

**UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC**

In the Matter of: SUN QUEST EXECUTIVE AIR CHARTER, INC.

FAA Order No. 2011-13

Docket No. CP08WP0004
FDMS No. FAA-2008-0238¹

Served: November 22, 2011

DECISION AND ORDER²

I. Introduction

Complainant Federal Aviation Administration (FAA) has appealed the written initial decision of Administrative Law Judge (ALJ) Richard C. Goodwin.³ Among his findings, the ALJ held that the failure of Respondent Sun Quest Executive Air Charter, Inc. (Sun Quest) to include in its flight and duty time records 50.4 hours of flights that one of its pilots made for the Los Angeles Police Department (LAPD) did not constitute a violation of 14 C.F.R. § 135.63(a)(4)(vii).⁴

¹ Materials filed in the FAA Hearing Docket (except for materials filed in security cases) are also available for viewing at the following Internet address: www.regulations.gov.

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. 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.

³ A copy of the ALJ's initial decision is attached.

⁴ Section 135.63(a)(4)(vii) provides as follows:

(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,

Section 135.63(a)(4)(vii) of the Federal Aviation Regulations (FAR) requires certificate holders who operate under 14 C.F.R. Part 135⁵ to “keep [a]n individual record of each pilot ... including ... the pilot’s flight time in sufficient detail to determine compliance with the flight time limitations.” The FAR require certificate holders to count “other commercial flying” as flight time for the purpose of the flight time limitations. *See, e.g.*, 14 C.F.R. § 135.267(b) and (c)(2), which include “other commercial flying” in the amount of flight time that a Part 135 flight crewmember may not exceed.⁶

The FAA had argued that Sun Quest pilot Mark C. Smith’s flight time for the LAPD was “other commercial flying,” a record of which Sun Quest needed to keep.⁷ The ALJ held that the LAPD flights involved public aircraft and were therefore not subject to FAA regulation. To support his determination that the LAPD helicopter was a

including the following information:

* * *

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

⁵ Requirements for commuter and on demand operators are set forth in 14 C.F.R. Part 135.

⁶ Section 135.267(b) and (c)(2) provide:

(b) Except as provided in paragraph (c) of this section, during any 24 consecutive hours the total flight time of the assigned flight *when added to any other commercial flying* by that flight crewmember may not exceed – (1) 8 hours for a flight crew consisting of one pilot; or (2) 10 hours for a flight crew consisting of two pilots qualified under this part for the operation being conducted.

(c) A flight crewmember’s flight time may exceed the flight time limits of paragraph (b) of this section if the assigned flight time occurs during a regularly assigned duty period of no more than 14 hours and – ... (2) If flight time is assigned during this period, that total flight time *when added to any other commercial flying* by the flight crewmember may not exceed – (i) 8 hours for a flight crew consisting of one pilot; or (ii) 10 hours for a flight crew consisting of two pilots
(Emphasis added.)

⁷ The FAA did not allege that Sun Quest actually violated the flight time limitations – instead, it simply alleged that Sun Quest failed to *record* the pilot’s flight time for the LAPD.

public aircraft, the ALJ wrote that the LAPD was a governmental unit and that it owned and operated the helicopter flown by the Sun Quest pilot. Further, the ALJ wrote, there was no evidence that the aircraft performed any activities other than police work.

In addition, the ALJ held that:

- Sun Quest did not violate Section 135.63(a)(4)(vii) by not tracking in the flight and duty time records as other commercial flying the 1.3-hour check ride that Smith administered on January 24, 2005;
- Sun Quest violated Section 135.63(a)(4)(vii) by not tracking in the flight and duty time records as other commercial flying the 1.5-hour check ride that Smith gave to a company pilot on March 9, 2005;
- Sun Quest's records generally failed to satisfy Section 135.63(a)(4)(vii) regarding the flight time that it did track because while it recorded the total amount of time per flight, it did not record the time that each flight began and ended.

The FAA sought a \$20,000 civil penalty in the amended complaint. The ALJ assessed a \$5,000 civil penalty for the violations that he found.

