renewal of Motions to Dismiss." The Respondents objected to the admission of Exhibit A-29, including A-29(a), for the reason that it was not authenticated by the testimony of anyone from Freedom Jets, the supposed source of the exhibits. Respondent Wallace testified that neither he nor anyone else from Global Air Charter prepared Exhibit A-29(a), which is materially different from the invoice form normally used by Global Air Charter, which he submitted to Freedom Jets (Exhibit A-11). The Respondents moved that the Acting Administrator's complaint should be dismissed for lack of evidence, as previously moved by the Respondents at the close of the Administrator's case-in-chief.

Exhibit A-29, which is a collection of records from Freedom Jets, was not admitted during the hearing, not because there was doubt as to the authenticity of the records, but because they had been in the possession of the FAA since April 2008, but had not been timely disclosed to the Respondents as required by the Prehearing Order. That ruling remains unchanged, except for Exhibit A-29(a), which was admitted during the Acting Administrator's rebuttal. It is an invoice on Global Air Charter letterhead purportedly sent to Freedom Jets and obtained by an FAA inspector from a Freedom Jets employee, for the flight at issue here, in the amount of \$12,000, for a charter flight. It differs little in appearance from Exhibit A-11, which is also an invoice from Global Air Charter to Freedom Jets for the same flight obtained from Global Air Charter's records, but in the amount of \$12,001, for a Part 91 flight. Exhibit A-29(a) was admitted because its relevance outweighed the possible prejudice from lack of timely disclosure, and because there was no doubt that Exhibit A-29 was obtained from Freedom Jets by an FAA aviation safety inspector.

The Respondents' "Objection" is overruled for reasons discussed in this Written Initial Decision, and reconsideration of the motion to dismiss is DENIED. Exhibit A-29(a) will be given such weight, if any, as may be warranted.

On January 2, 2009, the Respondents filed "Respondents' Closing Argument, in which the Respondents argue that the flight at issue was a Part 91 flight, and that this is a case of "botched record keeping, not a violation that merits a certificate revocation."

On January 5, 2009, the Acting Administrator filed "Complainant's Written Closing Argument," requesting affirmance of the Acting Administrator's Emergency Order of Revocation, arguing that the flight at issue was not a Part 91 flight, and that even one intentional falsification merits revocation.

I have read the written closing statements, and I will give them such consideration as they may merit in reaching my decision set out below.

On January 12, 2009, the Respondents filed their "Objection to Administrator's Closing Argument," disputing the Acting Administrator's summary of testimony by witness Daniel Showalter, and requesting removal of that portion of the Acting Administrator's closing statement.

On January 13, 2009, the Acting Administrator filed his "Opposition to Respondents' Objection to the Administrator's Closing Argument," contending that the record speaks for itself concerning witness Showalter's testimony.

On January 14, 2009, the Respondents filed their "Rebuttal to Administrator's Opposition to Objection," in which the Respondents contend that there was no emergency, and the Administrator's case is based on hearsay evidence and hearsay within hearsay, with no acceptable circumstantial indicia of trustworthiness. The Respondent further states their review of the transcript confirms their dispute concerning the testimony of Daniel Showalter.

Closing arguments are not evidence. They are just what the term implies -- argument. I will not give closing statements by counsel any weight as evidence, and will decide the case on the evidence as I find it. I have read the last three pleadings described above, but I note that they were neither authorized or solicited, nor do they serve any useful purpose.

I.

It is undisputed that Respondent Wallace was and is the owner of Respondent Global Air Charter, and Global Air Charter is the holder of the Air Carrier Certificate alleged in the complaint. It is further undisputed that on or about February 21, 2008, Respondent Wallace served as pilot-in-command of N550AK, a Lear Jet LR55, operated by Global Air Charter, on a flight from Lexington, KY, to Orlando, FL, to Teterboro, NJ, and return to Lexington, KY (LEX-MCO-TEB-LEX). On this flight, Richard Scott Lechtrecker, the Chief Pilot of Global Air Charter, served as second in command. The Respondents contend that the flight was conducted under Part 91 of the FARs, not Part 135.

Whether or not the flight was conducted under Part 135 or Part 91 is a material issue of fact and law that the Acting Administrator must prove in this proceeding.

N550AK is type certificated for more than one pilot flight crewmember. The FARs concerning Part 135 flights require that any person serving as second in command of an aircraft type certificated for more than one pilot flight crewmember must comply with the requirements set forth in FAR § 61.55(b)(2) within the preceding 12 calendar months. It is undisputed that at the time of the flight, Mr. Lechtrecker had not met that requirement. He had also not met the requirements of FAR § 135.293(a) and 135.293(b) within the preceding 12 months. Respondent Wallace is deemed to have admitted in his answer to the complaint that his operation of the flight without a qualified second-in-command was careless and/or reckless. A similar allegation was denied by Respondent Global Air Charter.

