UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

In the Matter of: AIR SOLUTIONS, LLC AND AIR SOLUTIONS GROUP, INC.

FAA Order No. 2009-1

Docket No. CP05EA0012
FDMS No. FAA-2005-21062[1]

Served: January 12, 2009

DECISION AND ORDER[2]

Complainant Federal Aviation Administration (FAA) has appealed the administrative law judge's (ALJ's) decision,[3] which found that neither Respondent Air Solutions, LLC (AS LLC) nor Respondent Air Solutions Group, Inc. (AS Group) could be held responsible for operating two flights that violated the safety regulations.[4] This

[1] Materials filed in the FAA Hearing Docket (except for materials filed in security cases) are also available for viewing through the Federal Docket Management System (FDMS) at the following Internet address: *http://regulations.gov*. For additional information, see *http://dms.dot.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/West 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 order is attached. (The ALJ's order is not attached to the electronic versions of this decision nor is it included on the FAA Web site.)

[4] The complaint, as amended at the hearing (Tr. 135-36), alleged the violation of the following regulations: 14 C.F.R. § 119.33(a)(2)) (operating as a direct air carrier without a certificate); § 119.33(a)(3) (operating without operations specifications); § 119.5(g) (operating as a direct air carrier without or in violation of a certificate and operations specifications); § 119.5(i) (operating without economic authority); § 135.21(a)) (operating without a manual); § 135.244(a) (using a pilot in command who lacks experience); § 135.293(a) (using a pilot who has not passed a test); § 135.297(a) (using a pilot who has not passed an instrument proficiency check); §135.299(a) (using a pilot who has not passed a flight check); § 135.3(a)(1) (not complying with 14 C.F.R. Part 135); § 135.323(a)(1) (not having a training program); § 135.327(a) (not having training program curricula); § 135.341(a) (not having an approved pilot training program); § 135.343 (using a crewmember who lacks recurrent training); § 135.351(a) (not ensuring that

decision reverses the ALJ's finding that AS LLC cannot be held responsible for operating the flights. It finds that there is sufficient evidence that AS LLC operated the illegal flights, and it assesses AS LLC a $44,000 civil penalty.

I. Facts

On April 1, 2004, an FAA Aviation Safety Inspector saw a British Aerospace Jetstream 3101 aircraft, with tail number N418UE, on the tarmac at Republic Airport in Farmingdale, New York. "Air Solutions" was painted on the tail. The inspector spoke with the captain, who claimed that the flight was a demonstration flight operating under the general operating and flight rules of 14 C.F.R. Part 91. As it turned out, however, the flight was not a demonstration flight, but instead was a charter flight that was subject to the more demanding regulations that govern air carriers.

The inspector asked the pilot to wait while he went to his office to verify that the flight conformed to the regulations, but when the inspector returned 10 minutes later, the aircraft was gone. The inspector encountered an agent for Harrah's casino, who told him that the passengers were going to Harrah's in Atlantic City, New Jersey, and that it was a charter flight. The ensuing investigation revealed that the same aircraft, N418UE, had flown on this route on March 6, 2004, as well. It is undisputed that both flights were charter flights operated contrary to the regulations.

II. Case History

On April 26, 2005, the agency filed its complaint. Among other things, the complaint alleged that AS LLC operated a British Aerospace Jetstream 3101 as a direct

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crewmembers receive recurrent training); § 135.63(a) (not keeping required information); § 135.77 (not listing in the manual the identity of each person authorized to exercise operational control); § 91.13(a) (operating an aircraft in a careless or reckless manner).

air carrier for passenger-carrying flights on March 6, 2004, and April 1, 2004, when it did not have an air carrier certificate, operations specifications, economic authority, or qualified crewmembers.[5] The complaint sought a civil penalty of $44,000. On May 26, 2005, AS LLC filed an answer to the complaint, admitting some allegations, denying others, and asserting the affirmative defense that "Air Solutions, LLC is not the entity that operated the flight [singular] in question."

The ALJ held a hearing on August 25, 2006. At the beginning of the hearing, counsel for AS LLC stated that AS LLC was willing to admit to all of the complaint allegations, but, on behalf of AS LLC, he asserted the affirmative defense that a defunct entity called AS Group, rather than AS LLC, operated the *flights* (plural) in question. (Tr. 6, 15, 18.) AS LLC's counsel informed the ALJ that he represented AS Group in addition to AS LLC. (Tr. 18.) The ALJ permitted the FAA to amend the complaint to include AS Group as a respondent, and counsel for AS Group did not object.[6]

In his written decision following the hearing, the ALJ held that the principal issue in the case was whether the FAA named the wrong entity as the respondent. The ALJ *sua sponte* reversed his earlier decision to add AS Group as a respondent. The ALJ explained that AS Group and AS LLC had different officers, businesses, and investors. Even though AS Group had not objected to being added as a respondent, the ALJ stated that due process prohibited imposing liability on AS Group without giving it the

[5] For a complete list of violations, *see* note 4 above.

