UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

In the Matter of: **CHARTER AIRLINES, INC., JAMES E. WALKER, and LARRY A. MORT**	FAA Order No. 95-8 Served: May 9, 1995 Docket Nos. CP93WP0005, CP93WP0012, CP93WP0003

DECISION AND ORDER

Complainant and Respondents have filed cross-appeals from the written initial decision by Administrative Law Judge Burton S. Kolko served on April 19, 1994.[1] In this decision, the law judge held that Respondents violated:

(1) 14 C.F.R. § 135.267(d)[2] on August 3, 1990, when Respondents James E. Walker and Larry A. Mort did not receive 10 consecutive hours of rest in the 24-hour period preceding the planned completion of the flight; and

(2) 14 C.F.R. § 135.267(b)[3] on September 13, 1990, and November 6, 1990, when Respondents Walker's and Mort's commercial flight time exceeded 10 hours in a 24-hour period.

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

[2] Section 135.267(d) of the Federal Aviation Regulations, 14 C.F.R. § 135.267(d), provides that:

> Each assignment ... must provide for at least 10 consecutive hours of rest during the 24-hour period that precedes the planned completion time of the assignment.

[3] Section 135.267(b)(2) of the Federal Aviation Regulations, 14 C.F.R. § 135.267(b)(2), provides in pertinent part that:

> [D]uring 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 --
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> > (2) 10 hours for a flight crew consisting of two pilots qualified under this part for the operation being conducted.

However, the law judge held that the Respondents did ***not*** violate:

(1) 14 C.F.R. § 135.267(d) on October 25, 1990, and on November 6, 1990; and

(2) 14 C.F.R. § 135.263(a)[4] on August 3, September 13, October 25, or November 6, 1990.

The law judge assessed a $5000 civil penalty against Respondent Charter Airlines, and $1000 civil penalties against Mr. Walker and Mr. Mort.

After consideration of the record on appeal, including the briefs, the law judge's order is affirmed in part and reversed in part. It is held herein that Respondents violated: Section 135.267(b) with regard to flights conducted on September 12-13, and on November 6, 1990; Section 135.267(d) with regard to flights conducted on August 2-3, 1990, and on October 25, 1990; and Section 135.263(a) with regard to each of those series of flights. A $10,000 civil penalty is assessed against Charter Airlines, and $2000 civil penalties are assessed against Mr. Walker and Mr. Mort.

James Walker is the chief pilot and director of operations of Charter Airlines, which is the holder of an air taxi operator certificate issued under 14 C.F.R. Part 135. At all times involved in this matter, Charter Airlines operated two Lear Jet aircraft. Larry Mort is a pilot employed by Charter Airlines. On all of the flights in question, Mr. Walker was the pilot in command, and Mr. Mort was the co-pilot.

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[4] Section 135.263(a) of the Federal Aviation Regulations, 14 C.F.R. § 135.263(a), provides:

> A certificate holder may assign a flight crewmember and a flight crewmember may accept an assignment for flight time only when the applicable requirements of §§ 135.263 through 135.271 are met.

Sections 135.267(b) and (d) set forth flight and duty time limitations for pilots of aircraft operated under Part 135 in unscheduled operations. Section 135.267(b) contains the flight time restriction. Under Section 135.267(b)(2), when two flight crewmembers are required, the total flight time of an assigned flight, when added to any other commercial flying by that crew, may not exceed 10 hours during any 24-hour period. Section 135.267(b)(2) provides in pertinent part:

> [D]uring 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 --
>
> (2) 10 hours for a flight crew consisting of two pilots ....

14 C.F.R. § 135.267(b)(2).

Section 135.267(d) limits duty time by requiring that each assignment provide a minimum number of hours of rest for crewmembers within a 24-hour period. Specifically, Section 135.267(d) requires as follows:

> Each assignment ... must provide for at least 10 consecutive hours of rest during the 24-hour period that precedes the *planned* completion time of the assignment.

