

SERVED: June 3, 2010

NTSB Order No. EA-5521

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 2<sup>nd</sup> day of June, 2010

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J. RANDOLPH BABBITT,		)	
Administrator,		)	
Federal Aviation Administration,		)	
		)	
	Complainant,	)	
		)	Docket SE-18409
	v.	)	
		)	
ELTON H. DARBY,		)	
		)	
	Respondent.	)	
		)	
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**OPINION AND ORDER**

Respondent appeals the written initial decision of Administrative Law Judge William A. Pope, II, issued December 14, 2009, in this matter.<sup>1</sup> By that decision, the law judge affirmed the allegations in the Administrator's complaint,

<sup>1</sup> A copy of the initial decision and order is attached.

which charged violations of 14 C.F.R. § 135.293(a),<sup>2</sup> but reduced the sanction from a 180-day suspension to a 90-day suspension of respondent's airline transport pilot (ATP) certificate.<sup>3</sup> We grant respondent's appeal, in part.

The Administrator issued the order of suspension, which became the complaint in this case, on October 28, 2008. In the complaint, the Administrator alleged that respondent operated two civil aircraft as pilot-in-command (PIC)—one on January 28, 2008, and the other on February 11, 2008—under 14 C.F.R. part 135, when he had not completed an oral or written test in the past 12 calendar months for the types of aircraft that he operated. As a result, the Administrator charged respondent with two violations of § 135.293(a).

Respondent submitted an answer to the complaint, in which he alleged that the complaint was stale under the Board's Stale Complaint Rule.<sup>4</sup> Respondent subsequently filed motions for summary judgment and to dismiss the complaint on the basis that

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<sup>2</sup> Section 135.293(a), quoted below in the text of this opinion, requires that a pilot pass a written or oral test, which covers specific subjects, on an annual basis.

<sup>3</sup> The Administrator did not appeal the law judge's reduction in sanction.

<sup>4</sup> Title 49 C.F.R. § 821.33, entitled, "Motion to dismiss stale complaint," provides as follows: "Where the complaint states allegations of offenses which occurred more than 6 months prior to the Administrator's advising the respondent as to reasons for proposed action ... the respondent may move to dismiss such allegations as stale."

it was stale. In the latter motion, respondent asserted that the Administrator's Notice of Proposed Certificate Action (NOPCA), which the Administrator issued on June 20, 2008, alleged that, "[a]t the time of the above described flights, you had not completed an oral or written test in the past 12 calendar months in accordance with FAR 135.293(a)(1)."

Respondent argued that the Administrator's complaint impermissibly expanded the charge to a violation of § 135.293(a), rather than simply subsection (1) of § 135.293(a). In the motion for summary judgment, respondent argued that no factual issues existed because he had completed the required tests. The law judge denied both motions, and ordered a hearing, which occurred on March 31, April 1, and November 17-18, 2009.

During opening statements at the hearing, counsel for both parties indicated that the resolution of the case would depend on an interpretation of the regulatory language at issue. In this regard, we note that § 135.293(a) provides as follows (the language at issue in this case appears in italics):

**§ 135.293 Initial and recurrent pilot testing requirements.**

(a) No 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 the following areas—

- (1) The appropriate provisions of Parts 61, 91, and 135 of this chapter and the operations specifications and the manual of the certificate holder;
- (2) *For each type of aircraft to be flown by the pilot*, the aircraft powerplant, major components and systems, major appliances, performance and operating limitations, standard and emergency operating procedures, and the contents of the approved Aircraft Flight Manual or equivalent, as applicable;
- (3) *For each type of aircraft to be flown by the pilot*, the method of determining compliance with weight and balance limitations for takeoff, landing and en route operations;
- (4) Navigation and use of air navigation aids appropriate to the operation or pilot authorization, including, when applicable, instrument approach facilities and procedures;
- (5) Air traffic control procedures, including IFR procedures when applicable;
- (6) Meteorology in general, including the principles of frontal systems, icing, fog, thunderstorms, and windshear, and, if appropriate for the operation of the certificate holder, high altitude weather;
- (7) Procedures for—
  - (i) Recognizing and avoiding severe weather situations;
  - (ii) Escaping from severe weather situations, in case of inadvertent encounters, including low-altitude windshear (except that rotorcraft pilots are not required to be tested on escaping from low-altitude windshear); and
  - (iii) Operating in or near thunderstorms (including best penetrating altitudes), turbulent air (including clear air turbulence), icing, hail, and other potentially hazardous meteorological conditions; and
- (8) New equipment, procedures, or techniques, as appropriate.

Respondent's argument on appeal, stated simply, is that he was current in both the Learjet and Gulfstream II when he conducted the flights at issue. Respondent asserts that he was current in the Gulfstream II because he completed an instrument proficiency

test under § 135.297, and § 135.293(c)<sup>5</sup> allows an airman to substitute the instrument proficiency check for the competency check that § 135.293 requires. Respondent also contends that he was current in the Learjet 30 because the plain language of § 135.293(a) only requires that the pilot be tested each year on one of the aircraft that he or she operates. As a result, respondent contends that he satisfied the requirements of § 135.293(a)(1) and (4)–(8) when he successfully completed a check in a Bell 206 helicopter, and that he satisfied the requirements of § 135.293(a)(2) and (3) when he engaged in a check in a simulator. The Administrator asserts that respondent is inappropriately attempting to piece together various checks in an attempt to show that he fulfilled the requirements of § 135.293(a) for both the Gulfstream II and the Learjet 30. In particular, the Administrator contends that § 135.293(c) does not permit respondent's instrument proficiency check in the Gulfstream II to fulfill the requirements of § 135.293(a) because the check airman indicated that the instrument proficiency check would serve to fulfill *only* the requirements of § 135.297, that § 135.293(a) requires the completion of a competency check in *each* particular type of aircraft that an

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<sup>5</sup> Section 135.293(c) provides that, "[t]he instrument proficiency check required by § 135.297 may be substituted for the competency check required by this section for the type of aircraft used in the check."

airman operates (rather than a single competency check, such as respondent's check in the Bell 206), and that the check airmen that respondent alleges administered checks for him— Messrs. Richard Parker and Richard Romero—were either not rated in either the Learjet or Gulfstream or were not authorized check airmen for Darby Aviation.

The Administrator commenced the case by calling Philip Fox, an aviation safety inspector in the Birmingham, Alabama Flight Standards District Office, to testify. Inspector Fox stated that he has served as the principal operations inspector (POI) for Darby Aviation since 2006, and that he interpreted § 135.293(a) as including subject areas for each particular aircraft that a pilot is assigned to fly. Inspector Fox testified that the substance of the subsections of § 135.293(a) indicates that the subsections are aircraft-specific; for example, Inspector Fox stated that, with regard to (a)(4), "the Learjet and the Gulfstream and the Bell 206 helicopter all have different avionic systems in them." Tr. at 50.<sup>6</sup> With regard to (a)(7), Inspector Fox testified that recognizing and avoiding severe weather in a helicopter is different from doing so in a fixed-wing aircraft, and that a pilot could not fulfill a test

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<sup>6</sup> Inspector Fox appeared to interpret § 135.293(a) on behalf of the FAA; the Administrator's counsel did not challenge Inspector Fox's interpretation of the regulation's requirements.

on new equipment and procedures in a Learjet or Gulfstream, pursuant to (a)(8), in a Bell 206.<sup>7</sup>

With regard to his oversight of Darby Aviation, Inspector Fox testified that, when he assumed responsibility as Darby's POI, Darby's pilot training records were in disarray. Inspector Fox further stated that no one could be qualified as a check airman for Darby under 14 C.F.R. § 135.337 unless Inspector Fox approved him or her.<sup>8</sup> Inspector Fox testified that he had never given a letter of authorization to anyone at SimCom, which is a simulator training center in Orlando, to complete checks for Darby Aviation, even though respondent argues that he completed

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<sup>7</sup> Before accepting evidence, the law judge stated that he had determined, as a matter of law, that a helicopter check ride could not fulfill the requirements of § 135.293(a), and that he therefore would not accept evidence on the alleged helicopter check ride.

<sup>8</sup> With regard to an approved part 135 operator, § 135.337, entitled, "Qualifications: Check airmen (aircraft) and check airmen (simulator)," requires that an operator's check airmen must, with regard to each type of aircraft that is the subject of their tests: (1) hold the airman certificates and ratings required to serve as a pilot in command in operations; (2) have satisfactorily completed the training phases for the aircraft, including recurrent training, that are required to serve as a pilot in command in operations; (3) have satisfactorily completed the proficiency or competency checks that are required to serve as a pilot in command in operations; (4) have satisfactorily completed the applicable training requirements of 14 C.F.R. § 135.339; (5) hold at least a Class III medical certificate (or, in some cases, a Class I or Class II medical certificate); (6) have satisfied the requirements of 14 C.F.R. § 135.247; and (7) have been approved by the Administrator for the check airman duties involved.

subsections (a)(2) and (3) of § 135.293 at SimCom. Tr. at 61. Inspector Fox also stated that Richard Parker, who respondent argued administered a test for him that covered subsections (a)(1) and (4)–(8), could not administer such a test for a Learjet or Gulfstream because he is not rated in either aircraft. Tr. at 66, 111. Inspector Fox further testified that John Morrison, who is the director of operations for Darby Aviation, also could not have administered such a test because he was not currently qualified to act as PIC of a Learjet or Gulfstream (Tr. at 69); in this regard, Inspector Fox identified a copy of a letter he sent to Mr. Morrison that rescinded Mr. Morrison's check airman authority on July 3, 2007 (Exh. A-4; Tr. at 91–93, 187), and testified that Mr. Morrison never had the authority to administer tests for Gulfstream aircraft. In addition, Inspector Fox testified that Richard Romero, who signed a form indicating that respondent completed tests pursuant to §§ 135.293 and 135.297, was not an authorized check airman for Darby Aviation. Tr. at 96.

Inspector Fox identified numerous other exhibits in support of the Administrator's case. These exhibits included:

- A copy of FAA Form 8410-3, entitled "Airman Competency/Proficiency Check," dated September 12, 2006, and signed by Mr. Morrison, and marked "FAR 135.293, FAR

135.297, and FAR 135.299" for "LR 35 [meaning Learjet 35]" (Exh. A-1);

- A "Record of Simulator Checks" from CAE SimuFlite, electronically signed on January 12, 2007, by Robert McClellan and marked "PIC 135.297 (only)" and marked satisfactory for "297" both in the "oral base aircraft" and "sim check 1" categories (Exh. A-2);
- A copy of another FAA Form 8410-3, dated June 25, 2007, signed by Mr. Morrison, and marked "FAR 135.299" for "LR 35" (Exh. A-3);
- An approved version of FAA Form 8410-3 signed by Mr. Romero indicating that respondent completed a satisfactory test on August 1, 2007 in a "LRJet, Level 'C,' #544," in which Mr. Romero initialed beside "135.293(a 2 & 3) and (b)," and "135.297" (Exh. A-5);
- A copy of another FAA Form 8410-3, dated September 14, 2006, signed by Mr. Parker, and marked "FAR 135.293" and "135.299" for the Bell 206, and listing an expiration date of August 31, 2007 (Exh. A-6); and
- A copy of another FAA Form 8410-3, dated April 6, 2007, signed by Mr. Parker, and marked "FAR 135.293" and "FAR 135.299" for the Bell 206, and listing an expiration date of April 30, 2008 (Exh. A-7).

Inspector Fox testified that, taken as a whole, the above-described forms fail to show that respondent had completed the necessary tests for a Learjet or Gulfstream II.

Inspector Fox also stated that, in his opinion, 14 C.F.R. § 135.293(c) does not allow respondent to substitute his instrument proficiency check (as evidenced by Exh. A-2, described above) under 14 C.F.R. § 135.297 for the requirements of § 135.293(a). Inspector Fox opined that the form, marked "PIC 135.297 (only)," indicated that the check airman did not intend to allow the test to count for both §§ 135.297 and 135.293. Tr. at 84.

Respondent began his rebuttal case by calling Mr. Morrison to testify. Mr. Morrison stated that he had been employed at Darby Aviation since May 1992, and that he holds an ATP with ratings in the Learjet and Gulfstream II and III, as well as other aircraft. Mr. Morrison testified that, as director of operations for Darby Aviation, he is responsible for ensuring that pilots at Darby are current in their training, and that he tracks the training with a computer program. He further stated that the standard schedule for respondent's checks at Darby Aviation involved two ground school trainings per year: each fall, respondent completed training for the Learjet and Gulfstream, and each spring, respondent completed training for a

helicopter.<sup>9</sup> Mr. Morrison also testified that Darby Aviation has used SimuFlite to provide Gulfstream flight checks for Darby Aviation's pilots for approximately 15 years, and regularly uses SimCom for Learjet checks.

Mr. Morrison recalled that, on January 12, 2007, he was sitting alongside respondent in the simulator at SimuFlite, and that respondent completed an oral test administered by Robert McClellan that lasted over 2 hours, and covered "[v]irtually everything about the aircraft inclusive of systems, of engines, the whole airplane." Tr. at 274. Mr. Morrison stated that respondent also correctly answered questions concerning equipment and emergency procedures in a Gulfstream II, and that the instructor gave respondent a simulated trip and

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<sup>9</sup> Mr. Morrison testified as follows:

Q. Okay. And explain why Mr. Darby had ground school training twice in a year.

A. The Learjet and Gulfstream is ordinarily done in the fall, but the helicopter was ordinarily done in the spring. Consequently, we did it twice.

Q. Because the actual flying portions occurred in the spring and the fall?

A. The testing happened in the springtime.

Q. Okay. And so each -- so Mr. Darby was tested for oral and written tests in the spring and fall of each year. How far back does that go?

