

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

In the Matter of: TRANS STATES AIRLINES, INC.

FAA Order No. 2005-2

Docket No. CP01CE00003
DMS No. FAA-2002-9292¹

Served: March 9, 2005

DECISION AND ORDER²

On May 2, 2002, Administrative Law Judge Burton S. Kolko issued a written initial decision,³ holding that Complainant proved that Trans States Airlines, Inc., (“Trans States”), violated Section 121.683(a)(1) of the Federal Aviation Regulations (FAR), 14 C.F.R. § 121.683(a)(1).⁴ The ALJ held that Trans States failed to maintain accurate and current flight, duty, and rest time records for seven pilots and assessed a \$25,000

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

² The Administrator’s civil penalty decisions, along with indexes of the decisions, the rules of practice, and other information, are on the Internet at the following address: <http://www.faa.gov/agc/cpwebsite>. In addition, there are two reporters of the decisions: Hawkins’ Civil Penalty Cases Digest Service and Clark Boardman Callaghan’s Federal Aviation Decisions. Finally, the decisions are available through LEXIS and Westlaw. For additional information, see the website.

³ A copy of the ALJ’s written initial decision in Docket No. CP01CE00003 is attached. The ALJ resolved two cases – Docket No. CP01CE00003, as well as Docket No. CP00CE00005 – involving Trans States in the written decision served on May 2, 2000. The latter case is not on appeal. (The initial decision is not attached to the electronic versions of this decision and is not included on the FAA website.)

⁴ Section 121.683(a)(1) of the FAR provides:

(a) Each certificate holder shall –

(1) Maintain current records of each crewmember ... that show whether the crewmember ... complies with the applicable sections of this chapter, including but not limited to ... flight, duty, and rest time records;

14 C.F.R. § 121.683(a)(1).

civil penalty. On appeal, Trans States argues that it used an FAA-approved computerized system to track its pilots' flight, duty and rest time, and as a result, the Administrator should reverse the ALJ's finding that it failed to maintain current flight, duty and rest time records in violation of Section 121.683(a)(1). Trans States also argues that Section 121.683(a)(1), as interpreted by the ALJ, is unconstitutionally vague. After consideration of the record in this case, Trans States' appeal is denied, and the ALJ's initial decision is affirmed.

I. The Evidence

Trans States holds Air Carrier Certificate Number RAIA053A and operates as United Express under Part 121 of the Federal Aviation Regulations (FAR). (Tr. 81.) Section 121.683 requires an air carrier operating under 14 C.F.R. Part 121 to maintain current records for each crewmember that show whether that crewmember is in compliance with the flight and duty time limitations and rest time requirements included in 14 C.F.R. Part 121, subpart Q.⁵

In September 1999, FAA Inspector Timothy Harristhal, the principal operations inspector (POI) for Trans States, conducted a records check of Trans States' flight, duty and rest time records. (Tr. 10.)⁶ At the time, Trans States used the Bornemann system, a commercially available airline crew scheduling software system, to keep track of its pilots' flight, duty and rest time and to ensure that pilots were in compliance with the

⁵ Specifically, the flight and duty time limitations and rest requirements for crewmembers on Part 121 domestic operations are set forth at 14 C.F.R. §§ 121.470 and 121.471.

⁶ Harristhal decided to check the flight, duty and rest time records after Trans States determined that its mechanics would no longer be allowed to taxi its aircraft for maintenance purposes, but instead that its pilots would do all the maintenance-related taxiing. Harristhal wanted to see how the company was accounting for this additional pilot duty time in its records. (Tr. 10-11.)

flight, duty and rest time regulations. (Tr. 56, 63, 77, 86.)

Harristhal explained at the hearing how Trans States implemented its flight, duty and rest time recordkeeping system. A line pilot would contact dispatch after a flight and inform dispatch that he or she was on the ground or at the station. Then dispatch would make the appropriate computer entry regarding that pilot's duty time. (Tr. 13.)

