

UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

In the Matter of:

SOUTH AERO

FAA Order No. 96-4

Served: February 13, 1996

Docket No. CP94SW0023

DECISION AND ORDER

Respondent South Aero has appealed from the initial decision of Administrative Law Judge Robert S. Barton, Jr.,¹ in which the law judge found that South Aero violated two regulations--one requiring that South Aero adequately record its pilots' flight time,² and another requiring that South Aero provide its pilots with 10 hours of rest before their next assignments.³ The law judge ordered

¹ A copy of the law judge's written initial decision is attached.

² 14 C.F.R. § 135.63(a)(4)(vii), which provides as follows:

§ 135.63 Recordkeeping requirements.

(a) Each certificate holder shall keep at its principal business office or at other places approved by the Administrator, and shall make available for inspection by the Administrator the following--

...

(4) An individual record of each pilot used in operations under this part, including the following information:

...

(vii) The pilot's flight time in sufficient detail to determine compliance with the flight time limitations of this part.

³ 14 C.F.R. § 135.267(d), which provides as follows:

**§ 135.267 Flight time limitations and rest requirements:
Unscheduled one- and two-pilot crews.**

that South Aero pay a \$500 civil penalty for each of the two violations, resulting in a \$1,000 total civil penalty. This decision affirms the law judge's initial decision.

South Aero is the holder of a certificate to conduct air taxi/commercial operations under Part 135 of the Federal Aviation Regulations. In February 1992, the FAA sent eight inspectors to South Aero's facility for an in-depth investigation that lasted 5 days. By piecing together various records, the FAA inspectors discovered during the course of their inspection that South Aero had failed to record, on the company's flight and duty time records, the flight time of two pilots who had their competency checks conducted by a company check pilot in a company plane. The two pilots who received the checks were listed as "off duty" on the dates the checks took place. South Aero recorded the competency check flights of the two pilots, Messrs. Brumley and Durham, only on forms for the results of each competency check,⁴ and not on the company's flight and duty time records. As the law judge noted:

Because Durham's airman competency/proficiency check record indicated that he took a check flight on January 24, 1992, and because check airman Southerland only took one check flight on January 24, 1992, the FAA could deduce that Durham's check flight was conducted at the same time as Southerland's only flight on this date. However, had Southerland flown more than one competency check flight on January 24, 1992, there would have been no way to determine the exact time that pilot Durham took his check flight.

(d) Each assignment under paragraph b of this section must provide for at least 10 consecutive hours of rest during the 24-hour period that precedes the planned completion time of the assignment.

⁴ The company check pilot filled out a separate FAA Form 8410-3, entitled, "Airman Competency/Proficiency Check," for each of the two competency checks at issue.

(Initial Decision at 7.) The same was true for pilot Brumley--*i.e.*, if the check pilot had flown more than one competency check on the date of Mr. Brumley's check flight, it would have been impossible to determine the exact time that Mr. Brumley began and ended his check flight. (Initial Decision at 8.) The inspectors considered South Aero's failure to record the competency check flight time to be a violation of Section 135.63(a)(4)(vii), which requires a Part 135 certificate holder to record a pilot's flight time in sufficient detail to determine compliance with the flight time limitations of Part 135. The inspectors believed that the competency check flight constituted duty time, and an interruption of rest that needed to be recorded under Section 135.63(a)(4)(vii).

During their inspection, the inspectors also discovered that on four occasions South Aero had assigned one of its pilots to duty with only 9.5 hours rest, a violation of Section 135.267(d)'s 10-hour rest requirement. South Aero admitted the violation of Section 135.267(d); thus, only the alleged violation of Section 135.63(a)(4)(vii) is in dispute. At a pre-hearing conference, the parties stipulated to a number of facts and to the admission of all documents and exhibits (Tr. 11-16). The parties waived an evidentiary hearing. (Tr. 9-10, 10-12).

The law judge held that the check flights constituted an interruption of rest (*i.e.*, duty time), that Section 135.63(a)(4)(vii) requires the recordation of duty time, and that South Aero's records were inadequate. The law judge imposed a \$500 civil penalty for each violation, resulting in a total civil penalty of \$1,000.

