

UNITED STATES DEPARTMENT OF TRANSPORTATION  
FEDERAL AVIATION ADMINISTRATION  
WASHINGTON, DC

**In the Matter of:**

**BLUE RIDGE AIRLINES**

FAA Order No. 99-15

Served: December 22, 1999

Docket No. CP97NM0024

**DECISION AND ORDER**<sup>1</sup>

This case involves the alleged use of an unqualified pilot in an air carrier operation. Although Blue Ridge Airlines claimed that the operation was a private, cost-sharing arrangement, the law judge disagreed. The law judge found that Blue Ridge Airlines violated a number of the regulations that apply to air carriers, and assessed a \$1,600 civil penalty.<sup>2</sup>

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<sup>1</sup> The Administrator's civil penalty decisions are available on LEXIS, WestLaw, and other computer databases. They are also available on CD-ROM through Aeroflight Publications. Finally, they can be found in Hawkins's Civil Penalty Cases Digest Service and Clark Boardman Callaghan's Federal Aviation Decisions. For additional information, see 64 Fed. Reg. 58879, 58895 (November 1, 1999).

<sup>2</sup> A copy of the law judge's written initial decision is attached. Specifically, the law judge found that Blue Ridge Airlines violated 14 C.F.R. §§ 135.3; 135.243(b)(1) & (3); 135.293(a) & (b); 135.299; 135.343; and 135.95, which provide, in relevant part, as follows:

**§ 135.3 Rules applicable to operations subject to this part.**

(a) Each person operating an aircraft in operations subject to this part shall –

(1) While operating inside the United States, comply with the applicable rules of this chapter ....

**§ 135.243 Pilot in command qualifications.**

(b) ... [N]o certificate holder may use a person ... as pilot in command of an aircraft under VFR unless that person –

(1) Holds at least a commercial pilot certificate with appropriate category and class ratings and, if required, an appropriate type rating for that aircraft ....

...

Both parties have appealed the law judge's decision. This appeal presents the following two main questions:

1. Should the case be remanded to the law judge to permit Blue Ridge Airlines to introduce new testimony?
2. Was the \$1,600 civil penalty assessed by the law judge too high or too low?

### **I. Facts**

Blue Ridge Airlines holds an FAA-issued certificate to conduct on-demand

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(3) For an airplane, holds an instrument rating or an airline transport pilot certificate with an airplane category rating.

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

(a) No certificate holder may use a pilot ... unless, since the beginning of the 12th calendar month before that service, that pilot has passed a written or oral test, given by the Administrator or an authorized check pilot ...

(b) No certificate holder may use a pilot ... in any aircraft unless, since the beginning of the 12th calendar month before that service, that pilot has passed a competency check given by the Administrator or an authorized pilot in that class of aircraft ... to determine the pilot's competence in practical skills and techniques in that aircraft ....

#### **§ 135.299 Pilot in command: Line checks: Routes and airports.**

(a) No certificate holder may use a pilot ... as a pilot in command of a flight unless, since the beginning of the 12th calendar month before that service, that pilot has passed a flight check in one of the types of aircraft which that pilot is to fly ....

#### **§ 135.343 Crewmember initial and recurrent training requirements.**

No certificate holder may use a person ... as a crewmember in operations under this part unless that crewmember has completed the appropriate initial or recurrent training phase of the training program appropriate to the type of operation in which the crewmember is to serve since the beginning of the 12th calendar month before that service ....

#### **§ 135.95 Airmen: Limitations on use of services.**

No certificate holder may use the services of any person as an airman unless the person performing those services –

- (a) Holds an appropriate and current airman certificate; and
- (b) Is qualified under this chapter, for the operation for which the person is to be used.

operations (*i.e.*, charter operations) under 14 C.F.R. Part 135. (Tr. 28.) It is undisputed that Douglas Haynes, the President of Blue Ridge Airlines (Tr. 145), was the pilot-in-command of a flight on November 9, 1996, with several passengers aboard a Beech Bonanza aircraft that traveled from Watkins, Colorado to Hays, Kansas and back again. (Tr. 153-54.) It is also undisputed that Haynes holds only a private pilot certificate (Tr. 146), is not authorized to serve as pilot-in-command for Blue Ridge Airlines' flights (Tr. 28), and that Blue Ridge Airlines' operations specifications permit it to use only a Mooney M-20-J airplane ( Tr. 146).