The FAA only appealed from the ALJ's finding regarding the LAPD flights, and Sun Quest did not appeal. This decision affirms the ALJ's decision in Sun Quest's favor regarding the LAPD flights, but not for the reasons cited by the ALJ. Instead, this decision holds that the FAA failed to prove that the flights were "other *commercial* flying" that Sun Quest was required to record under Section 135.63(a)(4)(vii) because the FAA failed to prove that the LAPD paid Smith for the flights. As for the sanction, given that the FAA argues only that the sanction should be increased to \$20,000 if this decision is in its favor (Appeal Brief at 27), which it is not, the civil penalty will remain as assessed by the ALJ, at \$5,000.

II. Facts

The facts relevant to this appeal are as follows.⁸ During all relevant times, Sun Quest held an air carrier certificate and operated under 14 C.F.R. Part 135. (Stip. ¶ 2.) Smith was the President, Chief Pilot, Check Pilot, and Line Captain for Sun Quest. (Amended Complaint & Amended Answer ¶ II, § 4.) Sun Quest used Smith as a pilot in operations under Part 135. (*Id.*)

There is no disagreement that Smith also served as a police officer for the LAPD. (*See* Exhibit A to the FAA’s “Trial Brief Based on Stipulated Statement of Facts.” Exhibit A is a letter dated May 5, 2005, from the LAPD Chief of Police, stating that he was responding to the request of Sun Quest’s Principal Operations Inspector (POI) for “*Officer*” Smith’s flight records for the LAPD. *See also* Amended Complaint & Amended Answer ¶ II, § 4, both stating that Smith was a police officer for the LAPD.) Smith’s work for the LAPD involved piloting a police helicopter owned and operated by the LAPD. (Stip. ¶ 24.)

During February 2005, Smith served as a police officer pilot for the LAPD on 17 dates, with a total flight time for the month of 50.4 hours. (Stip. ¶ 24, which incorporates Amended Complaint ¶ II, § 12.) Sun Quest’s Part 135 flight and duty time records for Smith did not reflect any of this pilot flight time for the LAPD. (Stip. ¶ 23.) The LAPD had operational control over the initiating, conducting, and terminating of all flights in its helicopters. (Stip. ¶ 26.)

⁸ The parties agreed, with the ALJ’s approval, to file a joint stipulation and then to submit briefs in which they argued their respective positions.

III. Arguments on Appeal

A. The FAA's Arguments

The FAA's arguments on appeal include the following.

1. The ALJ erred in finding that the FAA does not have any jurisdiction over public aircraft operations. (Appeal Brief at 6.)
2. The ALJ erred in finding that the LAPD aircraft were public aircraft, because there was no evidence that the LAPD flights were public aircraft operations. (*Id.* at 7.)
3. Under the FAA's interpretation of the term "other commercial flying," flying in a public aircraft may be "other commercial flying" within the meaning of 14 C.F.R. § 135.267 if the pilot was paid for the flying. (*Id.* at 23.)
4. Amendments to the statutory definition of "public aircraft" do not justify changing the FAA's interpretation of the term "other commercial flying" to exclude all public flying (as opposed to excluding only military aircraft operations.)
5. Sun Quest's argument that it only had to track other commercial flying that it assigned fails because this argument is based on FAA legal interpretations involving rest requirements rather than flight time limitations.

B. Sun Quest's Arguments

Sun Quest's counterarguments include the following.

1. The LAPD flights involved public aircraft, and the Federal Aviation Act, as amended, gives the FAA the authority to regulate public aircraft regarding *airspace*, but not to regulate public aircraft when airspace is not at issue, as in the instant case.
2. Under FAA legal interpretations, the LAPD flying was not "other commercial flying" for purposes of Sun Quest's recordkeeping because *Sun Quest* did not assign the flying.
3. The FAA's interpretation of "other commercial flying," which excludes only military flying, a subset of public aircraft flying, is incorrect because the statute exempts *all* public aircraft from FAA regulation, except for airspace regulation.

4. The FAA did not produce any evidence that Smith received any compensation for the LAPD flights.

IV. Discussion

The FAA is correct that it has jurisdiction over some public aircraft operations.⁹ Regardless, the FAA's appeal must be denied because the FAA failed to prove that Smith's flying for the LAPD constituted "other commercial flying" within the meaning of 14 C.F.R. § 135.267. Hence, the FAA did not prove that Sun Quest violated Section 135.63(a)(4)(vii), as alleged, by failing to record Smith's flight time for LAPD as "other commercial flying."

