

SERVED: February 9, 2011

NTSB Order No. EA-5572

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 8<sup>th</sup> day of February, 2011

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J. RANDOLPH BABBITT,		)	
Administrator,		)	
Federal Aviation Administration,		)	
		)	
Complainant,		)	
		)	Dockets SE-19000
v.		)	and SE-19001
		)	
JETSMART, INC. and		)	
JAMES CHARLES HOWE,		)	
		)	
Respondents.		)	
		)	
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**OPINION AND ORDER**

Respondents appeal the oral initial decision of Administrative Law Judge Alfonso J. Montaña, issued January 14, 2011.<sup>1</sup> By that decision, the law judge determined that the Administrator proved Respondent Howe violated 14 C.F.R.

<sup>1</sup> A copy of the law judge's initial decision, an excerpt from the hearing transcript, is attached.

§§ 61.59(a)(2)<sup>2</sup> and 91.13(a),<sup>3</sup> but did not violate §§ 135.385(b) or (d),<sup>4</sup> as the Administrator had alleged.<sup>5</sup> The law judge similarly found that Respondent JetSmart violated 14 C.F.R. §§ 119.21(a),<sup>6</sup> 135.63(c),<sup>7</sup> and 91.13(a), but did not violate

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<sup>2</sup> Section 61.59(a)(2) provides as follows:

No person may make or cause to be made ... [a]ny fraudulent or intentionally false entry in any logbook, record, or report that is required to be kept, made, or used to show compliance with any requirement for the issuance or exercise of the privileges of any certificate, rating, or authorization under this part.

<sup>3</sup> Section 91.13(a) states that no person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

<sup>4</sup> Section 135.385(b) and (d) specifies required runway lengths for landing an aircraft pursuant to 14 C.F.R. part 135.

<sup>5</sup> The Administrator's complaint against Respondent Howe originally contained an allegation that Respondent Howe violated § 135.63(c), described infra at note 7. On the second day of the evidentiary hearing, the Administrator's attorney withdrew the allegations that Respondent Howe violated §§ 135.63(c) and 135.385(d). In his initial decision, the law judge acknowledged this withdrawal, and further determined the Administrator failed to prove the § 135.385(b) violation.

<sup>6</sup> Section 119.21(a) provides that, "[e]ach person who conducts airplane operations as a commercial operator engaged in intrastate common carriage of persons or property for compensation or hire in air commerce, or as a direct air carrier, shall comply with the certification and operations specifications requirements in subpart C of this part." Subpart C of Part 119 sets forth certification requirements and prescribes the content of operations specifications and other requirements for operations conducted under 14 C.F.R. parts 121 or 135.

<sup>7</sup> Section 135.63(c) states that, for multiengine aircraft, each certificate holder is responsible for the preparation and

§§ 135.385(b) or (d). As a result of these findings, the law judge affirmed revocation of Respondent Howe's airline transport pilot (ATP), and Respondent JetSmart's air carrier, certificates. We deny respondents' appeal.

The Administrator issued the emergency revocation orders,<sup>8</sup> which became the complaints in this case, against Respondent JetSmart on December 3, 2010, and against Respondent Howe on December 14, 2010. The complaints alleged that Respondent Howe, as the sole owner, president, and director of operations of JetSmart, Inc., provided on-demand air taxi operations pursuant to 14 C.F.R. part 135. The complaints further specified that JetSmart's fleet of aircraft included a LearJet 60 (hereinafter, "N179LF"). The complaints stated that during September through December 2008, JetSmart operated 16 different flights under part 135, many of which landed at Sikorsky Airport in Bridgeport, Connecticut (BDR). With regard to all 16 flights at issue, the complaints stated that Respondent Howe entered flight log

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accuracy of a load manifest in duplicate containing information concerning the loading of the aircraft, and requires the manifest to be prepared before each takeoff and include certain information.

<sup>8</sup> This case proceeds pursuant to the Administrator's authority to issue immediately effective orders under 49 U.S.C. §§ 44709(e) and 46105(c), and in accordance with the Board's Rules of Practice governing emergency proceedings, codified at 49 C.F.R. §§ 821.52-821.57.

information indicating that flight segments were conducted under 14 C.F.R. part 91, even though Respondent Howe allegedly knew the flight was to or did transport passengers for compensation or hire. The complaints alleged that JetSmart failed to prepare a load manifest for the 16 flights prior to takeoff reflecting the weight of the passengers, the total weight of the loaded aircraft, the maximum allowable takeoff weight for the flight, the center of gravity limits, or the center of gravity of the loaded aircraft as required under part 135. The complaints further stated that the longest runway at BDR is 4,761 feet, and that N179LF could not have made a full stop landing within 60 percent of the effective length of any runway at BDR. As a result, the Administrator alleged that respondents violated each of the regulations at issue.

The law judge held a consolidated hearing for the case, at which the Administrator's counsel called several witnesses. Inspectors Lee Abbott and Chris Holliday, both of the Rochester Flight Standards District Office (FSDO), testified the FSDO received an anonymous complaint in the mail concerning operation of N179LF into BDR, when the runway at BDR was not long enough for operation under part 135.<sup>9</sup> Inspector Abbott identified a

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<sup>9</sup> The anonymous complaint, at Exhibit A-3 of the record, stated, in part, as follows:

JetSmart ownership (Jim Howe) has misled its management team and pilots into believing [the trips

copy of the aircraft services agreement between JetSmart and Vertrue, Inc., in which JetSmart agreed to provide priority scheduling to Vertrue for an annual usage of 175 flight hours in exchange for a payment of \$21,000.00 per month and \$2,100.00 per flight hour for use of "the LEAR 60, Astra, or its equivalent Mid Jet." Exh. A-5 at 1. The agreement specifically mentioned BDR as the primary airport for the flights.<sup>10</sup>

Inspector Abbott also identified copies of several flight logs and invoices, all concerning the 16 flights at issue. Inspector Abbott testified that he obtained the flight logs from a computer disk supplied by Jonathan Ottney, the former director of operations for JetSmart whom the FAA later hired as an aviation safety inspector at the Rochester FSDO. Inspector Abbott stated that the flight logs on the disk were from the records JetSmart kept in CharterLog, which is a software program for logging flights, maintenance, and other information. According to Inspector Abbott, the paper copies of the flight

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into BDR] were being operated under Part 91 operating rules. The above were told that the customer was leasing the aircraft and had a lease in place allowing the aircraft to operate under part 91 when it was flown.

<sup>10</sup> The agreement states, "[u]nless otherwise agreed to in writing by the parties, JetSmart will provide all aircraft to be supplied to Vertrue hereunder using Sikorsky Memorial Airport in Stratford, Connecticut as a start point/base for the purposes of calculating flight hours hereunder." Id.

logs, printed from CharterLog, all show the initials of the person who released the flight alongside "91," indicating that the flight was conducted under 14 C.F.R. part 91. Many of the flight logs contained the initials "jh," meaning Respondent Howe, and some contained the initials "md," meaning Michael DePasquale, who was JetSmart's part-time chief pilot in 2008. Inspector Abbott also identified copies of the invoices for the flights, which included attached itineraries showing the flights logged as "other commercial," while the "Part 135" column is blank. Inspector Abbott stated that "other commercial" indicated the flights were logged as part 91 flights. Tr. at 58. Inspectors Abbott and Holliday acknowledged JetSmart did not have FAA approval for an electronic recordkeeping system, and, therefore, paper copies of flight logs and crew duty records fulfilled JetSmart's recordkeeping obligations.<sup>11</sup> Nevertheless, both testified that they had no reason to question the veracity of the "91" entry on the records the FAA obtained from CharterLog.

The Administrator also called Allan Greco, Rachel Bernacki, and Mr. DePasquale to testify. Mr. Greco held the position of

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<sup>11</sup> The parties agreed that the retention period for the paper copies of the flight logs and duty records had expired prior to the start of the FAA investigation; therefore, JetSmart had permissibly disposed of the paper records before the Administrator charged respondents. With regard to the invoices, Inspector Holliday testified that he obtained copies of the invoices for the flights from Vertrue.

captain in the Learjet 60 at JetSmart, and Ms. Bernacki served as a first officer of the LearJet 60. Mr. Greco recalled the process in which JetSmart scheduled and dispatched trips, and stated that, after the scheduling occurred, either Respondent Howe or Mr. DePasquale would release the trip. Following the approval, Mr. Greco stated that he would complete paperwork and enter information into the CharterLog system. After the flight, Mr. Greco testified that he would go to JetSmart's office and close out the flight plans in the CharterLog system. Mr. Greco's understanding was that he should complete the flights into BDR under part 91, and that he would not have operated the flights under part 135, because the runway at BDR was not long enough to accommodate a 135 operation. Tr. at 116-17. Ms. Bernacki's testimony corroborated Mr. Greco's testimony; Ms. Bernacki testified that she had never operated a LearJet 60 into BDR under part 135, and that she verified this fact by reviewing her own personal trip logs.

Mr. Greco further testified that the flight logs contained no information concerning the load manifest or weight and balance calculations, which would be required under part 135, but not part 91. Mr. Greco acknowledged that certain information at the top of the flight log pages printed from CharterLog contained incorrect entries in the fields for airframe hours, aircraft landings, and engine hours/cycles.

Mr. Greco also acknowledged that the CharterLog records did not list any maintenance discrepancies, which was somewhat unusual, but explained the pilots would typically hand-write discrepancies, and maintenance would later log them in.

