

UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

In the Matter of:

AERO NATIONAL, INC.

FAA Order No. 2000-26

Served: December 21, 2000

Docket No. CP99EA0016

DMS No. FAA-1999-5449¹

DECISION AND ORDER²

In a written initial decision served on March 3, 2000,³ Administrative Law Judge Burton S. Kolko held that Aero National violated Section 135.337(b) of the Federal Aviation Regulations (FAR), 14 C.F.R. § 135.337(b),⁴ and assessed a \$3,300 civil penalty. Aero National filed an appeal from the law judge's decision.

¹ Materials filed in the FAA Hearing Docket (except for materials filed in security cases) are also available for viewing through the Department of Transportation's Docket Management System (DMS). Access may be obtained through the following Internet address: <http://dms.dot.gov>.

² The Administrator's civil penalty decisions are available on LEXIS, Westlaw, and other computer databases. They also can be found in Hawkins's Civil Penalty Cases Digest Service and Clark Boardman Callaghan's Federal Aviation Decisions. For additional information, see 65 Fed. Reg. 67,445, 67,462 (November 9, 2000).

³ A hearing was held in this matter on October 19, 1999. At the conclusion of the hearing, the law judge elected to prepare a written initial decision. A copy of the law judge's written initial decision is attached.

⁴ In particular, the law judge held that Aero National violated Section 135.337(b)(3), which provides as follows:

(b) No certificate holder may use a person, nor may any person serve as a check airman (aircraft) in a training program established under this subpart unless, with respect to the aircraft type involved that person –

(3) Has satisfactorily completed the proficiency or competency checks that are required to serve as a pilot in command in operations under this part.

After consideration of the record on appeal and the appellate briefs, Aero National's appeal is denied.

Aero National is a fixed base operator. It operates a charter service and is authorized to fly multiengine aircraft on both VFR⁵ and IFR⁶ flights under Part 135. (Tr. 70.) In June 1998, Aero National employed James Hickey as a check airman, and Jeffrey M. Vaccaro as a pilot. On June 29, 1998, James Hickey gave competency checks in a Cessna 340 and a PA-31 and an IFR-proficiency check to Jeffrey Vaccaro. (Tr. 17, 20.)

When an airman takes a competency check, an airman is required to demonstrate his ability to fly a specific make and model aircraft. A pilot may not serve as pilot in command of an aircraft in a Part 135 operation unless since the beginning of the twelfth calendar month before the flight, the pilot has passed a competency check in that aircraft. 14 C.F.R. § 135.293(b).

A proficiency check is given to test a pilot's capability to fly on instruments and, in contrast to a competency check, is not aircraft specific. (Tr. 17.) An instrument proficiency test covers holding procedures, different types of instrument approaches, missed approaches, uses of the autopilot, etc. (Tr. 24.) A pilot may not serve as a pilot in command of an aircraft under IFR unless since the beginning of the sixth calendar month before that service, the pilot has passed an instrument proficiency check. 14 C.F.R. § 135.297(a). As explained by FAA Aviation Safety Inspector Terrence Ricker, a

14 C.F.R. § 135.337(b)(3).

⁵ Visual Flight Rules. See 14 C.F.R. §§ 91.151-91.159.

⁶ Instrument Flight Rules. See 14 C.F.R. §§ 91.167-91.193.

proficiency check is "good" for a 6-month period and the pilot has a 1-month grace period in which to retake the proficiency check. (Tr. 18, 25.)

When Hickey administered the competency and proficiency checks, he was current himself on his competency checks but not his proficiency checks.⁷ Hickey's authorization to fly an aircraft under IFR lapsed on April 30, 1998,⁸ and he had not renewed it prior to administering the check ride to Vacarro on June 29, 1998.

The central issue for the law judge to decide was whether Hickey was authorized to administer the IFR proficiency check to Vaccaro if Hickey's own authority to fly an aircraft under IFR in a Part 135 operation had lapsed. Aero National argued that as long as Hickey was current on either his competency *or* his proficiency checks, he could administer both competency *and* proficiency checks to other pilots. The law judge rejected Aero National's argument as follows:

I find, as Inspector Ricker stated, that a check airman such as Captain Hickey could administer a check ride only in those areas of competency and proficiency in which he is current himself (Tr. 27-29, 44, 51, 105-06). There was some disagreement on this point (see e.g., Tr. 84); but section 135.337(b)(3) is plain: it states in pertinent part that no person may "serve as check airman ... unless ... that person has satisfactorily completed the proficiency or competency checks ..." Any other interpretation of the FARs, moreover, is contrary to the FAA's goal of safe skies.

(Initial Decision at 3.)

⁷ At the time, Aero National's chief pilot maintained a status board on which he kept track of when the various pilots needed to take their check rides. Michael Solon, the chief pilot, miscalculated when Hickey was due to take his next instrument proficiency check, and as a result, wrote on the status board that Hickey's instrument proficiency lapsed one month later than it actually did. (Complainant's Exhibit 6; Tr. 83.)

⁸ See Complainant's Exhibits 1 and 2. He did not retake the instrument proficiency test during the one-month grace period which ended on May 31, 1998.