A. I don't recall exactly when it was certified; at least ten years. It could be more. I don't recall.

Q. And who conducted the ground school training?

A. I do.

Q. And who conducted the testing?

A. We've had either the FAA has done it or we've had a check airman whose name is Richard Parker.

Tr. at 269.

fuel load, and required respondent to compute the weight and balance. Likewise, Mr. Morrison recalled that he was also present for the check in the simulator for the Learjet 35 at SimCom,<sup>10</sup> and that Mr. Romero, who administered the test, asked specific questions concerning the aircraft, such as emergency procedures, the aircraft's flight manual and performance, weight and balance, and the like. Mr. Morrison stated that respondent answered these questions correctly.

Mr. Morrison also testified that, although the ground school training for Darby Aviation in the spring is for rotorcraft, they do "a general review of everything," and ask questions about the Learjet and Gulfstream II. Tr. at 290-91. Mr. Morrison stated that he is careful to ask questions covering all subjects of § 135.293(a) for both types of aircraft. When the law judge questioned the documentation concerning the questions, respondent's counsel presented FAA guidance, which states that, "you can record when the actual oral and written testing is done, or they may wait until all of the modules are

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<sup>10</sup> Mr. Morrison testified that, before the testing at SimCom began, he called Inspector Fox to ask him to sign a form indicating that SimCom could administer the tests for Darby Aviation's pilots. Mr. Morrison stated that Inspector Fox signed the form, and that SimCom verified that this form sufficed, and began the testing. Mr. Morrison later identified a letter, dated April 1, 2009, from SimCom to the FAA, stating that SimCom believed that an inspector's signature at the bottom of the form indicated that "all indicated [training center evaluators]" listed in the form "were approved as check airmen." Exhs. A-16 and R-179; see also Tr. at 402.

complete and go ahead and record once a flight check was done." Tr. at 297; see also Exh. R-181 (unsigned copy of letter from Rebecca MacPherson of the FAA Office of the Chief Counsel to Mr. Gregory S. Winton, Esq., stating that the ground portion of training may or may not be aircraft-specific, and that different check airmen may administer different parts of the test). Mr. Morrison testified that he administered the ground portion of the check (§ 135.293(a)(1) and (4)-(8)), and that Mr. Parker administered the flight portion of the check (§ 135.293(a)(2) and (3)).<sup>11</sup>

Mr. Morrison also testified that respondent completed the operations manual test, which includes general questions concerning the operations of Darby Aviation. Mr. Morrison stated that the purpose of the test is to satisfy, on an annual basis, the requirements of § 135.293(a), and that the former POI for Darby Aviation, Mr. Blount, approved the test for that purpose. Tr. at 326-27. Mr. Morrison identified a copy of a test that he administered to respondent in April 2007. Exh. R-43. Mr. Morrison testified that he "completely and thoroughly"

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<sup>11</sup> In corresponding with counsel at the hearing concerning this testimony, the law judge pointed out that Mr. Morrison had admitted that he is not a check airman for the Gulfstream. The law judge stated that, as a result, he did not believe that Mr. Morrison could sign off for respondent's check for the Gulfstream II. Tr. at 377-78. The law judge also stated, later in the hearing, that the Administrator had established that Mr. Parker is not an authorized check airman for either the Learjet or Gulfstream II. Tr. at 469.

tested respondent in April 2007 on the subjects listed at § 135.293(a)(1) and (4)–(8).

Respondent's counsel also called Inspector Fox to provide additional testimony. Inspector Fox stated that, while the Learjet and Gulfstream II are both transport category aircraft and are turbojets, they do not have the same navigation systems, engines, or performance parameters. Inspector Fox further stated that Mr. Romero was not approved to administer checks under part 135.<sup>12</sup> Following Inspector Fox's testimony, respondent's counsel again called Mr. Morrison, who testified

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<sup>12</sup> Inspector Fox stated that only a check airman appointed in writing by letter from the FAA may perform checks under §§ 135.293 and 135.297. Inspector Fox testified that, when he signed the form allowing Mr. Romero to administer checks for Darby Aviation, he was only authorizing Mr. Romero to do so under 14 C.F.R. part 142, not part 135. Tr. at 494. Inspector Fox testified that a part 142 training center is one that administers training in a simulator, and that such training cannot suffice for purposes of part 135's check requirements unless specifically authorized. In addition, Inspector Fox stated that Darby Aviation's operations specifications would need to be changed to reflect that Mr. Romero could administer the tests. Tr. at 515. Inspector Fox stated that his signature on Exhibit R-174, which is the SimCom Record of Approved Instructors/TCE's/Check Pilots, indicates that Inspector Fox was approving each person as an instructor pilot, but not as someone who could administer a check under part 135. The form includes a list of nine SimCom employees in a table, and includes an "X" beside Mr. Romero's name in the "IP" and "TCE/CHECK PILOT" categories. Exh. R-174. The form does not include any mark or signature in the column that says, "If this TCE/CHECK PILOT is approved as a Check Airman, the POI signs below." Id. With regard to the definition of "check airman," Inspector Fox testified at the hearing that some operators have authorized "check airmen," who are pilots that the POI for the organization has authorized to conduct checks on behalf of the organization. Tr. at 43.

that he had a conversation with Inspector Fox while at SimCom, and that he told Inspector Fox that they were at SimCom to receive training under § 135.293.

Respondent concluded his rebuttal by testifying on his own behalf. Respondent's testimony corroborated Mr. Morrison's testimony; respondent testified that his test at SimuFlite covered the subjects of § 135.293(a) concerning the Gulfstream II, and that, when he took the test at SimCom for the Learjet, which also covered all the necessary subjects, he believed Mr. Romero was an authorized check airman. Respondent further testified that Mr. Morrison administered oral and written tests in April 2007 that covered all the subjects in § 135.293(a). Respondent stated that he believed he was current in both the Learjet and the Gulfstream II at the time that he operated those aircraft on the dates alleged in the complaint.

After the hearing, counsel for both parties submitted closing arguments in writing, after which the law judge issued a written initial decision, in which he determined that the Administrator proved that respondent violated § 135.293(a) on the flights in question. The law judge stated that it was "self-evident" that a test given by a person not qualified to administer checks on a particular aircraft cannot satisfy § 135.293(a)(1) and (4)-(8), and that, "[i]t would also appear to be self-evident that the examination to satisfy the

requirements of ... § 135.293(a)(1) and (4)–(8) should be geared to and relevant to the aircraft involved, otherwise the examination would be meaningless.” Initial Decision at 17. Based on these determinations, the law judge found that respondent did not fulfill the requirements of § 135.293(a)(1) and (4)–(8), because the test on the Bell 206 helicopter could not suffice for a check in a Learjet or Gulfstream II, and because Mr. Romero, who completed a version of Form 8410-3 to show that he administered the Learjet check, was not authorized to administer checks for Darby Aviation under part 135.<sup>13</sup> The law judge also concluded that the form dated June 25, 2007, which describes the test respondent took on May 24, 2007, indicated that the test occurred for purposes of “FAR 135.299,” and that, if Mr. Morrison had intended for the test to suffice for the requirements of § 135.293, he would have marked it accordingly; otherwise, the law judge reasoned, the “type of check” section of the form would be meaningless. The law judge determined that Mr. Morrison improperly sought to expand the § 135.299 check to suffice as a check under §§ 135.293 and 135.297. The law judge further held that, because the § 135.297

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<sup>13</sup> On this issue, the law judge determined that the most reasonable interpretation of the record of approved instructors/check pilots was that it required the signature of the POI *twice* on the form: once beside the person’s name in the table, and again at the bottom of the form. See note 12, supra, for a description of the form.

check expired before respondent's February 11, 2008 flight in the Learjet, respondent had not completed the requirements of § 135.293(a) before he operated the February 11 flight. Based on this reasoning, the law judge concluded that respondent had not satisfied the requirements of § 135.293(a) in the 12 months prior to the February 11, 2008 flight in the Learjet.

With regard to the check for the Gulfstream II, the law judge determined that the SimuFlite record, marked "PIC 135.297 (only)," indicated that the check airman who administered the test did not test respondent on the subjects of § 135.293. Initial Decision at 21. The law judge further held that the periodic training that Mr. Morrison testified that he administered did not satisfy the § 135.293(a) requirements, because Mr. Morrison is not an authorized check airman in the Gulfstream II. Based on this analysis, the law judge concluded that respondent did not satisfy the testing requirements of § 135.293(a) in the 12 months that preceded his January 28, 2008 flight in the Gulfstream II.

Concerning sanction, the law judge determined that respondent's actions did not warrant the maximum sanction of 180 days suspension, because respondent did not "flagrantly ignore" the requirements of § 135.293(a). The law judge stated that respondent likely believed Mr. Romero's test in the Learjet simulator sufficed for purposes of § 135.293(a), and that this

served as a mitigating factor. The law judge determined that a 90-day suspension was appropriate, based on the circumstances of this case and on Board precedent.

On appeal, respondent argues that: the Administrator impermissibly expanded the charges against him, in violation of the Stale Complaint Rule; the plain language of § 135.293(c) allows a § 135.297 check to suffice for a § 135.293(a) check; the language of § 135.293(a) does not require an aircraft-specific test for subsections (a)(1) and (4)–(8); respondent's check at SimuFlite sufficed to fulfill the requirements of § 135.293(a)(2)–(3); and, even if respondent did violate § 135.293(a) as charged, the law judge erred in imposing a sanction because the Administrator has no published sanction guidance concerning violations of § 135.293(a). The Administrator opposes each of respondent's arguments, and urges us to affirm the law judge's decision. We address each issue in turn, below.

#### Stale Complaint Rule

In the response to respondent's motion to dismiss, and in the reply brief, the Administrator acknowledges that the NOPCA issued to respondent only cited § 135.293(a)(1), rather than § 135.293(a). As a result of this error, respondent contends that the Administrator may only pursue a charge of § 135.293(a)(1) against respondent, and that the law judge

should have dismissed the allegations concerning subsections (a)(2)–(8).<sup>14</sup> Respondent asserts that the law judge’s failure to dismiss the alleged violations of (a)(2)–(8) was contrary to Board precedent, because the law judge “[confused] the role prejudice plays under the stale complaint rule.” Appeal Br. at 6.

We agree with respondent concerning the fact that a respondent does not have the burden to show that he or she suffered prejudice caused by a delay. In Ramaprakash v. FAA, 346 F.3d 1121, 1126 (D.C. Cir. 2003), the D.C. Circuit expressly stated that the Board may not require a showing that a respondent was prejudiced as the result of a delay. Indeed, the Board has long held that prejudice is presumed when the respondent has suffered an “unreasonable delay.”<sup>15</sup>

In the case at issue, the law judge appeared to consider prejudice in his denial of respondent’s motion to dismiss; the

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<sup>14</sup> We note that respondent also contends that the law judge erred in stating that the NOPCA alleged that respondent violated § 135.293(a), when the NOPCA really alleged that respondent violated § 135.293(a)(1). While we acknowledge this error, we do not consider it a basis for appeal, because the briefs confirm that both parties understood respondent’s argument that the Administrator had violated the stale complaint rule.

<sup>15</sup> Administrator v. Parish, 3 NTSB 3474 (1981) (stating that the stale complaint rule “creates a presumption that prejudice does exist when six months have passed and a respondent has not been notified that an action is contemplated”); see also Administrator v. Dill, NTSB Order No. EA-4099 at 9 n.9 (1994).

law judge stated that, although the Administrator did not limit the charge to subsection (a)(1) of § 135.239 when the Administrator issued the order, respondent nevertheless received "notice that he would have to defend against some or all of the subparts of FAR § 135.293(a)." Order Denying Motion to Dismiss Stale Compl. and Summary J. at 5. The law judge also stated that respondent had the opportunity to request clarification from the Administrator at the informal conference or during discovery, and that the NOPCA was not "so vague or misleading that it prejudiced [respondent's] ability to defend himself against the charges brought by the Administrator." Id. Based on this language of the law judge's order, we find that the law judge considered whether the error prejudiced respondent's defense, but that the law judge did not base his order on a finding of the lack of prejudice. Instead, the law judge stated that the NOPCA provided respondent with adequate notice of the Administrator's case.

We do not find respondent's argument on this issue persuasive. The authority respondent cites (Ramaprakash, Parish, and Dill, supra) are all cases in which the Administrator failed to issue a NOPCA at all within 6 months,<sup>16</sup>

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<sup>16</sup> In Ramaprakash, the Administrator did not issue a NOPCA until 12 months after the violation, and argued that good cause justified the delay. The Parish case involved the issue of whether mailing notice just before the expiration of the 6-month

rather than cases in which the Administrator has expanded the charges after issuing the NOPCA. As evidenced by the language of cases interpreting the stale complaint rule, the purpose of the rule is to ensure that a respondent has notice that the Administrator is pursuing a case against him or her. In this regard, the Board has applied the principles of "notice pleading," which refers to "a procedural system requiring that the pleader give only a short and plain statement of the claim, showing that the pleader is entitled to relief, and not a complete detailing of all the facts." Black's Law Dictionary 941 (7<sup>th</sup> ed. 2000) (citing Fed. R. Civ. P. 8(a)). While we do not condone the Administrator's act of expanding a charge in an order from that which the Administrator listed in a NOPCA, we note that, in this case, the NOPCA served to notify respondent that the Administrator alleged that he had not completed checks on the two aircraft he operated on January 28, 2008, and February 11, 2008, respectively. As a result, we decline to dismiss the § 135.293(a)(2)-(8) charges based on our stale complaint rule.

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(..continued)

period sufficed to provide the respondent with adequate notice. In Dill, the Board affirmed the law judge's finding that a 2-year delay constituted a violation of the stale complaint rule.