The FAA's own longstanding interpretation, which there is no reason to disturb,¹⁰ is that "[o]ther commercial flying" means any nonmilitary flying as a required

⁹ For example, the Federal aviation statute provides: "[T]he FAA Administrator shall ... assign by regulation or order the use of the airspace necessary to ensure the safety of *aircraft* ["aircraft" includes both civil *and* public aircraft]" 49 U.S.C. § 40103(b)(1). *See also U.S. v. Christensen*, 419 F.2d 1401, 1402 (9th Cir. 1969), finding that FAA regulations requiring "aircraft" to comply with air traffic control instructions apply to "public aircraft." Further, 49 U.S.C. § 44701 provides that the FAA Administrator shall promote safe flight of civil aircraft in air commerce. Insofar as public aircraft operations may adversely affect the safety of civil aircraft, the FAA may regulate them under circumstances that will not be delineated here.

Regardless, Sections 135.63(a)(4)(vii) and 135.267(b) and (c)(2), do *not* regulate public aircraft operations, but instead regulate civil aircraft operations. The FAA's case was against Sun Quest, a civil operator. Hence, the FAA was not seeking to regulate public aircraft or an operator of public aircraft. Consequently, there is no need to address the issue whether Sun Quest proved that Smith's flights for the LAPD constituted public aircraft flights.

¹⁰ The Administrator permitted the parties to submit additional briefs (both initial and reply briefs) on whether the longstanding FAA interpretation of the term "other commercial flying" (as stated above, any nonmilitary flying, as a required crewmember, other than in air transportation, for which the crewmember is paid for his or her services) had changed or should be changed, given statutory changes in the definition of "public aircraft." *Sun Quest*, FAA Order No. 2011-1 at 2 (January 5, 2011). Specifically, the Administrator inquired whether the definition of "other commercial flying" should be changed to exclude any *public aircraft* flying, rather than excluding only *military aircraft* flying, which is a subset of public aircraft flying. In its additional brief, the FAA asserts that no statutory changes justify a change in the definition of "other commercial flying." The FAA points out that the legislative history shows that in the past, Congress has treated military flying differently than non-military public aircraft for purposes of flight time limitations because military flying is essential to the national defense. Sun Quest does not point to any statutory changes that justify a change in the definition of "other commercial flying."

crewmember, other than in air transportation, for which the crewmember is paid for his or her services.”¹¹ Letter from Assistant Chief Counsel for Regulations to Richard Martinelli, 2009 WL 737336 (March 11, 2009); Letter from Assistant Chief Counsel for Regulations to Ryan Koepp, 2008 WL 3200870 (March 6, 2008); Letter from Assistant Chief Counsel for Regulations to James W. Johnson, 2003 WL 25427850 (May 9, 2003); Letter from Assistant Chief Counsel for Regulations to Jeff J. Jacober (June 24, 1991); and Letter from Assistant Chief Counsel for Regulations to Manager, NE-FSDO-03 (October 31, 1990).

The FAA failed to prove the element of compensation – specifically, that the LAPD paid Smith for his LAPD flying. Although the ALJ found that “Smith was a required crewmember and received payment” (Initial Decision at 6), there was no stipulation or admission that Smith was compensated for his work with the LAPD. As

¹¹ Sun Quest argues for an additional element of “other commercial flying” – that the flying be assigned by the certificate holder. However, the numerous FAA interpretations defining “other commercial flying” do not include “flying for the same employer” as part of the definition.

Also, as the FAA points out, FAA interpretations indicate that flying performed for other employers can in fact be “other commercial flying.” For example, one interpretation states that the following types of flying, at least some of which would be for other employers, would count as “other commercial flying” – executive pilot services, aerial application, sight-seeing flights, carriage of parachutists, banner and glider towing, game survey, power and pipeline patrol. Letter from Chief, Air Carrier and General Operating Branch, AGC-22, to AFS-200 n.9, 1975 WL 342744 (August 1, 1975).

Sun Quest quotes from the following interpretation:

The rule regarding “other commercial flying” is that it may not be conducted during required rest periods, *if it is assigned by the certificate holder*.

Specifically, the prohibition against “other commercial flying” during the required rest period applies to situations *where the certificate holder requires the flying*.

Letter from Acting Assistant Chief Counsel, Regulations and Enforcement, to Manager, FAA Lincoln Flight Standards District Office, 1989 WL 1631930 (August 9, 1989). (Emphasis added by Sun Quest.)