South Aero has appealed, claiming that the law judge erred in finding a violation of Section 135.63(a)(4)(vii). According to South Aero, it did not need to record the check flights on its flight and duty time records because the flights

occurred during a rest period rather than a duty period. To support its claim that the flights occurred during a rest period, South Aero points out that it did not pay the pilots for the time they spent undergoing the competency checks. South Aero further argues that if the check flights did occur during a duty period, it did not have notice that such was the case.

The law judge properly found that the competency checks at issue, which were administered by a company check pilot in a company plane, constituted an interruption of rest that needed to be recorded on South Aero's flight and duty time records. He did not err in concluding that the term "flight time limitations" in Section 135.63(a)(4)(vii) includes the duty time limitations and rest requirements.⁵ It is true, as the law judge stated, that although more precise regulatory language indicating that the records must reveal compliance with both flight time limitations *and rest requirements* would have been preferable, common sense must be exercised in interpreting this regulatory scheme, as with any other.⁶ (Initial Decision at 16,

⁵ Rest requirements limit the time a pilot may spend in flight; thus, they can be considered a type of flight time limitation for purposes of Section 135.63(a)(4)(vii).

⁶ Although decisions of the National Transportation Safety Board are not binding precedent, they may be persuasive. In the Matter of Westair Commuter Airlines, Inc., FAA Order No. 93-18 at 6 (June 10, 1993). As the law judge noted, at least one NTSB case suggests that Section 135.63(a)(4)(vii) requires the recording of both flight time and duty time. (Initial Decision at 15.) In Administrator v. Air Maryland, Inc., NTSB Order No. EA-2951, 1989 NTSB LEXIS 94 at *13-*14, the NTSB stated:

We also find that respondent violated Section 135.63. Respondent testified that he (correctly) understood the FAA's subpoena for his records to include flight *and duty time* records. . . . The records submitted, however, reflected neither flight time of AMI's pilots . . . nor *pilot duty time*. The FAA inspector testified that both of the deficiencies were significant. . . . In summary, we find that respondent Air Maryland, Incorporated violated the following sections of the FAR's [Federal Aviation Regulations] and Federal Aviation Act: . . . Section 135.63(a)(vii) in that it did not maintain pilot's flight time in sufficient detail.

(Emphasis added.)

n.11.) In this regard, it is telling, as the law judge pointed out, that South Aero never asserted that Section 135.63(a)(4)(vii) required it to record only flight time and not duty time. Rather, South Aero's main contention throughout the proceeding was that competency check flights are not duty time. (*Id.*)

As for whether the competency check flight time constituted rest, one must look beyond an air carrier's characterization of a particular activity to determine whether, based on all the surrounding circumstances, the pilot is free from all responsibility for work for the air carrier.⁷ The question of whether the pilot receives remuneration is not determinative, although it is one factor to be

⁷ Although the regulations in effect at the time did not specifically define the term "rest," (Tr. 21), in at least one place they stated what is *not* "rest":

Time spent in transportation, not local in character, that a certificate holder requires of a flight crewmember and provides to transport the crewmember to an airport at which he is to serve on a flight as a crewmember, or from an airport at which he was relieved from duty to return to his home station, is not considered part of a rest period.

14 C.F.R. § 135.263(c). As the law judge pointed out, if time spent traveling as a passenger to and from an assignment is not rest, then a check flight in which the pilot is actually in control of the plane logically would not be considered rest. (Initial Decision at 14.)

In past interpretations, the FAA has defined "rest period" as "a continuous period of time that is free from all restraint, including freedom from work and freedom from responsibility for work should the occasion arise." (Exhibit G to Complainant's Pre-Hearing Memorandum--*i.e.*, Letter to P.A. Brennaman from Hays v. Hettinger, Associate Regional Counsel (May 7, 1975), in 1 Federal Aviation Decisions, at I-50, I-51 (Clark Boardman Callaghan 1993).) The FAA has issued a Notice of Proposed Rulemaking (NPRM) in which it proposes to "establish one set of duty period limitations, flight time limitations and rest requirements for flight crewmembers engaged in air transportation." 60 Fed. Reg. 65,951 (December 20, 1995). The proposed rule defines "rest period" as follows:

Rest period means the time period free of all restraint or duty for a certificate holder and free of all responsibility for work or duty should the occasion arise. "Free of all restraint" and "free of all responsibility" would include, but not be limited to, accepting phone calls, being required to carry a beeper, or being required to contact the air carrier. If a flight crewmember is not serving in assigned time, reserve time, standby duty or a duty period, that crewmember would be in a rest period.

considered in making this determination. Thus, the fact that South Aero did not pay its pilots specifically for the time spent during the check flights does not necessarily mean that the pilots were not engaged in work for South Aero.⁸

South Aero's claim that the competency check flights at issue did not further its business is not persuasive. If that were true, it is unclear why South Aero provided a company check pilot and a company plane for the flights. South Aero had a simple business motive for providing the company plane and check pilot: it needed pilots who were current on their competency checks, due to 14 C.F.R. § 13.293(b).⁹ When one looks at all the circumstances of this case, particularly the following, the only reasonable conclusion is that the check flights at issue did in fact occur during a duty period rather than during a rest period:

- the competency checks were administered by a company check pilot in a company plane;¹⁰
- the pilots could not legally fly in South Aero's Part 135 operations without successfully completing the competency checks; and
- the regulations required that the competency checks take place in the exact type, category, and class of the aircraft flown in *South Aero's* operations.¹¹

⁸ Moreover, arguably the pilots were paid *indirectly* for their flying time during the competency checks--*i.e.*, through their normal paychecks--because the pilots could not legally fly for South Aero without having successfully completed the competency checks. 14 C.F.R. § 135.293(b). In addition, as Complainant points out, by providing the pilots with the services of a company check pilot and the company plane for their competency checks, South Aero did provide its pilots with a form of remuneration for the time they spent being tested during the check flights.

⁹ As the law judge noted at p. 13 of his initial decision, Section 13.293(b) prohibits Part 135 certificate holders from using a pilot in any aircraft unless that pilot has passed a competency check administered by an authorized check pilot. Moreover, throughout the competency check, the pilot must be the "master of the aircraft." 14 C.F.R. § 135.293(d).

¹⁰ This is not to say that if the flights were *not* administered in a company plane, then one can safely conclude that they were not assigned by the certificate holder. All the surrounding circumstances must be examined to determine whether the check flights were assigned by the certificate holder.

Resolving this issue as South Aero asks would leave the door open to air carriers to circumvent the flight time limitations and rest requirements by choosing not to pay their pilots for portions of their work for the air carriers. (Reply Brief at 23-24.) The FAA cannot permit circumvention of the flight time limitations and rest requirements in this manner. By reducing fatigue, which is known to cause accidents, the flight time limitations and rest requirements serve a crucial safety function.

South Aero argues that it did not have fair notice that it needed to record the competency checks, stating as follows:

In the present case, we have respondent charged with a violation for which there was no instruction, regulation, or directive known to respondent to advise him that his record keeping was not in conformance with the FSDO [Flight Service District Office] expectations.

To the best knowledge of respondent's counsel, the FAA Interpretations which might have provided guidance were in existence at the time of the alleged violation, but respondent had no means of knowing this. Not until the release in 1993 of Federal Aviation Decisions, . . . published by Clark Boardman Callaghan, would a member of the public have known of the Interpretations. To penalize respondent under these circumstances is unwarranted.

(Appeal Brief at 9-10.)

South Aero's lack of notice argument is without merit. The regulations themselves were sufficient to alert South Aero that it needed to record the competency checks on its flight and duty time records.¹² Specifically,

¹¹ 14 C.F.R. § 135.293(b).