Mr. DePasquale testified that, as the chief pilot for JetSmart in 2008, his job was to oversee pilot records and ensure that the proper crewmembers were assigned to each trip. Mr. DePasquale stated that a flight could not be released under part 91 unless he or Respondent Howe first approved of the operation. Mr. DePasquale recalled that two pilots informed him that operating a LearJet 60 into BDR under part 135 was impermissible. After this conversation, Mr. DePasquale stated that he calculated the required relevant distances and determined that it was "almost impossible" to comply with the runway length requirements under part 135 at BDR. Tr. at 171. Mr. DePasquale testified that he informed Respondent Howe of this issue, and recalled, "I think [Respondent Howe] said let me take a look at it." Tr. at 172. Mr. DePasquale stated that, with Respondent Howe's agreement, he subsequently refused to conduct LearJet 60 flights into BDR, and that they began operating flights under part 91 to avoid the runway length issue.<sup>12</sup> Mr. DePasquale also recalled that, at the direction of

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<sup>12</sup> Specifically, Mr. DePasquale described the flights as follows:

the FAA, it was customary at JetSmart for someone with "operation[al] control"—either Respondent Howe or Mr. DePasquale—to review the crew duty records every month for accuracy and sign them. Tr. at 176–77 (referring to Exhibit A-24, which is a record of Mr. Greco's flights in November 2008).

At the conclusion of Mr. DePasquale's testimony, the Administrator called Mr. Ottney to testify. Mr. Ottney described his calculations concerning the necessary runway length for operation of a LearJet 60 under § 135.385, and opined that the length required exceeded the length of all runways at BDR. Mr. Ottney also provided testimony during the rebuttal phase of the Administrator's case, in which he again described his calculations, and recalled Respondent Howe approaching him about flying under part 91 rather than 135 for a flight to the Caribbean, to avoid the runway length issue. Tr. at 641.

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(..continued)

A. ... I don't know how it was brought to my attention, but I noticed that it was -- Vertrue had a flight scheduled in the airplane going from Bridgeport to -- I don't know where it was going, but they were a charter customer.

Q. Where did you notice that?

A. On the schedule.

Q. Okay. This would be --

A. I don't remember if I saw it on a trip sheet or I saw it on a board or somewhere. I don't remember how I saw it. And that's when I asked [Respondent Howe] about it, and he told me that Vertrue was leasing the airplane from the owner so they could fly the airplane 91 now and go in and out of Bridgeport, meaning non-charter. It wasn't a charter trip anymore. They were considered an owner.

Tr. at 174.

Mr. Ottney further testified that someone at JetSmart had told him that N179LF was the "cash cow" of JetSmart's fleet. Tr. at 651. Mr. Ottney denied having sent the anonymous correspondence to the Rochester FSDO concerning JetSmart.

Following the Administrator's case-in-chief, Respondent Howe testified on his own behalf. He emphasized that the invoice records the Administrator produced show a federal excise tax that Vertrue paid for the flights at issue, indicating that they occurred under part 135, as the tax does not apply to operations under part 91. Respondent Howe denied authorizing any of the flights at issue to occur under part 91, and denied instructing any pilots to conduct the flights at issue under part 91. When Respondent Howe took the stand again at the end of his rebuttal case, he testified he was aware that some pilots had expressed concern about operating the LearJet 60 into BDR. In response to inquiries from the law judge, Respondent Howe testified that he did not release any of the flights at issue, and that he assumed Mr. DePasquale did so, even though Mr. DePasquale was a part-time employee who worked in Rochester, rather than JetSmart's other office in Bridgeport. Respondent Howe explained that he did not review any of the flight releases, and speculated that the logging of the flights as part 91 operations "was an error, a mistake." Tr. at 542.

Respondent Howe claimed he did not release any of the flights that contained his initials on the CharterLog flight log records. He acknowledged that one CharterLog record indicated that he and Mr. Greco were the crewmembers on Flight No. 3169 from BDR to Seattle, from Seattle to Victoria, British Columbia, and back to BDR, but stated the entries indicating that Mr. Greco and Respondent Howe took turns between functioning as captain and first officer may not have been correct. Exh. A-13. Respondent Howe recalled that Mr. Greco entered the information for Flight No. 3169, and that the notation "md" alongside "91" on the log indicated Mr. DePasquale had released the flight. Concerning the records from CharterLog, Respondent Howe explained that the flight times at the top of the documents remain the same when printed out. He further testified that the CharterLog system was not secure, as employees shared passwords. Respondent Howe asserted that the CharterLog records were not kept to show compliance with the regulations.

With regard to JetSmart's relationship with Vertrue, Respondent Howe testified that Vertrue was a charter customer, and did not have "a lease or other type of ownership interest" in N179LF. Tr. at 347. He stated that the flights JetSmart conducted for Vertrue were charter flights under part 135. He acknowledged that the invoices indicated the flights were logged in the "other commercial" category, and admitted that he signed

these documents, but stated that they were not accurate, and that he did not carefully review them before signing them. Tr. at 393–95. Respondent Howe testified that characterizing N179LF as the “cash cow” of the fleet was incorrect, and stated that there was little pecuniary difference between N179LF and the Astra that JetSmart also operated for Vertrue.

Respondents also called Dana Carlton, who was JetSmart’s director of maintenance, as well as Joann Brickley, who was JetSmart’s chief financial officer, to testify. Mr. Carlton provided the engine times from the official aircraft logbooks and Pratt and Whitney data, to compare to the incorrect listings for this information in the CharterLog records. Ms. Brickley testified that the invoices she completed for the flights at issue reflect that Vertrue was a charter client, and that the inclusion of the taxes listed in the invoices further indicated that the flights at issue were charter flights. Ms. Brickley stated that she was involved in the scheduling and the billing for the flights. In response to questions from the law judge, Ms. Brickley recalled that one of the directors of operations (either Respondent Howe or Mr. DePasquale) would need to release the flights that Ms. Brickley scheduled, and that she could not recall specifically who released each flight. Ms. Brickley further stated that JetSmart’s costs for operating N179LF were fixed. Tr. at 518.

Respondents also provided the testimony of James North, a self-employed software developer who authored CharterLog. Mr. North stated that he did not intend CharterLog to maintain FAA-approved electronic records, but instead developed the software to assist small operators in generating paperwork for their flights. Mr. North explained that anyone accessing CharterLog could alter data, and opined that, with regard to the copies of the flight logs at issue, the airframe and engine hour entries on each paper record did not change because aircraft records do not update unless "the flight log is closed." Tr. at 466-67. Mr. North speculated that the flight logs the Administrator had entered into evidence may not have been closed in sequence, thus accounting for the inconsistencies and variation in airframe hours, number of aircraft landings, and engine cycles.

In rebuttal, the Administrator called Thomas McCormick, an aviation safety inspector from the Rochester FSDO, who, as a long-time user of CharterLog while the director of maintenance at a part 135 charter airline, provided expert testimony concerning CharterLog. Mr. McCormick utilized a computer to access certain CharterLog records while testifying, and stated that the data showed that Respondent Howe might not have modified the flight log records at issue, but that the software showed he was the last person to access the records on several

of the flights at issue. Tr. at 570. The Administrator also recalled Messrs. DePasquale and Ottney, who testified concerning JetSmart's attainment of an ARG/US rating.<sup>13</sup>

At the conclusion of the 5-day hearing, the law judge issued an oral initial decision, in which he made specific credibility findings with regard to all witnesses. In particular, the law judge determined that the Administrator's evidence showed that Respondent Howe falsified the flight logs at issue when he documented the flights as part 91 flights; specifically, the law judge rejected respondents' argument that the CharterLog records were unreliable, on the basis that, "[t]here is no information that [the JetSmart database] has been manipulated in any way that would render it unreliable." Initial Decision at 734. The law judge instead concluded that several documents showed Respondent Howe was the last person to open the documents and make any changes. The law judge made a credibility finding adverse to Respondent Howe, and in favor of Mr. Greco. The law judge cited Hart v. McLucas<sup>14</sup> as the

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<sup>13</sup> Aviation Research Group/United States, Inc. is an independent group that performs on-site safety audits, and provides ratings of "platinum," "gold plus," and "gold" to operators that meet certain standards.

<sup>14</sup> 535 F.2d 516, 519 (9<sup>th</sup> Cir. 1976) (citing Pence v. United States, 316 U.S. 332, 338 (1942) for the falsification standard that the Board has used for intentional falsification cases, in which the Board has held the Administrator must prove that a certificate holder: (1) made a false representation, (2) in

instructive case concerning falsification charges, and provided the following analysis concerning the third prong of the Hart test:

The evidence establishes that the flight was a Part 135 flight. It was billed as a 135 flight and payment for that flight was collected as a 135 flight. Taxes were collected and paid to the federal government as a 135 flight. Yet the flight duty record, which [respondent] signed, indicates that it was a Part 91 flight. It is logged in that record as another commercial flight and not a Part 135 flight. Mr. Howe testified he did not carefully review the document before he signed it.

I did not find Mr. Howe's defense of carelessness to be credible. I find the evidence before me established by a preponderance of evidence that Mr. Howe made a false entry on his flight duty log. He had the opportunity to correct it. He had the knowledge to correct it. It was his responsibility to correct it and he did not. He offered no explanation on direct or cross-examination as to why the flight log indicates the flight was flown as a Part 91 flight.