The cited portion of the interpretation is not on point – it deals only with whether “other commercial flying” may be performed during a rest period, which is not the issue here. Moreover, as this interpretation makes clear, “other commercial flying” that precedes Part 135 flying, regardless of whether it was assigned by another certificate holder, must be counted against the daily flight time limitations.

Sun Quest points out, Smith's work for the LAPD may have been on a volunteer basis, like that of volunteer firefighters.¹² The FAA simply did not bear its burden of proving compensation to the pilot, an element of "other commercial flying."

In conclusion, the FAA failed to show that Smith's LAPD flying met all the elements of "other commercial flying." Consequently, the FAA failed to show that Sun Quest violated 14 C.F.R. § 135.63(a)(4)(vii), as alleged, regarding Smith's flights for the LAPD. The FAA's appeal is denied.¹³

[Original signed by J. Randolph Babbitt]

J. RANDOLPH BABBITT
ADMINISTRATOR
Federal Aviation Administration

¹² Judicial notice is taken of the LAPD Web site, which indicates that the LAPD does in fact use volunteer police officers:

The Los Angeles Police Reserve Corps is comprised of community members who volunteer their time to fulfill many of the roles handled by full-time sworn police officers. Reserve officers receive the same training as full-time officers and work alongside them in every aspect of Department operations.

http://www.lapdonline.org/join_the_team/content_basic_view/542

¹³ Under the circumstances, there is no need to address any of the other issues raised by the parties on appeal.

SERVED JANUARY 26, 2010

DEPT. OF TRANSPORTATION
DOCKETS

UNITED STATES DEPARTMENT OF TRANSPORTATION
OFFICE OF HEARINGS
WASHINGTON, D.C.

FEDERAL AVIATION ADMINISTRATION,

Complainant,

v.

SUN QUEST EXECUTIVE AIR CHARTER, INC.

Respondent.

FAA DOCKET No. CP08WP0004

(Civil Penalty Action)

DMS No. FAA-2008-0238

INITIAL DECISION
OF ADMINISTRATIVE LAW JUDGE RICHARD C. GOODWIN

Found: 1) Respondent violated 14 CFR §135.63(a)(4)(vii) on two counts; and
2) Respondent is assessed a civil penalty of \$5,000.

I. Background

Flight and duty times for pilots operating under Part 135 of the Federal Aviation Regulations ("FARs") are circumscribed. Section 135.267(b), 14 C.F.R. §135.267(b), generally limits one-pilot flight crews during any 24 consecutive hours to 8 hours of total flight time "when added to any other commercial flying by that flight crewmember"; for flight crews of two pilots, the regulation caps flight time at 10 hours of total flight time (including "other commercial flying").

Respondent Sun Quest Executive Air Charter, Inc. ("Respondent" or "Sun Quest") is an air carrier certificated under Part 135. Certificate holders are required to keep records of pilots' flight time in sufficient detail to determine compliance with the described limitations. The issue in this case is whether Sun Quest did so.

This matter originated in a records inspection carried out by agency inspectors on March 18, 2005. The inspectors noted several discrepancies in Respondent's records. The Complaint of the Federal Aviation Administration ("FAA," "Complainant," or "the agency") followed.

The Complaint, as amended, asserts that Sun Quest violated 14 C.F.R. §135.63(a)(4)(vii). This FAR requires certificate holders to "make available for

inspection by the Administrator . . . [t]he pilot's flight time in sufficient detail to determine compliance with the flight time limitations of this part." Complainant charges four violations of this FAR. The agency asks for a total civil penalty until 49 U.S.C. §46301(a)(2) of \$25,000.

Charge one is that Respondent's pilot records themselves are not sufficiently detailed to determine compliance with relevant limitations on flight time. Charges two and three assert that Sun Quest President and chief pilot Mark Smith failed to comply with flight and duty time limitations in providing (a) flight training on January 24, 2005 (charge two), and (b) a check ride on March 9, 2005 (charge three). The fourth charge alleges that Sun Quest records failed to reflect Captain Smith's flight time for the Los Angeles Police Department ("LAPD"). Because Smith's piloting for the LAPD constitutes "other commercial flying" under §135.267(b) according to the Complaint, Sun Quest should have tracked it.

Respondent denied the charges. It contends that no discrepancies were noted or in fact existed (Stip. ¶11).