¹² Although South Aero attempts to argue that it did not have fair notice because the FAA interpretations that might have provided guidance were unpublished at the time, this argument fails for several reasons. As stated in the text, the regulations themselves were sufficient to put South Aero on notice. Furthermore, there were no legal interpretations in existence that addressed the question of whether competency check flights are duty time that

Section 135.63(a)(4)(vii) put South Aero on notice that it was required to record its pilots' flight time in sufficient detail to determine compliance with the flight time limitations, which included the rest requirements.¹³ Other regulations, *i.e.*, Section 135.267(d) and Section 135.263(b), put South Aero on notice that it needed to provide its pilots with a certain amount of rest, and that it could not assign its pilots to duty during that rest.¹⁴ Without a record of the competency check flight times, there was no way for the FAA inspectors (or for South Aero itself, for that matter), to determine readily and accurately whether the pilots had received sufficient rest before their next assignments. It was inappropriate for South Aero to assume, without checking with the FAA, that the check flights at issue constituted rest.

The FAA legal interpretations cited by South Aero in support of its position do not actually advance South Aero's cause. For example, South Aero cites Interpretation 1986-3¹⁵ for the proposition that check rides are not considered flying

must be recorded under Section 135.63(a)(4)(vii). And finally, there was nothing to stop South Aero from submitting either a request under the Freedom of Information Act for existing legal interpretations or--and even better--a request for a legal interpretation tailored to its own particular situation.

¹³ See p. 4 above for a discussion involving the law judge's finding, which was correct, that Section 135.63(a)(4)(vii)'s reference to "flight time limitations" includes the rest requirements.

¹⁴ Section 135.267(d) required South Aero to ensure that each of its assignments provided its pilots with at least 10 consecutive hours of rest during the 24-hour period that preceded the planned completion time of the assignment. Section 135.263(b) prohibits Part 135 air carriers like South Aero from assigning any of its flight crewmembers to any duty during a required rest period.

¹⁵ Letter to Thomas Sherman from John H. Cassady, Assistant Chief Counsel, AGC-200 (February 4, 1986), in 2 Federal Aviation Decisions, at I-90, I-91 (Clark Boardman Callaghan 1993).

“in air carrier service.” Aside from the fact that the language relied upon by South Aero involves a different regulation than the one at issue here,¹⁶ the interpretation specifically defines “in air carrier service” as operations conducted under authority of Part 121 (or, as in the instant case, Part 135). The author of the interpretation was distinguishing between an air carrier’s Part 91 flights (*e.g.*, repositioning and ferry flights), which do not involve transportation of passengers for compensation or hire, and the air carrier’s Part 121 (or Part 135) flights, which do involve such transportation of passengers. Thus, Interpretation 1986-3 does not indicate that a competency check administered by a company check pilot in a company plane is rest rather than work for the air carrier. Pilots are not considered to be on a rest period when they fly Part 91 flights (such as repositioning, ferry, training, and check flights) for their air carriers. In fact, even non-flying duties for the air carrier are considered duty rather than rest. As stated in a previous case, “If the crewmember is involved in *any type of duty for the certificate holder*, including preparing for a flight or standing by at the airport waiting for passengers or cargo, then that time cannot be considered a rest period.” In the Matter of Charter Airlines, Inc., FAA Order No. 95-8 at 4 (May 9, 1995) (emphasis added).

The next interpretation cited by South Aero as suggesting that check rides are not duty time is Interpretation 1989-21.¹⁷ South Aero cites this interpretation

¹⁶ This interpretation deals with 14 C.F.R. § 121.503(d) and (e), which provide, respectively, that “No pilot may fly as a crewmember in air carrier service more than 100 hours during any 30 consecutive days,” and “No pilot may fly as a crewmember in air carrier service more than 1,000 hours during any calendar year.”

¹⁷ Letter to Jimmie E. Young from Donald P. Byrne, Acting Assistant Chief Counsel, Regulations and Enforcement Division (August 1, 1989), in 2 Federal Aviation Decisions, at I-236 through I-240.

for the proposition that Part 135 does not apply to training flights conducted under Part 91. (South Aero argues that training flights and check flights should be treated similarly.) South Aero points out that Interpretation 1989-21 states that "if the Part 91 flying is assigned by the certificate holder, it may not be conducted during a required rest period." This statement actually supports Complainant's position that the check flights at issue needed to be recorded. South Aero argues, however, that there was evidence that the competency check flights at issue began and ended prior to the beginning of the required rest period preceding the pilots' next flight duty. While this is true,¹⁸ the answer to this, as Complainant points out, is that one cannot tell whether crew rest is sufficient unless one keeps a record of the flights that might impinge upon it. (Tr. 35-36.) South Aero needed to record the flights so that the FAA inspectors could readily determine whether the check flights interrupted the required rest period before the pilots' next assignments.