Plain Language of § 135.293Gulfstream

Respondent also asserts that § 135.293(c) allows an airman to substitute a § 135.297 instrument proficiency check for a check under § 135.293(a). As stated above, § 135.293(c) provides that, "[t]he instrument proficiency check required by § 135.297 may be substituted for the competency check required by this section for the type of aircraft used in the check." Respondent contends that the law judge's determination that respondent could not use his § 135.297 check to fulfill the requirements of § 135.293(a) would render § 135.293(c) useless.<sup>17</sup> Respondent asserts this argument with regard to his check in the Gulfstream II.

At the hearing, the parties did not dispute that an instrument proficiency check under § 135.297 expires every 6 months.<sup>18</sup> Respondent argues that he passed an instrument

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<sup>17</sup> Respondent's brief includes several references to, and a lengthy discussion regarding, In the Matter of Darby Aviation, FAA Docket No. CP08SO0026, DMS No. FAA-2008-1192, wherein an FAA administrative law judge determined that § 135.293(c) allows pilots to substitute a check under § 135.297 for the requirements of § 135.293(a).

<sup>18</sup> See Tr. at 46, 80, and 82 (Inspector Fox's testimony that a check under § 135.297 is valid for 6 months); 212 (respondent's counsel's statement that a § 135.293 check is valid for one year, while a § 135.297 check is valid for 6 months); 305 (respondent's counsel's statement that, "although you have to have a check under 297 every six months, you don't have to have it in each type of aircraft. You only have to have it each six

proficiency test under § 135.297 on January 12, 2007, at SimuFlite, for the Gulfstream II. Based on this test, respondent testified that his instrument proficiency check would expire one month after July 30, 2007, provided that he could take advantage of a one-month grace period. Tr. at 559. Respondent now asserts that the check under § 135.297 suffices to authorize him for the flights at issue because it occurred, not within 6 months of the flights, but *within* a year of the alleged unauthorized flights. Appeal Br. at 11. Respondent's contention appears to be based on the presumption that a check under § 135.297, in effect, replaces a check under § 135.293(a), such that the check, for purposes of § 135.293(a), becomes valid for 12 months, rather than 6 months. Respondent provides no authority for this contention, but relies only on the plain language of § 135.293(c).<sup>19</sup>

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(..continued)

months in one type of aircraft"); 311 (the Administrator's counsel's statement that, "[pilots] have to take a check ride every six months under 297 instrument rules, but the annual check ride then is flip-flopped for each of the two aircrafts"); 389 (respondent's counsel's proffer, in which she stated, "if you fly two airplanes, you get a 297 every six months in each of the aircrafts, which satisfies both their 293 requirements and their 297 requirements"); 436-37 (Mr. Morrison's testimony that the check under § 135.297 is valid for 6 months). See also Exh. R-181 at 2 (FAA letter stating that instrument proficiency checks must occur every 6 months).

<sup>19</sup> In addition, respondent states that, "[t]he alleged unauthorized flights occurred between October 2007 and January 2008, within a year of the test." Appeal Br. at 11.

We agree that the plain language of § 135.293(c) unequivocally allows an instrument proficiency check to suffice for the substantive requirements of § 135.293(a). However, respondent does not address the fact that his instrument proficiency check under § 135.297 did not occur within the 6 months that preceded the flights at issue. Respondent provides no support for his ostensible assumption that the check would not expire for 12 months once substituted for the § 135.293(a) check.

We also note that Exhibit R-1, which is the form for respondent's January 12, 2007 check under § 135.297, is only marked in the category of "297," when the check airman could have marked that the check had also occurred under § 135.293. The "check results" section of the form appears as follows:

CHECK RESULTS	S/U	DATE	EXPIRES**
Oral 293(a)(1)			
Oral Base Aircraft [ ] 293(a)(2) [X] 297	S	1/12/07	See below
Oral 293(a)(2) Variant-Model:_____			
Oral 293(a)(3) Wt. & Balance***			
Oral 293(a)(4-8) Gen Subjects			
Sim Check 1 [ ] 293(b) [X] 297	S	1/12/07	See below
Sim Check 2 [ ] 293(b) [ ] 297			See below

(..continued)

However, the complaint clearly states that the flights at issue occurred on or about January 28, 2008, and February 11, 2008. Compl. at ¶¶ 2, 3. In any event, assuming that the instrument proficiency check may suffice for the check under § 135.293(a), and would expire within 12 months, the check would be valid until February 29, 2008, as the evidence established that the Administrator allows for a grace period of one month.

Exh. R-1. Respondent does not address why, if he intended this § 135.297 check to substitute as a check under § 135.293, he did not undergo *any* of the tests for § 135.293, such as § 135.293(b), on the date of the check.

The Administrator does not deny that § 135.293(c) allows for the type of substitution described above. The Administrator's reply brief, however, states that respondent may not take advantage of such substitution, because his check ride under § 135.297 did not cover the knowledge requirements of § 135.293:

There was no testimony given to show that the January 12, 2007, Part 297 check ride covered any of the knowledge areas required under Part 293(a). As such, the Respondent cannot claim that his January 12, 2007 instrument check ride in any way substituted for the Part 293 requirements prior to the January and February 2008 flights.

Reply Br. at 10-11. The Administrator's brief also states that the § 135.297 check may substitute for a § 135.293 check only "in situations where an airman is required to take check rides in two or more company aircraft," wherein the airman uses the competency provisions of § 135.297 to satisfy the "annual requirements" so that he need not take two check rides per year in each aircraft. Reply Br. at 10. Therefore, the Administrator contends that § 135.293(c) only permits an airman to alternate aircraft and take a § 135.297 check ride every 6 months.

We are mindful of the fact that Congress has directed the Board to defer to the Administrator's interpretation of FAA regulations. 49 U.S.C. § 44709(d)(3); see also Garvey v. NTSB, 190 F.3d 571, 576-79 (D.C. Cir. 1999). In particular, § 44709(d)(3) provides that the Board "is bound by all validly adopted interpretations of laws and regulations the Administrator carries out ... unless the Board finds an interpretation is arbitrary, capricious, or otherwise not according to law." Given that the two types of checks expire at different times, we do not believe that the Administrator's interpretation of this substitution provision is arbitrary, capricious, or not according to law. We therefore reject respondent's appeal on this issue.

Respondent further argues that Exhibit A-2, which is the SimuFlite Record of Simulator Checks for respondent, electronically signed on January 12, 2007, by Robert McClellan, and marked "PIC 135.297 (only)," is internally inconsistent. Respondent asserts that Mr. Morrison testified that respondent correctly answered several questions specific to the Gulfstream II while in the simulator, and that this check fulfilled the requirements of § 135.293(a), despite the marking on the form. Respondent's argument is based only on conjecture. As the above excerpt from the form indicates, Mr. McClellan clearly marked that the check was an instrument proficiency check pursuant to

§ 135.297. Without testimony from Mr. McClellan or any other evidence to show that the check, in spite of the form, was intended as a check under § 135.293(a), we cannot adopt respondent's reasoning on this issue. Mr. Morrison's recollection of the subjects covered in the check, while helpful, was retrospective, and, combined with the lack of any corroborating evidence to indicate that this § 135.297 check covered all the subjects of § 135.293(a), was not persuasive.

#### Learjet

With regard to the check ride for the Learjet, respondent argues that the law judge erred when he held that pilots are required to pass a test covering § 135.293(a)(1) and (4)-(8) for each type of aircraft every year. Respondent asserts that the plain language of the regulation only requires that the pilot be tested each year on one of the aircraft that he or she operates. As a result, respondent contends that the law judge erred in not admitting a copy of FAA Form 8410-3 that shows that respondent satisfied § 135.293(a)(1) and (4)-(8) in the Bell 206 helicopter on April 6, 2007. Respondent argues that, at the hearing, the law judge acknowledged that some of the questions concerning subsections (1) and (4)-(8) are general enough to cover all aircraft.

Respondent additionally asserts that he passed the oral and written tests that Mr. Morrison administered; in this regard,

Exhibit R-43, entitled "[FAR] Test Part 135," dated April 4, 2007,<sup>20</sup> and initialed by Mr. Morrison, indicates that respondent answered all 20 questions correctly. See Tr. 329-31. The questions on this test include some hypothetical scenarios, and are not aircraft-specific, but are generally related to operation under part 135.

We agree with the Administrator that respondent's assertions amount to a piecemeal attempt to show compliance with § 135.293(a). However, § 135.293(a) does not require that a pilot undergo a check covering all subjects of § 135.293(a) at the same time. In fact, the FAA letter that respondent submitted into the record, although undated and unsigned, was not disputed by the FAA, and specifically indicates that different subjects may be covered at different times.<sup>21</sup> While the law judge did not admit into evidence the FAA form showing that respondent fulfilled a check in a Bell 206, the Administrator did not dispute that such a check occurred; the issue concerning the check in the helicopter rests on whether such a check can suffice for a fixed-wing aircraft, such as a

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<sup>20</sup> Respondent does not dispute that the FAA rescinded Mr. Morrison's check airman authority on July 3, 2007. Exh. A-4.

<sup>21</sup> The FAA letter was admitted into evidence at the hearing without objection (see Tr. at 315), and the Administrator's counsel did not attempt to contradict any portions of the letter or offer an alternative interpretation. Exh. R-181.

Learjet. In this regard, we note that it is axiomatic that rotorcraft and fixed-wing aircraft are significantly and fundamentally different. The plain language of § 135.293(a)(1) and (4)–(8), however, neither separates rotorcraft from fixed-wing aircraft, nor requires that the subjects of (a)(1) and (4)–(8) be aircraft-specific. On the contrary, subsections (a)(2) and (3) are obviously aircraft-specific, as they provide, “[f]or each type of aircraft to be flown by the pilot,” while the remaining subsections do not include this phrase. As a result, we find that the Administrator’s contention that each subsection of § 135.293(a) requires an aircraft-specific check amounts to an arbitrary and capricious interpretation, as it is contrary to the plain language of the regulation.

Respondent further argues that the simulated check that Mr. Romero administered at SimCom on May 24, 2007, also satisfied the requirements of § 135.293(a) for the Learjet. Respondent contends that the law judge erred in finding that Mr. Romero was not authorized to administer such checks for Darby Aviation.<sup>22</sup> Respondent also argues that the fact that the form Mr. Romero signed does not indicate that Mr. Romero covered the subjects of § 135.293(a)(1) and (4)–(8) is not dispositive,

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<sup>22</sup> Exhibit A-16, which is a letter from SimCom dated April 1, 2009, provides that, “[w]e received a form from Mr. Fox ... signed at the bottom. We took this to mean that all indicated [training center evaluators] were approved as check airmen.”

because the Administrator has not charged respondent with a violation of a regulation concerning accurate recordkeeping. The Administrator's only evidence concerning Mr. Romero's alleged lack of authorization was the testimony of Inspector Fox, which was not convincing.<sup>23</sup> The Administrator's contention

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<sup>23</sup> Inspector Fox acknowledged that Mr. Morrison called him from SimCom because he and respondent were at SimCom for a proficiency check. Inspector Fox's colloquy with respondent's counsel on this subject included the following:

A. ... Darby Aviation had the option of having their Learjet check rides observed and signed off by an FAA inspector.

Q. And when [Mr. Morrison] called you they wanted to get this done by SimCom, didn't they?

A. They were in the process of doing that, yes.

Q. Okay. And so they sent you this form, and the goal of why they were doing this is they wanted SimCom to actually be the check airman, correct?

A. Not at that point, no.

Q. Are you testifying under oath that you did not know that they were down there to get their training and checking in the Learjet?

A. I didn't say that. What I said was at the time that this form was sent to me, Mr. Morrison made the statement on the phone call that SimCom would not start training unless they had a designated instructor. That's what this form was for so that they could start training.

Q. And the purpose of the training is to have the check ride, correct?

A. The purpose of the training they were enrolled in at the time was a proficiency check under Part 6158 and 6157.

Q. That's where I was trying to get.

A. Their annual and biannual training.

Tr. at 498-99. The law judge did not make an adverse credibility determination concerning Inspector Fox's testimony, but, in the written initial decision, the law judge stated:

[T]here is a certain amount of ambiguity in the form that conceivably could have confused the Respondent into believing that Fox's signature at the bottom of

that Mr. Romero must have only tested respondent under 14 C.F.R. parts 61 and 91 is inconsistent with the fact that respondent and other employees of Darby Aviation traveled to SimCom and paid to complete a check, when they could have completed a check under parts 61 or 91 closer to home. In addition, the form that Mr. Romero completed does not include any references to parts 61 or 91, and Inspector Fox testified that he would not need to approve a check airman for purposes of parts 61 or 91. Tr. at 499-500.

Based on this lack of evidence, we do not believe the Administrator fulfilled the burden of proving that Mr. Romero was not authorized to administer such a check for respondent. We note that we have long recognized that the Administrator has the burden of proving each charge in a complaint by a preponderance of the evidence.<sup>24</sup> We disagree with the law

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(..continued)

the form was sufficient to approve Romero as a check airman for Darby Aviation. Because of that, I further find that even if Romero was technically not approved as a check airman for Darby Aviation, I credit the testimony of Morrison and the Respondent that they acted in good faith in relying on Exhibit R-3 as proof that the Respondent had satisfied the requirements of FAR § 135.293(a)(2) and (3), and (b), and FAR § 135.297 for proficiency/competency on the Lear 35.

Initial Decision at 19 (footnote omitted).

<sup>24</sup> See, e.g., Administrator v. Opat, NTSB Order No. EA-5290 at 5 (2007) (citing Administrator v. Schwandt, NTSB Order No. EA-5226 at 2 (2006), and Administrator v. Van Der Horst, NTSB Order No. EA-5179 at 3 (2005)).

judge's assessment that the Administrator satisfactorily proved that Mr. Romero was not authorized to perform the check for respondent depicted in Exhibit R-2.

