UNITED STATES DEPARTMENT OF TRANSPORTATION

FEDERAL AVIATION ADMINISTRATION

WASHINGTON, DC

In the Matter of: **EVERGREEN HELICOPTERS OF ALASKA, INC.**	FAA Order No. 99-11 Served: August 31, 1999 Docket No. CP97AL0001

ORDER PROVIDING PARTIES OPPORTUNITY TO SUBMIT ARGUMENTS ON NEW ISSUES[1]

Complainant Federal Aviation Administration (FAA) has appealed the initial decision of Chief Administrative Law Judge Roy J. Maurer dismissing Complainant's $10,000 civil penalty action against Evergreen Helicopters of Alaska, Inc. (Evergreen).

The Rules of Practice – specifically, 14 C.F.R. § 13.233(j)(1) – permit the FAA Administrator to raise any issue on her own initiative that is required for the proper disposition of the proceedings. If the Administrator raises any new issues, 14 C.F.R. § 13.233(j)(1) provides that she will give the parties a reasonable opportunity to submit arguments on the new issues before making a decision on the appeal. Thus, pursuant to 14 C.F.R. § 13.233(j)(1), this order grants the parties a reasonable opportunity to submit

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[1] The Administrator's civil penalty decisions are available on LEXIS, WestLaw, and other computer databases. They are also available on CD-ROM through Aeroflight Publications. Finally, they can be found in Hawkins's Civil Penalty Cases Digest Service and Clark Boardman Callaghan's Federal Aviation Decisions. For additional information, *see* 64 Fed. Reg. 43,236, 43,250 (August 9, 1999).

arguments on several new issues. The new issues are set forth below, following a review of the facts and the proceedings up to this point.

I. Facts

The facts of this case are undisputed. Evergreen, a U.S. air carrier, holds an FAA-issued certificate to conduct commuter and on-demand operations under Part 135 of the Federal Aviation Regulations (14 C.F.R. Part 135).[2] In February 1996, under contract with the United Nations (UN), Evergreen transported passengers on a U.S.-registered CASA 212 airplane, using Angolan pilots on approximately 20 flights inside Angola. The pilots held only Angolan airline transport pilot certificates; they did not hold U.S. airline transport pilot certificates.[3]

II. Statement of Case

Complainant's position in this case has been that Evergreen violated 14 C.F.R. § 135.243(a) by using pilots who lacked U.S. airline transport pilot certificates. Section 135.243(a) provides, in pertinent part, as follows:

> **§ 135.243 Pilot in command qualifications.**
>
> (a) No certificate holder may use a person ... as pilot in command in passenger-carrying operations—
>
> (1) ... of an airplane having a passenger-seat configuration, excluding each crewmember seat, of 10 seats or more ... , unless that person holds an airline transport pilot certificate with appropriate category and class ratings ....

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[2] Part 135 is entitled "Operating Requirements: Commuter and On-Demand Operations."

[3] Evergreen admitted in its answer that one of its pilots flew the aircraft on at least three flights subject to 14 C.F.R. Part 135 and the other pilot flew the same aircraft on at least 16 such flights.

Evergreen's position was that it had not violated Section 135.243 because that regulation does not state that the pilot in command must have a *U.S.* airline transport pilot certificate. Evergreen also pointed out that 14 C.F.R. § 61.3 expressly provides that when an aircraft is operated within a foreign country, "a current pilot license issued by the country in which the aircraft is operated may be used."

By joint motion, the parties asked the law judge to cancel the hearing, which he did in an order served March 11, 1998. Both parties moved for decision on the merits of the case. In an order served May 6, 1998, the law judge dismissed the agency's case against Evergreen. His reasoning was as follows:

- The question in this case is whether Section 135.243(a)(1) dictates that the pilots should have had U.S.-issued airline transport pilot certificates.

- The pilots may have been properly licensed because Section 135.243(a)(1) does not expressly impose a U.S.-issued certificate requirement. Also, Section 61.5(a) expressly provides that the pilot of a U.S.-registered aircraft may use a license issued by the country within which the aircraft is operated, and this language indicates the FAA's intent to comply with Article 32, Article 33, and Annex 1 of the Convention on International Civil Aviation ("Chicago Convention").[4]

- The parties were unable to produce any documentary evidence regarding whether airline transport pilot licenses issued by Angola to two Angolan nationals, and used for flights within Angola, meet or exceed the standards for such licenses in the Chicago Convention's Annex 1.