Initial Decision at 747. Concerning the Administrator's allegation that respondents also violated §§ 135.385(b) and (d), the law judge determined that the Administrator did not provide sufficient evidence to prove those charges, as the Administrator failed to gain admission into evidence the documents on which Mr. Ottney relied for his calculations.

Respondents' argument on appeal principally focuses on the alleged unreliability of the CharterLog records. Respondents

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reference to a material fact, (3) with knowledge of the falsity of the fact).

assert, "[t]he 'flight logs' which served as the basis for the Administrator's case did not come from the compliance file. They were not the original records, but were computer-generated re-creations generated by JetSmart's CharterLog software program." Appeal Br. at 7. Respondents' appeal brief also includes a statement that JetSmart was poorly organized and managed.<sup>15</sup> Respondents allege, however, that the law judge erred in his findings of fact, as they were not supported by and were contrary to the evidence, and that the law judge's conclusions of law were not made in accordance with Board precedent and policy. With regard to the disputed factual conclusions, respondents contend that Respondent Howe was never aware of the flight log entries, as Mr. Greco prepared the flight logs at issue. Respondent Howe further contends that he was unable to locate any releases in his Echo-Sign log,<sup>16</sup> even though he found other flights that he had authorized in 2008. Respondent Howe admits that he signed his own flight duty record for September 2008, indicating that he accumulated 17.7 "other commercial" flight hours, but he contends that Mr. Ottney gave him the form

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<sup>15</sup> Id. at 9 (stating that, "there were no clear lines of authority, direction and communication for the release of flights and recordkeeping was not being particularly well handled").

<sup>16</sup> The record established that Echo Sign is an e-mail or text message system in which pilots receive flight releases.

to sign, and that he did not review it before signing it.

Exh. A-15. Respondents further admit that the flight log for Flight No. 3169 does not contain a manifest entry, but assert that Mr. Greco did perform the weight and balance calculations, as part 135 requires. Concerning the disputed legal conclusions, Respondent Howe compares the facts of his case to those of Hart v. McLucas, and argues that, in Hart, the Ninth Circuit found the respondent's defense of carelessness excused the respondent of liability for a falsification violation. The Administrator contests each of respondents' arguments, and urges us to affirm the law judge's decision.<sup>17</sup>

We do not believe the law judge incorrectly assessed the facts in this case. The law judge's decision includes a detailed review of the relevant testimony and exhibits, as well as specific credibility findings for each witness. Many of the arguments in respondents' appeal brief concerning the law judge's theoretical erroneous findings of fact simply include a comparison between Respondent Howe's self-serving testimony and the testimony and exhibits the Administrator presented.

The law judge and the parties correctly enunciated our three-part test for intentional falsification. In their brief, respondents concede that the Administrator's evidence

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<sup>17</sup> We note that the Administrator originally also filed a notice of appeal of the law judge's decision, but later withdrew the appeal.

established the first two prongs under Hart of a false entry that was material. Respondents' legal defense, however, focuses on the third prong, concerning Respondent Howe's knowledge at the time of the false entry. For this element, respondents ostensibly assert that, while Respondent Howe did not carry out the duties as director of operations at JetSmart in the most consistent or responsible manner, his lack of organizational skills and failure to review the records at issue do not amount to a violation of § 61.59(a)(2). The law judge, however, rejected this defense, based upon his finding that Respondent Howe's testimony in furtherance of this defense was not credible, was inconsistent, and was contradictory.

We have long held that the Board's law judges are in the best position to evaluate witnesses' credibility.<sup>18</sup> We have also held that credibility determinations are "within the exclusive province of the law judge," unless the law judge has made the determinations "in an arbitrary or capricious manner."<sup>19</sup> In this regard, the Board is free to reject testimony that a law judge has accepted when the Board finds that the testimony is inherently incredible or inconsistent with the overwhelming

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<sup>18</sup> Administrator v. Taylor, NTSB Order No. EA-4509 at 7 (1996) (stating that, "the law judge sees and hears the witnesses, and he is in the best position to evaluate their credibility").

<sup>19</sup> Administrator v. Kocsis, 4 NTSB 461, 465 n.23 (1982); see also Administrator v. Smith, 5 NTSB 1560, 1563 (1986); Administrator v. Sanders, 4 NTSB 1062 (1983).

weight of the evidence.<sup>20</sup> Therefore, where parties challenge a law judge's credibility determinations, the Board will not reverse the determinations unless they are arbitrary, capricious, or clearly erroneous.<sup>21</sup>

We are mindful that we recently clarified our application of the three-prong Hart standard to cases in which the Administrator has alleged a respondent intentionally falsified a document. In Administrator v. Dillmon, NTSB Order No. EA-5528 (2010), after remand Dillmon v. NTSB, 588 F.3d 1085, 1094 (D.C. Cir. 2009), we instructed law judges to make specific factual findings—especially with regard to credibility—when a respondent asserts he or she misunderstood a document. In the case at issue, the law judge adhered to this instruction, making very specific credibility findings as to all witnesses, and finding that Respondent Howe's testimony that he did not intend to include references to part 91 on the flight logs and flight duty records was not credible. The law judge made specific findings of fact regarding the evasive and contradictory nature of Respondent Howe's testimony in support of the law judge's conclusion that Respondent's Howe testimony was not credible and, as a result, that the third-prong of Hart was met in this

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<sup>20</sup> Administrator v. Blossom, 7 NTSB 76, 77 (1990) (citing Administrator v. Powell, 4 NTSB 640 (1982), and Administrator v. Klayer, 1 NTSB 982 (1970)).

<sup>21</sup> Smith, supra note 19, at 1563.

case. For example, in addition to the findings that Respondent Howe had the opportunity to correct the records, but did not, the law judge also stated as follows, with regard to Flight No. 3169:

As captain of the flight and as the president of JetSmart and as director of operations, as the sole owner of the company, I have no evidence that would lead me to believe that [Respondent Howe] did not review the flight logs or that he knew the flight was being flown as Part 91. It is hard to believe that he would not have reviewed the flight log that he was using to document the flight and show any problems with the plane or document any problems with the plane. I therefore also find that Mr. Howe made a false representation as to the flight log at A-13 in this case.

Initial Decision at 748. We have carefully reviewed the record, and agree with the law judge's conclusion. We find no reason to disturb the law judge's credibility findings, as they were not arbitrary, capricious, or contrary to law. Likewise, we find the law judge's findings of fact and conclusions of law regarding the falsification to be correct.

We also believe the law judge's assessment did not contravene the analysis of the Hart case. Respondents' argument that Hart is controlling in this case and requires us to grant the appeal, based on the assertion that Respondent Howe's carelessness excuses the inaccurate records, fails based on the law judge's credibility assessment here. In Hart, the law judge found the respondent's carelessness defense to be credible. In

contrast, in this case, the law judge specifically rejected this argument. Tr. at 747. We have recently reemphasized credibility as an important consideration in falsification cases,<sup>22</sup> and, in general, we defer to law judges' credibility determinations. Therefore, we do not find respondents' carelessness argument to be persuasive.

To the extent that respondents assert the CharterLog records are unreliable, we do not find this defense exonerating. Even if the CharterLog software, or someone logging into the CharterLog system, somehow altered the records to show that the flights were conducted under part 91,<sup>23</sup> it is uncontroverted that no load manifests exist for the flights as would be required under part 135. Further, we find the law judge correctly noted that the inaccuracies in the logbooks went to the weight, and not the admissibility, of the documents. Therefore, we conclude

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<sup>22</sup> Administrator v. Angstadt, NTSB Order No. EA-5421 (2008), *pet. for review denied*, Angstadt v. FAA, No. 09-1005, 348 Fed.Appx. 589 (D.C. Cir. Sept. 24, 2009) (per curiam).

<sup>23</sup> We agree with the law judge's finding that although respondents alleged throughout the hearing that someone was logging into the system and manipulating the data, there was no actual evidence of any manipulation or tampering with the system. To the contrary, Inspector McCormick's testimony showed Respondent Howe was the last person to log into many of the records at issue. Additionally, while all parties agreed a software glitch existed that caused the airframe hours, number of aircraft landings, and engine cycles to carry over from record to record, there was no evidence that such a glitch existed as to the remainder of the information entered into the electronic logbook.

that the non-existence of load manifests along with the testimony of the witnesses regarding the operating procedures of JetSmart are factors that support the law judge's findings.

We recognize the Administrator's original complaints alleged specific violations of certain part 135 regulations concerning necessary runway lengths. At the hearing, however, the evidence the Administrator presented focused more on the falsification allegation against Respondent Howe than the part 135 regulations. As explained above, the Administrator withdrew the §§ 135.63(c) and 135.385(d) violations against Respondent Howe, and the law judge subsequently found the Administrator failed to prove the § 135.385(b) violation against Respondent Howe. Similarly, the law judge determined the Administrator did not prove Respondent JetSmart violated §§ 135.385(b) or (d). The Administrator did not perfect an appeal concerning these determinations, and we therefore do not believe a discussion of the merits of these allegations or any other issue in this opinion is necessary.

We also affirm the law judge's imposition of the sanctions.

**ACCORDINGLY, IT IS ORDERED THAT:**

1. Respondents' appeal is denied;
2. The law judge's decision is affirmed; and

3. The Administrator's emergency revocation of Respondent Howe's ATP certificate, as well as JetSmart's air carrier certificate, is affirmed.