14 C.F.R. § 135.267(d) (emphasis added.) Hence, as explained by FAA Inspector James J. Daigle at the hearing, to comply with 14 C.F.R. § 135.267(d), the planned completion time of the assignment should be no later than 14 hours after the time that the pilots report for duty. Otherwise it would be impossible for the pilots to have 10 consecutive hours of rest during the 24-hour period preceding the planned completion time of the assignment.[5] If the original planning was realistic, but was

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[5] Inspector Daigle testified:

> So generally, [for] planning purposes ... once a crew member has to show up for duty, let's say to prepare for a flight, let's say 6 a.m. ... he has to be back on the ground 14 hours later ....
>
> That assignment must allow for that crew member to be back on the ground by 8 p.m. that evening. If he's flying beyond that time, he no longer meets this requirement,

upset due to circumstances beyond the control of the pilots and operator, the flight may be conducted even though the crew duty time may exceed 14 hours.[6]

Duty time includes more than simply a pilot's flight time. Duty time is any time that is not a rest period. If the crewmember is involved in any type of duty for the certificate holder, including preparing for a flight or standing by at the airport waiting for passengers or cargo, then that time cannot be considered a rest period.[7]

> this rest period requirement in paragraph D, because if he's flying, let's say, until ... [9] p.m., you go 9 p.m. back 24 hours to 9 p.m. the previous night, ... you're only going to show a nine-hour period there.
>
> In other words, after 14 hours, you no longer meet the ten consecutive hour rest requirement.

(Tr. 33-34.)

[6] 14 C.F.R. § 135.263(d) provides:

> A flight crewmember is not considered to be assigned flight time in excess of flight time limitations if the flights to which he is assigned normally terminate within the limitations, but due to circumstances beyond the control of the certificate holder or flight crewmember (such as adverse weather conditions), are not at the time of departure expected to reach their destination within the planned flight time.

The FAA has consistently emphasized in its written interpretations that the key to interpreting Section 135.267(d) is to look at the original planning of the assignment. The question is not so much when the assignment was completed, but at what time, according to the original planning, was the assignment expected to be completed. Whether the original planning was realistic must also be taken into account. *See, e.g.*, Letter to Robert B. Thomas from Donald P. Byrne, Assistant Chief Counsel for Regulations and Enforcement (December 6, 1990), *in* 2 Federal Aviation Decisions, at I-358, I-359 (Clark Boardman Callaghan 1993) in which it is stated as follows:

> Section 135.267(d) does not contain an explicit limitation on duty time. This regulation provides limits on *flight time* rather than *duty time*. Thus, paragraph (d) of § 135.267(d) cannot be construed as a hard and fast rule that 14 hours of duty time must never, under any circumstances, be exceeded.
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> The key to the applicability of § 135.267(d) is in the final phrase "*planned* completion time of the assignment" (emphasis added). If the original planning is upset for reasons beyond the control of the crew and the operator, the flight may nevertheless be conducted, even though crew duty time may extend beyond 14 hours. This assumes, of course, that the original planning was realistic.
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> As to what circumstances are beyond the control of the operator and crew, the FAA has taken the position that delays caused by late passenger arrivals, maintenance difficulties, and adverse weather may legally extend the flight beyond the 14 hours of crew duty time.

[7] *See* testimony of Inspector Daigle at Tr. 32.

In the discussion that follows, the series of flights by Respondents on August 2-3, 1990, and on October 25, 1990, will be analyzed first to determine whether Respondents violated Section 135.267(d) on those dates. The series of flights on September 12-13, 1990, and on November 6, 1990, will be reviewed afterwards for violations of Section 135.267(b). Thereafter, the other issues raised by the parties regarding Section 135.263 and sanction will be discussed.

Section 135.267(d)

The Flights on August 2 and 3, 1990

Mr. Walker and Mr. Mort were the pilots on a series of flights on August 2 and 3, 1990. According to the flight manifest (Complainant's Exhibit 1), the pilots reported for duty at 2030[8] in Carlsbad, California.