Management pilots and instructors, in contrast, would complete a paper document entitled "Daily Crew Status Report," CSOM⁷ Form 04, noting whether they had been on or off duty, and what they had been doing. According to Harristhal, the management pilots and instructors had to fill out this form on a daily basis. Once completed, this form would be submitted to the crew scheduling department. (Tr. 13-16.) Under the Crew Scheduling Manual in effect at the time, "Management pilots and instructors will complete CSOM-4 with the appropriate flight and duty information to be entered by the Crew Scheduling Auditor." (Exhibit A-1.)

Harristhal found discrepancies in the computerized flight, duty and rest time records for the following seven management and instructor pilots.

1. Scott Wilkinson. Harristhal compared the computerized flight, duty and rest time record for August 1999 (printed out on September 7, 1999) for Captain Scott Wilkinson, a check airman for Trans States, with Wilkinson's "check pilot activity record" for that month. The computerized record indicated that Wilkinson had been off duty on August 12 and 23. (Exhibit A-3a; Tr. 19.) The hand-written check pilot activity record kept by Wilkinson, however, indicated that he had administered two check rides on August 12 (lasting 1.8 and .8 hours respectively), and two proficiency check rides on

⁷ CSOM stands for Crew Scheduling Operations Manual.

August 23 (each lasting 2.0 hours).⁸ These check rides constituted duty time for which he was paid. (Tr. 20, 86, 88.) Harristhal testified that “if the airman is receiving compensation and the company is gaining a benefit from it, it’s duty time.” (Tr. 21.)

2. Christopher Palliardi. When Harristhal reviewed the computerized flight, duty and rest record for pilot Christopher Palliardi for August 1999 (printed out on September 14, 1999), he found that it indicated that Palliardi had been off duty on August 12, 1999. (Tr. 23; Exhibit A-5.) However, Palliardi took a check ride on that date according to a check ride form provided to Harristhal. (Exhibit A-4.) The time that Palliardi spent on that check ride, according to Harristhal, was duty time. (Tr. 24-25; Exhibit A-4.)

3. William Pamplin. Harristhal found that William Pamplin’s computerized flight, duty and rest time record for August 1999 (printed out on September 14, 1999) indicated that he had been off duty on August 23, 1999. (Exhibit A-5.) Pamplin, however, had taken a check ride on August 23, 1999, according to the record of that check ride. (Tr. 25, Exhibit A-3c). The time that he spent on the check ride counted as duty time.

4. Dennis Craig. According to a document entitled “taxi volunteer pay,” Captain Dennis Craig, a Trans States pilot and instructor, taxied two airplanes on August 24, 1999. The document indicates that the Payroll Department approved these trips. (Tr. 27; Exhibit A-6a.) The time spent taxiing the aircraft on that day should have been logged as duty time. (Tr. 28, 93.) The computerized flight, duty and rest time record for Craig for

⁸ Wilkinson acknowledged that he had been on duty on August 12 and 23, 1999, and had been paid for that duty time, but that his computerized flight, duty and rest time record, printed out on September 7, 1999, did not reflect those facts. (Tr. 86-88.)

August 1999 (printed out on September 7, 1999), however indicated that he was off duty on August 24, 1999. (Tr. 28, 94, Exhibit A-6b.)

5. Robert Epoch. According to a taxi volunteer pay record for Captain Robert Epoch for August 1999, Epoch taxied aircraft 3 times on August 2, 1999. These trips constituted duty time. The computerized flight, duty and rest time record (printed out on September 7, 1999), however, showed that Epoch was off duty on that date. (Tr. 29-30; Exhibit A-7a and A-7b.)

6. Jason Currie. The computerized flight, duty and rest time record for Trans States' pilot Jason Currie for August 1999, (printed out on September 7, 1999) indicated that Currie had been off duty on August 6, 14 and 24, 1999. (Tr. 32; Exhibit A-8d.) However, according to the taxi volunteer pay form which Currie completed, he had taxied aircraft on those dates, and he was paid for that service. (Tr. 30-31; Exhibits A-8a and A-8b.) The time that he spent taxiing the aircraft constituted duty time. (Tr. 31.)