It is undisputed that the Global Air Charter Request for Flight Release form is used by Global Air Charter to show compliance with the FARs, but the Respondents deny that on or about February 21, 2008, Respondent Wallace made or caused to be made on a Global Air Charter Request for Release form the signature of "D. Diloreto" as the second-in-command. The Respondents admitted that "D. Diloreto" was not the second-in-command of the flight, and the entry of "D. Delrito" on the form at paragraph 16 was fraudulent or intentionally false.

Whether or not Respondent Wallace made or caused to be made the fraudulent or intentionally false entry that "D. Diloreto" was the second-in-command on the flight is a material issue of fact that the Acting Administrator must prove in this proceeding.

There is no dispute that the Global Air Charter Flight Manifest form is used by Global Air Charter to show compliance with the FARs, but the Respondents deny that on February 21, 2008, Respondent Wallace made or caused a fraudulent or intentionally false entry in paragraph 21 of that form that "Diloreto" was the second-in-command of the flight. There is no dispute that "Diloreto" was not the second-in-command on the flight.

Whether or not Respondent Wallace made or caused to be made the fraudulent or intentionally false entry on the Global Air Charter Flight Manifest that "Diloreto" was the second-in-command is a material issue of fact that the Acting Administrator must prove in this proceeding.

It is admitted that on or about February 20, 2008, Respondent Wallace scheduled a crew, including himself as pilot-in-command, for the flight at issue on February 21, 2008, in N550AK. But the Respondents denied that Respondent Wallace used the Global Air Request for Flight Release form to schedule the flight; that he entered or caused to be entered the name of Global Air's Director of Maintenance, Daniel Showalter, in the "issued by" block on the form. Respondent Wallace denied, but Respondent Global Air admitted that contrary to the entry Daniel Showalter did not issue the flight release; and, that Daniel Showalter did not determine whether N550AK was airworthy prior to flight as required by Global Air Charter's operational specifications. Both Respondents admitted that the entry in the "issued by" block was fraudulent or intentionally false, in that Daniel Showalter did not issue the flight release for N550AK for February 21, 2008. Respondent Wallace admitted, but Respondent Global Air denied

Global Air denied that the Operations Specifications for Global Air Charter require at Paragraph A008 that prior to a Part 135 flight the aircraft must be determined to be airworthy under its FAA-approved maintenance, inspection, or airworthiness program.

Other material issues of fact that the Acting Administrator must prove include whether or not Respondent Wallace used the Global Air Request for Flight Release to schedule the flight, and entered or caused the name of Daniel Showalter, Global Air's Director of Maintenance to be entered in "issued by" block on the form, whether or not Daniel Showalter did or did not issue the flight release and did or did not determine whether N550AK was airworthy prior to flight, as required by Paragraph A008 of Global Air Charter's operations specifications.

Included in the paperwork obtained from Global Air Charter's files by FAA inspectors during a meeting with Respondent Wallace in April 2008 are various documents pertaining to the 2/21/08 flight. They include a Daily Flight Control Log (Administrator Exhibit A-9); a request for flight release (Administrator Exhibit A-8); a passenger manifest (Administrator Exhibit A-10); and, an invoice for the flight from Global Air Charter to Freedom Jets, showing the flight to be a Part 91 flight (Administrator's Exhibit A-11). Admitted during the Administrator's rebuttal was Administrator's Exhibit A-29(a), also purporting to be an invoice from Global Air Charter to Freedom Jets, this one showing the flight as a charter flight.

Respondent Wallace asserts that on February 20, 2008, he received a telephone call from Don Bailey, an official of Freedom Jets, whom he has known for a number of years, asking that Global Air Charter transport Freedom Jets' charter passengers who had been stranded in Orlando, FL, by another charter carrier that had experienced aircraft maintenance problems, to their destination, Teterboro, NJ, on February 21, 2008. Respondent Wallace agreed to transport the stranded passengers on February 21, 2008, and prepared paperwork for the flight the next day under Part 135 listing Don Diloreto as the second in command. But, according to Respondent Wallace, he subsequently learned that the second-in-command he intended to use for the flight, Don Diloreto, was not available, and another Part 135 qualified pilot also declined to take the flight as second-in-command. Respondent Wallace said he decided to take the trip as a Part 91 flight, and use Dick Lechtreker, the company's chief pilot, who was qualified to serve as a Part 91 second-in-command of N550AK, but was not current under Part 135, and could not be used as second-in-command on a Part 135 flight. He said he decided to take the flight for Freedom Jets to cement his established business relationship with Freedom Jets, in hope that Freedom Jets would employ Global Air Charter for other flight in the future.

Respondent Wallace claims that he told the Director of Maintenance, Don Showalter, that the flight would be a Part 91 flight, and Showalter indicated that no dispatch would be required. However, since the flight was running late, Respondent Wallace decided to use the flight log he had filled out earlier listing Diloreto as the second in command to record in and out times during the flight, and then recopy it after the flight to reflect that the flight was conducted under Part 91. Respondent Wallace said he briefed the passengers on the cost difference at the Orlando Airport, and after

refueling and giving a safety briefing, departed for the Teterboro, NJ airport, where the passengers got off. From there he returned to Lexington, KY.