According to Mr. Walker's testimony, Mr. Mort and he were staying at a beach house in Carlsbad, California, on vacation. They flew to El Paso, Texas,[9] where Charter Airlines has a base of operations, picked up freight, and then flew that freight to Youngstown, Ohio. After unloading that freight in Youngstown, they flew to St. Mary's, Pennsylvania, which according to Mr. Walker is only about 18 minutes away from Youngstown, Ohio. They arrived in St. Mary's at 0221 where they planned to pick up freight to deliver to El Paso. It is noted on the flight manifest that the freight was 5 hours late at St. Mary's. The pilots rested at the

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[8] Mr. Walker testified that "all these times are Las Vegas times because, with the time zones, and we pass through three time zones almost every time we keep all time on Pacific time or Las Vegas time." (Tr. 126.) Hence, all times throughout this decision are expressed in Pacific time.

[9] When the FAA inspectors first examined the flight manifest reflecting the flights on August 2 and 3, 1990 (Complainant's Exhibit 1), there was no indication on that flight manifest that the flight from Carlsbad, California, to El Paso, Texas, was a positioning flight. When the inspectors reviewed the flight manifest with Mr. Walker, Mr. Walker marked the Carlsbad to El Paso leg as "ferry" in red pencil. Likewise, he marked the flight from El Paso to Carlsbad on August 3 as "ferry." *See* Complainant's Exhibit 1.

airport while waiting for the freight to arrive. They departed from St. Mary's at 1042 on August 3, 1990. *By their departure time from St. Mary's*, the crew had been on duty for 14 hours and 12 minutes.[10]

After departing from St. Mary's, the flight stopped at Oklahoma City for fuel, and then flew to El Paso, arriving at 1438.[11] Hence, Mr. Walker's and Mr. Mort's *total duty time* was approximately 18 hours for the duty day beginning in Carlsbad on August 2 and ending in El Paso on August 3.

The following chart[12] summarizes the relevant flights made by Respondents on August 2 and 3, 1990:

August 2, 1990
(Reported for Duty at 2030)

City	Arrival Time	Departure Time
Carlsbad, CA		2047
El Paso, TX	2211	2232
Youngstown, OH	0138	0157
St. Mary's, PA	0221	

August 3, 1990

St. Mary's, PA		1042
Oklahoma City, OK	1306	1320
El Paso, TX	1438	

[10] The law judge held that the pilot's duty day began at 2030 in Carlsbad, California. In reaching this conclusion, the law judge explained that Respondents are bound by the information in the records, citing In the Matter of Watts Agricultural Aviation, FAA Order No. 91-8 (April 11, 1991), *petition for review denied*, No. 91-70365 (9th Cir. October 1, 1992). The law judge explained "I ... do not make either a factual determination whether the flight from Carlsbad to El Paso [on August 2, 1990] was a positioning flight or a legal determination whether positioning flights are part of a crewmember's duty time." (Initial Decision at 5, note 3.) On appeal, Respondents do not challenge the law judge's finding that the duty day began at 2030.

[11] After unloading the freight in El Paso, Mr. Walker and Mr. Mort flew back to Carlsbad, California. Complainant does not contend that the trip back to Carlsbad from El Paso should be considered as commercial flying time that should be included in computing flight time for the purpose of determining compliance with 14 C.F.R. § 135.267(d).

[12] This chart is based on Complainant's Exhibit 1.

In his initial decision, the law judge wrote:

> To recapitulate, Walker and Mort reported for duty on August 2, 1990, at 2030 hours, and landed in El Paso with a shipment of cargo at 1438 hours on August 3, 1990. During the 24 hour period preceding the landing in El Paso, they did not have 10 consecutive hours of rest. Rather, in the 24 hour period before the flight landed in El Paso, Walker and Mort only had approximately 6 consecutive hours rest (1438 hours to 2030 hours on August 2, 1990). Respondents Walker and Mort thereby violated 14 C.F.R. § 135.267(d) by accepting an assignment that did not provide for 10 consecutive hours rest in the 24 hour period preceding the planned completion of the assignment. Furthermore, Respondent Charter Airlines violated 14 C.F.R. § 135.267(d) by failing to provide crewmembers Walker and Mort with 10 consecutive hours rest.