7. Tim Hawkins. Harristhal requested the computerized flight, duty and rest time records for Trans States' management pilot, Captain Tim Hawkins. The company gave him a printout that day indicating that Hawkins had worked only 6 days that month. (Tr. 33; Exhibit A-9a.) After Harristhal questioned the accuracy of this record, the director of operations spoke with Hawkins, who then completed his timekeeping paperwork and submitted it to the crew scheduling department. Harristhal received an updated computerized flight, duty and rest time printout which indicated that Hawkins had been on duty most of that month. (Tr. 33; Exhibit A-9b.)

Harristhal explained that accurate recordkeeping is important so that the airline and the FAA can determine whether crewmembers are getting adequate rest between

assignments. (Tr. 26.) When the records are incomplete, the dispatchers cannot determine whether a particular crewmember has had sufficient rest and may be assigned a particular flight. (*See* Tr. 34, 50.) Harristhal made it clear that he did not find any violations by these seven pilots of the flight and duty limitations or the rest time requirements provided in 14 C.F.R. Part 121, subpart Q. (Tr. 26, 37, 40.)

Trans States did not dispute the inaccuracy of the copies of the computerized flight, duty and rest records that it provided to Harristhal for these seven pilots on September 7 and 14, 1999. Wilkinson testified that for non-line pilots, the computer system automatically entered normal office hours (OFC), unless dispatch entered information reflecting the pilots' actual activities. (Tr. 84-85.) The management and instructor pilots who testified on Trans States' behalf explained that these computerized records are usually inaccurate until the pilots submit current information pertaining to their actual duty time. They testified that they would not provide that information until contacted by the scheduler regarding their availability for their next flight assignment. (Tr. 70-71, 77, 86, 91-92.)

Stewart Scott, Trans States' flight manager, for example, testified that before he would accept any flight assignment, he would check his own personal records to make sure that he was "legal" to fly under the regulations. If the scheduling department called him to assign a flight to him, he would check his own records because the Borneman system records might not be accurate. (Tr. 71, 77-79.) He would let the scheduler know what he had been doing so that the scheduler could then enter that information into the computer, and the computer would tell them whether he could accept the flight assignment under the regulations. (Tr. 79.) Captain Dennis Craig, the manager of flight

standards, testified similarly. (Tr. 91-92.)

II. The ALJ's Decision

The ALJ wrote:

When Inspector Harristhal examined Respondent's flight and duty time records, a week had passed since the end of the period represented by the records. By that time, the records should have been accurate. The evidence clearly showed that they were not. The records failed to note pilot activities such as taxiing and check rides which were required to have been timely logged. I find, then, that the violation was proven in each instance.

(Initial Decision at 9.) The ALJ held further that the \$35,000 civil penalty sought by Complainant was too high, and instead, assessed a \$25,000 civil penalty. (Initial Decision at 9.)

III. Discussion

Trans States argues that it used an FAA-approved computerized recordkeeping system and that the fact that the FAA found no violations of the flight, duty and rest time regulations in 14 C.F.R. Part 121, subpart Q proves that it implemented the approved system properly. (Appeal Brief at 4-5.)⁹

This argument lacks merit. The issue in this case is whether Trans States kept current and accurate records, as required by 14 C.F.R. § 121.683, not whether any of its pilots violated the separate flight, duty and rest time regulations in 14 C.F.R. §§ 121.470 and 121.471. Trans States printed out its computerized records pertaining to

⁹ The ALJ aptly wrote in response to a similar argument presented by Trans States at the hearing: Finally, Respondent points out that the agency never alleged any actual violation of the time and duty restrictions contained in the FARs (Tr. 6, 44). The regulation setting out the amount of rest required in particular situations is a different regulation from the recordkeeping rule at issue today (Tr. 26, 37). There was no "actual violation," it states (Tr. 6). But this contention is neither here nor there. Respondent is charged with keeping inaccurate flight and duty time records. This allegation, if proven, constitutes an actual § 121.683(a)(1) violation. The fact that no violation of any other FAR is alleged simply is not relevant to this charge.

(Initial Decision at 8-9.)