Respondent Wallace said that once he returned to Lexington, he recopied the flight log showing Lechtreker as the second in command, and showing the flight to be under Part 91. He said he put the original paperwork and the new flight log on the desk of his son, Kevin Wallace, who was employed by the company, but had already gone home, and went home, himself. The next morning Kevin Wallace erroneously threw the Part 91 paperwork away, and kept the Part 135 paperwork, which he placed in Global Air Charter's files, not realizing that the flight had been conducted under Part 91 not Part 135.

Respondent Wallace said that at the meeting with FAA inspectors on April 14, 2008, he showed the FAA inspectors the paperwork for the February 21, 2008, flight, and they made copies. Respondent Wallace said he was surprised to see the Part 135 paperwork, when the flight had been a Part 91 flight. He said he told the FAA Principal Operations Inspector that he did not remember who had signed Diloreto's name on the dispatch paperwork, but it was common for pilots to sign each other's names with the others' concurrence. Respondent Wallace said he explained to the FAA POI that the paperwork was wrong.

During his testimony, however, Respondent Wallace said that his son, Kevin Wallace, had prepared the Part 135 paperwork the day before the flight, including the Part 135 flight log, Administrator's Exhibit A-9, and Kevin Wallace told him that he had signed Diloreto's name on it. Respondent Wallace said he had written his name and that of Diloreto in the crew box on the flight log.

Both Respondent Wallace, as the pilot-in-command of the flight, and Daniel Showalter, Director of Maintenance, agreed in their testimony that although Showalter's printed name is on the flight release form, Showalter did not release the aircraft. Showalter said Respondent Wallace told him before the flight that it would be under Part 91, and he told Wallace that a release was not needed. Showalter said he did not see the paperwork after the flight.

Kevin Wallace testified that he is Respondent Robert Wallace's son. He said that he works for Global Air Charter, and that in February 2008, his responsibilities were basically operational support, including participating in release of aircraft, seeing to it that paperwork was done correctly, and filing paperwork for flight in his office. He said he did not check paperwork for accuracy. He said he generated the paperwork for the February 21, 2008, flight the night before. He said he showed the paperwork [which includes a flight release with Showalter's printed name on it] to Showalter, who said it looked okay. He then gave the paperwork to his father. He said he signed Diloreto's name on Exhibit A-8. He thought that Diloreto was on the flight when it departed.

He said that the next morning [February 22, 2008] he saw two flight logs, but thought they were identical, and discarded one, and filed the other. He said he had already filed the flight release and other paperwork for the flight.

Kevin Wallace said he typed the invoice marked as Administrator Exhibit A-11 for his father. He said it was the only invoice he created for the flight.

Richard Lechtrecker, Chief Pilot for Global Air Charter, said that on the morning of February 21, 2008, Bob Wallace asked him to be second-in-command of a flight. He told Respondent Wallace that he was not current for a Part 135 flight, but was current for a Part 91 flight. Respondent Wallace said it would be a Part 91 flight.

Don Diloreto, who is now chief pilot of Global Air Charter, said it is quite common for the pilot-in-command to prepare paperwork, including signing for other crewmembers, with the knowledge of the other crewmembers. But, he said that he did not know that his signature had been signed for him by anyone for the flight on February 21, 2008, nor does he recall Respondent Wallace telling him he had signed Diloreto's name.

As discussed above, included in the paperwork obtained by FAA inspectors from Global Air Charter's files is an invoice from Global Air Charter to Freedom Jets for \$12,001, for a Part 91 flight on February 21, 2008. Administrator Exhibit A-11. Respondent Wallace said that the normal charge for a Part 135 flight would have been \$20,000, but Freedom Jets only paid \$12,001. Respondent said he charged only for expenses and incidentals, and made no profit. Therefore, the flight was not for compensation.

In his sworn surrebuttal statement, dated January 14, 2009, submitted by the Respondents in surrebuttal, Kevin Wallace said that his father, Respondent Wallace, generated the invoice admitted as Exhibit A-11 "as a special billing for the Part 91 flight at the end of February 2008 or early March 2008," and he faxed it to Don Bailey at Freedom Jets in late February 2008. He said that before March or April 2008, Global Air Charter's invoices had grid lines in the body of the invoice. He said that the invoice admitted as Exhibit A-29(a) is different from other Global Air Charter invoices in that it is smaller in size and scale, the shading in the boxes is different, the outline below the date and time line is not bold, it does not contain grid lines, and it does not show a fax number. He said that before the February 21, 2008, flight, Global Air Charter e-mailed invoices, and Exhibit A-29(a) could have been altered from an e-mail.