The parties met for hearing on January 26, 2009. Since nearly all the facts of the case were undisputed (Tr. 4), the parties agreed, with the Court's approval, to file a joint stipulation and then to submit briefs arguing their respective positions. The stipulations and briefs have now been filed and the case is ready for decision.¹

The agency has the burden of proof. To prevail it must prove its case by a preponderance of the reliable, probative, and substantial evidence (14 C.F.R. §13.223).

II. Discussion

A. The Nature of Respondent's Pilot Logs Violates the Regulation

Sun Quest records its flight time and duty time records for its pilots in a document it calls "Duty and Flight Time Log Sheet" ("Log Sheet"). *See, e.g.*, Compl. Br., Exh. B. The document has column entries for duty beginning time (called "Time On Duty"), duty end time ("Time Off Duty"), total duty time, and total flight time ("Flight Time").

Flight time limitations are calculated on a rolling 24-hour basis (14 C.F.R. §135.267). The FAA determines compliance by counting back 24 hours from the scheduled end of a shift. So, for example, if a pilot's shift is scheduled to end at 9:00 p.m. on September 2, and the pilot is limited under FAR §135.267(b) to 8 hours of flight time, that pilot may not accumulate more than 8 hours of flight time between 9:00 p.m.

¹ Complainant's briefs, entitled Complainant's Trial Brief Based on Stipulated Statement of Facts, Complainant's Reply to Respondent's Trial Brief, and Complainant's Supplemental Brief, will be referred to as "Compl. Br.," "Compl. Reply," and "Compl. Suppl.," respectively; Respondent's briefs, entitled Respondent's Brief, Respondent's Reply Brief, and Respondent's Supplemental Brief, will be referred to as "Resp. Br.," "Resp. Reply," and "Resp. Suppl." respectively. (The supplemental briefs were filed at the behest of the Court by Order served September 1, 2009). Citations to Stipulated Facts will be noted as "Stip." followed by the paragraph number.

September 1 (counting back 24 hours from the scheduled end of the shift) and 9:00 p.m.
 September 2 (the scheduled end of the shift).

Sun Quest's Log Sheet does not record when flight time (as opposed to duty time) begins and ends. It is Complainant's contention that because of this omission, Respondent's records are insufficient to determine compliance with flight time limitations, thus making out the alleged violation of §135.63(a)(4)(vii).

I find the violation. Complainant has shown that Sun Quest's records for its pilots do not provide the information necessary to determine compliance with the FAR's limitations on flight time.

In failing to record the time a flight begins and ends, the Log Sheet does not enable a determination of whether regulatory standards have been met. If a pilot operates for six consecutive hours on two consecutive days, for example, the data Sun Quest enters permit a conclusion that the pilot gained sufficient rest, thereby complying with the regulations – but the data, or lack of it, also permit the opposite conclusion. Sun Quest's failure to record the times that the flights begin and end make it impossible to know which.

The following example illustrates why:

Scenario One:

September 1

12-hour shift, 10:00 a.m.-10:00 p.m.
 6-hour flight, 10:30 a.m.-4:30 p.m.

September 2

12-hour shift, 10:00 a.m.-10:00 p.m.
 6-hour flight, 3:30 p.m.-9:30 p.m.

Scenario Two:

September 1

12-hour shift, 10:00 a.m.-10:00 p.m.
 6-hour flight, 3:30 p.m.-9:30 p.m.

September 2

12-hour shift, 10:00 a.m.-10:00 p.m.
 6-hour flight, 10:30 a.m.-4:30 p.m.

The scenarios span identical duty times, 10:00 a.m. to 10:00 p.m. on consecutive days. Scenario One is legal – the pilot has flown the aircraft within limits, 6 hours in a

24-hour period.² But Scenario Two is not. In Scenario Two, the pilot has flown 11 hours in a 24-hour period.³ That situation constitutes a violation of §135.267.

The point is that Sun Quest's records do not enable a records examiner to determine which scenario has occurred. Respondent's failure to document when a pilot's flight time begins and ends is inadequate to the task. The express purpose of §135.63(a)(4)(vii) – to set out the pilot's flight time "in sufficient detail to determine compliance with the flight time limitations of this part" – is not fulfilled. Sun Quest's pilot records thus fall short of compliance.