The dispute between the parties centers on whether the November 9, 1996, operation piloted by Haynes was an air carrier operation. Blue Ridge Airlines, represented throughout these proceedings by Haynes, argues that it was a cost-sharing operation in which the pilot and passengers shared a common purpose, and therefore, only the general operating rules in 14 C.F.R. Part 91 applied. The law judge found, however, that it was an air carrier operation, and that as a result, the air carrier rules in 14 C.F.R. Part 135 (a number of which Blue Ridge Airlines failed to follow) applied as well.

The record contains the following facts that shed light on whether the operation was that of an air carrier:

Bryan Jackson stated in a sworn declaration that he and an associate reserved a flight with Blue Ridge Airlines for a business trip on November 9, 1996.<sup>3</sup>

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<sup>3</sup> Jackson testified to the same effect in a proceeding, before a law judge for the National Transportation Safety Board (NTSB), in which the FAA sought to suspend Haynes's private pilot certificate. (Tr. 156-59.) At the end of the hearing in the NTSB proceeding, the NTSB law judge ordered the suspension of Haynes's private pilot certificate for 180 days. On appeal, the full NTSB affirmed the law judge's order of suspension. Garvey v. Haynes, 1998 NTSB LEXIS 90 (August 12, 1998), *reconsideration denied*, 1998 NTSB LEXIS 133 (November 10, 1998).

(Complainant's Exhibit A-7.) Jackson and his associate, Leon Houglum, entered the Front Range Airport terminal about 10 a.m. on November 9, 1996. (Tr. 93.) They told an airport employee that they were going to take a flight on Blue Ridge Airlines' Mooney airplane and asked for Blue Ridge Airlines' ticket counter.<sup>4</sup> (Tr. 93-94.)

About 9 a.m. on November 9, 1996, a woman named Joan Valverde called the Front Range Airport and asked to book a flight on Blue Ridge Airlines. (Tr. 92.) Then, around 11 a.m., Valverde entered the terminal and went over to the two businessmen. (Tr. 95.) Jackson, Houglum, and Valverde were waiting together in the terminal when Haynes, the President of Blue Ridge Airlines, arrived at about 11:30 a.m. (Tr. 95.)

Haynes left the terminal with Jackson, Houglum, and Valverde, and the four boarded a Beech Bonanza. (Tr. 95-96.) The Beech Bonanza took off from the airport with Jackson, Houglum, and Valverde as passengers and Haynes as the pilot. (*Id.*) The airplane landed in Hays, Kansas, where Jackson and Houglum left the airplane. (Tr. 146; Complainant's Exhibit A-7.)

Haynes testified that he then flew Joan Valverde to the other side of Hays where he landed the airplane at another airport. (Tr. 146, 147, 153, 154.) Haynes further testified that he and Valverde left the airplane to go visit Haynes' cousin, who lives in Hays, Kansas. (Tr. 146, 147.)

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Subsequently, the NTSB granted Haynes's request to stay the suspension of Haynes's private pilot certificate pending disposition of Haynes's petition for review to be filed in the U.S. Court of Appeals. Garvey v. Haynes, 1998 NTSB LEXIS 142 (December 22, 1998), *reconsideration denied*, 1999 NTSB LEXIS 10 (February 25, 1999).

In the instant case, Complainant submitted into evidence the transcript of Jackson's January 13, 1998, testimony before the NTSB law judge. (Tr. 33.)

Later on November 9, 1996, Haynes returned without Joan Valverde in the Beech Bonanza to the airport in Hays, Kansas where he dropped off Jackson and Houghlum. (Complainant's Exhibit A-7.) Haynes picked up Jackson and Houghlum and flew them back to Front Range Airport in Watkins, Colorado. (*Id.*)

During the FAA's investigation of the incident, Haynes gave the FAA inspector a copy of a receipt for \$432, stating that it was a copy of the receipt he gave Jackson for the flights between Colorado and Kansas. (Tr. 31; Complainant's Exhibit A-3.) Haynes told the inspector that \$432 was half the operating expenses for the flight.