We note that, as discussed above, we are obligated to defer to the Administrator's interpretation of the FAR. However, we are mindful of the fact that such deference is not blind; when the Administrator attempts to read an additional requirement into a regulation, or interpret a regulation in a manner that is arbitrary, capricious, or contrary to law, we will interpret the regulation at issue outside the scope of deference. We have previously held that we consider the Administrator to be bound by the plain text of the FAR, and we have not agreed with interpretations that would result in supplying an additional, unannounced burden or requirement on a certificate-holder.<sup>25</sup>

In the case at hand, while some of the subjects of § 135.293(a)(1) and (4)–(8) may appear aircraft-specific, the plain language of those subsections does not require a separate oral or written test on those subjects for each aircraft. In our opinion, reading such a requirement into the regulation would amount to an arbitrary and capricious interpretation of § 135.293(a).

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<sup>25</sup> See Administrator v. Holland, NTSB Order No. EA-5472 (2009); Administrator v. Glennon and Shewbart, NTSB Order No. EA-5411 (2008).

Sanction

Lastly, respondent contends that imposing any sanction in this case, even if we find that respondent has violated § 135.293(a), would be inappropriate because the Administrator's Sanction Guidance Table, FAA Order 2150.3A, does not specifically suggest an appropriate sanction range for a violation of § 135.293(a). Respondent further argues that imposing any sanction would not be fair.<sup>26</sup> At the hearing, the Administrator's attorney submitted the Sanction Guidance Table into the record, and Inspector Fox testified that a sanction of 180 days (90 days per aircraft) was appropriate, because the Table provides a range of 30 to 90 days for a "missed proficiency line check." Tr. at 118. Inspector Fox further testified that the maximum sanction was suitable for the circumstances of this case, based on several aggravating factors.<sup>27</sup>

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<sup>26</sup> In support of this fairness argument, respondent quotes Administrator v. Gartner, NTSB Order No. EA-4623 (1998) (denying pet. for recon.), at length in his brief. Gartner did not involve a failure to complete a competency or proficiency check, but instead involved a failure to comply with a provision of Annex 2 to the Convention on International Civil Aviation prohibiting operation of an aircraft at a height less than 150 meters or 500 feet above the ground or water (except when necessary for takeoff or landing). The Board declined to impose a sanction because the FAA had tacitly granted the respondent permission to engage in the flight, and knew about the low altitude at which the respondent needed to fly.

<sup>27</sup> Inspector Fox stated that respondent is the chief pilot for a

The Sanction Guidance Table does not suggest a sanction range for a "missed competency check." We do not believe, however, that it is unreasonable for the Administrator to consider the suggested sanction for a missed proficiency line check to be instructive. We have previously stated that we will defer to the Administrator's choice of sanction when such deference is appropriate. We have held that it is the Administrator's burden under 49 U.S.C. § 44709 to articulate clearly the sanction sought, and to ask the Board in a timely manner to defer to that determination. We have also held that the Administrator must support the request for deference with evidence showing that the sanction has not been selected arbitrarily, capriciously, or contrary to law.<sup>28</sup>

With regard to this case, it is not unreasonable to consider a competency check to be similar to a proficiency check; in fact, respondent would likely agree with this determination, since a principal argument that he asserted in his appeal was that a § 135.297 check may substitute for a check

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(..continued)

135 organization, and, based on his experience, "should have known he was out of currency" (Tr. at 118), and that not complying with § 135.293(a) presents a hazard to air safety (Tr. at 119).

<sup>28</sup> See, e.g., Administrator v. Peacon, NTSB Order No. EA-4607 at 10 (1997); see also Administrator v. Oliver, NTSB Order No. EA-4505 (1996) (no deference where the Administrator introduced no evidence regarding applicable or relevant sanction guidance).

under § 135.293(a). To the extent that respondent contends that the Administrator may not impose any sanction unless the Sanction Guidance Table suggests one, we believe that this assertion is illogical, because an inability to impose a sanction for a violation of a regulation would render the regulation useless. Respondent cites no authority for his contention, and we believe it is contrary to 49 U.S.C. § 44709 and our precedent.

We also reject respondent's fairness argument. Unlike Gartner, the FAA in this case did not approve of respondent's failure to complete his § 135.293(a) check concerning the Gulfstream. We do not believe any circumstances in this case counsel in favor of waiving sanction. Given that the law judge reduced the sanction to 90 days, and we only affirm the law judge's decision with regard to respondent's failure to complete the § 135.293(a) check for the Gulfstream II, we believe a sanction of 45 days would be appropriate.

**ACCORDINGLY, IT IS ORDERED THAT:**

1. Respondent's appeal is granted, in part;
2. The law judge's initial decision, including the reduction in sanction from 180 to 90 days, is affirmed, in part, with a further sanction reduction to 45 days; and
3. The 45-day suspension of respondent's ATP certificate shall begin 30 days after the service date indicated on this

opinion and order.<sup>29</sup>

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

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<sup>29</sup> For the purpose of this order, respondent must physically surrender his certificate to a representative of the Federal Aviation Administration pursuant to 14 C.F.R. § 61.19(g).

Served: December 14, 2009

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

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ADMINISTRATOR,  
FEDERAL AVIATION ADMINISTRATION,

Complainant,

v.

Docket No. SE-18409

ELTON H. DARBY,

Respondent.

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**WRITTEN INITIAL DECISION AND ORDER**

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**William A. Pope, II, Administrative Law Judge:** 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. Elton H. Darby, the Respondent, has appealed the Administrator's Order of Suspension, dated October 28, 2008, which pursuant to §821.31(a) of the Board's Rules serves as the complaint, in which the Administrator ordered the suspension of any Airline Transport Pilot certificates held by the Respondent for 180 days, because of two instances of violation of § 135.293(a) of the Federal Aviation Regulations, by serving as pilot on two aircraft engaged in Part 135 flights when he had not completed an oral or written test for the types of aircraft within the past 12 calendar months.

The Order of Suspension, filed as the complaint, provides, as follows:

1. At all times material herein you were and are the holder of Airline Transport Pilot Certificate No. [Certificate number omitted].
2. On or about February 11, 2008, you operated civil aircraft N35ED as pilot in command on a flight.

3. On or about January 28, 2008, you operated civil aircraft N840RG as pilot in command.

4. The above flights were conducted under Part 135 of the Federal Aviation Regulations.

5. At the time of the above described flights you had not completed an oral or written test in the past 12 calendar months in accordance with FAR 135.293(a) for these types of aircraft.

6. As a result, you violated section 135.293(a) of the Federal Aviation Regulations in that no person may use a pilot, nor may any person serve as a pilot, unless, since the beginning of the 12<sup>th</sup> 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 the areas specified in this section.

NOW, THEREFORE, IT IS ORDERED, pursuant to 49 U.S.C. Section 44709, that any and all Airline Transport Pilot certificates held by you, including Airline Transport Pilot Certificate No. [omitted], be and hereby are suspended effective October 31, 2008, said suspension to continue in force for a period of 180 days thereafter, and it is further ORDERED that you surrender your certificate(s) on or before that date to this office. Should you fail to surrender the certificate(s) on or before the effective date, the suspension shall continue in effect for 180 days from the date of actual surrender. Surrender of the certificate(s) before the effective date will begin the suspension on that earlier date. You may appeal this Order in accordance with the paragraph below.

In his Answer to the Complaint, Respondent admitted paragraphs 1, 2, 3, and 4, and denied all other allegations of the Complaint. Thus, the Respondent admits that he is the holder of the Airline Transport Certificate alleged; that on or about February 11, 2008, he operated civil aircraft N35ED, a Lear 35, as pilot in command on a flight from KOMA to KGAD; that on or about January 28, 2008, he operated N840RG, a Gulfstream II, as pilot in command on a flight; and, the flights were operated under Part 135 of the Federal Aviation Regulations. He denied that at the time of the flights he had not completed an oral or written test in the past 12 calendar months in accordance with FAR § 135.293(a) for these types of aircraft; and, that he had violated § 135.293(a) in that no certificate holder may use a pilot, nor may any person serve as pilot, unless since the beginning of the 12<sup>th</sup> calendar month before that service, that pilot had passed a written or oral test, given by the Administrator or an authorized check pilot, on the pilot's knowledge in the areas specified in this section.

In a prehearing Motion to Dismiss Stale Complaint, filed on November 24, 2008, and denied by my Order on February 10, 2009, the Respondent asserted that he had satisfied the aircraft specific testing requirements of FAR § 135.293(a)(2) and (3) by passing a CAE SimuFlite check for the Lear 35 on May 24, 2007, and prior to that had passed a check ride in a Bell 206 helicopter. On November 25, 2008, the Respondent filed a Motion for Summary Judgment, which I also denied in my Order of February 10, 2009, the Respondent argued that the aircraft specific requirements of FAR § 135.293(a)(2) and (3) for the aircraft flown by the Respondent were satisfied by the proficiency check taken and passed by the Respondent at CAE SimuFlite on May 24, 2007, and the non-aircraft specific requirements of § 135.293(a)(1) and (4) through (8) were satisfied on April 6, 2007, by a proficiency check passed by the Respondent in a Bell 206 helicopter.

## I. Discussion of Evidence

There appears to be no dispute by the Respondent to the assertion by the Administrator in Complainant's Response in Opposition to Respondent's Motion to Dismiss, that the Respondent was chief pilot for Darby Aviation, a family-owned business, which is the holder of an air carrier certificate, and that it had listed on its Operations Specifications civil aircraft N35ED, an 8-passenger Lear Jet Model 35, a multi-engine turbo-jet powered aircraft; N840RG, a 13-passenger Gulfstream Model GA-1159 multi-engine turbo-jet aircraft; and, a Bell Model 206B helicopter.

FAA Aviation Safety Inspector (ASI) James Philip Fox testified that in March 2007, Darby Aviation had a Gulfstream II, a Lear Jet, and a Bell 206 helicopter on its Operations Specifications. The Bell 206 helicopter was a VFR aircraft, not certified for IFR, but the Darby Operations Specifications required IFR operations only.

In March 2007, on his first visit to Darby Aviation after becoming its Principal Operations Inspector (POI), he found the company records in what he termed disarray. He found documentation that on April 6, 2007, the Respondent completed and passed an Airman Competency/Proficiency Check on a Bell 206 helicopter, and on May 24, 2007, a check flight on a Bell 206 helicopter, administered at CAE SimuFlite.

He said that check airmen have to be proficient in the aircraft involved, and have a currency check for pilot in command. They cannot give oral or written tests unless qualified as a line pilot.

He said that CAE SimuFlite in Orlando, FL, was authorized to give Darby Aviation pilots FAR § 135.293(a)(2) and (3) checks. The Respondent, and pilots Morrison and Rheinschmidt, were listed as authorized to give checks for the rest of FAR § 135.293(a).

He said that FAR § 135.293(a)(2) – (3) is aircraft specific. The pilot must calculate the weight and balance based on how the aircraft is configured. The Gulfstream is authorized for international operations over water. The Bell 206 helicopter is a VOR aircraft, not certified for IFR flight, and it cannot be operated above 18,000 feet. The Darby Aviation Operations Manual requires IFR operations only. The Gulfstream and Lear Jet have different navigation systems.

To give Lear and Gulfstream checks under FAR § 135.293, a check airman would have to be qualified on both aircraft. Rheinschmidt was qualified on the Piper Cheyenne only. Morrison was not qualified as a pilot in command on the Gulfstream or Lear.

Exhibit A-1 is an Airman Competency/Proficiency Form 8410-3. The Type of Check is marked for "FAR 135.293, FAR 135.297, and FAR 135.299." This Airman Competency/Proficiency check was given to the Respondent in the Lear 35, N35ED, on September 12, 2006 by John Morrison, and expired at the end of October 2007. In the Airman Competency Information section of the form, "9.07" was handwritten opposite "Demonstrated Current Knowledge FAR 135.293(a), Make/Model Expires (12 Months);" "Demonstrated Competency FAR 135.283(b), Make/Model Expires (12 Months);" "Satisfactorily Demonstrated Line Checks, FAR 135.299 Expires (12 Months);" and, 3.07 was handwritten opposite "Satisfactorily Demonstrated IFR Proficiency FAR 135.297 Expires (6 Months). Why the shorter expiration dates were entered is not apparent on the form.

Exhibit A-2 is a record of a CAE SimuFlite check for "PIC 135.297 (only)," given to Elton Darby on 1/12/07. The FAR § 135.297 check is an instrument proficiency check valid for 6 months on the Gulfstream II. But, it would also count for any aircraft operated IFR. It could have been substituted for a currency/competency check under FAR § 135.293, but that was not the case since only the FAR § 135.297 box was checked as the "Type of Check," and, therefore, the check did not satisfy the requirement for a check on the Gulfstream II under FAR § 135.293(a) and (b). CAE Simuflite is a Part 142 simulator training center.

Exhibit A-3 is an Airman Competency/Proficiency Form 8410-3 marked in the Type of Check block for a "FAR 135.299" line check, on the Lear 35, and administered by Morrison to the Respondent on 6/25/07. The line check is marked as expiring on 9/07, even though it was good for 12 months. Also marked as expiring on 9/07 in the Airman Competency Information Block are "Demonstrated Current Knowledge of FAR 135.293(a) and (b)," and, as expiring on 3/07, and, "Satisfactorily Demonstrated IFR Proficiency FAR 135.297."

Exhibit A-4 is a letter from ASI Fox, as the POI, to John Morrison, Darby Aviation, dated July 3, 2007, rescinding the check airman authority of the Respondent, Dane J. Rheinschmidt, and John H. Morrison, because Darby Aviation does not have sufficient checking activity to warrant a check airman under 14 CFR 135.337. ASI Fox said the check airman authority of these three individuals has not been reinstated since then.

Exhibit A-5 is a record of a simulator check on 8/1/07 given to and passed by the Respondent, which ASI Fox found in the Respondent's training file. It is a form used by SimCom in Orlando, Florida, and is signed by Richard Romero. It is for "FAR 135.293(a)(2) and (3) and (b) only, and, for FAR 135.297." The type of aircraft is shown as a "Lear 35, Level C."

