UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

In the Matter of: HELICOPTER FLITE, INC.
FAA Order No. 2011-11

Docket No. CP09EA0015
FDMS No. FAA-2009-0579[1]

Served: November 22, 2011

FAA'S PETITION FOR MODIFICATION OF FAA ORDER NO. 2011-6 GRANTED IN PART[2]

I. Introduction

In FAA Order No. 2011-6, the Administrator held that Complainant FAA had failed to prove that Helicopter Flite violated Section 135.25(b) of the Federal Aviation Regulations (FAR), 14 C.F.R. § 135.25(b). That regulation provides, in pertinent part, "Each certificate holder must have the exclusive use of at least one aircraft that meets the requirements for at least one kind of operation authorized in the certificate holder's operations specifications." The Administrator explained in the decision that a violation of Section 135.25(b) required evidence of operation by the certificate holder when it did not have an exclusive use aircraft.

[1] Generally, materials filed in the FAA Hearing Docket (except for materials filed in security cases) are also available for viewing at *http://www.regulations.gov*. 14 C.F.R. § 13.210(e)(1).

[2] The Administrator's civil penalty decisions, along with indexes of the decisions, the rules of practice, and other information, are available on the Internet at the following address: *www.faa.gov/about/office_org/headquarters_offices/agc/pol_adjudication/AGC400/Civil_Penalty/*. *See* 14 C.F.R. § 13.210(e)(2). In addition, Thomson Reuters/West Publishing publishes Federal Aviation Decisions. Finally, the decisions are available through LEXIS (TRANS library) and WestLaw (FTRAN-FAA database). For additional information, see the Web site.

The Complainant filed a petition for modification. In the petition, the Complainant requested that the Administrator:

1. Clarify that a carrier can be found to be in noncompliance with Section 135.25 when it lacks an exclusive use aircraft even if the carrier does not conduct Part 135 operations during that period;

2. Modify the order to explain the safety bases for the exclusive use requirement in Section 135.25;

3. Find that Helicopter Flite was in violation of Section 135.25(b) between February 12, 2008, and September 15, 2008, during which time it did not have an exclusive use aircraft; and

4. Hold that the agency may impose a civil penalty in appropriate circumstances for a violation of Section 135.25(b), although the agency is no longer seeking a civil penalty against Helicopter Flite in this case.

(Petition at 17-18.)[3] The Complainant wrote further that the agency is no longer seeking a civil penalty against Helicopter Flite.

Upon further consideration of the issues present, the petition is granted in part as explained below. The Complainant correctly pointed out that FAA Order No. 2011-6 blurred the boundaries between the elements necessary to prove noncompliance with Section 135.25 and guidance regarding the imposition of an appropriate sanction, if any. Hence, FAA Order No. 2011-6 is modified to hold as follows:

[3] Helicopter Flite filed a petition to quash the petition to modify FAA Order No. 2011-6, arguing that the Complainant failed to file a notice of appeal within 10 days of the issuance of the initial decision. The petition to quash is denied. The FAA had 30 days from the date of issuance of FAA Order No. 2011-6 in which to file a petition for modification under 14 C.F.R. § 13.234, plus an additional 5 days under the "mailing rule," 14 C.F.R. § 13.211(e). Hence, the Complainant had a total of 35 days in which to file a petition for reconsideration or modification. The Complainant filed its petition in a timely fashion on July 13, 2011, 30 days after the issuance of FAA Order No. 2011-6. Contrary to Helicopter Flite's argument, the Complainant was not required to file a notice of appeal within 10 days of the date of issuance of FAA Order No. 2011-6 because the requirement to file a notice of appeal is limited to appeals from initial decisions issued by administrative law judges (*see* 14 C.F.R. § 13.233(a)) and does not apply to petitions to reconsider or modify a decision by the Administrator under 14 C.F.R. § 13.234.

1. A finding that a certificate holder is not in compliance with Section 135.25(b) does not require proof that the certificate holder operated any aircraft during the time period in which it lacked an exclusive use aircraft;

2. A certificate holder which does not have exclusive use of at least one aircraft that meets the requirements for at least one kind of operation authorized in the certificate holder's operations specifications is not in compliance with Section 135.25(b);

3. Helicopter Flite was not in compliance with Section 135.25(b) between February 12, 2008, and September 15, 2008, when it did not have an exclusive use aircraft; and

4. No civil penalty is assessed.

II. The Case

Briefly, the pertinent facts in this case are as follows. Air Chopper, LLC, a holding company, leased a helicopter, identification number N407Z, to Helicopter Flite on November 12, 2007, giving Helicopter Flite exclusive use of N407Z. The FAA approved the addition of N407Z to Helicopter Flite's operations specifications on January 30, 2008. At the time, Helicopter Flite only had exclusive use of this one helicopter. Under its operations specifications and under 14 C.F.R. § 13.25(b), Helicopter Flite was required to have the exclusive use of at least one aircraft that met the requirements for at least one kind of operation authorized in the certificate holder's operations specifications.