Haynes admitted at the hearing that he did not know either Jackson or Houghlum personally. (Tr. 118, 152.) According to Haynes, it was just a coincidence that he was making the trip to Hays, Kansas to get flight time and to visit his cousin on the same day that Jackson and Houghlum needed to go to the same place on business. (Tr. 146, 147, 149.) As for Joan Valverde, Haynes testified that Valverde was a personal friend of his and that he met her at a mall where she worked at a clothing store. (Tr. 135, 147.) He testified that he did not charge Valverde for the flight. (Tr. 151.) Despite their alleged friendship, Haynes stated that he does not know where she is or how to locate her. (Tr. 147, 152.) Complainant apparently was unable to locate Valverde to obtain her version of events.

Jackson did not appear at the hearing, but Complainant offered into evidence a declaration signed by him under penalty of perjury. (Complainant's Exhibit A-7).

Jackson's declaration indicates that he paid Haynes, the pilot of the flight, \$800.52 in

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<sup>4</sup> The airport employee told the two businessmen that Blue Ridge Airlines did not have a ticket counter and gave them directions to Blue Ridge Airlines' office, which was in a building apart from the terminal. (Tr. 93.)

cash for the roundtrip flight that he booked with Blue Ridge Airlines for himself and his business associate. (*Id.*) Haynes, who has represented Blue Ridge Airlines throughout the proceedings, did not object to Jackson's declaration, and the law judge admitted it into evidence. (Tr. 134.) The law judge also admitted, without objection from Blue Ridge Airlines, the receipt for \$800.52 that Jackson turned over to the FAA inspector who investigated this case. (Tr. 29, 34.) Haynes was unable to offer any explanation as to why Jackson would say that he paid \$800.52 if he only paid \$432. (Tr. 157.)

## II. ALJ Decision

After the hearing, the law judge issued a written initial decision in which he found that Blue Ridge Airlines committed the alleged violations. The law judge found that there was no cost-sharing for the flight, as Blue Ridge Airlines claimed. (Initial Decision at 5.) The law judge believed Jackson's statement that he paid \$800.52, the full cost of the flight, especially since it was supported by a receipt. (*Id.*) The law judge pointed out that the record contained no evidence of a motive for Jackson to forge a receipt, while Haynes had an obvious motive to do so. (*Id.*)

The law judge rejected the notion of a "common purpose" for the flight. (Initial Decision at 5.) He did not find credible Haynes's assertion that it was mere coincidence that Haynes encountered Jackson and his business associate at Front Range Airport on November 9, 1996, and that they all happened to want to go to Hays, Kansas on that particular day. (*Id.*) Instead, the law judge found that all three passengers booked a flight with Blue Ridge Airlines, rather than coming to an arrangement with Haynes as a private pilot. Additionally, the law judge found that there was "not a shred of evidence" to support Blue Ridge Airlines' claims that Complainant's case was contaminated by

perjury and by racial discrimination.<sup>5</sup> (Initial Decision at 6.) For these reasons, the law judge found that Blue Ridge had violated the regulations alleged in the complaint. Regarding the sanction, the law judge assessed a \$1,600 civil penalty, even though Complainant had sought a \$5,000 civil penalty. (*Id.*)

### III. New Evidence

Blue Ridge Airlines argues on appeal that Complainant misrepresented the facts in this case, and that the case should be remanded to the law judge to obtain further testimony from Jackson and other, unidentified witnesses. Blue Ridge Airlines states that “the witness Jackson is willing to testify to ... place the record right.” (Notice of Appeal/Appeal Brief at 1.)

Blue Ridge Airlines’ request for remand is denied. Blue Ridge Airlines has failed to explain the nature of the new testimony it wishes to submit. Moreover, Blue Ridge Airlines has failed to provide any affidavits or other authenticated documents to support its claim that Jackson and the others would provide testimony helpful to its case. Blue Ridge Airlines has failed to show that if its request for remand were granted, the outcome of this case likely would be different. Finally, Blue Ridge Airlines has failed to explain why it did not present at the hearing the testimony it now seeks to present for the first time on appeal. Under the circumstances, permitting additional proceedings is unjustified. Blue Ridge Airlines has already had its day in court.<sup>6</sup>

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<sup>5</sup> Blue Ridge Airlines states that it is a minority-owned business. (*See, e.g.,* Answer, p. 1.)