- Complainant had submitted an affidavit stating that the FAA does not have knowledge of the civil aviation system in Angola, including the standards for certification of Angolan airmen.

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[4] 61 Stat. 1180, T.I.A.S. No. 1591 (December 7, 1944).

- The U.S. Court of Appeals for the District of Columbia has issued two decisions holding that Article 33 of the Chicago Convention imposes an obligation on the United States "to recognize as valid any [personnel] license issued by any other signatory,[5] provided that the requirements underlying such licenses are 'equal to or above the minimum standards which may be established from time to time pursuant to this [the Chicago] Convention.'" Professional Pilots v. FAA, 118 F.3d 758, 768 (D.C. Cir. 1997); *see also* British Caledonian Airways v. Bond, 665 F.2d 1153, 1162 (D.C. Cir 1981).

- The United States is obligated to recognize as valid the licenses issued to these Angolan pilots by Angola, provided that the requirements underlying the licenses are "equal to or above the minimum standards" in Annex 1 of the Chicago Convention.

- The burden of proof under the FAA's Rules of Practice in 14 C.F.R. Part 13 (Subpart G) is on the agency (*i.e.*, Complainant), and because Complainant had failed to show that the Angolan licenses failed to meet the minimum standards contained in Annex 1 of the Chicago Convention, its complaint must be dismissed.

Order of Dismissal, served by Chief Administrative Law Judge Roy J. Maurer, May 6, 1998.

III. Arguments on Appeal

A. Complainant's Arguments

In its appeal brief, Complainant argues that a foreign airline transport pilot certificate does not constitute an "airline transport pilot certificate" under the Federal Aviation Regulations. Complainant also argues that under the Chicago Convention, the state of registry of the aircraft and operator determines the pilot certification requirements, and that the Chicago Convention does not require the United States to render valid airline transport pilot certificates issued by Angola.

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[5] Both Angola and the United States are signatories to the Chicago Convention.

B. Evergreen's Counterarguments

In reply, Evergreen argues that 14 C.F.R. § 61.3 expressly permits use of foreign airline transport pilot certificates and that 14 C.F.R. § 135.243(a)(1) by its terms does not require a *U.S.*-issued airline transport pilot certificate. Evergreen also argues that Complainant's interpretation of Section 135.243(a)(1) is so far afield from the rule's plain language that Evergreen lacked fair notice, violating Evergreen's right to due process. Further, although Evergreen believes that Section 61.3 is dispositive of the case and the Chicago Convention analysis is not required, Evergreen argues that the Chicago Convention neither requires a U.S. airline transport pilot certificate nor forbids use of an Angolan airline transport pilot certificate.

IV. Complainant Provided Opportunity to Brief New Issues

Complainant is granted 30 days from the service date of this order, plus the 5 additional days provided by 14 C.F.R. § 13.211(e), to brief the following issues:

1. What is the FAA's specific statutory authority for bringing the instant civil penalty action against Evergreen, given that neither the departure nor arrival points of any of the flights in question involved a point inside the U.S., and there is no evidence in the record that the flights at issue had any contact with other flights to or from the U.S.? Complainant's explanation of its statutory authority for bringing the instant action should take into account the definitions contained in 49 U.S.C. § 40102 of the terms "air commerce," "air transportation," "foreign air commerce," and "foreign air transportation." Complainant should cite any case law, letters of interpretation, regulatory history, or other materials that support Complainant's statutory authority to bring the instant civil penalty action against Evergreen.

2. A letter of interpretation issued on January 28, 1985, by John Cassady, FAA Assistant Chief Counsel for Regulation and Enforcement, to Mr. Ira Curtis,[6] indicates that a holder of a foreign pilot license may

[6] Interpretation 1985-1, 2 Federal Aviation Decisions I-46 (Clark Boardman Callaghan 1993).

indeed operate a U.S.-registered airplane for compensation or hire inside the foreign country, even if the pilot does not hold a U.S. airline transport pilot certificate. (A copy of the interpretation is attached.) Is Complainant's position in this case consistent with the 1985 interpretation? Is the 1985 interpretation distinguishable? Finally, if Complainant's position in the instant case represents a departure from the 1985 interpretation, how does Complainant justify the departure?