Respondent Wallace said in his sworn surrebuttal statement, dated January 14, 2009, that he spoke to Don Bailey on the telephone on December 23, 2008, and he said that he did not remember seeing or receiving from Respondent Wallace or Global the invoice marked as Exhibit A-29(a). He said that the only invoice he remembered seeing was Exhibit A-11. He said he paid Global Air Charter without seeing an invoice. Respondent Wallace said he faxed Exhibit A-11 to Don Bailey at Freedom Jets in late February 2008. He said he had generated Exhibit A-11 at the end of February 2008 as a special invoice in a new format that Global Air Charter began using in April 2008. He corroborated his son's sworn statement concerning the differences between the old invoice and the new one.

Administrator's Exhibit A-11, contained in Global Air Charter's files and identified by Respondent Wallace as the invoice that he had sent to Freedom Jets in the amount of \$12,001 for the February 21, 2008, Part 91 flight, contrasts sharply with the invoice obtained from Freedom Jets by its FAA principal operations inspector. Exhibit A-29(a). This invoice from Global Air Charter to Freedom Jets for the same flight, is for \$12,000, and lists the flight as a charter flight. Respondent Wallace contends that the second invoice, Exhibit A-29(a), is not authentic, but that Exhibit A-11 is the authentic invoice Global Air Charter sent to Freedom Jets.

In rebuttal, the Administrator offered in evidence Exhibit A-29(a), an invoice included in rejected Exhibit A-29, which were documents obtained from Freedom Jets by the company's FAA Principal Operations Inspector. It was admitted over objection as Administrator Exhibit A-29(a). Exhibit A-29 had been rejected because it was not timely disclosed to the Respondents. Exhibit A-29(a) was admitted because its relevance outweighed any prejudice from the failure of the Administrator to timely disclose it. To cure any possible prejudice, however, I granted the Respondents' request for a continuance until a further hearing on December 29, 2008, to produce evidence challenging the authenticity of Administrator Exhibit A-29(a). Subsequently, on December 23, 2008, I granted Respondents' request to allow them to submit their rebuttal in writing, *in lieu* of at a hearing, and canceled the hearing for December 29, 2008.

Respondent Wallace has maintained from an early date in the investigation by the FAA that the flight at issue on February 21, 2008, was a Part 91 flight, not a Part 135 flight. In a letter to Randall Sizemore, FAA Principal Operations Inspector for Global Air Charter, dated April 25, 2008, in response to Inspector Sizemore's letter of investigation, Respondent Wallace stated the following:

On February 21<sup>st</sup>, as we explained in our meeting, we had last minute crew scheduling problems involving a sick first officer, (Birch) and another First Officer (Diloreto) both unable to fly a scheduled flight. In the interest of not stranding the passengers, we elected to re-dispatch the Flight under Part 91 rules, (charging only fuel and incidentals) in order to use Richard Lechtrecker as First officer on this flight. I contacted Daniel Showalter who was acting as management person on duty that day and explained the situation. Dan Showalter said his records on our pilot tracking board showed Dick Lechtrecker expired for FAR Part 135 purposes in September of 2007, but we both thought he was still qualified to serve as F/O on a Part 91 flight. Dick Lechtrecker thought he was as well, so we re-dispatched the flight using Dick. (Emphasis supplied.)

On December 12, 2008, the Respondents filed "Respondent's Motion to Strike Administrator's Motion for Reconsideration and Alternative Response," in which the Respondents contend that the Acting Administrator, in effect, misconstrues Global Air Charter's operations specifications when considered as a whole. That motion was denied. In the motion, however, the Respondents state that this issue is one of the seminal issues in this case, and the Acting Administrator has the burden of proving it. The Respondents state the following rationale in their motion to strike:

The Respondents will prove at the hearing that their intention was to conduct the subject flight as a Part 91 flight and that from Global's standpoint, everything

concerning that flight was conducted as a Part 91 flight. Freedom Jets informed Global that, due to its own administrative difficulties, it could not conduct a flight for which it had contracted and that its passengers were stranded as a result. Global, realizing that it could not conduct the flight as a Part 135 flight, agreed to conduct the flight as a Part 91 flight, for marketing purposes, that is, to show Freedom that Global was capable of flying the type of flight called for here and for marketing it[s] flight product to Freedom Jets. While Freedom was not a potential purchaser of the airplane itself, it was a potential user of Global's services because it is also in the business of providing common carriage services. Therefore, Global had a legitimate interest in demonstrating its capability to Freedom. The evidence presented by Global at the hearing will show that Global received no compensation from Freedom other than reimbursement for out of pocket expenses allowed for FAR § 91.501(b)(3) flight by FAR § 91.501(d).