[6] In conjunction with these developments, the ALJ advised the parties that the hearing would, necessarily, focus on the amount of the penalty. (Tr. 21.)

opportunity to be heard. (Initial Decision at 7.)[7]

The ALJ also held that the FAA had failed to prove that the remaining respondent, AS LLC, was the operator. According to the ALJ, AS LLC asserted in its answer that it did not operate either of the flights (plural) in question. The ALJ stated that the FAA was on notice that it would have to prove that AS LLC was the operator, but that it failed to do so. The ALJ wrote that the only direct evidence concerning the operator's identity was that of AS LLC's witness named Wallace Hilliard, an AS LLC investor and principal, who testified that AS LLC did not conduct passenger-carrying operations and only acquired and leased aircraft. Mr. Hilliard, however, had no personal knowledge concerning the flights charged in the complaint. The ALJ stated that the FAA had only two pieces of evidence to counter this witness's testimony. The first was an insurance policy covering the charter flights from Farmingdale to Atlantic City and naming AS LLC as the insured, which the ALJ concluded did not directly show that AS LLC was operating flights. The ALJ added his own observation that it would not be unreasonable for AS LLC to buy such insurance given the existing climate of tort liability.

The second piece of evidence was a printout from AS LLC's Web site, advertising its flight operations and listing a Chief Pilot and Director of In-Flight Operations. The ALJ refused to rely on the printout because there was no evidence regarding when the Web site was posted and whether it accurately depicted AS LLC's activities when the two flights took place.

[7] The FAA did not appeal the ALJ's reversal of his earlier decision to add AS Group as a respondent. Nonetheless, it is of concern that the ALJ reversed himself on such a fundamental matter as who the respondents were only in his written, post-hearing decision – a point in the proceedings when the parties lacked the opportunity to protest, and were instead limited to contesting the matter on appeal.

The ALJ stated that it would have been useful if the crewmembers had testified because he would have liked to have heard testimony regarding who paid their salaries. The ALJ also regretted that there was no testimony from Tommy Barraza, who was the Chief Executive Officer (CEO) of both AS LLC and AS Group. (Initial Decision at 6.)

For all of these reasons, the ALJ found that neither AS LLC nor AS Group could be held responsible for the violations alleged in the complaint. The FAA then filed the instant appeal.

IV. Analysis

A. Motion to Dismiss Appeal

On appeal, new counsel for AS LLC and AS Group, Inc., Dawn M. Rapoport, filed a motion to dismiss the FAA's appeal, arguing that FAA counsel did not serve the notice of appeal on her, as he should have done, but instead served it on AS LLC's and AS Group's original counsel. Therefore, she argues, the FAA's appeal should be dismissed as untimely. AS LLC's and AS Group's motion to dismiss is denied because the FAA timely filed its notice of appeal with the Hearing Docket. Moreover, the agency attorney's service on AS LLC's and AS Group's original counsel was understandable under the circumstances of this case.

Original counsel on the case was Michael Moulis of Moulis & Associates. Mr. Moulis handled the case through the hearing. Following the FAA's appeal, Ms. Rapoport filed a motion for an extension of time to file initial post-hearing briefs, asserting that AS LLC and AS Group had retained her in lieu of Mr. Moulis. However, she did not file a separate entry of appearance. She noted that both the FAA and the ALJ had served several documents on her directly.

FAA counsel argues that Ms. Rapoport created confusion concerning her professional relationship with Mr. Moulis given that: (1) Ms. Rapoport asserted in her motion for extra time to file her closing brief that she was "of counsel" to Mr. Moulis's firm; (2) she used Mr. Moulis's fax number as her fax number; and (3) the ALJ used Mr. Moulis's fax number to send faxes to Ms. Rapoport.

Given the confusion that arose, the FAA's failure to serve Ms. Rapoport directly with its notice of appeal was not unreasonable. Also, Ms. Rapoport's clients did not sustain any prejudice. Ms. Rapoport received the notice of appeal, and her clients' time to respond to the FAA's appeal brief was not reduced. (The FAA had not yet filed its appeal brief, which started the clock running on the reply brief.) For these reasons, AS LLC's and AS Group's motion to dismiss is denied.