Finally, South Aero cites Interpretation 1992-59¹⁹ for the proposition that a broad scope of piloting activities can occur during rest. At issue in Interpretation 1992-59 is Section 135.263(b), which states that: "[N]o certificate holder may assign any flight crewmember to any duty with the certificate holder during any required rest period." Interpretation 1992-59 indicates that the following activities would not interrupt a required rest period: flying one's own plane, flying for a corporate flight department, giving flight instruction, and flying for another Part 135 certificate

¹⁸ Complainant conceded at the pre-hearing conference that the competency check flights at issue did not result in a violation of Section 135.267(d)'s 10-hour rest requirement. (Tr. 9.)

¹⁹ Letter to James L. Nauman from Donald P. Byrne, Acting Assistant Chief Counsel, Regulations and Enforcement Division (August 7, 1992), in 3 Federal Aviation Decisions, at I-306, I-307.

holder. This interpretation does not support South Aero's appeal either. Unlike the listed activities which do not interrupt rest, the check flights at issue *were* for the certificate holder, in this case South Aero.

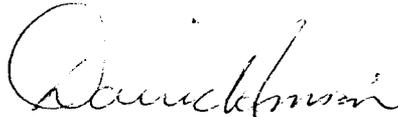
South Aero's claim that its recordkeeping was adequate must also fail. As noted on p. 2 above, if the check pilot had flown more than one competency check on the dates of the pilots' check flights, it would have been impossible to determine the exact times that the pilots took their check flights. South Aero's suggestion that FAA Form 8410-3, which records the result of the pilot's competency check, is deficient because it does not contain a place for the beginning and end times of the flight is not persuasive. Form 8410-3 was not intended to be a record of the pilot's flight and duty time. The problem here was that South Aero failed to record the check flights on its *flight and duty time records*. South Aero conceded that it was only through significant time and resources that the FAA inspectors were able to piece together the pilots' flight and duty time. (Tr. 13.) For these reasons, the law judge did not err in finding that South Aero's recordkeeping was inadequate.

Turning now to the sanction amount, the law judge found that South Aero violated two regulations: Section 135.267(d), involving four separate occasions on which South Aero violated the 10-hour rest requirement, which South Aero admitted; and Section 135.63(a)(4)(vii), which South Aero did not admit. South Aero argues in its appeal brief that a sanction of \$500 for the admitted violation is excessive. I do not agree. The maximum penalty for each violation was \$10,000. 49 U.S.C. § 46301(a)(2). The Sanction Guidance Table, Appendix 4 to FAA Order 2150.3A, lists the minimum penalty for air carrier violations at \$1,000-\$3,999. (Complainant's Motion for Decision at 2.) Given these parameters, a civil penalty of

\$500 cannot be considered excessive for either violation. The law judge's decision indicates that he took into account all relevant factors, including South Aero's corrective action--*i.e.*, amending its flight and duty record form to include competency check flights.

South Aero argues that it is impossible for a penalty to have a deterrent effect if it is meted out after the air carrier has committed the act that it is intended to deter. This argument borders on the frivolous. The civil penalty, of course, is intended to deter *future* violations of the safety regulations by South Aero and by other air carriers as well.

In summary, the law judge's finding of a violation of Sections 135.63(a)(4)(vii) and 135.267(d), and his assessment of a \$1,000 civil penalty, are affirmed.²⁰



DAVID R. HINSON, ADMINISTRATOR
Federal Aviation Administration

Issued this 13th day of February, 1996.

²⁰ Unless Respondent files a petition for review with a Court of Appeals of the United States within 60 days of service of this decision (under 49 U.S.C. § 46110), this decision shall be considered an order assessing civil penalty. See 14 C.F.R. §§ 13.16(b)(4) and 13.233(j)(2) (1995).