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

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

\* \* \* \* \*

In the matter of: \*

J. RANDOLPH BABBITT, \*

ADMINISTRATOR, \*

Federal Aviation Administration, \*

Complainant, \*

v. \* Docket No.: SE-19000

JETSMART, INC. and \* SE-19001

JAMES CHARLES HOWE, \* JUDGE MONTAÑO

Respondents. \*

\* \* \* \* \*

General Services Administration  
26 Federal Plaza  
Courtroom 238  
New York, New York 10278

Friday,  
January 14, 2011

The above-entitled matter came on for hearing, pursuant  
to Notice, at 2:04 p.m.

BEFORE: ALFONSO J. MONTAÑO  
Administrative Law Judge

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ORAL INITIAL DECISION AND ORDER

ADMINISTRATIVE LAW JUDGE MONTAÑO: This is the oral initial decision and order. This is a proceeding under the provisions of 49 U.S.C. Section 44709, formerly Section 609, of the Federal Aviation Act, and the provisions and the Rules of

1 Practice in Air Safety Proceedings of the National Transportation  
2 Safety Board.

3 This case involves two appeals which have been  
4 consolidated for this hearing. James Charles Howe, as president  
5 and sole owner of JetSmart, appealed the Administrator's Emergency  
6 Notice of Revocation dated December 3, 2010. James Charles Howe,  
7 as an individual and a management official for JetSmart and sole  
8 owner of JetSmart, appealed the Administrator's Emergency Notice  
9 of Revocation dated December 14, 2010.

10 Pursuant to 821.55(a) of the Board's Rules, these  
11 emergency orders serve as the complaints in this case, and as  
12 noted, the Administrator has revoked JetSmart's air carrier  
13 certificate and has revoked James Howe's airline transport pilot  
14 certificate and any other airman pilot certificate he holds.

15 This matter has been heard before me as an  
16 Administrative Law Judge for the National Transportation Safety  
17 Board, and as required by the Board's Rules in emergency  
18 proceedings, I am issuing a bench decision in these proceedings.

19 Pursuant to notice, this matter came on for trial on  
20 January 10 through 14, 2011 in New York City. The Administrator  
21 was represented by his legal counsel, Robert Spitzer and Stephen  
22 Brice. Mr. Howe and JetSmart were represented by Mr. Michael  
23 Dworkin and his associate, John T. Van Geffen. The parties were  
24 afforded full opportunity to offer evidence, to call, examine and

1 cross-examine the witnesses and to make arguments in support of  
2 their respective positions. Mr. Howe is a Respondent and, as a  
3 management official and the sole owner of JetSmart, has been  
4 present throughout this hearing.

5 I will not discuss all of the evidence in detail because  
6 there indeed has been a lot of evidence in this case, but I have  
7 considered all the evidence. I've gone through it a number of  
8 times, and that evidence which I do not specifically mention is  
9 viewed by me as being either corroborative or not materially  
10 affecting the outcome of the decision.

11 As far as the agreements in this case, in his response  
12 to the Administrator's Emergency Order of December 3rd, Mr. Howe,  
13 as the sole owner of JetSmart, admitted the following paragraphs  
14 of the Administrator's complaint: 1, 2, 3, 4, 5, 6, 9 and 11.  
15 Accordingly, the matters set forth in those paragraphs in the  
16 complaint are deemed established for purposes of this decision.  
17 As to all other paragraphs in the complaint, the Respondent denied  
18 or Respondent indicated he did not have sufficient information or  
19 belief to respond to the allegations.

20 In his response to the Administrator's Emergency Order  
21 of December 14, Respondent admits the following paragraphs of the  
22 Administrator's complaint: 1, 2, 3, 4, 5, 6, 7, 8, 12 and 22.  
23 Accordingly, the matters set forth in those paragraphs of the  
24 complaint are deemed established for purposes of this decision as

1 well. As to all the other paragraphs of the complaint or this  
2 specific complaint, the Respondent denied the allegations or  
3 responded that he did not have sufficient information or belief to  
4 respond to those allegations.

5 As to the exhibits in this case, the Administrator moved  
6 for the admission of exhibits that were applicable to both cases.  
7 I admitted into evidence the following Administrator's exhibits:  
8 Exhibit A-1 through A-8, Exhibit A-10 through A-32, Exhibit A-37,  
9 Exhibit A-40 and Exhibit A-42. The record will reflect that the  
10 admissions of some of these exhibits were over the objection by  
11 Respondent.

12 Respondent moved for the admission and I admitted into  
13 evidence Respondent's Exhibits R-1 through R-7, R-8, R-12, R-14,  
14 R-19, R-25 and R-29. Those exhibits were admitted without  
15 objection from the Administrator.

16 As far as the testimony is concerned in this case, the  
17 Administrator presented the testimony of Mr. Lee Abbott, aviation  
18 safety inspector; Mr. Allan Greco, a former pilot for JetSmart;  
19 Rachel Bernacki, a former pilot for JetSmart; and Michael  
20 DePasquale, a former chief pilot for JetSmart. Chris Holliday,  
21 federal aviation inspector, was offered and qualified as an expert  
22 as to the regulatory requirements for participation under Part 135  
23 of the Federal Aviation Regulations without objection. Jon Ottney  
24 was qualified as an expert witness in the Learjet 60 aircraft

1 without objection. Mr. Tom McCormick for the Administrator was  
2 also qualified as an expert in the Charter Log Software System  
3 without objection from the Respondent.

4 Respondent presented the testimony of Mr. James Howe,  
5 Respondent and also the president and sole owner of JetSmart.  
6 Also presented the testimony of Ms. Joann Brickley who is the  
7 chief financial officer for JetSmart. And we heard testimony also  
8 from Mr. Dana Carlton, who is the director of maintenance for  
9 JetSmart. Mr. James Francis North, the person who created Charter  
10 Log, has also testified for the Respondent.

11 I am going to discuss briefly an overview of the issues  
12 in the case at this point. The Administrator alleges that  
13 Mr. Howe, as chief operations officer and sole owner of JetSmart,  
14 instructed pilots in JetSmart's employ to conduct the 16 flights  
15 alleged in the Emergency Order of Revocation as though they were  
16 Part 91 flights. The Administrator alleges that the 16 flights  
17 were, in fact, Part 135 passenger-carrying flights that could not  
18 be completed legally, as the flights were required to land at  
19 Bridgeport, Connecticut airport, or as it is also known, BDR.

20 As 135 flights, the 16 flights were required to meet a  
21 higher standard of safety for its passengers. The Administrator  
22 alleges that the runway at BDR is not long enough to permit 135  
23 operation in the Learjet 60, and the Administrator alleges that  
24 the Respondent represented to the pilots that the flights could be

1 flown under Part 91 because one of its clients called Vertrue, for  
2 which all of the 16 flights were conducted, had a lease agreement  
3 with the owner of the Learjet 60, which is identified by its tail  
4 number N179LF. The lease agreement rendered Vertrue an owner and  
5 thus permitted the flights to be conducted under Part 91.

6 The Administrator investigated and Administrator's  
7 investigation disclosed that there was no such lease between  
8 Vertrue and the owner of the Learjet 60. The Administrator  
9 maintains that the Respondent's misrepresentation caused the  
10 pilots that flew the 16 flights to falsify flight logs and flight  
11 duty records which are relied upon by the Administrator to ensure  
12 compliance with Part 135 of the Federal Aviation Regulations. The  
13 Administrator alleges that Mr. Howe himself was a required crew  
14 member on one of the flights in issue as well.

15 I will first address the issue of the JetSmart documents  
16 that have been admitted into evidence in this case. It has been  
17 Respondent's contention throughout these proceedings that the  
18 flight logs and the flight duty records introduced by the  
19 Administrator and admitted into evidence to prove his case are  
20 unreliable. The Respondent maintains and elicited through  
21 witnesses' testimony that JetSmart is not approved for electronic  
22 or computerized method of showing compliance to the FAA. During  
23 the period of time in issue, September of 2008 through December of  
24 2008, JetSmart was on a paper compliance reporting system.

1 JetSmart had to keep paper copies of flight logs for 30 days and  
2 flight duty records for 12 months in order to comply with the FAA  
3 requirements.

4           It is not in dispute that the JetSmart paper compliance  
5 records are printed out of JetSmart's Charter Log computer system.  
6 It is also not disputed that JetSmart provided its Charter Log  
7 database to the Administrator. The Administrator printed out the  
8 flight logs that had been admitted into evidence in this case from  
9 the JetSmart Charter Log database.

10           Respondent argues that because the Administrator  
11 produced copies of the flight logs printed from the Charter Log  
12 database, these flight logs are not true copies of the flight logs  
13 that were produced by JetSmart because those original paper copies  
14 had long since been destroyed. Further, Respondent argues that  
15 the flight duty records produced by the Administrator are also  
16 unreliable because the Charter Log system merely transferred  
17 erroneous data from flight logs to the flight duty records.