The law judge held further that since Hickey had not maintained his instrument proficiency, Vaccaro operated on subsequent charter flights without a valid instrument proficiency check. Nonetheless, the law judge held, because Complainant failed to prove that Vaccaro operated under IFR, Complainant failed to prove that Aero National had violated Section 135.297(a).⁹

The law judge assessed a \$3,300 civil penalty against Aero National. In explaining this sanction, the law judge wrote:

The FARs are designed to ensure that check airman are operationally qualified on a continuing basis. This purpose is accomplished by requiring periodic tests and checks. [citation omitted.] Respondent was under a duty to assure that Captain Hickey was current or to prohibit him from administering check rides in areas in which he was not. (Tr. 64-65.) It failed in this duty. As a consequence, Captain Vaccaro served as a PIC while under the mistaken belief that he was instrument-proficient. While no proof was adduced that Captain Vaccaro actually had flown under IFR, the described chain of events exposed the traveling public to an unreasonable risk that it would fly with a PIC under conditions in which he was not qualified to operate. Thus, Respondent's actions were in derogation of the safety net established by the FARs.

(Initial Decision at 4.)

On appeal, Aero National again argues that Hickey was qualified to administer the flight checks because under Section 135.337(b)(3) he was only required to have been current on his competency *or* proficiency checks. Aero National notes that Section 135.337(b)(3) specifies that no person may serve as a check airman unless that person has satisfactorily completed the “proficiency *or* competency checks” that are required. Hence, argues Aero National, since the regulation uses the disjunctive term “or,” rather

⁹ Section 135.297(a) prohibits any Part 135 operator from using any person as pilot in command of an aircraft under IFR unless, since the beginning of the sixth calendar month before that service, that pilot has passed an instrument proficiency check.

Complainant did not appeal from the dismissal of the allegation that Aero National violated Section 135.297(a).

than the conjunctive term “and,” Hickey was not required to have passed both competency and proficiency checks.

Aero National’s interpretation of 14 C.F.R. § 135.337(b)(3) is flawed because it focuses simply on the regulation’s use of the word “or” and ignores the modifying language “that are required to serve as a pilot in command in operations under this part.” Section 135.337(b)(3) provides:

(b) No certificate holder may use a person, nor may any person serve as a check airman (aircraft) in a training program established under this subpart unless, with respect to the aircraft type involved that person –

(3) Has satisfactorily completed the proficiency or competency checks that are required to serve as a pilot in command in operations under this part.

14 C.F.R. § 135.337(b)(3). To be qualified to fly VFR-only flights under Part 135, a pilot must be current only on his competency tests. In contrast, to be qualified to fly both under VFR and IFR – then the pilot must be current on both the appropriate competency check(s), as well as the instrument proficiency check. The use of the disjunctive “or” is appropriate because it indicates that there are times when the check airman must have satisfactorily passed in a timely fashion either just the appropriate competency checks, or both the competency and proficiency checks. Hence, under this regulation, the Part 135 operator may not use a check airman to perform flight checks for operations in which the check airman himself would not be qualified to serve as pilot in command.¹⁰

To argue otherwise, as Aero National does, is to ignore both basic grammatical construction and the safety purpose behind the regulations. Only check airmen who have themselves demonstrated their competency in a particular aircraft should and may under

¹⁰ See testimony of Inspector Ricker at Tr. 48-49.

the regulations administer competency tests in that aircraft to others. Likewise, only check airmen who have demonstrated their proficiency to fly on instruments should and may under the regulations administer instrument proficiency tests to others. As Judge Kolko wrote in his initial decision:

To permit a PIC [pilot in command] to administer a check ride in an area in which he himself is not qualified would needlessly risk disaster. It would also compromise the integrity of the examination system.

(Initial Decision at 3.)

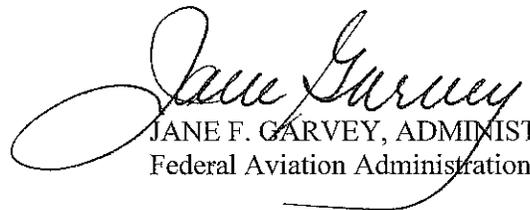
Aero National also points to Section 135.337(b)(5)'s requirement that a check airman only needs a Class III medical certificate rather than a Class II medical certificate, which pilots flying charter flights are required to hold. Aero National argues that the requirement for only a Class III medical certificate proves that the FAA has lower standards for check airmen, and thus that check airmen are not required to be current on all the competency and proficiency tests. This argument must be rejected. The FAA has determined that a check airman performing a competency or proficiency check does not need to meet the higher *medical* standards that would be necessary to serve as pilot in command of a flight for compensation or hire. Whether a check pilot holds a Class II or Class III medical certificate, however, has nothing to do with the check airman's ability to judge the competency or proficiency of another pilot.

Aero National contends that it should not be assessed a civil penalty because the FAA had not provided notification prior to the check flights that James Hickey was no longer qualified to perform proficiency tests. Aero National apparently ignores the language in Section 135.337(b) making the Part 135 operator – as well as the check

airman – responsible for determining whether a check airman is qualified to perform competency and proficiency checks.

Aero National argues that the \$3,300 civil penalty assessed by the law judge is excessive in light of Complainant's failure to prove that Vaccaro actually flew for compensation or hire under IFR. It is simply fortuitous if Mr. Vaccaro did not exercise the privileges that he thought that he had. A \$3,300 civil penalty is an appropriate civil penalty in light of the potential hazards that could arise when a check airman performs checks that he is not qualified to perform.

THEREFORE, Aero National's appeal is denied, and the law judge's initial decision, assessing a \$3,300 civil penalty is affirmed.¹¹


JANE F. GARVEY, ADMINISTRATOR
Federal Aviation Administration

Issued this 19th day of December, 2000.

¹¹ Unless Respondent files a petition for review with a Court of Appeals of the United States under 49 U.S.C. § 46110 within 60 days of service of this decision, this decision shall be considered an order assessing civil penalty. See 14 C.F.R. §§ 13.16(b)(4) and 13.233(j)(2)(2000.)