ASI Fox said, however, that Richard Romero, of SimCom was not at that time a check airman for Darby Aviation. He did not receive that designation until 12/08. If Romero had been designated as a check airman for Darby Aviation on 8/01/07, the check would have been valid for FAR § 135.293(a)(2) and (3), and (b), and FAR § 135.297. However, it applied only to the Lear 35, and not at all to FAR § 135.293(a)(1) and (4) through (8). He said that normal procedure would have been for the airman to take the written or oral examination first, then the simulator training, but there was no documentation to show that had happened. He said there was nothing to indicate that a test for FAR § 135.293(a)(1) and (4) through (8) had taken place.

Exhibit A-6 is an Airman Competency/Proficiency Check Form 8410-3, for the Respondent, dated 09/14/06, signed by Richard Parker as the Check Airman, showing satisfactory completion of the requirements under FAR § 135.293(a) and (b), and for a line check under FAR § 135.299, all of which expired on 8/31/2007. The aircraft used for the check ride was a VFR Bell 206 helicopter. ASI Fox testified it was only applicable to the Bell 206 helicopter under VFR conditions, which is a completely different aircraft from a fixed wing turbojet.

Exhibit A-7 is the Respondent's Airman Competency/Proficiency Check Form 8410-3, dated 04/06/2007, taken in a Bell 206 helicopter, showing compliance with the requirements of FAR § 135.293(a) and (b), and § 135.299, signed by Richard Parker as the check airman.

ASI Fox said it is not valid for the Lear 35 or the Gulfstream II. Parker was not rated as a check airman for either of these aircraft. His authority was limited to the Bell 206 helicopter

under VFR conditions. It expired on 4/30/08 for the Bell 206 helicopter.

ASI Fox said Morrison was not currently qualified, so he could not have given an oral or written test in the Gulfstream or the Lear Jet.

ASI Fox identified Exhibit A-14 as the FAA's Sanction Guidance Table. He said that Chapter 72 provides that the sanction for missed proficiency or line check is a 30 to 90 day suspension. There were two flights involved in this case, so the sanction is suspension for 180 days. The aggravating factors are that the Respondent is the chief pilot, and the level of his experience.

On cross-examination, ASI Fox said the Lear and Gulfstream aircraft have different engines, flight systems, and peculiarities. FAR § 1.1 makes it clear that differences count between makes and models.

He said there is no evidence Morrison was qualified to fly the Learjet. However, Exhibit R-172 shows the Respondent, as check airman, approved Morrison based on a check on 9/12/06, for FAR § 135.293(a) and (b), and FAR § 135.299, which expired in 12 months, and 135.297, which expired in six months. ASI Fox, however, said Morrison was out of currency, because initial and subsequent records were missing.

Exhibit R-173 is an Airman Competency/Proficiency Check form for Morrison, dated 12/28/06, for FAR §§ 135.293, 135.297, and FAR 135.299, in the Gulfstream II.

Exhibit R-174 is a "SimCom Record of Approved Instructors/TCE Check Pilots," signed by John Morrison, Director of Operations for Darby Aviation, and ASI Fox on 7/31/2007. The name of Richard Romero appears as an instructor pilot and TCE check pilot. ASI Fox said TCE stands for training center evaluator. This document allows pilots of Darby Aviation to take training at SimCom. It allows Romero to do a check ride for a type certificate, but he is not approved as a check airman to do a Part 135.293 check ride. SimCom is a Part 142 simulator training center.

Exhibits A-14 and A-15 were admitted as a copy of the FAA inspector's manual, and a summary exhibit, respectively.

Exhibit R-55 is a copy of a letter of investigation sent by ASI Fox, to John Morrison, Darby Aviation, dated March 17, 2008, alleging that the Respondent had been allowed to act as pilot in command on February 11, 2008, without having successfully completed an oral or written test given by an authorized check pilot or the Administrator, as required by 14 CFR 135.293(a) since the 12<sup>th</sup> calendar month prior to that service. (It was admitted to show that it was written, but not for the truth of document.)

ASI Fox identified Exhibit R-126 as an Enforcement Decision Tool, used by inspectors to recommend which legal action to take. Fox said it was not applicable in this case, because lack of qualification is an exception, and he believes lack of qualification was shown in this case.

Respondent's motion to dismiss the complaint at the conclusion of the Administrator's case was denied.

Respondent called John Morrison as his first witness. Morrison was Director of Operations for Darby Aviation. He said he has 21,000 flight hours, with 2,500 in the Lear, and 2,000 in the Gulfstream II. He said he was approved as a check airman in 1994, and that was rescinded in July 2007.

He said Exhibit A-5 is a record of a simulator check ride at SimCom, an approved facility that Darby Aviation used. He said it qualified the Respondent on the Lear 35 under § 135.293 and 297. (But, the purpose of the check as shown on the form is limited to “FAR 135.293(a)(2) and (3) only” and “FAR 135.297.” It does not include FAR § 135.293(a) (1) and (4) through (8).) He said that Romero was at the time a check airman for SimCom.

He identified Exhibit R-179 as a letter, dated April 1, 2009, from the Director of Training of SimCom to Darby Aviation. The letter states that TCE/Check Pilots listed on Exhibit 179 have been qualified by SimCom, and, if the POI signs the bottom of the page, he is accepting their TCE qualifications as a means of appointing them as check airmen for Darby’s operation. The POI can sign opposite each name, or for all individuals at the bottom of the page.

Exhibit A-16 is a letter, dated April 1, 2009, from Howard Cox, Director of Training, SimCom, to the FAA’s Birmingham FSDO, stating he “would like to clarify the use of the Record of Approved Instructor/Check Airmen form used by SimCom.” He said in the letter that the “intent is for the POI to approve all indicated TCEs as check airmen by signing in the space at the bottom of the form marked Principal Operations Inspector Approval. If the POI wanted to approve only specific TCEs as check airmen he would indicate so by signing next to the individual’s name and not signing the bottom of the form.”

Mr. Morrison said that he is the director of operations of Darby Aviation, which uses a computer program to keep pilots current. There is a release required for each trip, which can be signed by the Respondent, as chief pilot, Morrison, and the chief of maintenance. No one can release his own flight.

Morrison said in mid 2007, he was current in the Lear and the Gulfstream, and was a check airman for the Lear. He said he conducted ground school twice a month, and either he or Richard Parker, or the FAA, did the flight checks.

Exhibit R-1 is a CAE SimuFlight form, dated 1/12/07, but unsigned. For the Gulfstream checks they used CAE SimuFlite. For the Lear, they used SimCom. It is a record that the Respondent passed a “PIC 135.297 (only)” check on 1/12/07 on the Gulfstream II. Morrison said he conducts Lear training in the fall, and Gulfstream in the spring. On January 2, 2007, he was with the Respondent in the SimuFlight simulator. The Respondent answered questions about the Gulfstream II satisfactorily, including concerning weight and balance.

Exhibit R-2 is a FAA Form 8410-3 for a FAR § 135.299 line check given to the Respondent by John Morrison on 6/25/07 on the Lear 35. Although the type of check is marked only for “FAR 135.299,” Morrison also recorded on the lower part of the form that the Respondent “demonstrated current knowledge for FAR 135.293(a), competency for FAR 135.293(b), a line check for 135.299, and IFR proficiency for 135.297.” Although by regulation, the line check is good for 12 months, Morrison only put down that it was good for approximately 3 months, until 9/07.

Morrison said he called ASI Fox, and told him that he needed authorization for SimCom to give the check ride to the Respondent. This was a new requirement. He faxed the form to Fox before the check was given.

R-180 is the SimCom form Morrison said he faxed to ASI Fox. SimCom said this form allowed them to do training and checking on the Learjet. The form is entitled SimCom Record of Approved Instructors/TCE Check Pilot. Richard Romero is listed on the form, and beside his name the columns IP (Instructor Pilot) and TCE/Check Pilot are marked with an "x". The last column to the right of Romero's name is entitled, "If this TCE/Check Pilot is Approved as a Check Airman the POI Signs Below." There are no signatures in this column opposite the names of any the listed SimCom employees, including Richard Romero. The form was signed by William Miller, Orlando FSDO, Training Center Program Manager, on 11/14/06, and bears the name and signature of James P. Fox, dated 7/31/07, in the block at the bottom entitled, "Principal Operations Inspector Approval."

R-3 is a SimCom check form for the Respondent on the "LRJet, Level 'C', #544," dated May 24, 2007. It shows under Competency Information, "135.293(a 2 & 3) and (b) Only," and "135.297." Morrison said he was with the Respondent while he was being trained. The form is signed by Richard Romero on 8/01/07. The Respondent passed the questions he was asked and the simulated flight test. Morrison said he was current on the Lear 35 for the next 12 months.

In the Spring of 2007, Morrison gave ground school training to Respondent, mainly on the helicopter, but he included questions about the Darby operations manual, and the Learjet powerplant, and about the Gulfstream, and the standard and emergency operating procedures for both the Lear and the Gulfstream.

Exhibit R-5 is a check form for the Bell 206 helicopter, showing that the Respondent passed. It was signed by Parker on 4/6/07. (R-5 was rejected as irrelevant. Asking helicopter-related or even general knowledge questions in a helicopter check rides does not satisfy the knowledge testing requirements of FAR § 135.293(a) for a Lear 35 or Gulfstream II.)

Morrison identified Respondent's Exhibit R-181 as an FAA opinion letter which says, "When an operator adopts a modular approach for recurrent training, all recurrent training elements and events must be grouped into specific modules to be administered and recorded as a recurrent training curriculum. The modules for Part 135 are composed of two parts. One part consists of the written or oral test elements, and the other part consists of the flight training and checking events. Because the ground and flight training elements are separate and distinct parts, they may be completed at different times. Nevertheless they comprise a single module. An operator may record when each module is complete or may record when all the modules are complete, but is not required to record when each element of a module is complete."

[However, nothing in this portion of the opinion letter dealing with recurring training modules authorizes a person who is not an authorized check airman to certify any of the knowledge elements required under Section 135.293(a) for any aircraft. Such a person could give training, and even tests, but that would not satisfy the knowledge testing requirements under Paragraph 135.293(a).]

Exhibit R-6 is form designating Richard Parker as a check airman for the BHT-206 and HU-269, HU 369E, both of which are helicopters, dated October 24, 2003.

Exhibit R-36 is a form, signed by Morrison, dated 4/4/07. certifying that the Respondent received recurrent training on the B-206 helicopter.

Exhibit R-40 is an Operations Manual Test given by Morrison to the Respondent on 4/02/07. The Respondent passed with a grade of 100%. Morrison said it is a non-aircraft specific ground test that satisfies the requirement of FAR § 235.293(a), and it is a test kept in the pilot book. Exhibit R-43 is a record of an examination given to the Respondent concerning regulations, and applies to any equipment operated by Darby Aviation, and meets the requirements of FAR § 135.293(a)(1) and (4) through (8).

[Counsel for the Administrator stated, in response to my question, that Form 8410-3 is the only form used by check airmen to record that an airman completed oral or written exams and flight checks.]

Exhibit R-182 is a Form 8410-3 record of a competency/proficiency check passed by John Morrison on the Gulfstream II on 12/28/06. The type of test is shown as "FAR 185.293, FAR 135.297, and FAR 135.299." It expired in 12 months. Therefore, Morrison was qualified to operate the Gulfstream II as pilot-in-command during the times relevant to this case. It did not confer check airman status on him.

Morrison conceded that at the times relevant to this case, he was a check airman for the Lear, but not for the Gulfstream II or the Bell 206 helicopter. He contended, however, that he could give aircraft non-specific examinations for any type of aircraft the company operated, but could give an aircraft-specific check under FAR § 135.293(a)(2) and (3) only for the Lear.

He said that a FAR § 135.297 check meets the requirements for a competency check under FAR § 135.293.

Exhibit R-185 is Morrison's authorization as a check airman for the Lear 35.

Morrison identified Exhibit R-3<sup>1</sup> as a form signed by Richard Romero, as a check airman employed by SimCom, on 8/1/07. It shows that the Respondent completed the requirements for the competency/proficiency check on the Lear aircraft under "FAR 135.293(a)(2) and (3), and (b), Only," and "135.297." Morrison said he was a check airman on the Lear, and he had completed the testing of the Respondent required by FAR § 135.293(a)(1) and (4) through (8), and had signed the company's training records to that effect.

Morrison identified A-4 as a letter from the FAA addressed to him that rescinded his check airman authority on July 3, 2007. Therefore, he was not a check airman on or about 8/1/07, at the time of the time of the SimCom check referred to in Exhibit R-3 (above).

He said that Exhibit A-1, is the Form 8410-3, dated 9/2/06, which he signed as check airman, showing that the Respondent passed the competency/proficiency check on the Lear meeting the requirements of "FAR 135.293, 297, and 299." He said the check was good for 12

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<sup>1</sup> Exhibit R-3 and A-5 appear to be the same.

months, but he entered the expiration date of 9/07, just to realign checks for company airman to the same period for training purposes.

Morrison identified Exhibit R-36 as a certificate he signed certifying that the Respondent received 26 hours of recurrent training on the Bell 206 helicopter on 4/4/07, but he acknowledged that he was not a check airman for that aircraft.

He identified Exhibits R-37 and 38 as forms showing recurrent training of the Respondent on the Bell 206 helicopter, signed by Parker, the check airman on that aircraft. (They were ruled to be irrelevant during the hearing).

Morrison identified Exhibit R-43 as a FAR § 135 test he gave to Respondent on 4/4/07. The Respondent received a grade of 100%. He said this is a type of record retained by Darby Aviation.