## II.

At the outset, I find that the issues in this case hinge to a very critical degree on the credibility of Respondent Wallace. I have observed his demeanor and carefully evaluated his testimony, particularly in light of his admissions and the other evidence admitted during the hearing. I find that his contention that the flight was conducted under Part 91, not Part 135, as alleged in the complaint, is not credible, and is contrary to established Board precedent. More likely than not, that contention by Respondent Wallace is an after-the-fact attempt to disguise the true nature of the flight as a Part 135 flight from the FAA. I find from the evidence adduced during the hearing, and afterwards in surrebuttal by the Respondents, that it is apparent that Respondent Wallace wanted to continue doing business with Freedom Jets, and he did not want to jeopardize his business relationship with them by refusing Freedom Jets' request to finish the charter flight of Freedom Jets' passengers stranded in Orlando, FL, on February 21, 2008. When he found that he could not conduct the flight under Part 135, he transported them anyway, not expecting to be found out.

I find that Respondent's testimony concerning how the Part 135 paperwork came to be in Global Air Charter's files is nothing less than an attempt to shift the responsibility to Respondent Wallace's son, Kevin Wallace, an employee of Global Air Charter, for mistakenly filing the paperwork found in the files of Respondent Global Air Charter, listing the flight as Part 135 flight with Don Diloreto as the second in command. I do not find credible Respondent Wallace's claim that he intended for his son to file the Part 91 paperwork he said he left on his son's desk, and to throw away the Part 135 paperwork, not the other way around. Respondent Wallace admitted that he did not tell his son that the flight had been changed from a Part 135 flight to a Part 91 flight, and his son was not there when he says he left both sets of paperwork on his son's desk after the flight. Clearly, Kevin Wallace believed that the flight had been a Part 135 flight when he filed the Part 135 paperwork for the flight, and received no guidance from his father to do otherwise.

For purposes of this case, I find that the Respondents are bound by statements against interest in correspondence to the FAA and in their pleadings. The Respondents' defense is that it conducted the flight at issue as a good will flight to garner future business from Freedom Jets, and charged only for actual expenses. But, even if Global Air Charter only billed Freedom Jets for what it considered to be compensation for out-of

compensation for out-of pocket expenses and incidentals for the February 21, 2008, flight, I find that the flight was still a Part 135 flight and not Part 91 flight. I find that the record as a whole establishes that the Administrator has met his burden of proving by a preponderance of the evidence that the flight at issue was conducted under Part 135, not Part 91.

The Respondents' defense that the flight was conducted under Part 91 clearly runs afoul of Board precedent. See *Administrator v. Clair Aero, Inc.*, NTSB Order No. EA-5181 (2005), and cases cited therein; in which the Board said that "intangible benefits, such as the expectation of future economic benefit or business, are sufficient to render a flight one 'for compensation or hire.'" In *Administrator v. Wagner*, NTSB Order No. EA-4081 (1994), the Board noted that elements of common carriage are (1) a holding out of a willingness to (2) transport persons or property (3) from place to place (4) for compensation, and that the compensation which is one of elements of common carriage need not be monetary, but can be intangible, such as good will or future economic benefit.

Here the admissions of the Respondents and the evidence of record clearly establishes that the purpose of the flight in question on February 21, 2008, even accepting the Respondents' explanation, was for good will and in the expectation of future business from Freedom Jets.

The evidence clearly establishes that Global Air Charter received monetary compensation from Freedom Jets, whether in the amount of \$12,001 or \$12,000. Respondent Wallace contends the payment was reimbursement for expenses and incidentals, and that Global Air Charter did not make a profit. However, whether not a carrier made a profit is not determinative of whether or not a flight was a flight for compensation or hire. Compensation means compensation in whatever form.

I find no reason to question the authenticity of Exhibit A-29(a), the invoice provided by Freedom Jets, which shows that Global Air Charter billed Freedom Jets in the amount of \$12,000, and described the flight as a charter flight. The invoice was obtained from Freedom Jets by its principal operations inspector.

I find nothing irregular about the invoice, or the circumstances under which it was obtained, such as might raise a question as to its authenticity. I find no indicia that it was somehow fabricated by someone at Freedom Jets for some unclear purpose. For example, I find no logical reason why Freedom Jets would agree to a proposal from Global Air Charter to change the flight from a Part 135 flight to a Part 91 flight, when clearly, from Freedom Jets' perspective, the transportation of the passengers stranded earlier in Orlando, FL, started out as a Part 135 flight and continued to be a Part 135 flight until the passengers reached their destination in Teterboro, NJ. The obvious significance of the invoice obtained from Freedom Jets is that there never was an agreement with Global Air Charter to change the transportation of the stranded passengers from common carriage under Part 135 to carriage under Part 91. I do not credit Respondent Wallace's testimony that Exhibit A-11 was submitted to Freedom Jets for payment. Rather, I find that it was a fabrication placed in the records of Global Air

Air Charter for the purpose of concealing the true nature of the flight at issue as a Part 135 flight from the FAA.