Respondent counters that its Log Sheet "does not stand alone." The FAA inspector should have compared it with Sun Quest's flight manifest, the carrier states (Resp. Suppl. Br., p. 2). This argument is rejected. A form entitled "Duty and Flight Time Log Sheet" is self-evidently intended to address duty and flight time. An FAA representative, therefore, should look to such a document to ascertain if flight-time limitations have been respected -- and need look no further. The document's title plainly indicates its intended function. It points to only one source for duty and flight time data -- itself. An inspector is under no duty in such circumstances to search elsewhere. Moreover, the regulations contemplate that inspectors be able to draw conclusions "readily." *South Aero*, FAA Order No. 96-4 (February 13, 1996), pp. 8, 10. But placing a duty on inspectors to rummage for other documents, as Respondent apparently would, does not in any sense suggest "readily." It would place on the agency a burden not warranted by the sense of the regulations.

The agency was justified in basing its determination that the pertinent regulation had been violated on Sun Quest's Duty and Flight Time Log Sheet.

B. Other Flying

1. Flight Training and Check Ride

On January 24, 2005, Mark Smith of Sun Quest provided 1.3 hours of flight training to a company pilot. On March 9, 2005, Captain Smith gave a company pilot a check ride lasting 1.5 hours. These actions were included in Smith's duty time records but not in his flight time records (Stips. ¶¶12, 13, 17, 22). Complainant contends that Sun Quest should have recorded these flights as flight time under the category of "other commercial flying." Respondent demurs.

² For instance, between 10:00 a.m. on September 1 and 10:00 a.m. on September 2, a 24-hour period, the pilot has flown 6 hours (10:30 a.m. September 1 to 4:30 p.m. September 1); or between 10:00 p.m. September 1 and 10:00 p.m. September 2, likewise a 24-hour period, the pilot also has flown 6 hours (3:30 p.m. September 2 to 9:30 p.m. September 2).

³ Between 3:30 p.m. on September 1 and 3:30 p.m. on September 2, a 24-hour period, the pilot has flown from 3:30 p.m. to 9:30 p.m. on September 1 (6 hours) plus between 10:30 a.m. and 3:30 p.m. on September 2 (5 hours). See also Compl. Br., pp. 6-7, for another illustration of two scenarios which span identical duty times, but result in flight times on either side of the law.

In support of its position, the FAA argues that the January 24 training flight lists Captain Smith as the check airman. He also was acting as the pilot-in-command ("PIC"). Regarding the check ride of March 9, Complainant argues that Respondent records show Smith as the assigned captain. Additionally, during at least part of the check ride, Smith would have been the sole pilot observing traffic because the trainee would have been "under the hood" (that is, using a vision-restricting device). As such, Smith would have been a required crewmember. Finally, Complainant notes that Captain Smith was paid for these tasks.

In sum, because Smith was a paid, and required, crewmember, Complainant states, these flights must be considered "other commercial flying" under FAR §135.267. Both the training flight of January 24 and the check ride of March 9 should have been added to Smith's assigned flight time in calculating his flight time limitations. Because Sun Quest did not do so, the company stands in violation of the regulation (Compl. Br., pp. 8-9; Compl. Reply, pp. 1-2).

Respondent counters that the January 24 flight was in an aircraft certified for single-pilot operation. Captain Smith could not be the pilot-in-command of a single pilot flight, nor could he record the flight as such, Sun Quest contends. The trainee could have logged the flight as PIC. Nor could Smith have logged the flight as a second-in-command -- not on a flight with one pilot. He was a check airman. Sun Quest concludes, contrary to Complainant, that Smith was not a required crewmember under Part 91 (under which the training took place). As to the March 9 check ride, the aircraft used also was certificated for single pilot flight. As in the January 24 flight, Smith could not have logged his service as second-in-command in a one-person crew. He was a check airman on this flight too, Sun Quest contends. The check airman's function is to oversee the operation of the pilot; he is not a member of the crew (Resp. Br., pp. 2-3; Resp. Reply, pp. 6-7).

I find and conclude that the January 24 training flight cannot be considered "other commercial flying" under §135.267. The March 9 check ride, on the other hand, must be considered "other commercial flying" and should have been counted toward flight time.