Morrison identified Exhibit R-56 as a letter he sent to ASI Fox on March 21, 2008, in which he said that prior to the Respondent receiving a helicopter flight check on April 6, 2007, he administered recurrent ground training to the Respondent as a regulatory requirement for Part 293 and Part 299 flight check. This ground school included all aircraft that this company (Alpha Jet, which he identified as a d/b/a of Darby Aviation) operates, and was completed on April 3 or 4, 2007." He further said, "Subsequent to attending Lear recurrent training at SimCom in August 2007, I again administered recurrent ground school for all aircraft that this company operates, involving all pilots scheduled at SimCom." Morrison acknowledged that the letter does not say that he administered oral or written examinations to the pilots, but said he always included exams with ground training.

He identified Exhibit R-2<sup>2</sup> as a Form 8410-3 he completed and signed on 6/25/07 for a FAR § 135.299 line check the Respondent completed and passed in a Lear 35, which required a flight in the aircraft. He said the Respondent was given a written test that day. (Under Airman Competency Information at the bottom of the form, Morrison entered the expiration date of 9/07 for "demonstrated current knowledge FAR 135.293(a); demonstrated competency FAR 135.293(b); satisfactorily demonstrated line checks FAR 135.299," even though the stated expiration date for all three is 12 months; and, gave the expiration date of 7/07 for satisfactorily "demonstrated IFR proficiency FAR 135.297," even though the stated expiration date is 6 months. At the top of the form, under type of check, only the block for "FAR 135.299" is checked. The blocks for "FAR 135.293" and "FAR 135.297" are not checked.

Recalled as a witness by the Respondent, ASI Fox said that he signed Exhibit R-180 at the bottom of the form to allow the SimCom employees listed on the form, including Richard Romero, to be instructors under FAR § 135. He said SimCom had not yet been certified under Part 142 to give instruction to Darby Aviation pilots for Part 135. He said he did not designate any of the listed persons employed by SimCom as check airmen, because he did not sign opposite their names. He said a Part 142 training school is authorized to teach Part 135 training programs, but for a person at a training school to act as a check airman he must have the experience to qualify as a check airman. He said he signed the form so SimCom could start training Darby Aviation pilots, and he approved the SimCom employees listed on the form as instructor pilots, only, and not as check airmen. He said he did not approve Romero as a Darby

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<sup>2</sup> Exhibits R-2 and A-3 are the same document.

Aviation TCE/Check Pilot. Before he would have approved Romero as a check airman for Darby Aviation, Romero would have needed a letter from ASI Fox appointing him as a check airman for Darby Aviation. That would have been in addition to Exhibit R-180.

He said that Morrison had called him from SimCom and said they were enrolled in a training course, and they wanted to add SimCom as a FAR § 135 training provider. The process to accomplish that had not yet been completed when he signed Exhibit A-180. He said he was not aware at that time that SimCom had a different interpretation of Exhibit A-180, as expressed in Exhibit A-16, the SimCom letter to the Birmingham FSDO, dated April 1, 2009, that by signing at the bottom the POI approved all of the indicated TCEs as check airmen, and if only specific TCEs were being approved as check airmen, he signed to the right of the names, and did not sign the bottom of the form. He said he did not ask for SimCom's interpretation of the form at the time.

The Respondent testified in his own defense. He stated that Respondent's Exhibit R-1, a simulator checks conducted by CAE SimuFlight on 1/12/07, covered the knowledge questions under FAR § 135.293(a) on the Gulfstream II, and he passed the test. On the form under Check Results, only "297" is checked for "Oral Base Aircraft" and "Sim Check 1." The boxes for "Oral 293(a)(2) Variant-Model", and "Oral 293(a)(3) Wt. & Balance," are not checked. The form does not have a box to check for "Oral 293(a) (4-8) Gen Subjects."

He said that at the time he took the test at SimCom for the Learjet, he believed Romero to be an authorized check airman for that aircraft, and he passed that check. He said that his company paid \$4,500 per pilot to SimCom. He said that the company would not have paid SimCom if it had known that SimCom did not have check airman authority. He said he did not know about the FAA's problems with John Morrison.

He said that the company, Darby Aviation, released him to fly the Gulfstream II on January 28, 2008, and that the company keeps the pilot records and verified that he was current. He also believed that he was current, since John Morrison had been giving FAR § 135.293(a)(1) and (4) through (8) training and tests since the company got the Gulfstream II in 1994, and the FAA never objected. That was shown in the company's records.

The Respondent said that a proficiency and a competency check are the same thing, and the penalty for a missed proficiency check in the FAA's table is suspension for 30 to 90 days.

He said that the Notice of Proposed Certificate Action, dated June 20, 2008, only alleges violation of FAR § 135.293(a), and does not mention FAR § 135.293(a)(1) through (8).

On cross-examination, he said that a check ride under FAR § 135.297 does not include an oral or written test. He said as a check airman, he is required to ask questions under FAR § 135.297, but that does not include questions covering everything in FAR § 135.293(a).

He said he took an oral test at SimCom, and Respondent's Exhibit R-1 is the record. It covered weight and balance, and included the same questions for FAR § 135.293, but the form was checked for FAR Part 135.297 only, not also 293(a) and (b). He said the check would have expired in six months, plus one month grace period. He said as a check airman he never received instructions from the FAA on how to fill out FAA Form 8410-3.

## II. Administrator's Post Hearing Brief

The Administrator filed a post-hearing brief on November 27, 2009, in which the Administrator says that the Respondent had routinely taken regular FAR § 135.293 recurrent proficiency/competency flight checks and testing in the company's Lear 35 and Gulfstream II turbojet aircraft, and Bell 206 helicopter, through September 2006. On September 12, 2006, he took a Part 293 (recurrent and competency annual test), a 297 (semi-annual instrument check), and a 299 (line check) check ride in the Lear 35, given by company check airman John Morrison. On January 13, 2007, he took a Part 297 (instrument proficiency) check given by SimuFlite employee Robert McClellan on the Gulfstream II. The Administrator contends that after company check airman John Morrison's check airman authority was revoked on July 3, 2007, the testing pattern was disrupted, and from that point forward the Respondent is attempting to "piece together" a series of written tests, oral tests, simulator events, and helicopter check rides that renewed his annual check ride requirements under Part 293 for both the Lear 35 and the Gulfstream II, so that at the time he operated the Lear 35 on February 11, 2008, and Gulfstream II on January 28, 2008, he was not competent to do so.

The Administrator contends that the Respondent cannot "piece together" the various written tests, oral tests, simulator events, and helicopter checks to count as Part 293 annual checks on the Lear 35 and Gulfstream II turbojets. Further, the Administrator contends that the "pieced together" events did not cover all of the areas required under 14 CFR § 135.293 (a)(1) and (4) through (8). Moreover, the check airmen that the Respondent claims to have given him Part 293 oral and written tests were not qualified check airmen. Therefore, at the time the respondent conducted the flights in the two turbojet aircraft, he was not competent to do so.

The Administrator states that the testimony of ASI Fox establishes that John Morrison could not have administered the necessary tests required under Part 293(a)(1) and (4) through (8), because he was not then an authorized check airman and the tests had to be administered by an authorized check airman. Further, Richard Romero, an employee of SimCom was not an authorized check airman for Darby Aviation when he conducted a Lear 35 simulator check for the Respondent on August 1, 2007. The Administrator conceded, however, that at the time, both Romero and the Respondent may have mistakenly thought that Romero was a check airman for Darby Aviation.

The Administrator further contends, however, that even if the check given by Romero on the Lear 35 simulator on August 1, 2007, were to be counted, it covered only the requirements of FAR § 135.293(a)(2) and (3), and (b). It did not cover the knowledge requirements of § FAR § 135.293(a)(1) and (4) through (8). This knowledge requirement could not have been met either by John Morrison or Richard Parker, because as of August 1, 2007, neither of these individuals were check airmen. The tests given by Morrison and Parker were ostensibly given in connection with a helicopter check ride given to the Respondent by Parker, and the written test only in connection with a helicopter check would not cover the areas required under § 135.293(a)(1) and (4) through (8) for the Lear 35 turbojet.

The Administrator disputes the Respondent's contention that a Part 297 instrument proficiency check ride given to the Respondent on the Gulfstream II on January 12, 2007, counted for a Part 293 check ride, so that the Respondent was qualified to operate the

Gulfstream II on January 28, 2008. The January 12, 2007, check ride was for instrument proficiency under Part 297, and was good for only six months. The FAA Form 8410-3 was checked only for "FAR 135.297" in the type of test block. In any event, it would have satisfied only the requirement of a check ride under FAR § 135.293(b), a further knowledge test would have been necessary to satisfy the requirements of FAR § 135.293(a). The knowledge test required by FAR § 135.293(a) covers subjects that are generally applicable, such as ground training requirements, while the knowledge test required by FAR § 135.297 is an equipment test related to operational procedures in which the pilot must demonstrate competency before being used under IFR. (See, legislative history preamble to section 297, page 36774, Federal Register, Vol. 43, No. 196 – Tuesday, October 10, 1978.) Finally, neither John Morrison nor Richard Parker on January 12, 2007, were authorized check airmen on the Gulfstream II turbojet aircraft. Therefore, the Respondent did not have a current check ride in the Gulfstream II at the time of the January 28, 2008, flight. There is no evidence that the Respondent had a valid knowledge test under FAR § 135.293(a) for the Lear 35 flight he conducted on February 11, 2008, or the Gulfstream II flight he conducted on January 28, 2008.

The Administrator cites in support of the 180 days suspension imposed in this case, the cases of the *Administrator v. Haynes*, NTSB Order No. EA-4690 (1998); *Administrator v. Woolsey*, NTSB Order No. SE-3845 (1993); and, *Administrator v. Maxson*, NTSB Order No. EA-5183 (2005), in which the Board approved sanctions of 180 days suspension, 120 days suspension, and 150 days suspension; respectively; and the sanction guidance table, which, by inference, provides for a suspension of 90 days for each of the flights. The Administrator further requests deference by the NTSB to the FAA's interpretation of the regulation that the Part 293(a) knowledge test must be given with Part 293(b) check, and cannot be drawn from a Part 297 check or a Part 293 check in another aircraft. The Administrator contends that it is reasonable to require that the knowledge test be given in conjunction with the competency test by an authorized check airman current in the aircraft, and that it covers the areas required under FAR § 135.293(a)(1) and (4) through (8). The Administrator submits that did not happen in this case, and that suspension of the Respondent's ATP certificate for 180 days is the appropriate sanction.

### III. Respondent's Post Hearing Brief

In a post hearing brief, submitted on November 27, 2009, the Respondent contends that the Administrator has failed to prove that he had not taken and passed oral and written tests under FAR § 135.293(a) in both the Lear 35 and the Gulfstream II aircraft, and, therefore, was current and authorized to fly the aircraft at the time of the flights alleged in the complaint.

The Respondent asserts that he was current and authorized to fly the Gulfstream II on January 28, 2008, because he had passed an instrument proficiency test pursuant to FAR § 135.297 in the Gulfstream II given by Simuflite on January 12, 2007, which could be substituted for the general competency test specified in FAR § 135.293. But, without authority and in contravention of FAR § 135.293(c), the Administrator argues that the instrument proficiency test cannot be substituted for the FAR § 135.293 competency test check that the Respondent is accused of missing. In support of this proposition, the Respondent cites holdings by an Administrative Law Judge of the Department of Transportation in a case entitled *In the Matter of Darby Aviation*, FAA Docket No. CPO8SO0026, DMS No. FAA-2008-1192, to the effect that the

plain language of FAR § 135.293(c) allows such a substitution.<sup>3</sup>

The Respondent argues that the FAA's Inspector Handbook provides that the FAR § 135.297 proficiency check satisfies the requirements of § 135.293(a) and (b). Further, both the Respondent and John Morrison testified that during the Simuflite check, the Respondent was orally tested and correctly answered the aircraft specific questions required by § 135.293(a)(2) and (3). The Respondent states that Exhibit R-1, the FAA Form 8410-3 completed by the Simuflite check airman indicates that the Respondent passed the written and oral test under § 135.293(a), although at the top of the form, the type of check box is marked "297 only. The Respondent said that this is an inconsistency in the FAA's form, for which he is not responsible.

The Respondent also states that § 135.293(a)(1) and (4) through (8) are not aircraft specific, and the Respondent is not required to repeat the oral or written test required by this portion of the regulation for each type of aircraft he flies. Instead, to satisfy this regulatory requirement, a pilot needs only to be tested each year on one type of aircraft he flies. If that were not the case, there would be no need for the aircraft specific requirement in § 135.293(a)(2) and (3). Therefore, the oral and written tests by an authorized check airman on the Lear 35 satisfied the requirements of § 135.293(a)(1) and (4) through (8) for every aircraft flown by the Respondent, including the Gulfstream II. The Respondent further noted that § 135.293(a) does not require that he pilot evidence his passing of the oral or written examination on any form, let alone the FAA Form 8410-3, and neither does it require the certificate holder to use or retain that form. The certificate holder is required only to retain the date and result of each competency test.

The Respondent further contends that he passed the oral and written tests under § 135.293(a) qualifying him to fly the Lear 35 on February 11, 2008, by passing a § 135.297 instrument flight check given by Richard Romero at SimCom on August 1, 2007, which can be substituted for the § 135.293(a) testing requirements. Further, on August 1, 2007, he passed the oral test given by Richard Romero at SimCom, which expressly satisfied the testing requirements of § 135.293(a)(2) and (3) (Respondent's Exhibit R-3); and, finally, he passed oral and written tests covering all of § 135.293(a)(1) and (4) through (8) given by John Morrison, an approved check airman for the Lear 35, during 2007, as shown on the FAA Form 8410-3 for a FAR § 135.299 line check on June 25, 2007, signed by Morrison. The Respondent states that Richard Romero, an employee of SimCom, was approved by ASI Fox, Darby Aviation's POI, as a check airman for the Lear 35, on July 31, 2007.