On February 12, 2008, Air Chopper sold N407Z to Pumpco, Inc., terminating the exclusive use lease with Helicopter Flite.[4] On September 15, 2008, Helicopter Flite informed FAA inspectors[5] that it did not have exclusive use of N407Z.

[4] The lease provided that "both parties understand and agree that in the event the said helicopter is sold by Air Chopper, LLC, then this Lease shall automatically terminate." (Exhibit A-6.) As the Administrator wrote in FAA Order No. 2011-6, "[i]t may fairly be questioned whether a lease with a provision like this one satisfies Section 135.25(c)'s requirement for a

Subsequently, the Complainant initiated an $11,000 civil penalty enforcement action against Helicopter Flite, alleging that Helicopter Flite had violated Section 135.25(b). The Complainant's argument for an $11,000 civil penalty was based upon sanction guidance which provided that a moderate or maximum civil penalty is appropriate for an operation contrary to operations specifications involving "likely potential or actual adverse effect on safe operation." FAA Order No. 2150.3B, *FAA Compliance and Enforcement Program*, Appendix B, Figure B-1-c.[6] After a hearing, the administrative law judge (ALJ) issued a written initial decision, holding that Helicopter Flite had violated Section 135.25(b) and assessing an $11,000 civil penalty.

Helicopter Flite appealed from the initial decision, arguing that there was no evidence that it had operated contrary to its operations specifications during the time period when it did not have an exclusive use aircraft, and, therefore, under the sanction guidance, it had not violated the regulation.[7] In its reply brief, the Complainant continued to argue that an $11,000 civil penalty was appropriate. In FAA Order No. 2011-6, the

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written agreement giving the certificate holder sold possession, control and use for flight for at least 6 consecutive months." FAA Order No. 2011-6, at 5, n.8.

[5] The FAA inspectors were at Helicopter Flite's hangar, conducting a conformity inspection of another helicopter, N407JG, which Helicopter Flite wanted to add to its operations specifications. N407JG was added to Helicopter Flite's operations specifications in October 2008. (Tr. 45.)

[6] The guidance also provides that a minimum civil penalty is appropriate when an air carrier operates in technical noncompliance with its operations specifications.

[7] Helicopter Flite conflated the regulations with the sanction guidance. The questions to ask in a civil penalty action are first, was there a violation of the FAR, and if so, what is the appropriate civil penalty under the sanction guidance. While the agency's sanction guidance is comprehensive, it is conceivable that there may be a violation of the FAR for which there is no appropriate sanction guidance at which point, it will be necessary for an ALJ or the Administrator to determine what, if any civil penalty, should be assessed. Assuming the judicious exercise of prosecutorial discretion by agency attorneys, cases in which a violation is found but no civil penalty is appropriate should be very rare.

Administrator found that the Complainant had not proven that Helicopter Flite violated Section 135.25, and therefore, did not assess a civil penalty.

In the petition to modify, the Complainant argued that Helicopter Flite violated Section 135.25(b) but conceded, without explanation, that a civil penalty is not appropriate in this matter. The Complainant wrote that there are "areas of confusion" in FAA Order No. 2011-6, pointing to alleged inconsistencies in language on pages 2 and 9-10. On page 2 of that order, the Administrator wrote that no violation of Section 135.25(b) had been proven, as follows:

> … it is held that in the absence of evidence of operation, a certificate holder cannot be found to have violated Section 135.25(b). Consequently, the FAA failed to prove that Helicopter Flite violated Section 135.25(b) because the FAA did not introduce any evidence that Helicopter Flite or any other entity operated the helicopter in question[8] after the helicopter was sold.

[8] The Complainant suggested that another problem exists with the passage on page 2, as follows:

> We do not believe that the FAA Decisionmaker intended to suggest that one of the necessary elements of a Section 135.25(b) violation is that the actual aircraft "in question" (i.e., the aircraft listed on the operations specifications as the "exclusive use" aircraft) was operated by the Respondent carrier or by another operator. Whether the listed exclusive use aircraft is operated or not by anyone is not relevant to whether the Respondent carrier had an exclusive-use aircraft in its exclusive possession and control for the requisite period.