On the January 24 flight, Sun Quest's flight training record shows that Captain Smith served as check airman (Compl. Br., Exh. C). He did not fly the aircraft. Since the trainee-pilot did not wear a view-limiting device, Smith was never required to assume any responsibilities of a sole pilot. As such, he was not a required crewmember. While the flight training record lists the trainee as "SIC" (second-in-command), Smith did not thereby assume the role of PIC. In sum, Captain Smith did not act as a crewmember with responsibility for the safe operation of the aircraft. The critical concerns underlying the idea that flight time must be recorded -- promotion of safety in air transportation by reducing pilot fatigue (*South Aero*, FAA Order No. 96-4 (February 13, 1996), p. 7) -- were not in this instance directly or substantially implicated. I conclude for these reasons

that Smith's actions in giving a company pilot flight training on January 24, 2009 counts as duty time but not as flight time.⁴

The circumstances of the March 9 check ride lead to the opposite conclusion. A key difference is that Captain Smith on this flight was a required crewmember. He was the assigned captain (Compl. Br., Exh. D). Another critical factor is that check rides require the trainee pilot to have vision-restricting devices in place. Smith would have had to observe traffic while the trainee was "under the hood." Smith thus attained the status of a required crewmember (Compl. Br., pp. 8-9). Captain Smith was compensated for serving as a crewmember. The check ride should have been logged as flight time.

2. L.A.P.D. Flying

During February of 2005, Captain Smith served as a pilot for the Los Angeles Police Department. He piloted a helicopter owned and operated by the LAPD on 14 occasions for a total flight time of 50.4 hours (Compl. Br., Exh. A; Stip., ¶24). Smith's duty and flight time records for Sun Quest did not reflect any of this activity (Stip., ¶23).

Complainant argues that Captain Smith's LAPD flying constituted "other commercial flying" which should have been recorded by Sun Quest for the purpose of calculating his flight time limitations. Smith was a required crewmember and received payment. Since Respondent did not record Smith's LAPD operations, its records were "deficient," the agency contends. This omission constitutes another violation of §135.63(a)(4)(vii) (Compl. Br., p. 9; Compl. Reply, p. 2). Respondent counters that Smith's flying was performed as a police officer. The LAPD-owned and -operated helicopter was properly considered a "public aircraft" exempt from the agency's reach.⁵

I conclude that Complainant has failed to prove a violation.

I find that the helicopter was a statutory "public aircraft," and, as such, is not subject to FAA jurisdiction. The governing statute defines a "public aircraft" as an aircraft used exclusively for the service of any government which is not carrying persons or property for commercial purposes. 49 U.S.C. §40102 (a)(41)(D). The helicopter piloted by Captain Smith was owned and operated by the LAPD, a governmental unit. There is no evidence that it performed any activities other than police work. The plain words of the statute compel me to conclude that under these circumstances the helicopter must be considered a "public aircraft." The agency does not have jurisdiction over public aircraft. 49 U.S.C. §40102; *U.S. v. Aero Spacelines, Inc.* 361 F.2d 916, 921 (9th Cir. 1966). Respondent must prevail on this issue.⁶

⁴ That Smith was compensated is not determinative. He was not compensated for serving as a crewmember. See generally FAA Legal Interpretation 1990-21 (August 9, 1990), 1990 WL 10519417.

⁵ Resp. Br., pp. 7-8. Respondent's Brief, p. 4, states that "[i]t has been stipulated that the helicopter which Mark Smith flew for the L.A.P.D. was a 'public aircraft.'" This is not correct. Stipulation ¶25 reads, "Legal determination will have to be made as to whether the helicopter in question was a 'public aircraft' within the meaning of [the statute]."

⁶ Complainant contends that a finding for Respondent, by allowing pilots to add flight hours within a defined period, would undermine the safety concerns undergirding the regulatory limitations on flight time

All arguments have been considered. Those not explicitly addressed in this Initial Decision are denied as without merit. Further, Respondent's request for oral argument (Resp. Suppl. Br., p. 1) is denied.

III. Penalty

I will assess against Respondent a civil penalty of \$5,000.

An appropriate civil penalty must reflect the totality of the circumstances surrounding the violations. *Eastern Air Center, Inc.*, FAA Order No. 2008-3 (January 28, 2008)). The penalty should provide sufficient incentive to deter the respondent and similarly-situated entities from future violations. *Folsom's Air Service, Inc.*, FAA Order No. 2008-11 (November 6, 2008), p. 12.

The rules limiting the hours pilots may operate aircraft serve critical safety purposes. They ensure that pilots gain sufficient rest and minimize the risk of pilot fatigue. The safety implications of inadequate rest are well-known. Pilot fatigue can have catastrophic results. *See South Aero*, FAA Order No. 96-4 (February 13, 1996), p. 7.