The Respondent submits that in the interest of fairness, and because there is no written agency guidance for the sanction for violation of FAR § 135.293(a), there is no requirement for the Board to give deference to the Administrator's choice of sanction. The Respondent contends that there is no known public interpretation holding that § 297 may be substituted for § 293, and there is no known Board precedent interpretation saying that a pilot must satisfy § 135.293(a)(1) and (4) through (8) for each aircraft flown by the pilot.

Therefore, the Respondent requests that the complaint against him be dismissed, and the Administrator's request for sanctions be denied.

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<sup>3</sup> Language of an administrative law judge in a case before another agency is not a precedent in a case before the National Transportation Safety Board.

#### IV. Decision and Order

The Respondent is charged with violating FAR § 135.293(a), which provides:

Initial and recurrent pilot testing requirements.

(a) No 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 the following areas—

- (1) The appropriate provisions of Parts 61, 91, and 135 of this chapter and the operations specifications and the manual of the certificate holder;
- (2) For each type of aircraft to be flown by the pilot, the aircraft powerplant, major components and systems, major appliances, performance and operating limitations, standard and emergency operating procedures, and the contents of the approved Aircraft Flight Manual or equivalent, as applicable;
- (3) For each type of aircraft to be flown by the pilot, the method of determining compliance with weight and balance limitations for takeoff, landing and en route operations;
- (4) Navigation and use of air navigation aids appropriate to the operation or pilot authorization, including, when applicable, instrument approach facilities and procedures;
- (5) Air traffic control procedures, including IFR procedures when applicable;
- (6) Meteorology in general, including the principles of frontal systems, icing, fog, thunderstorms, and windshear, and, if appropriate for the operation of the certificate holder, high altitude weather
- (7) Procedures for--
  - (i) Recognizing and avoiding severe weather situations;
  - (ii) Escaping from severe weather situations, in case of inadvertent encounters, including low-altitude windshear (except that rotorcraft pilots are not required to be tested on escaping from low-altitude windshear); and
  - (iii) Operating in or near thunderstorms (including best penetrating altitudes), turbulent air (including clear air turbulence), icing, hail, and other potentially hazardous meteorological conditions; and
- (8) New equipment, procedures, or techniques, as appropriate.

(b) No certificate holder may use a pilot, nor may any person serve as a pilot, in any aircraft unless, since the beginning of the 12th calendar month before that service, that pilot has passed a competency check given by the Administrator or an authorized check pilot in that class of aircraft, if single-engine airplane other than turbojet, or that type of aircraft, if helicopter, multiengine airplane, or turbojet airplane, to determine the pilot's competence in practical skills and techniques in that aircraft or class of aircraft. The extent of the competency check shall be determined by the Administrator or authorized check pilot conducting the competency check. The competency check may include any of the maneuvers and procedures currently required for the original issuance of

the particular pilot certificate required for the operations authorized and appropriate to the category, class and type of aircraft involved. For the purposes of this paragraph, type, as to an airplane, means any one of a group of airplanes determined by the Administrator to have a similar means of propulsion, the same manufacturer, and no significantly different handling or flight characteristics. For the purposes of this paragraph, type, as to a helicopter, means a basic make and model.

(c) The instrument proficiency check required by Sec. 135.297 may be substituted for the competency check required by this section for the type of aircraft used in the check.

(d) For the purpose of this part, competent performance of a procedure or maneuver by a person to be used as a pilot requires that the pilot be the obvious master of the aircraft, with the successful outcome of the maneuver never in doubt.

(e) The Administrator or authorized check pilot certifies the competency of each pilot who passes the knowledge or flight check in the certificate holder's pilot records.

(f) Portions of a required competency check may be given in an aircraft simulator or other appropriate training device, if approved by the Administrator.

FAR § 135.297, referred to in FAR § 135.293(c), above, provides:

Pilot in command: Instrument proficiency check requirements.

(a) No certificate holder may use a pilot, nor may any person serve, as a pilot in command of an aircraft under IFR unless, since the beginning of the 6th calendar month before that service, that pilot has passed an instrument proficiency check under this section administered by the Administrator or an authorized check pilot.

(b) No pilot may use any type of precision instrument approach procedure under IFR unless, since the beginning of the 6th calendar month before that use, the pilot satisfactorily demonstrated that type of approach procedure. No pilot may use any type of nonprecision approach procedure under IFR unless, since the beginning of the 6th calendar month before that use, the pilot has satisfactorily demonstrated either that type of approach procedure or any other two different types of nonprecision approach procedures. The instrument approach procedure or procedures must include at least one straight-in approach, one circling approach, and one missed approach. Each type of approach procedure demonstrated must be conducted to published minimums for that procedure.

(c) The instrument proficiency check required by paragraph (a) of this section consists of an oral or written equipment test and a flight check under simulated or actual IFR conditions. The equipment test includes questions on emergency procedures, engine operation, fuel and lubrication systems, power settings, stall speeds, best engine-out speed, propeller and supercharger operations, and hydraulic, mechanical, and electrical systems, as appropriate. The flight check includes navigation by instruments, recovery from simulated emergencies, and standard instrument approaches involving navigational facilities which that pilot is to be authorized to use. Each pilot taking the instrument proficiency check must show that standard of competence required by Sec. 135.293(d).

(1) The instrument proficiency check must--

(i) For a pilot in command of an airplane under Sec. 135.243(a), include the procedures and maneuvers for an airline transport pilot certificate in the particular type of airplane, if appropriate; and

(ii) For a pilot in command of an airplane or helicopter under Sec. 135.243(c),

include the procedures and maneuvers for a commercial pilot certificate with an instrument rating and, if required, for the appropriate type rating.

(2) The instrument proficiency check must be given by an authorized check airman or by the Administrator.

(d) If the pilot in command is assigned to pilot only one type of aircraft, that pilot must take the instrument proficiency check required by paragraph (a) of this section in that type of aircraft.

(e) If the pilot in command is assigned to pilot more than one type of aircraft, that pilot must take the instrument proficiency check required by paragraph (a) of this section in each type of aircraft to which that pilot is assigned, in rotation, but not more than one flight check during each period described in paragraph (a) of this section.

(f) If the pilot in command is assigned to pilot both single-engine and multiengine aircraft, that pilot must initially take the instrument proficiency check required by paragraph (a) of this section in a multiengine aircraft, and each succeeding check alternately in single-engine and multiengine aircraft, but not more than one flight check during each period described in paragraph (a) of this section. Portions of a required flight check may be given in an aircraft simulator or other appropriate training device, if approved by the Administrator.

(g) If the pilot in command is authorized to use an autopilot system in place of a second in command, that pilot must show, during the required instrument proficiency check, that the pilot is able (without a second in command) both with and without using the autopilot to--

(1) Conduct instrument operations competently; and

(2) Properly conduct air-ground communications and comply with complex air traffic control instructions.

(3) Each pilot taking the autopilot check must show that, while using the autopilot, the airplane can be operated as proficiently as it would be if a second in command were present to handle air-ground communications and air traffic control instructions. The autopilot check need only be demonstrated once every 12 calendar months during the instrument proficiency check required under paragraph (a) of this section.

FAR § 135.299 provides that:

Pilot in command: Line checks: Routes and airports.

(a) No certificate holder may use a pilot, nor may any person serve, as a pilot in command of a flight unless, since the beginning of the 12th calendar month before that service, that pilot has passed a flight check in one of the types of aircraft which that pilot is to fly. The flight check shall--

(1) Be given by an approved check pilot or by the Administrator;

(2) Consist of at least one flight over one route segment; and

(3) Include takeoffs and landings at one or more representative airports. In addition to the requirements of this paragraph, for a pilot authorized to conduct IFR operations, at least one flight shall be flown over a civil airway, an approved off-airway route, or a portion of either of them.

(b) The pilot who conducts the check shall determine whether the pilot being checked satisfactorily performs the duties and responsibilities of a pilot in command in operations under this part, and shall so certify in the pilot training record.

(c) Each certificate holder shall establish in the manual required by Sec. 135.21 a procedure which will ensure that each pilot who has not flown

over a route and into an airport within the preceding 90 days will, before beginning the flight, become familiar with all available information required for the safe operation of that flight.

FAR § 1.1 defines type of aircraft as:

*Type:*

- (1) As used with respect to the certification, ratings, privileges, and limitations of airmen, means a specific make and basic model of aircraft, including modifications thereto that do not change its handling or flight characteristics. Examples include: DC-7, 1049, and F-27; and
- (2) As used with respect to the certification of aircraft, means those aircraft which are similar in design. Examples include: DC-7 and DC-7C; 1049G and 1049H; and F-27 and F-27F.

The Respondent basically contends that while the requirements of FAR § 135.293(a)(2) and (3) are aircraft specific, subparagraphs §135.293(a)(1), and (4) through (8), are not, and, therefore, as long as the questions in an oral examination or test covers the areas required for these tests, it does not matter whether or not the person giving the test had, himself, passed a current proficiency test in those aircraft, or was authorized as a check airman to give airman competency examinations under § 135.293(a).

FAR § 135.293(a) requires an oral or written knowledge examination. FAR § 135.293(b) requires a flight check. The knowledge requirements for a competency/proficiency check under § 135.293(a)(2) and (3) are specifically type related. Clearly there are two separate and distinct types of aircraft involved here, a Lear 35 turbojet and a Gulfstream II turbojet; they are not the same type of aircraft, within the definition in FAR § 1.1. They both have turbojet engines, but they are not manufactured by the same manufacturer, and do not have the same engines, instruments, and flight characteristics.

FAR § 135.293(a)(1) and (4) through (8) do not specifically say they are type related. Although the Administrator appears to have not published any guidance to check airmen as to the questions they should ask, other than what the regulation says,<sup>4</sup> to satisfy the requirements of FAR § 135.293(a)(1) and (4) through (8), it is self-evident that testing by an airman check pilot not qualified to give checks on a particular aircraft, in this instance, the Lear 35 or the Gulfstream II, cannot satisfy the requirement to give the oral or written tests required by FAR § 135.293(a)(1) and (4) through (8). It would also appear to be self-evident that the examination to satisfy the testing requirements of FAR § 135.293(a)(1) and (4) through (8) should be geared to and relevant to the aircraft involved, otherwise the examination would be meaningless.

Here, with respect to checking the competency/proficiency of a pilot on a Lear 35 and/or Gulfstream II, the questions should be applicable to these kind of aircraft. The Bell 206 helicopter, unlike the Lear 35 and the Gulfstream, is not a turbojet, high speed, high altitude IFR aircraft, and cannot lawfully operate in the weather conditions, such as referred to in

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<sup>4</sup> Counsel for the Administrator was asked if the FAA published any guidance to airmen check pilots as to specific written or oral examinations, tests, or questions they should ask or give to satisfy FAR 135.293(a)(1) and (4) through (8), but nothing was produced, other than reference to the areas stated in the regulation, itself. There appears to be no requirement that a record be kept of the questions asked. That, however, does not relieve the check airman of the obligation to ask appropriate questions on the areas stated in § 135.293(a)(1) and (4) through (8).

subparagraphs (4) through (8). Knowledge questions asked by a check airman giving a FAR § 135.293(a) check on the Bell 206 helicopter, standing alone, do not satisfy the knowledge test requirements of FAR § 135.293(a)(1) and (4) through (8) concerning a Lear 35 or Gulfstream II aircraft.

Although the Administrator appears to have not published any guidance to check airmen as to the questions they should ask during knowledge tests, other than what the regulation says, to satisfy the requirements of FAR § 135.293(a)(1) and (4) through (8), it is self-evident that testing by an airman check pilot not qualified to give checks on a particular aircraft, in this instance, the Lear 35 or the Gulfstream II, cannot satisfy the requirement to give the knowledge tests required by FAR § 135.293(a)(1) and (4) through (8). As already noted, it would also appear to be self-evident that the knowledge examination to satisfy the testing requirements of FAR § 135.293(a)(1) and (4) through (8) should be relevant to the aircraft involved, otherwise the examination would be meaningless.

At least some of the questions asked to show knowledge concerning the Lear 35 and Gulfstream II, in order to satisfy the knowledge requirements of FAR § 135.293(a)(1) and (4) through (8), must be relevant to those aircraft. It is self-evident that testing by an airman check pilot not qualified to give checks on a particular aircraft, in this instance, the Lear 35 or the Gulfstream II, cannot satisfy the requirement to give the oral or written tests required by FAR § 135.293(a)(1) and (4) through (8). The Bell 206 helicopter, unlike the Lear 35 and the Gulfstream, is not a fixed wing turbojet, high speed, high altitude IFR aircraft, and cannot lawfully operate in the weather conditions, such as referred to in subparagraphs (4) through (8). General questions asked by a check airman on the Bell 206 helicopter cannot logically substitute for all required knowledge questions concerning the Lear 35 or the Gulfstream II.

In summary, it is evident that the questions asked by a check airman during a FAR § 135.293(a)(1) and (4) through (8) check must cover the areas of testing specified in that section for the aircraft on which the check is being given. Questions asked during a Bell 206 helicopter check do not meet that criteria. Unlike the Lear 35 and the Gulfstream, the Bell 206 helicopter is not a turbojet, high speed, high altitude IFR aircraft, and cannot lawfully operate in the weather conditions, such as referred to in subparagraphs (4) through (8). Further, general questions asked by a non-check airman also are not sufficient to meet the testing requirements of FAR § 135.293(a)(1) and (4) through (8). For example, procedures for escaping from severe weather conditions and new equipment, both of which are required areas of examination by FAR § 135.293(a)(7) and (8), must be geared to the performance characteristics and limitations of the aircraft for which the check is being given, and how it is equipped.

Richard Parker was authorized as a check airman for Darby Aviation only for two types of helicopters, one of which was the Bell 206. *Cf.*, Exhibit R-6. He was not authorized as a check airman for either the Gulfstream II or the Lear 35 turbojets. Therefore, a proficiency/competency check he performed under FAR § 135.293(a) for a Bell 206 helicopter does not satisfy the testing requirements for either the Learjet or the Gulfstream II, and for purposes of this case is completely irrelevant to meeting the requirements for a check under FAR § 135.293(a) for either the Lear 35 or the Gulfstream II.