<sup>6</sup> *See* 14 C.F.R. § 13.234(c)(2) (providing that parties who seek reconsideration of a decision of the Administrator based on new evidence must set forth the new material and must include affidavits of prospective witnesses and authenticated documents that would be introduced in support of the new material, and that the party shall explain, in detail, why the party did not discover the new material through due diligence prior to the hearing). Although Section 13.234(c), strictly speaking, is inapplicable because the instant case does not involve a

#### IV. Sanction

Blue Ridge Airlines also argues on appeal that it cannot afford to pay a civil penalty in any amount. (Notice of Appeal/Appeal Brief at 1.) In reply, Complainant asserts that the record contains no evidence of financial hardship. (Reply Brief at 9.)

Complainant has also filed a cross-appeal regarding the sanction, arguing that the \$1,600 civil penalty imposed by the law judge is too low and that the law judge should have assessed \$5,000 in accord with the applicable sanction guidance. (Appeal Brief at 5-8.)

Law judges are expected to give a reasoned explanation of the amount of the civil penalty selected. In the Matter of Toyota Motor Sales, USA, FAA Order No. 94-28 at 7 (September 30, 1994), *clarified*, FAA No. 95-12 (May 10, 1995). In addition, law judges must follow the sanction guidance contained in FAA Order No. 2150.3A. In the Matter of Northwest Airlines, FAA Order No. 1990-37 at 8-9 (November 7, 1990), citing 55 Fed. Reg. 15,110, 15,114 (April 20, 1990) ("it is incumbent on law judges to apply agency policy faithfully"). The purpose of the agency's sanction guidance is to promote nationwide consistency and fairness in the setting of civil penalties. FAA Order No. 2150.3A, Appendix 4, p. 1 ("[t]his Appendix provides guidance to assure greater national consistency in enforcing the Federal Aviation Regulations"). If the law judges do not

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petition to reconsider a decision of the Administrator, it is reasonable to apply the same standard to all requests to submit new evidence that are presented after the close of the hearing. *See also* In the Matter of Kilrain, FAA Order No. 96-23 (August 13, 1996), where the Administrator rejected Respondent's request under Section 13.234(c) to submit new evidence; and In the Matter of Northwest Aircraft Rental, FAA Order No. 94-4 at 8, n.12 (March 10, 1994), where the Administrator granted Complainant's motion to strike new evidence submitted by way of an additional brief because Respondent had not demonstrated that the information was not previously available.

follow the agency's sanction guidance, it may be imposed on appeal. In the Matter of [Air Carrier], FAA Order No. 96-19 at 8 (June 4, 1996).

The normal ranges, under the agency's sanction guidance, for a single violation committed by air carriers the size of Blue Ridge Airlines,<sup>7</sup> are as follows:

Maximum \$4,000 - \$10,000<sup>8</sup>  
Moderate \$2,000 - \$4,000  
Minimum \$500 - \$2,000

FAA Order No. 2150.3A, Appendix 1, at p. 106. The violation in this case falls into the categories of failing to follow operations specifications and using an unqualified crewmember. In either event, the sanction guidance calls for a maximum civil penalty. FAA Order No. 2150.3A, Appendix 4 at 4, 6. Additionally, under the sanction guidance, the penalty for deliberate violations is higher than for inadvertent violations. FAA Order No. 2150.3A, Appendix 1, at pp. 107-108. Complainant argues persuasively that the violation in this case should be considered deliberate because Haynes knew that he had only a private pilot certificate (Tr. 146), and that the Beech Bonanza was not on Blue Ridge Airlines' operating specifications (Tr. 19-20). For these reasons, Complainant argues that under the sanction guidance, its proposed penalty of \$5,000 was not only reasonable, but was at the low end of what could be considered reasonable. (Appeal Brief at 8.)

The law judge did not explicitly rely on the sanction guidance in setting the sanction. His initial decision contains only the following statement about the sanction:

Finally, with regard to the amount of a civil penalty, it appears that the November 9<sup>th</sup> flight was the second and last flight Respondent has

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<sup>7</sup> Blue Ridge Airlines had only one authorized pilot and one authorized airplane. (Tr. 28.)

<sup>8</sup> Under 49 U.S.C. § 46301, Blue Ridge Airlines is subject to a civil penalty of up to \$10,000.

made pursuant to its Part 135 air carrier certificate. *See, e.g.*, Tr. 47, 94, 108. Moreover, the FAA inspector in this case agreed at the hearing that once it is established that a Part 135 operator uses a private pilot, there is a violation regardless of whether the aircraft type the pilot flies is authorized or the pilot's training is inadequate. (Tr. 42-43). In these circumstances, I find that doubling the \$800.00 amount which Mr. Haynes collected for the Part 135 flight would be reasonable.