The FAA's mandate to insure safety would ring hollow without a concomitant ability to monitor limitations compliance through examination of flight and duty time records. *Premier Jets, Inc.*, FAA Order No. 99-7 (August 31, 1999), p. 5. The FARs require that flight and duty time records be sufficiently detailed to enable a determination of compliance. Sun Quest's pilot records fell short of that standard. The agency's mandate to insure safety in the air was thereby compromised. The risk that pilots would operate aircraft without sufficient rest was unacceptably increased as a result. Respondent's failure to count a check ride toward restrictions on pilot time also was in derogation of the agency's duty to promote safety. Sun Quest's practices merit a significant assessment.

Yet it also must be recognized that Respondent's forms for logging pilot flight time were accepted for years by FAA inspectors assigned to supervise the carrier's practices. They were incorporated into Sun Quest's Operations Manual (Stip., ¶8). This circumstance does not allow Respondent to escape liability;⁷ but it must be considered as

(Compl. Br., p. 10; Compl. Reply, p. 3). This is essentially a policy argument. It cannot trump the clear meaning of the statute. Moreover, an air carrier which permits, or a pilot who undertakes, any flying under conditions which may endanger others risks a violation of 14 C.F.R. §91.13. That provision warns that aircraft may not operate "in a careless or reckless manner so as to endanger the life or property of another." *See* FAA Legal Interpretation 1989-23, 1989 WL 1631930 (August 9, 1989).

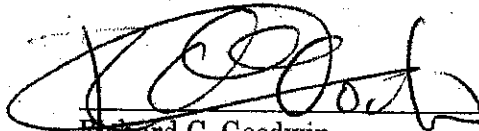
⁷ This argument amounts to a claim of an equitable estoppel. Estoppel against a government will not lie, at least absent a showing of affirmative misconduct by a government representative. *See, e.g., Siu de Puerto Rico, Caribe Y Latino America v. Virgin Island Port Authority*, 42 F.3d 801, 803 (3rd Cir. 1994). No showing of such conduct was made here.

It should be noted that our sister agency the National Transportation Safety Board, whose decisions are persuasive, has stated that estoppel will never lie where the public interest and safety in air commerce and transportation are implicated. *Ronald G. Fisher*, EA-2986, 6 NTSB 1292, 1294 (1989), *aff'd sub. nom.*

a mitigating factor in the determination of penalty. The fact that Respondent's recordkeeping practices passed muster several times understandably could have suggested to it that these practices were acceptable and consistent with applicable FARs. Against this background, Sun Quest had no evident reason to change them to conform to what the agency deems acceptable today.

I conclude that a civil penalty of \$5,000 is appropriate. It is commensurate with the nature and context of the violations while appropriately promoting the agency's policies of compliance and deterrence. It suitably accounts for the totality of the circumstances of this case.

Sun Quest Executive Air Charter, Inc. is hereby assessed a civil penalty of \$5,000 for two violations of FAR § 14 C.F.R. §135.63(a)(4)(vii), as discussed herein.⁸



Richard C. Goodwin

* Administrative Law Judge

Attachment – service list

Fisher v. Department of Transportation, 917 F.2d 27 (9 Cir. 1990); *Erik Milton Poole*, EA-4425, 1996 NTSB Lexis 11 (February 7, 1996).

⁸ This decision may be appealed to the Administrator of the FAA. The notice of appeal must conform to sections 13.210, 13.211(e) and 13.233 of the Rules of Practice, which require that a notice of appeal 1) be filed not later than 10 days (plus an additional five days if mailed) from the service date of this decision, and 2) be perfected with a written brief or memorandum not later than 50 days (plus an additional five, if mailed) from the service date of this decision. The notice of appeal and brief or memorandum must either be a) mailed to the Federal Aviation Administration, 800 Independence Avenue, S.W., Washington, DC 20591, Attn: Hearing Docket Clerk, AGC-430, Wilbur Wright Building—Suite 2W1000, or b) delivered personally or via expedited courier service to the Federal Aviation Administration, 600 Independence Avenue, S.W., Wilbur Wright Building—Suite 2W1000, Washington, D.C. 20591, Attn: Hearing Docket Clerk, AGC-430. A copy of the notice of appeal and brief or memorandum also must be sent to agency counsel. Service upon the presiding judge is optional.