The Respondents were afforded a continuance in order to allow them time to prepare and present evidence in surrebuttal to Exhibit A-29(a). At such a hearing, they could have subpoenaed witnesses, including Dan Bailey of Freedom Jets, to corroborate the sworn rebuttal statements of Respondent Wallace and his son, Kevin Wallace. However, the Respondents chose to forgo that opportunity, and waived the hearing without calling any witnesses. I do not find credible, under these circumstance, Respondent Wallace's representation of what Dan Bailey would say contained in his rebuttal sworn statement.

The Respondents further did not present any evidence as to the amount of the payment they received from Freedom Jets for the flight on February 21, 2008. There is no evidence from which it can be determined if Global Air Charter received \$12,001, the amount of the invoice marked as Exhibit A-11, or \$12,000, the amount of the invoice admitted as Exhibit A-29(a), or some other amount.

I do find convincing the sworn statements of Respondent Wallace and his son, Kevin Wallace, that minor differences in the invoice marked as Exhibit A-29(a) and various other invoices said to have been used at various times by Global Air Charter establishes that Exhibit A-29(a) is a forgery. Whatever differences there may be, the Respondents have not shown that forgery is the only, or even the most likely, explanation.

Respondent Wallace said he explained the new financial arrangement to the passengers, but there is no corroborative evidence of what he told the passengers, and, in any event what he may have told the passengers is irrelevant. Regardless of what the passengers may or may not have been told, when they were stranded in Orlando by aircraft difficulties suffered by the first Part 135 carrier, their main, and probably only, real interest was in getting to their destination of Teterboro, NJ., as their contract with Freedom Jets provided.

The critical point is that the passengers had no contractual arrangement with Global Air Charter, and did not pay anything to Global Air Charter for their transportation. Their contract for carriage was with Freedom Jets for transportation for compensation under Part 135, and that is who they paid for their transportation. Nothing about the Part 135 nature of their transportation changed because Freedom Jets had to arrange for a replacement aircraft when the first aircraft transporting them broke down and stranded them in Orlando. Their transportation started out under Part 135, and remained that way even when a different aircraft and charter carrier completed their transportation to their destination. The passengers had every right to expect that their entire flight would meet all of the safety requirements for Part 135 operations. Moreover, as passengers they had no right to waive Federal Aviation Regulations.

It is no defense here, nor even a circumstance in extenuation and mitigation, if Respondent Wallace was ignorant of the law. Nor is it a defense that he intended to conduct the flight as a Part 91 flight. As the owner and operator of a Part 135 certificated air carrier, and the holder of an Airline Transport Pilot certificate, he is required to know what he could legally do and not do. Here, having had the opportunity to observe the testimony and demeanor of Respondent Wallace, I do not credit his testimony in which he tried to extricate himself from the situation in which he found himself after the FAA came into possession of the paperwork for the flight maintained by Global Air Charter by claiming he undertook the flight to impress a prospective client and earn future business, and therefore, it was a Part 91 flight. I find, instead, that defense is largely an after-the-fact attempt to conceal the true nature of the flight. Legally and factually, the flight was a Part 135 flight, including the part flown by Global Air Charter, from start to finish, and Respondent knew that.

I find from the record as a whole that the most likely explanation consistent with the facts and admissions by Respondent Wallace is that he planned and flew the flight using the Part 135 paperwork that the FAA obtained from the records of Global Air Charter. Clearly, he did not expect any repercussions, otherwise he would have been more careful to make sure that his company records supported that the flight was a Part 91 flight. It is apparent that he was surprised by an FAA investigation, and he belatedly tried to manipulate the facts to establish that it was a Part 91 flight all along. That claim is an after-the-fact creation intended to hide the true nature of the flight. I do not find Respondent Wallace to be a credible witness.

As there is no dispute that the second-in-command who actually flew on the flight from Orlando, FL, to Teterboro, NJ, as a required pilot flight crewmember, Dick Lechtreker, was not current to fly Part 135 operations, the Respondents violated FAR §§ 135.293(a) and (b), forbidding his use as second-in-command because he had not complied with the requirements of FAR §§ 61.55(b)(2) and 135.293(a) and (2). There is also a § 91.13(a) residual or derivative violation.

I find, therefore, that the Acting Administrator has proven by a preponderance of the credible evidence that the flight on February 21, 2008, was conducted under Part 135, and not under Part 91, and by operating that flight, the Respondents violated FAR § 135.293(a) and (b).

### III.

The Respondents are charged with violating § 61.59(a)(2) by making or causing to be made fraudulent or intentionally false entries in records required to be kept to show compliance for the exercise of Part 135 privileges. Specifically, Respondent Wallace is accused of fraudulently and intentionally entering or causing to be entered the name D. Diloreto or Diloreto as the second-in-command of the Part 135 flight on February 21, 2008, in the Global Air Charter Request for Flight Release, and the Global Air Charter Flight Manifest. Respondents admitted or are deemed to have admitted that the Request for Flight Release form and Flight Manifest are used by Global Air Charter to

Charter to show compliance with the FARs.