(Petition at 3.) The Complainant agrees, however, that "the use of nonexclusive use aircraft by the Respondent carrier itself, during a period when it no longer had an exclusive-use aircraft, might be relevant to whether enforcement action should be taken or not and might be relevant as to the nature of the enforcement action (*e.g.*, certificate action versus civil penalty.)" (Petition at 3.)

There is a simple explanation for the Administrator's reference to the aircraft "in question" [N407Z] on page 2 of FAA Order No. 2011-6. First, N407Z was the only aircraft listed on Helicopter Flite's operations specifications, and the Administrator assumed that in the absence of contrary evidence, Helicopter Flite would not have operated an aircraft under Part 135 that was not listed on its operations specifications in violation of Section 119.5(g). Second, the FAA inspector testified, albeit confusingly and unconvincingly, that there is the potential for inadequate maintenance when an aircraft is not in the exclusive control of the certificate holder carrier. (Tr. 73-74.) The FAA did not set forth evidence or argument at the hearing to suggest that a violation of Section 135.25(b) may reveal safety concerns regarding operators generally or Helicopter Flite, in particular.

(Initial Decision at 2.) The Complainant argued that the above-quoted statement on page 2 is inconsistent with the Administrator's statement on pages 9-10 of FAA Order No. 2011-6 that "it makes no sense" to enforce the requirement contained in Section 135.25(b) by imposing a civil penalty unless there is evidence that the certificate holder continued to operate during the time period that it did not have exclusive use of at least one aircraft. The Administrator explained:

> If there is no implicit operation requirement, then, for example, the FAA could assess a civil penalty once a certificate holder's exclusive use aircraft was destroyed by a fire or natural disaster. Likewise, a certificate holder would not be able to sell its exclusive use aircraft and use the proceeds to purchase another aircraft without being in violation of Section 135.25(b).

According to the Complainant, the Administrator in this passage on pages 9-10 seemed to find that the evidence established a technical violation of Section 135.25(b), but *as a matter of enforcement policy*, evidence of operation is necessary to support imposition of a civil penalty. The Complainant suggested that this passage could also be read as guidance regarding when other enforcement action would be appropriate, such as a "remedial" certificate action. According to the Complainant, however, evidence of operation is not necessary to prove that a commercial operator or air carrier violated Section 135.25(b).

III. Analysis

Section 135.25(b) sets forth a requirement for applicants for, and holders of, certificates issued under Part 119 that authorize operations under Part 135. This requirement is that "[e]ach certificate holder must have the exclusive use of at least one aircraft that meets the requirements for at least one kind of operation authorized in the certificate holder's operations specifications." Section 135.25(b) is, by its wording, a

prerequisite for issuance of a certificate under Part 119, entitling a commercial operator or air carrier to operate under Part 135. It is also a requirement to continue to hold such a certificate. An applicant for, or holder of, such a certificate must either have exclusive use of an aircraft as the owner or have a lease that gives it exclusive use of an aircraft for at least six consecutive months. 14 C.F.R. § 135.25(c).

As worded, Section 135.25(b) does not contain an element of operation. If the drafters of this regulation had intended to include an element of operation, the regulation would have been worded "no certificate holder may operate unless it has the exclusive use of at least one aircraft …."[9] Further, if Section 135.25(b) is read as including an implicit operation component, then the FAA might not be able to deny an application for a certificate under Part 119 to an applicant seeking to operate under Part 135 which does not have an exclusive use aircraft.[10]

Operation without an exclusive use aircraft is a separate violation of the FAR. If the holder of a Part 119 certificate conducts operations under Part 135 in noncompliance with Section 135.25(b), then that operation would be a violation of 14 C.F.R. § 119.5(g). Section 119.5(g) prohibits operations contrary to a certificate holder's operations specifications, and the requirements of Section 135.25(b) are incorporated in the operations specifications of certificate holders authorized to operate under Part 135.

[9] For example, see Section 135.25(a), which provides: "… no certificate holder may operate an aircraft under this part unless that aircraft – (1) Is registered as a civil aircraft of the United States and carries an appropriate and current airworthiness certificate issued under this chapter; and (2) Is in an airworthy condition and meets the applicable airworthiness requirements of this chapter, …. 14 C.F.R. § 135.25(a).

[10] The Complainant stated that Section 135.25(b) "can have a prophylactic safety effect when used to deny fly-by-night applicants for a part 119 certificate to conduct part 135 operations …." (Petition at 5).

Depending upon the circumstances, a civil penalty action for operation contrary to operations specifications due to noncompliance with Section 135.25(b) may be warranted.