B. The March 6, 2004, Flight

The issue in this case is not whether the flights were operated contrary to the regulations – that is undisputed. Rather, the issue is which entity operated the flights. The ALJ stated, erroneously, that AS LLC asserted in its answer that it did not operate the *flights* (plural). Actually, however, AS LLC admitted unequivocally that it operated the March 6, 2004, flight. In paragraph 2 of its answer, AS LLC stated that: "Respondent admits the allegations in [complaint] count II paragraph 1, 2, 4, 5, 6, and 7(a) through 7(k)." As to the March 6, 2004, flight, the complaint count II, ¶¶ 1, 2, 4-7 provided as follows:

> 1. At all relevant times herein Air Solutions, LLC was the operator of a British Aerospace Jetstream 3101, identification number N418UE.
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> 2. On or about March 6, 2004, Air Solutions, LLC operated N418UE as a direct air carrier on a passenger carrying flight.

3. …

4. Air Solutions, LLC operated the above-described passenger carrying flights when it did not have an air carrier certificate.

5. Air Solutions, LLC operated the above-described passenger carrying flights when it did not have operations specifications ….

6. Air Solutions, LLC operated the above-described passenger carrying flights when it did not have the required economic authority from the Department of Transportation.

7. Air Solutions, LLC operated the above-described passenger carrying flights when it:

….

AS LLC's unequivocal statements in its answer that it was the operator of the March 6, 2004, flight were judicial admissions.[8] Judicial admissions may not be controverted at trial or on appeal; they bind a party throughout the proceeding.[9] Judicial admissions are not evidence but have the effect of withdrawing an issue from controversy or contention.[10] An exception is when the judge permits them to be withdrawn or amended,[11] but such permission will not be granted if it would work a hardship on the opposing party.[12] AS LLC did not ask the ALJ to withdraw or amend the admissions concerning the March 6, 2004, flight, and the ALJ did not do so. AS LLC responded,

[8] Schott Motorcycle Supply, Inc. v. American Honda Motor Co., Inc., 976 F.2d 58, 61 (1st Cir. 1992) (quoting Bellefonte Re Insurance Co. v. Argonaut Insurance Co., 757 F.2d 523, 528 (2nd Cir. 1985)) ("[a] party's assertion of fact in a pleading is a judicial admission …").

[9] *Id.*; Keller v. United States, 58 F.3d 1194, 1199 n.8 (7th Cir. 1995); and In Re Crawford, 274 B.R. 798, 804-05 (8th Cir. Bankruptcy App. Panel 2002).

[10] Selimi v. INS, 312 F.3d 854, 860 (7th Cir. 2003); Keller v. United States, 58 F.3d 1194, 1199 n.8 (7th Cir. 1995).

[11] In Re Crawford, 274 B.R. 798, 804-05 (8th Cir. Bankruptcy App. Panel 2002).

[12] Sullivan v. Randolph, 504 F.3d 665, 669 (7th Cir. 2007).

"Admitted," in response to the cited paragraphs of the complaint, clearly admitting that it had operated the aircraft on the March 6, 2004, flight. "[J]udicial efficiency demands that a party not be allowed to controvert what it has already unequivocally told a court by the most formal and considered means possible."[13] AS LLC should not have been permitted to controvert its judicial admissions regarding the March 6, 2004, flight. For these reasons, AS LLC is legally responsible for the violations relating to the March 6, 2004, flight.

C. The April 1, 2004, Flight

In addition to the other relevant portions of the complaint set forth above, count II ¶ 1 of the complaint alleged that:

> 1. At all relevant times herein [including April 1, 2004] Air Solutions, LLC was the operator of a British Aerospace Jetstream 3101, identification number N418UE.

In response to these allegations, AS LLC answered "admitted," thus acknowledging that it was the operator of all of the flights. This was similar to AS LLC's admission in other paragraphs that it operated *flights* (plural). However, AS LLC also denied the specific allegation that it operated the April 1 flight (Complaint Count II, ¶ 3, Answer ¶ 3) and it raised the affirmative defense that another entity operated the flight (Answer Affirmative Defense ¶ 1). As a result, its answer regarding the April 1, 2004, flight is ambiguous.

Nonetheless, based on these admissions and the other evidence, the FAA proved its case by "a preponderance of reliable, substantial, and probative evidence," as required under 14 C.F.R. §§ 13.223 and 13.233(b)(1). When asked by FAA Inspector Mauro to provide the training records of the crewmembers who operated the flights, Mr. Barraza, CEO of AS LLC and AS Group, faxed the information to Inspector Mauro using AS

[13] Soo Line R. Co. v. St. Louis Southwestern Ry. Co, 125 F3d. 481, 483 (7th Cir. 1997).