The elements of the charge of intentional falsification are (1) a false representation; (2) in reference to a material fact; (3) with knowledge of falsity. *Hart v. McLucas*, 535 F.2d 516, 519 (9<sup>th</sup> Cir. 1976). Proof of fraud requires proof of two additional elements, an intent to deceive and action taken in reliance upon the representation. *Twomey v. NTSB*, 821 F.2d 63, 66 (1<sup>st</sup> Cir. 1987). In order for a statement to be material, it need only be capable of influencing the decision of the agency. *Administrator v. Dillmon*, NTSB Order No. EA-5413 (2008); *Twomey v. NTSB*, *supra* at 66; *Administrator v. Cassis*, NTSB Order EA-1831 (1982); *Administrator v. Anderson*, NTSB Order EA-4564 (1997); *Administrator v. Richards*, NTSB Order EA-4813 (2000).

Respondent Wallace contends that there is a *mens rea* element in *Hart v. McLucas* that requires proof of a specific intent, and that here, the FAA is attempting to attach strict liability. That contention does not accurately reflect the law applicable to the charge of intentional falsification.

In the very recent case of *Administrator v. Dillmon*, *supra*, the Board, citing *Administrator v. McGonegal*, NTSB Order No. EA-5334 (2006), held that for purposes of evaluating whether a statement has been made with knowledge of the falsity, the third element elements set out in *Hart v. McLucas*, *supra*, the proper inquiry is whether the respondent provided the incorrect answer while cognizant of its falsity, and not whether he had any specific intent to deceive or falsify at the time the answer was provided.

Here, the evidence of record and the Respondents' own admissions clearly establish that Diloreto was not the second in command of the flight on February 21, 2008, and, that Respondent Wallace knew early on that he would not be the second in command. Yet, Respondent Wallace did nothing to correct or change the false entries in the records of the flight prepared the day before by his son, which he well knew all along contained false entries. Therefore, the entries alleged in the complaint listing Diloreto as the second in command in the Global Air Charter Request for Flight Release and Flight Manifest forms was clearly false, and Respondent Wallace was cognizant of their falsity. Even if he did not personally make all of the false entries, he knowingly caused them to be made by his son. That is sufficient to meet the third test of knowingly and intentionally making or causing to be made false statements.

Respondent Wallace denies that he made or caused to be made those entries. He contends, and his son corroborates, that his son filled out the forms on February 20, 2008, and gave them to his father.

Even assuming that to be true, I find that it is immaterial whether he filled them out personally, or someone else filled them out at his direction and with his knowledge as to their contents. Clearly, by his own admission Respondent Wallace caused the signing of Diloreto's name as the second-in-command. He was the pilot-in-command and was responsible for the accuracy and completeness of the records of the flight. He selected

selected the crew members. By his own admission, he subsequently learned that Diloreto would not accept the assignment, but did nothing to change the entries that Diloreto served as second in command. Those entries are manifestly false. In fact, Diloreto was not on the flight at all in any capacity.

Respondent Wallace was the only person who could approve the necessary paperwork, and he has not offered any convincing testimony that someone else filled them out erroneously, without his knowledge. As the pilot in command it was Respondent Wallace's responsibility to conduct lawful Part 135 operations, including completing required forms and using qualified flight crew personnel. He cannot lawfully shift responsibility for his claimed oversights and/or shortcomings to someone else and avoid taking responsibility.

One common definition of gross negligence is the lack of even minimum care in performing professional duties, indicating reckless disregard for duty and responsibility. In this case, considering the evidence of record and admissions. A defense of negligence is unavailing under the conditions present here. Even from Respondent Wallace's own testimony, it is clear that he was not only grossly negligent in performing his duties and responsibilities, but wantonly and willfully disregarded foreseeable consequences that could result if the data on the forms was false. Worse, he made no effort to verify that they were filled out correctly. I do not credit his testimony, or that of his son, which is inconclusive at best, that he filled out a duplicate form showing the flight at issue was made under Part 91 with Lechtrecker as second-in-command, and that he left that form on his son's desk, without any instructions, for his son to file.

I do not find him to be a credible witness when he claims that he was not cognizant of the false entries. On the contrary, I find that he was completely aware of them and cognizant of their falsity, and was the source of the intentionally false information contained in the entries, regardless of whether he personally made them or not.

Respondent Wallace was the pilot-in-command, not to mention the owner of the company, and was solely responsible for completing all necessary forms completely and accurately. He scheduled the crew for the flight in question. By Respondent Wallace's own admission, Diloreto never accepted or agreed to be the second in command of the flight at issue, and never was a crew member, something of which Respondent Wallace was fully cognizant at all relevant times.

As held by the Board in *Administrator v. Dillmon*, *supra*, citing *Administrator v. McGonegal*, NTSB Order No. EA-5334 (2006), Respondent Wallace was cognizant of the false entries when they were made, and, therefore, the third element of the *Hart v. McLucas* case, *supra*, has been satisfied and proven.