18           Listed among one of Mr. Howe's and JetSmart's  
19 affirmative defenses is that certain flight logs upon which the  
20 complaint relies are not only inaccurate but were prepared by  
21 persons whose employment relationship with the Respondent had been  
22 terminated and that such persons prepared said flight log  
23 information with the intent of causing harm to Respondent,  
24 Mr. Howe and JetSmart. Throughout the hearing, Respondent has

1 asked questions of witnesses seeking to establish that Charter Log  
2 program can be accessed improperly or illegally and that the data  
3 can be manipulated. Respondent asked witness after witness about  
4 the fact that in all of the flight logs in evidence the airframe  
5 hours, aircraft landings and engine cycle numbers remain the same.  
6 Respondent maintains that that fact should render the documents  
7 unreliable. Respondent points out that the Administrator's own  
8 expert on the Charter Log system testified, when referring to a  
9 record that he was reviewing, that "this doesn't make sense."

10           Mr. Howe himself during testimony under oath would not  
11 acknowledge that the records in evidence were JetSmart records.  
12 He, in fact, denied the logs were JetSmart records, and he  
13 answered questions to the effect that assuming the document is a  
14 JetSmart record.

15           Respondent argues that the flight log documents are the  
16 very foundation of the Administrator's case, and as such, the  
17 Administrator's case is unreliable. These documents, Respondent  
18 maintains, are unreliable because they have been manipulated,  
19 tampered with, falsified, and as such, the Administrator's case  
20 must fall.

21           In closing argument, Respondent posed the question,  
22 "Well, who would manipulate these records?" That remains unclear  
23 and it remains a mystery. I heard no evidence or witnesses from  
24 the Respondents to testify that the documents produced and relied

1 upon by the Administrator were falsified, manipulated or falsely  
2 created.

3           Respondent produced Mr. James North, the person who  
4 created and developed the Charter Log program, to testify. Mr.  
5 North testified that the same airframe hours, aircraft landing and  
6 engine hour cycles could be on the same or numerous documents if  
7 the documents were printed out on the same day without having  
8 previously been closed or the previous record having been closed.  
9 This confirms the testimony of the Administrator's witnesses Mr.  
10 Abbott and Mr. Holliday. Both of these witnesses argued or were  
11 under the belief that the reason the airframe and the other  
12 numbers at the top of the documents remained the same was because  
13 they were printed out on the same day.

14           Respondent's own director of maintenance, Mr. Dana Allen  
15 Carlton, testified that while he is not really sure, but he  
16 thought that the same hours for aircraft landing and engine cycle  
17 times could appear on a number of documents if they were printed  
18 out at the same time, or to be more precise, he indicated they  
19 could remain the same when the document was printed out or the  
20 documents were printed out.

21           As to the testimony of Mr. McCormick and his comment  
22 that "this doesn't make sense", I believe that when he made that  
23 comment, as I was sitting here and he was reviewing documents, he  
24 was making the comments in reference to maintenance documents in

1 the JetSmart Charter Log database that the Respondent's counsel  
2 had asked him to pull up. He was not making that statement, in my  
3 belief, in reference to the flight logs or flight duty records or  
4 data system. The maintenance data system is not an issue in this  
5 case.

6           When I asked him how confident he was of the  
7 information, he said, well, as confident as the information put  
8 into the database. This database was presented by JetSmart to the  
9 Administrator. It is their information. It is their documents.  
10 There is no information that it has been manipulated in any way  
11 that would render it unreliable. Mr. McCormick actually called up  
12 a number of documents which showed that the last person to open  
13 the documents and make any changes to the documents was Mr. Howe  
14 himself.

15           Facts established at trial is that the Charter data  
16 system was provided to the Administrator by JetSmart. It was  
17 delivered with no qualification, explanation or caveats by  
18 JetSmart that I have heard. Mr. Howe himself provided original  
19 duty records marked as Exhibits A-24, A-25, A-28, A-29, A-15 and  
20 A-18. However, at hearing Mr. Howe maintained that even those  
21 original documents, which he was required to keep for 12 months,  
22 are also false, as the information provided in them was merely  
23 transferred by the Charter Log system from the flight logs to the  
24 flight duty logs.

1           After considering the arguments and considering the  
2 evidence before me, I did not find that the arguments or the  
3 testimony of Mr. Howe as to the reliability of the flight logs and  
4 flight log duty logs in evidence to be credible or persuasive. I  
5 find that the documents offered by the Administrator are reliable  
6 and that I can rely upon them to make my decision in this case.

7           I will now turn to the issue of falsification in this  
8 case. As noted, the Administrator's case rests entirely upon the  
9 allegation of falsification in this case. In the Administrator's  
10 December 14, 2010 Emergency Order of Revocation sent to Mr. Howe,  
11 the Administrator maintains that Mr. Howe violated Section  
12 61.59(a)(2), which states that "No person may make or cause to be  
13 made any fraudulent or intentionally false entry in any logbook,  
14 record or report that is required to be kept, made or used to show  
15 compliance with any requirement for the issuance or exercise of  
16 the privilege of any certificate, rating or authorization under  
17 this part."

18           The Administrator's December 3, 2010 Emergency Order of  
19 Revocation addressed to the president of JetSmart, Inc. The  
20 Administrator alleges in allegation number 7 that James Howe  
21 entered or caused to be entered in the flight log information that  
22 flight segments were conducted under Part 91 of the Federal  
23 Aviation Regulations. Allegation number 8 alleges that at the  
24 time the information was entered in the flight log for each flight

1 described, paragraph 5 of the complaint, that James Howe knew that  
2 the flight was or was to or did transport passengers for  
3 compensation or hire. Allegation number 9 charges that JetSmart  
4 retained the flight log information for flights to show compliance  
5 with the FAR.

6           As the Administrator's counsel indicated upon my inquiry  
7 on closing argument, the revocation action in this case can only  
8 be supported if falsification is established. The Board has  
9 adhered to a three-prong standard to prove falsification claims.  
10 The Administrator must prove by a preponderance of reliable,  
11 probative and credible evidence that a pilot: One, made a false  
12 representation; two, that false representation was in reference to  
13 a material fact; and three, that false representation was made  
14 with the knowledge of the falsity of that fact. The three-part  
15 test arises from the case of Hart v. McLucas, 535 F.2d 516, 519  
16 (9th Cir. 1976). The Board has also held that a statement is  
17 false concerning material fact under the standard if the alleged  
18 false fact could influence the Administrator's decision concerning  
19 the certificate or compliance with regulations. The Board  
20 precedent has also held that falsification can be proven by  
21 circumstantial evidence.

22           In looking at the materiality of the documents in the  
23 record in issue first, the Administrator maintains that the flight  
24 logs and the flight duty time logs are documents which are relied

1 upon by the Administrator to determine if JetSmart and Mr. Howe  
2 were complying with Part 135 of the Federal Aviation Regulations.  
3 Aviation inspectors Lee Abbott and Chris Holliday confirmed this  
4 through their testimony at hearing, and Mr. Howe himself confirmed  
5 it in his testimony that these documents were compliance  
6 documents; these documents, of course, referring to flight logs  
7 and flight duty records. Thus, the records in issue I find are  
8 material.

9           Now that raises the question as to whether or not there  
10 was a false entry in these documents. The Administrator argues  
11 that the flight logs and the flight duty logs contain false  
12 entries in that they represent flights flown as Part 91 flights  
13 when in fact they were 135 charter flights. Flight logs represent  
14 that the 16 flights in issue are identified as other commercial  
15 flights and not correctly identified as Part 135 flights.

16           Inspectors Abbott and Holliday testified that their  
17 investigation disclosed that the 16 flights in issue were charter  
18 flights and were documented on the flight logs as Part 91 flights.  
19 JetSmart invoices in evidence for the flights showed that they  
20 were billed as Part 135 flights.

21           Pilot Allan Greco, who was a crew member or flew in each  
22 one of the 16 flights in issue, testified that he flew the flights  
23 as Part 91 because it was his understanding that Vertrue had a  
24 lease agreement with the owner of the Lear 60 N179LF, which would

1 render Vertrue owners and thus allow the flights to be flown under  
2 Part 91.

3           Respondent's witness Joann Brickley testified that  
4 Vertrue charter flights were always billed as 135 flights. The  
5 invoices in evidence included the appropriate federal tax which  
6 was charged to the client and then paid by JetSmart to the federal  
7 government. The evidence establishes that there were entries in  
8 the flight logs and flight duty records which do not correctly  
9 reflect the flight as Part 135 flights but rather 91 flights. So  
10 there are inaccurate entries in the record.

11           I have to determine whether or not Mr. Howe, as alleged,  
12 has made or has caused to be made any fraudulent or intentionally  
13 false entries in the records to determine that the Administrator  
14 has proven the first prong of the Hart v. McLucas standard. The  
15 Administrator, to prove that Mr. Howe caused to be made fraudulent  
16 or intentionally false entries in the records, called Mr. Allan  
17 Greco to testify. Mr. Greco is a Lear 60 jet captain who worked  
18 for JetSmart since spring of 2007. He holds an ATP certificate,  
19 has 1,900 hours of flight time, and he is rated in the Lear 45 and  
20 the Lear 60. Mr. Greco was a member, as I mentioned, of the  
21 flight crew in each of the 16 flights in issue.

22           He testified that a salesperson would receive  
23 information on a trip request. They would set it up, have it  
24 approved by Mr. Howe or Mr. DePasquale, the chief pilot. The

1 paperwork was generated by Charter Log and was sent to him from  
2 the Charter Log system. He testified that he filled out the  
3 information as to who released the flight and whether it was a  
4 Part 91 or a Part 135 flight. Mr. Greco testified that the flight  
5 release and whether the flight was to be flown under Part 135 or  
6 Part 91 was usually provided verbally. At the end of the flight,  
7 he filled out flight information on the Charter Log system and  
8 closed out the flight and locked in the numbers.