(Initial Decision at 6.)

Complainant is correct that nowhere does the sanction guidance indicate that the appropriate method of determining the sanction is to multiply the amount of revenue from a flight by two or any other figure. Complainant is also correct that there is precedent indicating that unless there are factors justifying the reduction of an otherwise reasonable civil penalty, Complainant's use of the sanction guidance to determine the appropriate civil penalty should not be disturbed. In the Matter of TWA, FAA Order No. 98-11 at 21 (June 16, 1998).

Nevertheless, a legitimate factor does indeed support the reduction of the \$5,000 civil penalty proposed by Complainant to \$1,600 – specifically, it is “the ability of the alleged violator to absorb the sanction.” FAA Order No. 2150.3A, Appendix 4, p. 2, #7; *see also* Appendix 1 to the same order, p.103 (stating that the guidelines in Appendix 1, which yield a range of \$4,000-10,000 for a carrier the size of Blue Ridge Airlines, “do not address the ability of a particular respondent to pay a civil penalty; they only provide for sanction ranges .... The ability of a particular respondent to pay a particular civil penalty may be considered separately on a case-by-case basis”). The Administrator has held numerous times that financial hardship, when proven, may constitute grounds for a reduction of an otherwise appropriate civil penalty. *See, e.g.*, In the Matter of Larry's Flying Service, FAA Order No. 95-17 at 8 (August 4, 1995). Indeed, although the law

judge did not expressly refer to Blue Ridge Airlines' inability to absorb the sanction, he may have reduced it, at least in part, on that basis. By stating that the November 9<sup>th</sup> flight was Blue Ridge Airlines' second and last flight, the law judge may have been referring to Blue Ridge Airlines' severely limited income.

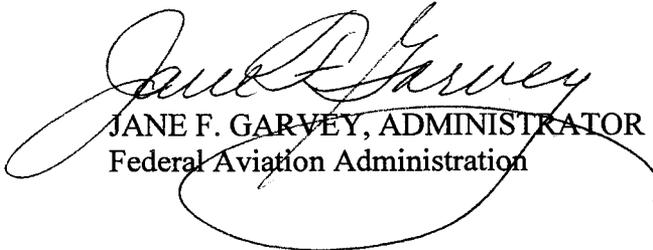
Even if the law judge employed an unauthorized method of determining the sanction, the error was harmless, given that he arrived at an appropriate sanction anyway. Contrary to Complainant's assertions (Appeal Brief at 8-10), the record does contain evidence of inability to absorb the sanction. As the law judge found, Blue Ridge Airlines' income was extremely limited -- it operated only two flights under its Part 135 air carrier certificate and is no longer operating. (Initial Decision at 6.) Testimony to this effect did not come from Haynes, Blue Ridge Airlines' President, but from one of Complainant's witnesses, an airport employee who was in a position to know and who was, if anything, hostile to Blue Ridge Airlines. (Tr. 101, 103.)

This is not a case, like In the Matter of Conquest Airlines, FAA Order No. 94-20 at 3 (June 22, 1994) or In the Matter of Giuffrida, FAA Order No. 92-72 at 3 (December 21, 1992), where unsworn statements from the alleged violator were the only evidence of financial hardship. The Administrator has recognized that in certain cases, the testimony of a credible, independent witness may be sufficient to prove financial hardship, even without supporting documentary evidence. In the Matter of Mauna Kea Helicopters, FAA Order No. 97-16 at 8 (May 23, 1997) (stating that "in certain, exceptional cases, the testimony of a credible, independent witness would be sufficient to prove financial hardship, even without supporting documentary evidence").

As for Blue Ridge Airlines' contention regarding the sanction -- that it is unable

to absorb even a \$1,600 civil penalty -- it too must be rejected. The \$1,600 civil penalty assessed by the law judge appropriately balances Blue Ridge Airlines' limited income with the seriousness of the violation.

In summary, the law judge arrived at an appropriate sanction amount, even if for the wrong reasons. Accordingly, the appeals of both Blue Ridge Airlines and Complainant are denied, and the law judge's decision assessing a \$1,600 civil penalty is affirmed.<sup>9</sup>

  
JANE F. GARVEY, ADMINISTRATOR  
Federal Aviation Administration

Issued this 21st day of December, 1999.

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<sup>9</sup> 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) (1999).