UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

In the Matter of: **CONQUEST HELICOPTERS, INC.**	FAA Order No. 95-25 Served: December 19, 1995 Docket No. CP92NM0500

DECISION AND ORDER

Conquest Helicopters, Inc. (Conquest) has appealed from Administrative Law Judge Burton S. Kolko's oral initial decision[1] imposing a $2,500 civil penalty on Conquest for transporting a passenger without the required Part 135 operating certificate.[2] Conquest argues that the Administrator should dismiss this case because the flights at issue fell within the aerial photography exception to Part 135 coverage.[3] This decision denies Conquest's appeal because it is untimely and because Conquest has failed to show good cause for the untimeliness.

In July 1991, Conquest was using one of its helicopters to conduct sight-seeing flights around the Mount St. Helens volcano from a temporary base

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[1] A copy of the law judge's initial decision is attached.

[2] Specifically, the law judge found that Conquest violated Section 135.5 of the Federal Aviation Regulations, 14 C.F.R. § 135.5, which provides, in relevant part, as follows: "No person may operate an aircraft under this part without, or in violation of, an air taxi/commercial operator (ATCO) operating certificate and appropriate operations specifications issued under this part . . . ."

[3] Section 135.1(b), 14 C.F.R. § 135.1(b), provides, in relevant part, that "[T]his part [Part 135] does not apply to -- . . . (4) Aerial work operations, including -- . . . (iii) Aerial photography or survey . . . ."

Conquest had set up in the southeast portion of the state of Washington. Conquest did not hold a Part 135 air taxi/commercial operator certificate.

On July 23, 1991, another operator's helicopter crashed nearby, resulting in at least one fatality. Claudia Brown, a reporter from a local television station, and Terry Renteria, a news photographer, attempted to drive to the crash site. On their way up the mountain, Ms. Brown and Mr. Renteria noticed Conquest's temporary base. When Ms. Brown and Mr. Renteria could not find the crash site, they returned to Conquest's temporary base, where Mr. Renteria spoke with Earl Franck. Mr. Franck, who owns Conquest and serves as one of its pilots, suggested that he take Mr. Renteria to the crash site.[4] According to Mr. Renteria, he did not tell Mr. Franck that he only wanted to photograph the site from the air (Complainant's Exhibit 11, Transcript of NTSB Proceeding, at 38-39), nor did Mr. Franck inform Mr. Renteria that he could not land at the crash site. (Tr. 13.)

Mr. Franck took off with Mr. Renteria and flew to the crash site. Ms. Brown did not accompany them. Instead, she remained at Conquest's temporary base. Once at the crash site, Mr. Franck circled while Mr. Renteria used his video camera to film the scene from the air. Mr. Franck then landed the helicopter at the crash site, and Mr. Renteria got out of the helicopter and filmed some more. It is unclear whether the landing took place at Mr. Renteria's express request, and if so, when

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[4] Mr. Franck testified to this effect at a hearing before an administrative law judge for the National Transportation Safety Board (NTSB) at which the FAA sought to suspend Mr. Franck's commercial operator certificate for his actions in the same incident. Complainant's Exhibit 11, Transcript of NTSB Proceeding, p. 97. At the conclusion of the hearing, Judge Davis suspended Mr. Franck's commercial pilot certificate for 15 days. On appeal, the FAA, which had sought a 90-day suspension, argued that the 15-day suspension was too lenient, but the NTSB affirmed the law judge's sanction determination. Administrator v. Franck, NTSB Order EA-4166, 1994 NTSB LEXIS 143 (May 11, 1994).

exactly he made the request. Mr. Franck and Mr. Renteria did not remember exactly what happened. (*See, e.g.*, Tr. 17, 107.) After filming on the ground, the two then flew back to Conquest's temporary base.

Conquest submitted an invoice to the news station for the flights to and from the crash site. However, when Mr. Franck learned that the FAA was investigating the incident, he called the manager of the news station to tell him that the bill did not have to be paid. Although Mr. Franck initially claimed that the document marked "INVOICE" was just a record of the flights and not a bill, he "abandoned that strained contention," to use the law judge's words, at the hearing. (Initial Decision at 4.)

After the hearing,[5] the law judge issued a written initial decision finding that Conquest violated Section 135.5. In this decision, the law judge rejected Conquest's claim that Part 135 did not apply because there was no charge for the flights. The law judge also rejected Conquest's claim that the flights fell within the aerial photography exception to Part 135 coverage. The law judge believed that Conquest's helicopter was simply a substitute mode of transportation to the crash scene. In the law judge's view, although an element of aerial photography was present, the aspect of straight transportation from point A to point B disqualified the flights at issue from the aerial photography exception. As a result, the law judge held that Conquest violated Section 135.5.