9 He testified he understood that flights for Vertrue in  
10 the Lear 60 could be flown into Bridgeport because Vertrue had a  
11 lease agreement with the owner, and that made them part owners of  
12 the aircraft, and therefore the flights could be flown as Part 91.  
13 He could not recall who specifically gave him that information or  
14 how it was relayed to him. He remembered discussing the lease  
15 agreement with a group of other pilots. He testified as to the  
16 flight documented on May 13, which is the flight in which Mr. Howe  
17 flew with him.

18 Mr. Greco testified that he would not fly a 135 flight  
19 in a Lear 60 into Bridgeport because he knew it was illegal as and  
20 runway was too short. He testified about the flights identified  
21 in flight logs marked as A-13, A-16, A-18, A-21, A-23, A-27 and A-  
22 30. Mr. Greco identified the types of flight, whether they were  
23 91 or 135, in the flight logs and who released the flight. He  
24 testified that they did not have load manifests on any of the 16

1 flights that he was a crew member on because under his  
2 understanding they were Part 91 flights.

3           On cross-examination, Mr. Greco confirmed that he had  
4 entered the data in the flight log as to who released the flight  
5 and how it was flown. He testified that Mr. Howe did not tell him  
6 to fly the 16 flights in issue. He did not remember speaking to  
7 Mr. Howe about the release of any of the flights in issue. He did  
8 not remember that Mr. Howe ever instructed him to fly any of the  
9 flights in issue as Part 91 flights. Mr. Greco testified he did  
10 not remember who told him about the lease agreement between  
11 Vertrue and the owners of the Learjet 60.

12           I found Mr. Greco's testimony to be credible. His  
13 testimony does not establish or demonstrate that Mr. Howe or  
14 JetSmart caused him to make false entries in the flight logs or  
15 the flight duty logs in issue in this case.

16           Rachel Bernacki was also called by the Administrator to  
17 testify. She flew as a pilot for JetSmart. She has an ATP  
18 certificate and 6,000 hours of flight time. She testified about  
19 her flight on September 8, 2008 from Bridgeport to Omaha and the  
20 return flight to Bridgeport. She flew with Mr. Greco on that  
21 flight. She identified Administrator's A-37, which is her  
22 personal copy of the flight log that she had printed out for her  
23 logbooks after the flight was completed. She testified that the  
24 flight log indicated that the flight was a Part 91 flight and

1 appeared from the document that Mr. Howe had released the flight  
2 by the initials in a data field that were part of the flight log.

3 Ms. Bernacki testified that there was no load manifest  
4 included in the flight log because the flight log was not a 135  
5 flight but rather a part 91 flight. She testified that the  
6 captain of the flight would fill out the load manifest for the  
7 flight.

8 On cross-examination, she testified she did not speak to  
9 Mr. Howe about the release of the aircraft for a Part 91 flight on  
10 September 8, 2008. She further testified she did not know how  
11 flights were released in general.

12 Her testimony was credible. However, her testimony does  
13 not establish or demonstrate that Mr. Howe or JetSmart caused her  
14 to make a fraudulent or intentionally false entry.

15 The Administrator also called Mr. Michael DePasquale.  
16 He was the chief pilot for JetSmart from August 15, 2008 to  
17 January 28, 2009. He testified that when he took the job he did  
18 not accept all of the responsibility of chief pilot as outlined in  
19 the general operating manual because he was still working for  
20 another employer at the same time. He testified that he  
21 essentially served as an intermediary between JetSmart in  
22 Bridgeport and the Rochester Flight Standards District Office. He  
23 described part of his responsibility as relating to updating  
24 flight and duty time records.

1           He described the procedure at JetSmart for setting up  
2 and releasing flights under Part 135 and Part 91. He indicated  
3 that a salesperson would inform him of a flight request. He would  
4 ensure crew pairing was appropriate and that the destination did  
5 not involve a high-risk airport. He testified that there was no  
6 formal procedure for releasing a flight under 135 or 91. He  
7 testified that he, Mr. Howe and Dana Carlton, director of  
8 maintenance, had the authority to release a flight.

9           However, on cross-examination he did admit that JetSmart  
10 did use e-mail or text system for release of flights called  
11 EchoSign. One of the two pilots assigned to a flight would fill  
12 out the flight log, which included the release and what type of  
13 flight the flight was supposed to take, either Part 91 or Part  
14 135. He testified more than once a pilot had inserted  
15 Mr. DePasquale's initials in a flight log as the person releasing  
16 the flight without telling Mr. DePasquale.

17           He testified that he had been consulted by pilots as to  
18 the flights under Part 91 and 135, and he testified his primary  
19 concern was to ensure pilot pairing and safety for the passengers  
20 on board. Mr. DePasquale testified that he had a conversation  
21 with pilots David Wakefield and Pat Curran who told him that they  
22 were uncomfortable with flying 135 flights into Bridgeport. They  
23 were uncomfortable because the runway was too short for 135  
24 flights.

1           He testified that he ran calculations of the length of  
2 the runway at Bridgeport, then spoke to Mr. Howe about it.  
3 Mr. Howe said he would look into it. Mr. DePasquale indicated  
4 later on he noticed a Vertrue flight on the schedule flying the  
5 Lear 60 out of Bridgeport and returning to Bridgeport, and that  
6 prompted him to speak to Mr. Howe. He testified that Mr. Howe  
7 told him that Vertrue had a leasing agreement with the owner of  
8 the Lear 60, which made them owners of the aircraft, so they as  
9 owners could fly out of Bridgeport under Part 91.

10           I do not believe Mr. DePasquale was sure as to the date  
11 that conversation when it took place. Mr. DePasquale testified  
12 that he had no reason to doubt what he was told by Mr. Howe about  
13 the lease. He testified that he informed the pilots of this  
14 conversation, but he does not really recall how that was done or  
15 when it was done. There was no testimony that he specifically  
16 informed Mr. Greco of his conversation with Mr. Howe.  
17 Mr. DePasquale did not testify as to which pilots he spoke to. He  
18 indicated there was no general meeting to make the announcement,  
19 and he testified he may have called them. However, he testified  
20 that it appeared clear to him that the pilots who flew the Lear 60  
21 were aware of the Vertrue lease agreement with the owners of the  
22 aircraft.

23           As to the flight and duty logs, he testified someone  
24 with operational control must review and sign the document. He

1 recognized the signature of Mr. Howe on one of the flight and duty  
2 logs. He testified that there was a winter operations meeting and  
3 135 flights into Bridgeport were discussed and it was prior to the  
4 period in issue in this case, but he did not really provide any  
5 more specific information about that.

6           Mr. DePasquale's testimony was at times vague, and he  
7 was unsure of dates. He was uncertain as to when he served as a  
8 chief pilot for JetSmart. While he testified he informed the  
9 pilots of his conversation with Mr. Howe, he was not sure how he  
10 informed them of that conversation. He did not testify nor was  
11 there evidence advanced that his conversation with Mr. Howe caused  
12 him to personally make any fraudulent or intentionally false  
13 entries in any records in issue in this case.

14           I cannot find his testimony to be reliable, and I am not  
15 convinced that his recollection of facts or events is accurate, as  
16 his testimony was vague on specifics. On that basis, I cannot  
17 find his testimony to be credible. That is not to say that I feel  
18 that he was fabricating. I just cannot find it credible based on  
19 the vagueness on questions about his recollection. The fact that  
20 he was essentially a part-time employee working 10 to 15 hours a  
21 week at JetSmart and he was employed elsewhere may account for the  
22 vagueness. Respondent argues that Mr. DePasquale is himself  
23 trying to avoid an action by the Administrator.

24           I did not make a finding on any one of those reasons,

1 but I do find that, as I have indicated, in any event, I cannot  
2 find that his testimony demonstrates or established that Mr. Howe  
3 caused him or any of the unidentified pilots he believed he  
4 communicated with to make any fraudulent or intentionally false  
5 statements relative to the documents for the flights in issue.

6 Mr. Howe, in his testimony, denied that he knew the  
7 flights were anything other than 135 flights. He testified he did  
8 not release any of the flights in issue, and while EchoSign system  
9 was only in place for a period of the time in issue, he had no  
10 documentation that he or anyone else released the flights in  
11 issue.

12 He denies that he told anyone to falsify records or  
13 documents to show that Part 91 flights were flown when, in fact,  
14 Part 135 flights were flown. He also denies that he had any  
15 conversations similar to that conversation described by  
16 Mr. DePasquale.

17 While the evidence indicates that there may have been a  
18 general understanding in the pilot lounges, the halls and the  
19 hangars at JetSmart that Vertrue flights were to be flown as  
20 Part 91 because of a lease agreement, the genesis or the origin of  
21 that general understanding has not been proven by the  
22 Administrator to be attributable to Mr. Howe. The Administrator  
23 has not produced evidence to demonstrate by a preponderance of the  
24 evidence that Mr. Howe caused any pilot or individual to make a

1 fraudulent or intentionally false entry. Based on all of the  
2 evidence before me, I cannot find that the Administrator has  
3 proven the first prong in the standard applicable to falsification  
4 cases as to whether a respondent made or caused to be made  
5 fraudulent or intentionally false entries by the pilots who flew  
6 the 16 flights in issue.