Wilkinson's, Craig's, Epoch's, Foster's and Currie's August flight, duty and rest time on September 7, 1999, and pertaining to the other two pilots' August flight, duty and rest time on September 14, 1999. Trans States does not argue that those records were accurate and current when they were provided to Harristhal.¹⁰ Those August records should have been brought up to date before Trans States provided those records to Harristhal.¹¹

Trans States contends that it required its non-line pilots to provide information about their activities to update the Bornemann system before they accepted their next flight assignments. The evidence, however, does not support that contention. The title of Form CSOM-4, "Daily Crew Status Report," suggests that the non-line pilots should have been providing information to be entered in the Bornemann system on a *daily* basis.

Moreover, Scott testified that he recalled that the non-line pilots were required under the

¹⁰ Trans States argues further that use of its payroll records to test the veracity of the required flight, duty and rest time records was inappropriate because the payroll records are inaccurate and not regulatory in nature. (Appeal Brief at 7.) Trans States' supervisor of crew payroll, Michelle McIntosh, did indeed characterize her department's records as "not accurate at all," and explained that the department is usually one month behind in processing the records. (Tr. 97.) She explained that the payroll and crew scheduling records are separate, and that the payroll records are not regulated by the FAA. (Tr. 97, 100.) It should be noted, however, that none of Trans States' witnesses contested the accuracy of any of the payroll or flight check records used by Harristhal. For that matter, Wilkinson admitted that he was on duty and was paid for his check pilot activity on August 12 and August 23, as reflected Exhibits A-3b, A-3c, and A-4. Likewise, Craig did not contest the accuracy of the entries on the taxi volunteer form, Exhibit A-6a, indicating that he had taxied aircraft on August 24, 1999, and was paid for that assignment. (Tr. 93.)

Harristhal acted appropriately in conducting a searching and thorough review of Trans States records, comparing the computerized records against other relevant records. Had he not done so, he would have failed to perform his safety duties. In the Matter of Premier Jets, Inc., FAA Order No. 1999-7 (August 31, 1999).

¹¹ It is not necessary for the Administrator to decide in this case how much time a carrier is permitted under Section 121.683(a)(1) after a pilot's duty assignment ends to update its flight, duty, and rest time records. There is no question that under the circumstances of this case, however, Trans States' failure to have its August flight, duty, and rest time records brought up-to-date for these pilots by the time that they were printed out on September 7 and 14 for Harristhal was unreasonable, and hence, a violation of Section 121.683(a)(1).

crew scheduling manual, as written in 1999, to update the computerized flight time system with actual flight duty information as that duty time occurred. (Tr. 70, 73, 75.)¹²

Trans States also argues that Section 121.683(a)(1) is unconstitutionally vague and, as a result, void. Trans States notes that it uses FAA-approved computerized airline crew scheduling software and its management and instructor pilots (who had irregular schedules) updated their records before accepting their next flight assignments. Trans States wrote in its brief, “[t]here is simply no other means of compliance.” (Appeal Brief at 10.)¹³

Under the vagueness doctrine, a law or regulation that does not fairly inform an ordinary person of what is commanded or prohibited or which encourages arbitrary and discriminatory enforcement is unconstitutional and violative of due process. In the Matter of American Airlines, FAA Order No. 1999-1 at 8 (March 2, 1999). When

¹² Scott used an excerpt from the crew scheduling manual dated 9/01/00 (marked for identification as Exhibit R-2) to refresh his recollection regarding the practices and requirements in that manual in 1999. The ALJ denied the motion to admit this document into evidence.

On appeal, Trans States argues that the ALJ erred by not admitting two exhibits that Trans States attempted to introduce into evidence. The two exhibits, which accompanied the record, were a copy of excerpts from Trans States’ operations specifications (marked for identification as Exhibit R-1) (Tr. 61-62), and excerpts from Trans States’ crew scheduling manual (marked for identification as Exhibit R-2.) This argument is rejected because the agency attorney properly objected to these exhibits, and the ALJ properly excluded them because neither was in effect in August 1999. (Tr. 67, 75.)