The law judge reduced the $18,000 civil penalty proposed by Complainant by one half because he believed that the two flights constituted a "single transaction."

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[5] The date of the hearing was March 29, 1993.

In addition, citing Conquest's financial hardship, the law judge again reduced the resulting $9,000 civil penalty by one half to arrive at a civil penalty of $4,500.

Conquest did not appeal from the law judge's finding of violation. Complainant appealed on the issue of sanction, arguing that a $4,500 civil penalty was too low. On appeal, the Administrator held that the law judge erred in concluding that the two flights constituted a single violation, and in reducing the penalty for financial hardship when the only basis for such a finding was Mr. Franck's unsworn statements. In the Matter of Conquest Helicopters, FAA Order No. 94-20 at 2, 3 (June 22, 1994). The Administrator remanded the case to the law judge for a hearing solely to determine the appropriate amount of the civil penalty. (*Id.* at 4.)

A week before the new hearing regarding the sanction, Conquest filed a motion to dismiss. Conquest asked the law judge to give its motion "expedited consideration," given the upcoming hearing. Conquest based its motion to dismiss on a decision issued by the United States Court of Appeals for the Ninth Circuit while Complainant's appeal of the sanction amount was pending before the Administrator. According to Conquest, under the Ninth Circuit's decision in Henderson v. FAA, 7 F.3d 875 (9th Cir. 1993), the law judge erred in finding that Conquest violated Section 135.5. Conquest argues that "Henderson very clearly holds that only actual pre-takeoff knowledge of an intended landing is sufficient to take the flight out of the aerial photography exception." (Appeal Brief at 3.) Conquest asserts that the law judge's decision is inconsistent with Henderson because the law judge, who stated that Mr. Franck "should have known" that his

passenger intended to land, did not find actual knowledge.[6] (*Id.*) The law judge denied Conquest's motion to dismiss on the ground that it raised an issue outside the scope of the remand. (Order Denying Motion to Dismiss, December 14, 1994.)

At the conclusion of the new hearing on sanction,[7] the law judge issued an oral initial decision imposing a $2,500 civil penalty. Conquest has appealed, but its appeal does not concern the sanction amount. Rather, Conquest argues that the standard the law judge applied in this case is inconsistent with the law relating to the aerial photography exception as articulated by the Ninth Circuit in Henderson.

The threshold issue in this case is whether the Administrator should even consider Conquest's appeal since it does not involve the appropriate amount of the sanction. Complainant argues that Conquest cannot now challenge the law judge's finding of violation because any appeal on the merits would be untimely at this point.[8]

Conquest's appeal on the merits is in fact untimely, but if Conquest had good cause for the untimeliness, its appeal would still be considered. The basis for Conquest's appeal is the law as articulated in the Ninth Circuit's decision in Henderson. Conquest claims, referring to Henderson, that the applicable law changed during the pendency of the appeal on sanction. (Appeal Brief at 3.) However, Conquest cannot fairly claim that it lacked knowledge of the basis for its

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[6] It is unclear from the law judge's decision whether he found actual knowledge.

[7] At this hearing, held on December 19, 1994, Conquest introduced evidence of financial hardship.

[8] The law judge served his decision finding liability on May 19, 1993. Section 13.233(a) of the Rules of Practice, 14 C.F.R. § 13.233(a), requires parties who desire to appeal to file a notice of appeal within 10 days after service of the written initial decision on the parties.

appeal until the Ninth Circuit issued Henderson.[9] The Henderson court based its holding regarding the aerial photography exception on NTSB case law.[10] Each of the NTSB decisions that formed the basis of the Ninth Circuit's decision in Henderson was issued years before Conquest's case even arose, and thus was available to Conquest whether or not the Ninth Circuit issued a decision in Henderson. As a result, Conquest has failed to show good cause for the untimeliness of its appeal on the merits.

Even if it were necessary to reach the merits of this case, a finding of violation would still be appropriate. With all due respect, the NTSB cases on which Henderson was based did not properly interpret the aerial photography exception. Any suggestion that an operator can perform an operation for which it is not certificated[11] merely because a passenger has requested it, whether before or after takeoff, goes against both reason and safety. The NTSB itself has questioned the continuing viability of the cases at issue. Upon remand from the Ninth Circuit, the NTSB noted as follows:

> Given the difficulty, as this case illustrates, that the Administrator faces in attempting to prove what a pilot actually knows about a passenger's intent before a flight begins, the potential for collusion, and the ease with which Part 135 coverage, and its attendant higher safety standards, can be defeated where the desire for an interim stop

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[9] Nor does the representation of Conquest at the time by Mr. Franck, who is not an attorney, lead to a finding of good cause. *Pro se* respondents must also follow the Rules of Practice. Moreover, in a pre-hearing order, the law judge advised Mr. Franck to obtain counsel, but he decided not to do so.