It is obvious from the unambiguous language of the regulation, FAR § 135.293(a), itself, that a written or oral test given by a check airman authorized only to give examinations and check rides concerning a helicopter, is not a substitute for written or oral tests, given to satisfy

the testing required under FAR § 135.293(a) for competency/proficiency on a Lear 35 turbojet or a Gulfstream II turbojet. Such questions are beyond the competence and qualifications of a check airman whose authority is limited to helicopters to ask.

Exhibit R-3 is an FAA Form 8310-3 showing that the Respondent passed a competency/proficiency check on the Lear 35 given by Richard Romero, an employee of SimCom, on 5/24/07. It certifies that Respondent demonstrated competency for “135.293(a 2 & 3) and (b),” and “135.297.” The Administrator argues that Romero was not an authorized check airman for SimCom at that time, but also acknowledges that the Respondent may have mistakenly thought that he was.

The Administrator and the Respondent are at odds concerning the meaning of Exhibit R-180, SIMCOM Record of Approved Instructors/Check Pilots, which includes the name of SimCom employee Richard Romero, designated as both “IP” (Instructor Pilot) and “TCE/Check Pilot,” and signed at the bottom under the block entitled “Certificate Holder Approval,” by John Morrison, Director of Operations for Darby Aviation, on July 31, 2007, and under the block entitled “Principal Operations Inspector Approval,” by James P. Fox, POI for Darby Aviation, on July 31, 2007. The Respondent contends ASI Fox’s signature at the bottom approved Romero as a check airman for Darby Aviation; the Administrator contends that it did not, because ASI Fox did not sign the form opposite Romero’s name in the column headed “If this TCE/Check Pilot is approved as a Check Airman, the POI signs below.”

I find that the most reasonable interpretation of the form is that it requires the signature of the POI in both places in order to authorize Romero as a check airman, but, on the other hand, there is a certain amount of ambiguity in the form that conceivably could have confused the Respondent into believing that Fox’s signature at the bottom of the form was sufficient to approve Romero as a check airman for Darby Aviation.<sup>5</sup> Because of that, I further find that even if Romero was technically not approved as a check airman for Darby Aviation, I credit the testimony of Morrison and the Respondent that they acted in good faith in relying on Exhibit R-3 as proof that the Respondent had satisfied the requirements of FAR § 135.293(a)(2) and (3), and (b), and FAR § 135.297 for proficiency/competency on the Lear 35.

That, however, does not resolve the question of whether the Respondent also passed the testing requirements of FAR § 135.293(a)(1) and (4) through (8) with regard to the Lear 35. I find that the Respondent has produced no record to that effect with regard to the Lear 35 signed by an authorized check airman at any time reasonably contemporaneous with Exhibit R-3. Prior general training sessions on the company’s aircraft, conducted by John Morrison during the preceding year, even if accompanied by general knowledge tests, do not satisfy the knowledge testing requirements of FAR § 135.293(a) for either the Lear 35 or Gulfstream II. They were not given as part of a proficiency check intended to satisfy the testing requirements of FAR § 135.293(a) for either the Lear 35 or Gulfstream II. They were, it is obvious from the testimony and other evidence, nothing more than training sessions which John Morrison apparently routinely gave to the company pilots. While they may have some areas for which FAR § 135.293(a) requires testing, they were not specifically designated as tests satisfying FAR § 135.293(a)(1) and (4) through (8), and do not satisfy the testing requirements of that section. I fully concur with the Administrator’s position that fragmentary piecemeal training and testing

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<sup>5</sup> The Respondent’s argument does not address the question of the status of the other five individuals listed along with Richard Romero as “TCE/Check Pilot,” as to whether they were also approved as check airmen for Darby Aviation.

conducted on a sporadic basis over a period of time cannot be pieced together to satisfy the knowledge testing requirements of FAR § 135.293(a).

Neither will Exhibit R-3, which is dated May 24, 2007, which reflects that the Respondent demonstrated competency on the Lear 35 for FAR § 135.297. For one thing, instrument proficiency under FAR § 135.297 expires in six months. Therefore, it had expired by the time of the Lear 35 flight on February 11, 2008. In any event, a competency/proficiency check is valid only for the purpose the check was given. Otherwise the purpose of designating the purpose on the FAA Form 8410-3 by checking the applicable boxes would be completely meaningless, and would leave practically nothing for the FAA to review to verify that a carrier's pilots were current and authorized to conduct Part 135 operations.

FAR § 135.297(c) requires both an oral or written equipment test and a flight check. "The equipment test includes questions on emergency procedures, engine operation, fuel and lubrication systems, power settings, stall speeds, best engine-out speed, propeller and supercharger operations, and hydraulic, mechanical, and electrical systems, as appropriate." It does not cover all of the items for which testing is required by FAR § 135.293(a)(1) and (4) through (8), such as testing on the provisions of Parts 61, 91, and 135, and the operations specifications and the manual of the certificate holder, testing on compliance with the weight and balance limitations of the aircraft, meteorology and weather procedures. There is no way to determine from the evidence of record what questions were asked by Romero during the FAR § 135.297 check on May 24, 2007, and there is nothing to indicate that they satisfied the requirements of FAR § 135.293(a)(1) and (4) through (8), nor did Romero indicate that they did. Therefore, I find that passing the SimCom FAR § 135.297 check given by Romero on May 24, 2007, did not satisfy the testing requirements of FAR § 135.293(a)(1) and (4) through (8), and cannot be substituted for a proficiency check on the Lear 35 under FAR § 135.293(a) or (b). Check Airman Romero did not qualify the Respondent to operate the Lear 35 in Part 135 service at the time alleged in the complaint.

Exhibit A-3,<sup>6</sup> is a Form 8410-3 for a FAR § 135.299 line check given by Check Airman Morrison on 6/25/07, to Respondent in the Lear. The type of check is marked only for "FAR 135.299." It was good for 12 months. The boxes for "FAR 135.293" and "FAR 135.297" were not checked. However, Morrison also checked on the lower part of the form that the Respondent had "Demonstrated Current Knowledge FAR 135.293(a)," "Demonstrated Competency FAR 135.293(b)," both of which expired in 12 months, although Morrison put down 6 months; and "Demonstrated IFR Proficiency," which expired in 6 months, although Morrison put down it was only good for 3 months. I do not find credible Morrison's unsupported testimony that he asked questions in all of these areas. FAR § 135.299 requires only a flight check, there is no requirement for an oral or written examination. Rather, I find that he was improperly attempting expand the type of check to include FAR § 135.293 (a) and (b), and FAR § 135.297, without necessarily giving the oral or written examinations required by those sections of the FARs, and the Respondent went along with it. Both Morrison and the Respondent were check airmen, and should have known that a competency/proficiency check is good for only the purpose for which it is stated that it was given.

Therefore, based on the evidence and the record as a whole, I find that the Respondent had not satisfied the recurrent pilot testing requirements of FAR § 135.293(a), during the 12

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<sup>6</sup> The same document as Exhibit R-2.

months (13 months, including the grace month) before serving as pilot in command of N35ED, a Lear 35 turbo-jet aircraft, in Part 135 operations on February 11, 2008, as charged in the complaint.

Exhibit A-2 is a record of a CAE SimuFlite<sup>7</sup> for "PIC 135.297 (only)," given to Elton Darby on 1/12/07. The FAR § 135.297 check is for instrument proficiency check valid for 6 months on the Gulfstream II. It could have been substituted for a currency/competency check under FAR § 135.293, had the check airman chosen to include that as a purpose of the test, but he did not. For reasons similar to those stated above with reference to Exhibit R-3, above, instrument proficiency check evidenced by Exhibit A-2 was on its face limited to "PIC 135.297 (only)," and did not include "PIC 135.293 and 297." Therefore, it did not satisfy the requirements of FAR § 135.293(a) for Respondent on the Gulfstream II under FAR § 135.293(a) and (b).

Even if John Morrison gave periodic training to Darby Aviation pilots on the Gulfstream II, accompanied by tests, that did not satisfy the requirement in FAR § 135.293(a) that "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 the following areas--." John Morrison was not an authorized check airman for the Gulfstream II.

Therefore, based on the evidence and the record as a whole, I find that the Respondent had not satisfied the recurrent pilot testing requirements of FAR § 135.293(a), during the 12 months (13 months, including the grace month) before serving as pilot in command of N840RG, a Gulfstream II turbo-jet aircraft, in Part 135 operations on January 28, 2008, as charged in the complaint.

The Administrator seeks a sanction of suspension of the Respondent Airline Transport Pilot Certificate for 180 days for the two violations of FAR § 135.293(a). By analogy, that appears to be the maximum sanction provided for these violations in the Administrator's Sanction Guidance Table.

As noted earlier, it seems that the Respondent and John Morrison, Darby Aviation's Director of Operations, who provided training to the company's pilots and kept records of their currency, both believed in good faith, not without some justification, but wrongly it turns out, that the SimCom check given by Richard Romero on May 24, 2007, on the Lear simulator (Exhibit R-3) satisfied the requirements of FAR § 135.293(a)(1) and (3) through (8), as well as FAR § 135.297, for his currency on the Lear 35. I find that to be a mitigating factor that should be taken into account insofar as the sanction is concerned, but by no means does it constitute justification or a defense to the charge of failing to complete the knowledge testing required by FAR § 135.293(a).

That said, neither the Respondent, nor Morrison, were justified in believing that the testing requirements of FAR § 135.293(a)(1) and (4) through (8) had been satisfied. It is not relevant whether the Respondent or Morrison was more at fault. The Respondent was, himself, a check airman, as well as the holder of an Airline Transport Pilot Certificate, and, as such, is held to the highest standard of care, and should have known that he could not establish his currency under FAR § 135.293(a)(1) and (4) through (8) to operate a Lear 35, or for that matter, the Gulfstream II, either, by passing knowledge tests given at disparate prior times as part of

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<sup>7</sup> SimuFlite is a Part 142 simulator training center.

pilot training, but not in conjunction with a knowledge check given by a check airman for the purpose of at establishing currency for purposes of FAR § 135.293(a) and (b). Any reliance by the Respondent on Morrison for such a proposition was entirely unwarranted and unreasonable. The Respondent was personally responsible for taking all necessary steps to maintain his currency under FAR § 135.293(a) and (b) on the Lear 35 and the Gulfstream II before operating either aircraft on Part 135 flights. Whatever advice the Respondent may have received from Morrison, notwithstanding, it did not excuse his failure to fulfill his personal responsibility that he was current on company aircraft before operating any of them on Part 135 flights.

The same applies to the Part 135 flight that the Respondent conducted in the Gulfstream II aircraft on January 28, 2008, without having passed the necessary knowledge tests. The Respondent, it appears from the evidence, willingly took the risk of relying on a SimCom check limited on its face to FAR § 135.297, only, to also satisfy the requirements of FAR § 135.293(a) and (b). From all appearances from the evidence and testimony in this case, the Respondent, (and Morrison, who was responsible for maintaining the company records and insuring the company's pilots were current), tried to save money by relying on checks expressly given for other purposes, and training and tests not given as part of check by a check airman, at all, to meet the knowledge testing requirements of FAR § 135.293(a). There are other possible reasons, no doubt, but that certainly seems the most likely. In that regard, it would appear that the Respondent could have and should have avoided the violations alleged in this case, by contacting the company's principal operations inspector, and getting his advice and/or consent to the procedures and checks that he was going to rely upon. That did not happen, however.

But, I do not find that the Respondent flagrantly ignored the knowledge testing requirements of FAR § 135.293(a) to the extent that the appropriate sanction is imposition of what amounts to the maximum sanction of 180 days' for the two violations of FAR § 135.293(a) of which he has been found guilty, as reflected in the Administrator's Enforcement Guidance Table for "missed proficiency check."

Neither is that sanction in keeping with Board precedent. Approved sanctions in cases involving violation of FAR § 135.293(a) and (b), usually coupled with other violations, have varied considerably, ranging from 120 days to 45 days suspensions. *Administrator v. Maxson*, NTSB Order No. EA-5183 (2005) (120 days); *Administrator v. Brown*, NTSB Order No. EA-3698 (1992) (120 days); *Administrator v. Lackey*, NTSB Order No. EA-5348 (2007) (110 days); *Administrator v. Tsosie*, NTSB Order No. EA-4678 (90 days); *Administrator v. Wagner*, NTSB Order No. EA-4081 (1994) (90 days); *Administrator v. Kizer*, NTSB Order No. 5339 (2007) (60 days); and, *Administrator v. Croy and Rich*, NTSB Order No. EA-4306 (1994) (45 days).

In this case, taking into consideration the facts surrounding the violations, and that the Respondent is charged only with two flights in violation of FAR § 135.293(a), I find that the appropriate sanction is a mid-range suspension of his Airline Transport Pilot Certificate for 90 days.

Upon consideration of all of the substantial, reliable, and probative evidence of record, I find that the Administrator has proven by a preponderance of the evidence that Respondent violated FAR § 135.293(a), as alleged in the Complaint, but that reduction of the sanction from suspension of his Airline Transport Pilot Certificate No. [omitted] for 180 days to 90 days is warranted.

Accordingly it is ORDERED:

1. The Respondent's appeal is granted, in part, and denied, in part.
2. The Administrator's Order of Suspension is AFFIRMED, except that the sanction shall be MODIFIED to provide that any and all Airline Transport Pilot Certificates held by the Respondent, including Airline Transport Pilot Certificate No. [omitted], shall be suspended for a period of 90 days.

ORDERED this 14<sup>th</sup> day of December 2009 at Washington, D.C.

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WILLIAM A. POPE, II  
Judge