LLC's fax machine, as the fax header shows.[14] (Tr. 169; FAA Exhibit C-10.) The fax cover sheet read, "From: Tommy Barraza, Air Solutions, LLC." (Exhibit C-10.) The information from Mr. Barraza showed that the same crewmembers operated both flights. Consequently, the evidence showed that the two flights, the first of which AS LLC admitted operating, were strikingly similar – *e.g.*, the aircraft was the same, the crewmembers were the same, and the origins and destinations of the flights were the same. This evidence is circumstantial, but nevertheless carries some weight. In the Matter of Continental Airlines, FAA Order No. 1998-6 at 7 (April 7, 1998) (circumstantial evidence may be used to sustain the FAA's burden of proof). While Mr. Hilliard testified, self-servingly, that AS LLC did not operate the flights, there was no evidence that he was in a position to know, or that he did know, whether AS LLC operated the particular flights. He even admitted that it was possible that Mr. Barraza did not tell him that AS LLC operated the flights. (Tr. 228-29.) The FAA's evidence, taken as a whole, though marginal, is sufficient to show that AS LLC operated not just the March 6, 2004, flight, but that it also operated the April 1, 2004, flight.

D. Sanction

It is unnecessary to remand this case to the ALJ to determine the appropriate civil penalty, and it would be inefficient to do so.[15] In this case, $11,000 was the maximum civil penalty per violation, because at issue were "[v]iolations of FAA statute or regulations by a person operating an aircraft for the transportation of passengers or

[14] The records did not show that the crewmembers were qualified to conduct the flights. (Tr. 203.)

[15] In the Matter of Interstate Chemical Co., FAA Order No. 2002-29 at 7 (December 6, 2002) (citing In the Matter of Zoltanski, FAA Order No. 2002-12 at 13 (April 16, 2002); In the Matter of USAir, FAA Order No. 1992-48 at 9 (July 22, 1992); and In the Matter of Esau, FAA Order No. 1991-38 at 7 n.7 (September 4, 1991)).

property for compensation." (FAA Exhibit C-9 at 1; Tr. 165.) In addition, the agency's sanction guidance indicated that a maximum civil penalty is appropriate for using an unqualified crewmember. (FAA Exhibit C-9 at 5; Tr. 166.)

Even though the FAA determined to seek a maximum civil penalty in this case, it did not count each of the 20 regulations violated as separate violations for purposes of the sanction. Instead, the FAA counted operating without an air carrier certificate on two flights as the first two violations, and operating with unqualified crewmembers on two flights as two additional violations. The FAA multiplied the four violations by $11,000, which is the maximum civil penalty per violation, to arrive at $44,000, the amount requested by the FAA.

The FAA's requested civil penalty is reasonable under all the circumstances, particularly the gravity of the offenses. Operating as an air carrier without a certificate and operating with unqualified crewmembers are serious violations. AS LLC argues that there are mitigating factors. For example, it argues that discontinuation of the demonstration flights was a mitigating factor. However, discontinuing illegal flights, *i.e.*, refraining from further illegal conduct, is not a mitigating factor.[16] In addition, according to AS LLC, the violations were not willful, but simply arose from a misinterpretation of the rules; AS LLC claims that it thought the flights were demonstration flights. However, the record shows that on one of the flights, the inspector told AS LLC to wait, but the aircraft departed anyway before the inspector returned. (Tr. 160.) The failure to heed the

[16] *See* In the Matter of Alika Aviation, Inc., FAA Order No. 1999-14 at 11 (December 22, 1999) (to result in a penalty reduction, corrective action must be positive in nature, such as sending employees to special training), citing In the Matter of Detroit-Metropolitan County Airport, FAA Order No. 1997-23 at 5 (June 5, 1997).

inspector indicates that, rather than a simple misunderstanding of the rules, the violations were deliberate. Under these circumstances, the requested civil penalty of $44,000 is warranted and appropriate.

THEREFORE, this decision reverses the ALJ's decision as to AS LLC and assesses AS LLC a $44,000 civil penalty.[17]

[Original signed by Robert A. Sturgell]

ROBERT A. STURGELL
ACTING ADMINISTRATOR
Federal Aviation Administration

[17] This decision shall be considered an order assessing civil penalty unless Respondent files a petition for review within 60 days of service of this decision with the U.S. Court of Appeals for the District of Columbia Circuit or the U.S. court of appeals for the circuit in which the respondent resides or has its principal place of business. 14 C.F.R. §§ 13.16(d)(4), 13.233(j)(2), 13.235 (2007). *See* 71 Fed. Reg. 70460 (Dec. 5, 2006) (regarding petitions for review of final agency decisions in civil penalty cases).