[10] In Henderson, the Ninth Circuit held that the National Transportation Safety Board (NTSB) acted arbitrarily and capriciously by issuing a decision regarding the aerial photography exception that was inconsistent with its previous decisions in Administrator v. Southeast Air, Inc., 4 NTSB 517 (1982), *aff'd*, 732 F.2d 139 (1st Cir. 1984); Administrator v. Bryan, 4 NTSB 1166 (1983); and Administrator v. Reed, NTSB Order No. EA-3082, 1990 NTSB LEXIS 31 (February 19, 1990).

[11] In this case, transportation from point A to point B for compensation or hire.

> can be asserted to have arisen after takeoff, we are concerned that our cases may have broadened the aerial photography exception, or increased its availability, to the point where a re-examination of our precedent's continuing viability should be undertaken when the issue next arises.

Administrator v. Henderson, NTSB Order No. EA-4197, 1994 NTSB LEXIS 202, *2, n.3 (June 15, 1994).

The FAA has consistently interpreted Section 135.1(b) so that any landing of a flight for compensation or hire other than at the departure point would take the flight out of the aerial photography exception.[12] This is because the flight takes on the dual purpose of both aerial photography and transporting passengers from one point to another for compensation or hire.[13] As a result, when a passenger on an aerial photography flight asks an operator without a Part 135 certificate to land at a site other than the departure point, the operator should inform the passenger that this cannot be done because the necessary certification is lacking. This is true even if the request comes after departure. Indeed, a prudent operator would ask the passenger before departure what services are required, and would advise the passenger at that time that any landing other than at the departure point is impermissible.[14]

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[12] An exception is made for landings for "aircraft or human needs." This term must be narrowly defined. The term "aircraft needs" includes such matters as fuel exhaustion and mechanical problems. As for the term "human needs," a medical emergency would be considered a human need, but the "need" to get a newspaper story would not.

[13] *See, e.g.*, Letter to Gerald Naekel from John H. Cassady, Assistant Chief Counsel for Regulations and Enforcement (April 7, 1989), *in* 2 Federal Aviation Decisions, at I-200 (Clark Boardman Callaghan 1993).

[14] Note that even under the actual knowledge standard articulated in Henderson, the flights at issue would not appear to fall within the aerial photography exception. Conquest's argument that the aerial photography exception applied constituted an affirmative defense. *See* Administrator v. Bielecki, NTSB Order No. EA-4222, 1994 NTSB LEXIS 219, *40, n.51 (July 21, 1994) (stating that a respondent's argument that certain flights took place under Part 91 rather than Part 135 constitutes an affirmative defense). Under the Rules of

Conquest has failed to show good cause for its failure to file a timely appeal on the merits. Therefore, its appeal is dismissed. The law judge's decision assessing a $2,500 civil penalty is affirmed.[15]

DAVID R. HINSON, ADMINISTRATOR
Federal Aviation Administration

Issued this 19th day of December, 1995.

Practice, a party who has asserted an affirmative defense has the burden of proving it. 14 C.F.R. § 13.224. Thus, assuming, *arguendo*, the correctness of the actual knowledge standard articulated in Henderson, Conquest bore the burden of proving that Mr. Frank lacked actual pre-takeoff knowledge that Mr. Renteria would want to land at the crash site. Conquest failed to bear this burden. Although Mr. Franck testified that the photographer asked him to land when they were airborne (Tr. 107) rather than before departure, Mr. Franck's credibility was damaged when he claimed, after sending the station a bill, that he did not intend to charge for the flight. The only other person to testify regarding Mr. Franck's pre-departure knowledge was Mr. Renteria, the photographer, who could not remember what he and Mr. Franck discussed that day. Mr. Renteria testified that his usual practice was to wait until reaching the site to make any suggestions, and the law judge stated that there was no reason to suppose he did not follow that practice here. However, notably absent from Mr. Renteria's testimony is any affirmative statement that his behavior that day was consistent with his usual practice. Given the damaged credibility of one witness, and the inability to remember of the other, Conquest did not meet its burden of showing, by a preponderance of the reliable, probative, and substantial evidence, that Mr. Franck had no actual knowledge of an intended landing prior to departure.

[15] Unless Respondent files a petition for review with a Court of Appeals of the United States within 60 days of service of this decision (under 49 U.S.C. § 46110), this decision shall be considered an order assessing civil penalty. *See* 14 C.F.R. §§ 13.16(b)(4) and 13.233(j)(2) (1994).