V. Evergreen's Right of Reply

Evergreen is granted 30 days from the service date of Complainant's document briefing the new issues, plus the 5 additional days provided by 14 C.F.R. § 13.211(e), to reply to Complainant's briefing of the new issues.

JANE F. GARVEY, ADMINISTRATOR
Federal Aviation Administration

Issued this 27th day of August, 1999.

Interpretation 1985-1

FAD Digest of Interpretations:

FAR 61.3(a), (c)
When operating a civil aircraft of U.S. registry in a foreign country, an individual may use a current pilot license and medical certificate issued by the foreign country instead of an FAA-issued pilot license and medical certificate; however, the individual may not operate the aircraft outside of the foreign country's airspace.

FAR 21.181; FAR 91.27; FAR 91.29
A U.S.-registered airplane operated in a foreign country must be maintained in accordance with U.S. airworthiness standards.

FAR 61.3(d)
A pilot who holds a flight instructor certificate issued by a foreign country may not give instruction which may be used to meet the requirements of a U.S. pilot certificate; however, the pilot is not prohibited from giving instruction in a civil aircraft of U.S. registry toward a pilot license issued by a foreign country.

Source of Interpretation: Letter to Ira Curtis from John H. Cassady, Assistant Chief Counsel, Regulations & Enforcement Division, dated January 28, 1985.

This is in response to your request for information regarding the extent to which the holder of an Israeli pilot license and medical certificate may operate a United States-registered aircraft. Specifically, you ask:

(1) May the pilot operate the airplane in and out of Israeli airspace?

(2) If the pilot holds an Israeli flight instructor certificate, may he instruct in the airplane?

(3) May the pilot operate the airplane for compensation or hire within Israeli airspace?

Section 61.3(a) of the Federal Aviation Regulations (FAR) provides that no person may act as pilot-in-command or in any other capacity as a required pilot flight crewmember of a civil aircraft of United States registry unless he has in his personal possession a current pilot certificate issued to him under Part 61 of the FAR. However, when the aircraft is operated within a foreign country, a current pilot license issued by the country in which the aircraft is operated may be used. Similarly, section 61.3(c) provides in part that, when an aircraft is operated within a foreign country with a current pilot license issued by that country, evidence of current medical qualification for that license, issued by that country, may be used.

In answer to your question (1), when operating the U.S.-registered airplane within Israel, the FAR requires only that the pilot hold an Israeli pilot license and evidence of current medical qualification for that license issued by Israel.

Your question, referring to "in and out" of Israeli airspace, implies that the pilot wishes to operate the aircraft outside of Israel. However, the FAR does not permit that pilot to operate the airplane outside of Israeli airspace.

Section 61.3(d) of the FAR provides, with exceptions not relevant here, that no person other than the holder of a flight instructor certificate issued under the FAR may give instruction required for a U.S. pilot certificate. To answer your question (2), the pilot you described may not give instruction which may be used to meet the requirements of a U.S. pilot certificate. The FAR does not prohibit the pilot from giving instruction in the airplane toward a pilot license issued by Israel. Israeli requirements for such operations should be reviewed.

To answer your question (3), the FAR does not prohibit the pilot from operating the airplane within Israel for compensation or hire.

Note that § 91.1(b) provides in part that each person operating a civil aircraft of U.S. registry within a foreign country shall comply with the regulations relating to the flight and maneuver of aircraft there in force. This means that while within Israel, Israeli aviation rules must be followed.

In addition, § 91.1(b) provides that with certain exceptions, Subpart A, C and D of Part 91 must be followed so far as they are not inconsistent with applicable regulations of the foreign country. Under §§ 91.27 and 91.29 (in Subpart A) no person may operate a U.S.-registered airplane unless it has within it an appropriate and current airworthiness certificate, and is in an airworthy condition. Under § 21.181, the airworthiness certificate is effective only as long as maintenance, preventive maintenance, and alterations are performed in accordance with the FAR. Therefore, the U.S.-registered airplane operated in Israel must be maintained in accordance with U.S. standards.

For further information regarding the operation of a U.S.-registered aircraft by non-U.S. pilots, please contact the FAA's Europe, Africa, and Middle East Office, c/o American Embassy, APO, New York, 09667.