Accordingly, I find that the Acting Administrator has proven by a preponderance of the evidence that Respondent Wallace violated FAR § 61.59(a)(2) by making or causing to be made the intentionally false entries in records required to be kept or used to show compliance with any requirement for exercise of Respondent Global Air Charter's air

Charter's air carrier certificate, as alleged in the complaint.

#### IV.

The remaining alleged violation is of FAR § 119.5(l), which provides that no person may operate an aircraft under Part 135 in violation of an air carrier operating certificate, or appropriate operations specifications issued under this part.

Respondent Wallace admitted, but Respondent Global Air Charter denied, that the Operations Specifications of Global Air Charter at Paragraph A008 require that prior to flight under Part 135 the aircraft is determined to be airworthy under its FAA approved maintenance, inspection, or airworthiness program. The evidence of record quite clearly establishes that Paragraph A008 of Global Air Charter's Operations Specifications, which was applicable to Part 135 flights, requires that prior to each flight the aircraft must be determined to be airworthy under Global Air Charter's approved maintenance, inspection, or airworthiness program. The evidence further establishes that Respondent Wallace used Global Air Charter's Request for Flight Release form to schedule the flight for February 21, 2008, and the name of the Director of Maintenance, Daniel S. Showalter was entered in the "Issued by" block on the form. Respondent Wallace admitted, but Respondent Global Charter denied that Daniel S. Showalter did not issue the form. Respondent Global Charter's denial is contrary to the evidence. Both Respondents deny that Daniel S. Showalter did not determine the aircraft to be airworthy under Global Air Charter's FAA approved maintenance, inspection, or airworthiness program, but the overwhelming weight of the evidence is that he did not determine the aircraft to be airworthy before the flight at issue.

At the hearing Daniel Showalter testified that he did not release the aircraft for the flight on February 21, 2008, contrary to what is shown on the records of the flight and Respondent Wallace admitted to be true. The only other persons who could possibly have released the flight as required by Global Air Charter were on the flight, and therefore they could not also release it. Clearly, the record showing that Showalter did release the aircraft if is a knowingly false statement of a material fact, of which Respondent Wallace was fully cognizant, and which he made or caused to be made.

Therefore, I find that the Acting Administrator has proven by a preponderance of the evidence that Respondents Wallace and Global Air Charter violated FAR § 61.59(a)(2), by knowingly making or causing to be made this false statement of material fact, as alleged in the complaint, and §§ 119.5(l) and 91.13(a), by operating an aircraft in violation of an air carrier operating certificate, operating certificate, or operations specifications.

Board precedent uniformly holds that making an intentional false statement of material fact shows lack of qualification to hold a certificate and that the appropriate sanction is revocation. *Administrator v. Hodges*, NTSB Order No. EA-5303 (2007), and cases cited therein.

V.

Often, a § 91.13(a) charge is alleged as a residual violation and is considered proven when the underlying operational violation has been proven. *Administrator v. Bassett*, NTSB Order No. EA-5195 (2005), citing *Administrator v. Seyb*, NTSB Order No. EA-5024 at 2 (2003); *Administrator v. Nix*, NTSB Order No. EA-5000 at 3 (2002); *Administrator v. Pierce*, NTSB Order No. EA-4965 at 2 n.2 (2002) Here, I find a residual violation of FAR § 91.13(a) by Respondent Wallace and Respondent Global Air Charter, as a result of the underlying findings that the Respondents violated §§ 135.293(a) and (b), 119.5(l), and 61.59(a)(2), but no separate sanction will be assessed.

VI.

Respondent Global Air Charter is a corporation or business entity which can only act through its owners, agents, and employees. Therefore, any violations of the FARs committed by Respondent Wallace, the owner, operator, and chief executive of Global Air Charter, are attributed to it also.

I find that the Acting Administrator has proven by a preponderance of the evidence that both Respondent Wallace and Respondent Global Air Charter violated FAR §§ 135.293(a) and (b); 91.13(a); 119.5(l), and 61.59(a)(2). These violations show lack of qualification, for which the appropriate sanction is revocation of Respondent Wallace's Airline Transport Pilot certificate, and Respondent Global Air Charter's Air Carrier Certificate.

VII.

Upon consideration of all of the evidence of record, I find that a preponderance of the substantial, reliable, and probative evidence of record establish that Respondents violated FAR §§ 135.293(a) and (b); 91.13(a); 119.5(l), and 61.59(a)(2), as alleged in the Complaint, and that safety in air commerce and air transportation and the public interest require affirmation of the Administrator's Order of Revocation.

ACCORDINGLY, it is hereby ORDERED that the Administrator's Order of Revocation is AFFIRMED.

ENTERED this 23<sup>rd</sup> day of January 2009, at Washington, D.C.



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William A. Pope, II  
Judge

## **APPEAL (WRITTEN INITIAL DECISION)**

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

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

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

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

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

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

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

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

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

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