7           However, my next line of analysis is whether or not --  
8 or I have to turn to the question of whether or not Mr. Howe made  
9 a fraudulent or intentionally false statement in the flight record  
10 and flight duty record for the flight that he made. The  
11 Administrator alleges that Mr. Howe was a required crew member on  
12 flights occurring on September 16, 17 and 18 of 2008. The flight  
13 was from Bridgeport to Fargo, North Dakota, then to Seattle and  
14 then to Victoria, British Columbia, and then from Victoria,  
15 British Columbia back to Bridgeport.

16           On direct examination, Mr. Howe testified that he could  
17 not tell from the flight log for that flight, which has been  
18 marked and identified in Administrator's Exhibit A-13, whether he  
19 was the flying pilot on the flight, but he does not deny he was on  
20 the flight. He does not remember clearly. But he does remember  
21 clearly that Mr. Greco, his flying partner, was the pilot-in-  
22 command. He does not remember if he flew, but he does remember  
23 that Mr. Greco made the entries on the flight log as to the  
24 release and the type of flight to be flown. In this case, it was

1 under Part 91. As I indicated, the flight in this instance is  
2 identified as a Part 91 flight that the record indicates was  
3 released by Mr. Michael DePasquale.

4 Administrator's Exhibit A-13 indicates that Mr. Howe was  
5 the captain on two legs of the trip, from Fargo to Seattle and the  
6 last leg from Victoria, British Columbia to Bridgeport. Mr. Howe  
7 presented his own flight duty time record to the FAA at  
8 Exhibit A-15. He testified on direct that the flight duty record  
9 for his specific flight bears his signature at the bottom of the  
10 page, which essentially means that he reviewed and signed the  
11 document as being accurate.

12 On cross-examination, he first testified that he did not  
13 know that the FAA was going to rely upon that flight duty log. He  
14 testified that he did not carefully review it before he signed it,  
15 when Mr. Ottney, who then worked for JetSmart, presented it to him  
16 for signature. However, on further cross-examination, Mr. Howe  
17 testified that the flight duty log is a compliance document needed  
18 for JetSmart to show compliance. He further responded that the  
19 FAA relies upon the document, and he knew the FAA relied upon the  
20 document. He admitted on cross-examination that the flight duty  
21 log was not accurate.

22 Based on that testimony that I heard, I now turn to the  
23 standards set forth in Hart v. McLucas. The first question is did  
24 Mr. Howe make false representation? The evidence established that

1 Mr. Howe signed his flight duty log which he admits under oath was  
2 inaccurate. The evidence establishes that the flight was a  
3 Part 135 flight. It was billed as a 135 flight and payment for  
4 that flight was collected as a 135 flight. Taxes were collected  
5 and paid to the federal government as a 135 flight. Yet the  
6 flight duty record, which he signed, indicates that it was a  
7 Part 91 flight. It is logged in that record as an other  
8 commercial flight and not a Part 135 flight. Mr. Howe testified  
9 he did not carefully review the document before he signed it.

10 I did not find Mr. Howe's defense of carelessness to be  
11 credible. I find the evidence before me established by a  
12 preponderance of evidence that Mr. Howe made a false entry on his  
13 flight duty log. He had the opportunity to correct it. He had  
14 the knowledge to correct it. It was his responsibility to correct  
15 it and he did not. He offered no explanation on direct or cross-  
16 examination as to why the flight log indicates the flight was  
17 flown as a Part 91 flight.

18 He testified he could not remember if he flew the  
19 flight. His later statement in response to my question was that,  
20 well, it was customary to fly if he was a necessary crew member.  
21 He does remember that he was not the pilot in command, and  
22 Mr. Greco filled out the flight log in Administrator's A-13. He  
23 was captain of the flight for two legs of the flight, and he knew  
24 the flight was a Part 135 flight.

1           As captain of the flight and as the president of  
2 JetSmart and as director of operations, as the sole owner of the  
3 company, I have no evidence that would lead me to believe that he  
4 did not review the flight logs or that he knew the flight was  
5 being flown as Part 91. It is hard to believe that he would not  
6 have reviewed the flight log that he was using to document the  
7 flight and show any problems with the plane or document any  
8 problems with the plane. I therefore also find that Mr. Howe made  
9 a false representation as to the flight log at A-13 in this case.

10           The second prong of the Hart v. McLucas standard is: was  
11 the false representation in reference to a material fact? I find  
12 that it was. Mr. Howe himself testified that he knew that the  
13 flight log and the duty records were compliance documents and the  
14 FAA could rely upon them or would rely upon them. Aviation  
15 Inspector Abbott and Holliday testified that they relied upon the  
16 flight log and duty-time records to show Part 135 compliance. I  
17 find again that the false representation was in reference to the  
18 material fact.

19           The third prong of the Hart v. McLucas standard is  
20 whether or not the false representation was made with knowledge of  
21 the falsity of that fact. Mr. Howe testified that during the time  
22 he was the director of operations, he did not generally do a good  
23 job. He did not pay attention to many things. He went through a  
24 list of things he would do differently if he had the opportunity.

1 The gist of his testimony was that he was simply negligent and  
2 would not intentionally falsify records. He testified that he was  
3 more concerned with meeting payroll, keeping the doors open in a  
4 poor economy and keeping his employees working.

5 I have observed Mr. Howe throughout the proceedings in  
6 this case, and I have observed his demeanor, and I have listened  
7 very carefully to the extensive testimonies provided under oath in  
8 this hearing. I have assessed his credibility and his answers to  
9 direct examination questions, cross-examination questions and his  
10 answers to questions that I asked him. I listened very carefully  
11 to testimony he gave when he was recalled by his counsel to  
12 correct previously, as counsel puts it, incorrect information, or  
13 testimony that he gave under oath. But simply on the questions I  
14 have asked him and on the questions that are in issue in this case  
15 asked by his own counsel, asked on cross-examination, I found his  
16 testimony, especially on cross and questions I asked, to be  
17 evasive, vague and at times contradictory. If he was concerned,  
18 as he indicates, with payroll and income and keeping the doors  
19 open, he should have paid attention to the specifics of this  
20 flight, as this specific flight he had flown, Vertrue was billed  
21 \$38,165.28.

22 Based on the evidence before me and my assessment of  
23 Mr. Howe's credibility, I find that he made a false representation  
24 and intentionally false and fraudulent entry in the flight duty

1 log and the flight log in this case relative to the flight taking  
2 place on September 16, 17 and 18.

3 I now will turn to address whether or not the Respondent  
4 has violated Section 135.385 as alleged by the Administrator.  
5 This section states that, "Except as provided in paragraphs (c),  
6 (d), (e) and (f) of this section, no person operating a turbine  
7 engine-powered, large transport category airplane may takeoff in  
8 that airplane unless its weight on arrival, allowing for normal  
9 compensation of fuel and oil in flight, would be allowed a full-  
10 stop landing at the intended destination airport within 60 percent  
11 of the effective length of the runway described in this section  
12 from a point 50 feet above the intersection of the obstruction  
13 clearance at the runway."

14 The Administrator provided the testimony of Aviation  
15 Inspector John Ottney. As I mentioned, he had been a previous  
16 employee of JetSmart. He was qualified without objection as an  
17 expert in the operation of Learjet 60. Mr. Ottney testified that  
18 he made landing performance calculations based on the Learjet 60  
19 performance tables, weights that he had relied upon relative to  
20 the Learjet, and analyzed applicable weather that he indicated was  
21 the forecasts that were for the times of the 16 landings or  
22 flights in issue. Based on his calculations, he concluded that  
23 none of the 16 flights in issue flown as Part 135 flights could  
24 have made landings at Bridgeport in a Lear 160 in compliance with

1 this regulation.

2 Respondent objected to Mr. Ottney's use of the weather  
3 data for these calculations because Mr. Ottney could not testify  
4 as to the specific source of the weather forecasts he obtained for  
5 his calculations. The Respondents provided no rebuttal evidence  
6 to show that the weather information used by Mr. Ottney was  
7 incorrect. Mr. Ottney's calculations were identified in one of  
8 the exhibits. I believe it was Exhibit 41. And the weights  
9 relative to the Lear 60 were identified as Exhibit 39. The  
10 exhibits were identified, but they were not offered or accepted  
11 into evidence in this case.

12 While I found Mr. Ottney's testimony to be credible on  
13 direct and cross-examination, the necessary documents he relied  
14 upon for his calculations are not in the record. I cannot find  
15 that I can reasonably find without those documents to cross-  
16 reference and test his testimony, that the Administrator has  
17 proven that JetSmart or Mr. Howe were in violation of this  
18 section.

19 Based on these findings and the evidence before me, I am  
20 going to make the following findings of fact and conclusions of  
21 law.

22 FINDINGS OF FACT AND CONCLUSIONS OF LAW

23 As to the December 14, 2008 Emergency Order of  
24 Revocation, herein the complaint, as to James Howe, I find that

1 the Respondent has admitted the allegations in paragraphs 1  
2 through 7. As to paragraph 8, 9 and 10, the Respondent as to  
3 number 8 indicated he was without knowledge of belief as to those  
4 allegations.