The Complainant wrote that "in the absence of the operation of any aircraft … it is not readily obvious why the FAA, and its predecessor agencies, decided that safety in air commerce required the adoption of this type of regulation."[11] (Petition at 4.) The Complainant contended that "Section 135.25(b) can serve as an early-warning system that an existing part 135 operator that has no exclusive-use aircraft might have problems conducting a safe and compliant part 135 operation." (Petition at 5.) It is hard to know what to make of this argument because such *clues* alone would not warrant punitive or remedial legal enforcement action, although they might justify investigation.

The Complainant discussed what it referred to as two "safety bases" for Section 135.25(b): (1) "The Best-Use-of-FAA-Safety-Inspectors-for Certification-and Oversight

[11] To support its position that Section 135.25 is based upon safety considerations and does not include an operational component, the Complainant attached several historical documents, including a letter written by Brock Adams, the Secretary of Transportation, to Congressman Parren J. Mitchell in 1977 regarding an order of revocation issued against Aire Cardinal International. Aire Cardinal had lost its two exclusive use aircraft, no longer employed required full-time personnel, and was not in operation. Aire Cardinal appealed to the National Transportation Safety Board (NTSB), and the certificate action was pending before the NTSB at the time of this letter. In this action, the FAA alleged that Aire Cardinal violated Section 121.155, which at the time, prohibited any supplemental air carrier or commercial operator from using any aircraft unless it had exclusive use of that aircraft, and required supplemental air carriers and commercial operators to have exclusive use of at least one aircraft. 14 C.F.R. § 121.155 (1977). Adams wrote in the letter that the exclusive use requirement in then Section 121.155, along with the requirement to retain key management and operations personnel, are "paramount safety considerations fully consistent with a commercial operator's legal obligation to conduct operations with the highest degree of safety." (Letter to Congressman Parren J. Mitchell dated July 13, 1977, at 2.) However, this claim seems exaggerated in light of the FAA's decision to delete Section 121.155 in 1981, at which time the FAA explained in the Federal Register, "[t]his updating of the Federal Aviation Regulations eliminates, *without any derogation in safety*, an unnecessary economic burden which the present rule imposes on this segment of aviation." 46 F.R. 35611 (July 9, 1981) (emphasis added).

Theory;" and (2) "The More-Meaningful-Data Theory." The first theory, as described by the Complainant, is premised upon the need to use scarce agency resources judiciously. Under this theory, Section 135.25(b) serves the public interest because the FAA's safety inspectors are able to devote their efforts to certifying and overseeing viable businesses, rather than also having to certify and oversee applicants without the means and intent to stay in business more than briefly. The Complainant wrote, "[i]f too many fly-by-night operations got certificated, safety problems that could otherwise be identified and corrected by FAA inspectors after inspecting real, going-concern part 135 operators, might be missed." (Petition at 13.)

The "more-meaningful-safety-data theory," as set forth by the Complainant in the petition, is premised on the assumption that FAA inspectors conducting oversight of a certificate holder would get a more meaningful picture of the operator's maintenance practices and willingness to comply with safety rules if the operator or carrier had at least one exclusive use aircraft in at least 6-month increments.

These theories may justify the decision of the FAA and its predecessors years ago to promulgate Section 135.25(b) (and the earlier iterations of this rule). Further, these theories would support the denial of an application to a prospective operator under Part 135 if the applicant did not have exclusive use of an aircraft. Depending upon the totality of the circumstances, these theories may support a remedial suspension or revocation action in cases of noncompliance with Section 135.25(b). It is unlikely that any punitive enforcement action – civil penalty or certificate suspension – would be warranted if a certificate holder lost its exclusive use aircraft through no fault of its own, such as due to

theft, fire or a natural disaster, and if the carrier is working diligently to replace its exclusive-use aircraft.

The Administrator expects the agency attorneys to exercise sound prosecutorial discretion when initiating enforcement actions. It is perturbing that in this case, the Complainant argued both before the ALJ and the Administrator that an $11,000 civil penalty was appropriate under FAA Order No. 2150.3B, Appendix B, Figure B-1-c. That guidance clearly did not apply because it pertains to *operation* contrary to operations specifications with *likely potential* or *actual adverse effect on safe operation*. Regardless, the Administrator makes no finding in this order regarding whether any civil penalty would be appropriate in this action because the agency attorney has taken that issue off the table.

IV. Conclusion

FAA Order No. 2011-6 is modified as explained in this order. No civil penalty is assessed.

[Original signed by J. Randolph Babbitt]

J. RANDOLPH BABBITT
ADMINISTRATOR
Federal Aviation Administration