Moreover, it should be noted that if the ALJ had admitted these documents, the outcome of this case would have been the same. Trans States tried to introduce the excerpts from the operations specifications to show that the FAA had approved Trans States’ use of the Bornemann system as Trans States’ official computer-based recordkeeping system. This fact, however, was not contested. The problem in this case was that this approved system was not updated often enough. If the ALJ had admitted the second document, the excerpts from the crew scheduling manual, it also would not have advanced Trans States’ case. There was evidence in the record that the manual in 1999 required non-line holding management pilots to update the system with their actual flight and duty activity *as it occurred* (not merely before a pilot accepted the next flight assignment from dispatch). (Tr. 70, 73, 75.) Thus, not only was the ALJ not in error when he rejected these exhibits, but Trans States was not prejudiced by those rulings by the ALJ.

¹³ This argument can be dismissed easily. The management and instructor pilots can, and should, update their flight records on a daily basis or shortly after completing their duty time assignments.

evaluating a void for vagueness challenge to a regulation, a court will require only a reasonable degree of certainty, and will demand less precision for a regulation governing business, rather than First Amendment, activities. Throckmorton v. National Transportation Safety Board, 963 F.2d 441, 445 (D.C. Cir. 1992).

Complainant's position in this case is that under Section 121.683(a)(1)'s requirement that each certificate holder "maintain current records," management and instructor pilots' flight, duty, and rest records must be updated regarding flight activities within a reasonable period of time.¹⁴ It is totally disingenuous for Trans States to argue that it thought that it was maintaining current records, when Scott testified that his computerized records were "hardly ever accurate" (Tr. 70-71), and Craig testified that on any given day the Bornemann record probably did not reflect his duty time accurately (Tr. 90-91.) As the evidence in this case revealed, the management and instructor pilot records printed out on September 7 and September 14 did not accurately reflect duty time accumulated in August. As a result, neither the carrier nor the FAA inspector could determine whether these pilots were in compliance with the flight, duty and rest time regulations, without investing considerable time to contact the individual pilots and/or cross-check the computerized records against other types of records.¹⁵ An ordinary

¹⁴ Trans States argues that its counsel, who was also a management pilot, would have been in violation of Section 121.683, as interpreted by the ALJ and Complainant, if the hearing had lasted until 1800, one hour beyond the default entry for the end of management personnel's duty time. Counsel argued that Trans States would have been in violation of Section 121.683 if at 1701 he had not contacted dispatch and informed them that the trial was running late. This argument is specious. Complainant is not arguing, and the ALJ did not hold, that Trans States management pilots were required to provide updates to dispatch even while they were still on duty. It is reasonable, however, to read the word "current" in Section 121.683, as requiring that the August, 1999, flight, duty and rest time records should have been updated, current and accurate by September 7, 1999.

¹⁵ In In the Matter of South Aero, FAA Order No. 1996-4 (February 13, 1996), the Administrator held that South Aero failed to comply with 14 C.F.R. § 135.63(a)(4)(vii) which required the

person would have known that the flight, duty and rest records were not current and could not be used to determine whether these pilots were in compliance with the flight and duty limitations and rest requirement, and therefore, did not meet the requirement of Section 121.683(a)(1).

IV. Conclusion

For the foregoing reasons, Trans States' appeal of the initial decision is denied.¹⁶

MARION C. BLAKEY, ADMINISTRATOR
Federal Aviation Administration

Issued this 8th day of March, 2005.

carrier to maintain an individual record including flight time information for each pilot in sufficient detail to determine compliance with Part 135's flight time limitations. In that case, South Aero failed to include information about its pilots' check flights in the flight and duty time records. The Administrator concluded that South Aero's flight time records were not adequate under that regulation because it was "only through significant time and resources that the FAA inspectors were able to piece together the pilots' flight and duty time." In the Matter of South Aero, FAA Order No. 1996-4 at 11.

¹⁶ Unless Respondent files a petition for review with a Court of Appeals of the United States under 49 U.S.C. § 46110 within 60 days of service of this decision, this decision shall be considered an order assessing civil penalty. 14 C.F.R. §§ 13.16(b)(4) and 13.233(j)(2).