5 I find that the Administrator has proven by a  
6 preponderance of evidence that Mr. Howe acted as a required flight  
7 crew member on the flights occurring on September 16 and 17, 2008,  
8 described in paragraphs (a) through (d) of paragraph 6 above.  
9 Paragraph (a) through (d) of paragraph 6 states that on or about  
10 September 16, 2008, the flight was from Sikorsky Airport,  
11 Bridgeport, Connecticut to Fargo, North Dakota; (b) indicates on  
12 or about September 16, 2008 from Fargo, North Dakota to Boeing  
13 Field, Seattle, Washington; 6(c) indicates on or about September  
14 17, 2008 from Boeing Field to Victoria, British Columbia, Canada;  
15 6(d) indicates on or about September 18, 2008 from Victoria,  
16 British Columbia to Bridgeport.

17 For paragraph 9, I find that the Administrator has  
18 proven that for the flights described in the preceding paragraph,  
19 you submitted flight and duty time records to verify that the  
20 flights were other commercial flying and not conducted under  
21 Part 135.

22 As to the allegation in paragraph number 10, I find that  
23 the Administrator has proven that Mr. Howe knew that when you  
24 completed and submitted the flight and duty time records described

1 in the preceding paragraphs that your verification that the  
2 flights on September 16, 17 and 18, 2008 were other commercial  
3 flying was false.

4 As to paragraph 11, allegation 11, I find that the  
5 Administrator has not proven by a preponderance of evidence that  
6 allegation.

7 I do not find that the Administrator has proven by a  
8 preponderance of evidence the allegation in number 12, nor number  
9 13, nor number 14, nor number 15 in their allegations.

10 As to paragraph 16, the allegations in paragraph 16,  
11 again I find that the Administrator has not proven by a  
12 preponderance of evidence that specific allegation.

13 As to allegation number 17, number 17 is admitted by the  
14 Respondent, which indicates that "JetSmart, Incorporated retained  
15 and used the flight log information for the flights described in  
16 paragraph 6 above to show compliance with the Federal Aviation  
17 Regulations."

18 As to paragraph 18 or allegation 18, I find that the  
19 Administrator has proven by a preponderance of evidence that by  
20 treating the flights described in paragraph 6(a) through (d) above  
21 as operations conducted under Part 91 of the Federal Aviation  
22 Regulations, you enabled JetSmart, Incorporated to circumvent the  
23 minimum fuel requirements and ceiling and visibility restrictions  
24 applicable to Part 135 operations under instrument flight rules,

1 among other things.

2           As to allegation number 19, I find that the  
3 Administrator has proven by a preponderance of the evidence that  
4 by entering information that the flight described in paragraph  
5 6(a) through (d) was conducted under Part 91 of the Federal  
6 Aviation Regulations, you made or caused to be made a fraudulent  
7 or intentionally false entry in a record or report that is  
8 required to be kept, made or used to show compliance with the  
9 requirements for the issuance or exercise of the privilege of any  
10 certificate, rating, authorization under Part 61 of the Federal  
11 Aviation Regulations, including, but not limited to, preparing  
12 load manifests and completing flight and duty time records.

13           As to paragraph 20, I find that the Administrator has  
14 proven that for the flight described in paragraph 6(a) through  
15 (d), JetSmart, Incorporated prepared no flight manifest prior to  
16 takeoff reflecting the weights of passengers, the total weight of  
17 the loaded aircraft, the maximum allowable takeoff weight for the  
18 flight, center of gravity limits, or the center of gravity of the  
19 loaded aircraft.

20           The Respondent has admitted that the longest runway at  
21 Bridgeport is 4,761 feet. However, I do not find that the  
22 Administrator, based on the evidence in the record, has proven the  
23 allegations in paragraph 22.

24           I do not find that based on the evidence before me and

1 admitted into evidence that the Administrator has proven the  
2 allegations in paragraph 23, 24, 25, 26.

3           However, I found that the Administrator has proven that,  
4 by a preponderance of evidence, that Mr. Howe has demonstrated a  
5 lack of the compliance disposition necessary to meet the  
6 qualifications to hold an airline transport pilot certificate.

7           As to the specific allegations of the violations of the  
8 regulations, I find that as to violation 61.59(a)(2), which is  
9 listed on page 6 of the complaint, is that the Administrator has  
10 proven that you violated this section which indicates that "no  
11 person may make or cause to be made any fraudulent or  
12 intentionally false entry in any logbook, record or report that is  
13 required to be kept, made or used to show compliance with any  
14 requirements for the issuance or exercise of the privileges of any  
15 certificate, rating or authorization under this part."

16           I also find that the Administrator has proven that by  
17 the fact that this flight was flown, the flight that you flew in  
18 this case, that under Section 91.13(a) that you violated this  
19 section which states that "no person may operate an aircraft in a  
20 careless or reckless manner so as to endanger the life or property  
21 of another."

22           Section (c) was withdrawn at the completion of the  
23 Administrator's case. They stated that they wished to amend the  
24 complaint to conform to the proof that they had produced at



1 airline transport pilot certificate and any other airman pilot  
2 certification held by him be, and hereby is, revoked.

3 ADMINISTRATIVE LAW JUDGE MONTAÑO: As to JetSmart, I  
4 have to read that into the record as well. As to the  
5 Administrator's December 3, 2010 Emergency Order of Revocation  
6 herein, addressed to President, JetSmart, Incorporated, the  
7 Respondent has admitted allegations paragraph 1 through 6. As to  
8 allegation number 7, I find that the Administrator has proven that  
9 for the flight described in paragraph 5(a) through (d), James Howe  
10 entered or caused to be entered in the flight log information for  
11 the flight that the flight segment was conducted under Part 91 of  
12 the Federal Aviation Regulations.

13 As to allegation in number 18, I find that the  
14 Administrator has proven that at the time that the information was  
15 entered in the flight log for each flight described in  
16 paragraph 5(a) through (d) above, James Howe knew that the flight  
17 was to or did transport passengers for compensation or hire in air  
18 transportation.

19 As to paragraph 9, I find the Administrator has proven  
20 that JetSmart, Inc. retained and used the flight log's information  
21 for the flights described in paragraph 5(a) through (d) above to  
22 show compliance with Federal Aviation Regulations.

23 As to paragraph 10, I also find the Administrator has  
24 proven that for the flight described in paragraph 5(a) through (d)

1 above, JetSmart, Incorporated prepared no load manifest prior to  
2 takeoff reflecting the weights of passengers, the total weight of  
3 the loaded aircraft, the maximum allowable takeoff weight for the  
4 flight, the center of gravity limit, or the center of gravity of  
5 the loaded aircraft.

6 As far as paragraph 11, that is admitted.

7 As to paragraph 12, I find that the Administrator has  
8 not proven by a preponderance of the evidence those allegations,  
9 nor do I find that he has proven the allegations in paragraph 13  
10 or 14.

11 As to paragraph 15, I find that the Administrator has  
12 proven by virtue of the foregoing that for the flight described in  
13 paragraph 5(a) through (d), JetSmart failed to comply with the  
14 operation specifications and requirements of Part 135 of the  
15 Federal Aviation Regulations.

16 I also find that the Administrator has proven allegation  
17 number 16: By virtue of the foregoing, JetSmart, Inc. conducted  
18 flight operations in a careless or reckless manner so as to  
19 endanger the life or property of another.

20 I also find paragraph 18 was proven by a preponderance  
21 of evidence that by virtue of the foregoing, JetSmart,  
22 Incorporated lacks the qualifications to hold an air carrier  
23 certificate.

24 The complaint reads: "As a result, JetSmart has

1 violated the following Federal Aviation Regulations." I find that  
2 Section 91.13(a), that the Administrator has proven this  
3 allegation, which states that no person may operate an aircraft in  
4 a careless or reckless manner so as to endanger the life or  
5 property of another.

6 The Administrator has also in proven section (b) Section  
7 119.21(a), which states that each person who conducts operations  
8 as a direct air carrier or as a commercial operator engaged in  
9 interstate carriage of persons or property for compensation or  
10 hire in air commerce shall comply with the certification and  
11 operation specification requirements in part (c) of this part and  
12 shall conduct its operations as set forth in this section.

13 I also find that the Administrator has proven Section  
14 135.63(c), which states that for a multiengine aircraft, each  
15 certificate holder is responsible for the preparation and accuracy  
16 of the load manifest in duplicate containing information  
17 concerning the loading of the aircraft. The manifest must be  
18 prepared before each takeoff and include the information required  
19 under this paragraph.

20 I find that the Administrator has not proven the  
21 allegations under Section 135.385(d). As to Section 135.385(d), I  
22 also find that the Administrator has not proven that allegation  
23 based on a preponderance of evidence.

24 In conclusion, having found that the Administrator has

1 proven the specific allegation in the Administrator's complaint,  
2 which I have cited, by a preponderance of reliable, probative and  
3 credible evidence, I now turn to the sanction imposed by the  
4 Administrator in this case. As to the appropriate sanction in  
5 this case, again by statute, deference is to be shown to the  
6 choice of sanction by the Administrator in the absence of any  
7 showing that that deference is an interpretation which is  
8 arbitrary, capricious or not in accordance with the law. There  
9 has been an allegation of that, but I have not had any showing  
10 that that is the case in this matter.

11 ORDER

12 I find therefore that the sanctions sought by the  
13 Administrator is appropriate and warranted in the public interest  
14 in air commerce and air safety. Therefore, I must find that the  
15 Emergency Order, the complaint herein, must be and shall be  
16 affirmed as I have read into the record. JetSmart, Incorporated's  
17 air carrier certificate is revoked.

18

19

20 EDITED ON

ALFONSO J. MONTAÑO

21 JANUARY 21, 2011

Administrative Law Judge