(Initial Decision at 5.)

The law judge held further that the delay of the delivery of the freight to St. Mary's Airport did not constitute a circumstance beyond the control of the flight crew, and therefore, that Respondents were not relieved of responsibility for failing to comply with 14 C.F.R. § 135.267(d). The law judge explained that Mr. Walker had accepted the assignment even though he had known after his first conversation with the customer that the freight would be delivered late at St. Mary's.

On appeal, Respondents challenge the law judge's ruling regarding the flights on August 2 and 3, 1990. Respondents argue that the law judge mischaracterized Mr. Walker's testimony regarding his discussions with the customer about the late delivery of the freight at St. Mary's Airport. Also, Respondents argue, it was error for the law judge to hold that the late freight delivery did not constitute a circumstance beyond the control of the flight crew.

Complainant argues in reply that it does not matter how many times Respondents spoke with the customer or when they found out that the delivery of the freight to the airport would be delayed. Complainant argues that Respondents

did not accept the flight until *after* the freight was delivered to St. Mary's and by then, Respondents knew that they had exceeded their duty day. In support of this argument, Complainant points to Mr. Walker's testimony that they decided to accept the flight after they had rested at the airport while waiting for the freight to arrive. (*See* Tr. 130, 166-167.)

When an operator adds a flight(s) to an assignment, the operator must determine whether the extra flight(s) can be completed in accordance with the requirement that the two-person crew receive at least 10 consecutive hours of rest during the 24-hour period preceding the planned completion time of the amended assignment. 14 C.F.R. §§ 135.263(a), 135.267(d). In addition, the flight crewmembers, before accepting an extra flight(s) as part of an assignment, must determine whether they will be able to complete the amended assignment and still comply with the rest requirement of Section 135.267(d). *Id.* Hence, it must be determined whether at the time Charter assigned the trip to carry freight from St. Mary's to El Paso, Charter had reason to believe that the assignment, as amended, would provide the crew with at least 10 consecutive hours of rest during the 24-hour period preceding the planned completion time of the assignment. Likewise, it must be determined whether Mr. Walker and Mr. Mort reasonably believed, when they accepted the extra flights, that the amended assignment provided for at least 10 consecutive hours of rest during the 24-hour period preceding the planned completion time of the amended assignment.

The law judge held that when the crew accepted the assignment to fly cargo from St. Mary's to El Paso, there was no planned completion time because they had no idea when the freight would arrive at St. Mary's or when they could depart for

El Paso. (Initial Decision at 6, note 4). In making this finding, the law judge apparently decided that Respondent Walker's testimony that the freight was supposed to be at St. Mary's when they arrived did not deserve any weight. Due to the inconsistencies in the record and Mr. Walker's failure to explain the basis of his expectation that the freight would be in St. Mary's upon their arrival,[13] it is understandable that the law judge chose to disregard that testimony.

If it were held that Charter Airlines made the assignment and Mr. Walker and Mr. Mort accepted the assignment while the crew was in Youngstown, it is doubtful that at that time they could have expected the freight to be at St. Mary's upon the crew's arrival. Mr. Walker did not explain who thought that the freight was supposed to be there when they arrived or the basis for that expectation. Moreover, Mr. Walker did not testify that they had formulated a planned completion time based upon the expectation that the freight would be at St. Mary's when they arrived. If Charter truly expected the freight to be in St. Mary's when the crew arrived, then a planned completion time for the amended assignment could have been computed. As the flight manifest revealed, the trip from St. Mary's to El Paso, including a refueling stop in Oklahoma City, took about 4 hours. Therefore, if Respondents actually expected the freight to be present in St. Mary's when they arrived, the planned completion time should have been some time after 0630. (0221 plus 4 hours of flight/refueling time plus time to load and unload the

[13] The evidence appears to indicate that Mr. Walker did not talk to the customer before arriving at St. Mary's. There is no evidence regarding who actually spoke to the customer or, more importantly, what the customer said that led Mr. Walker to conclude that the freight would be waiting for them at St. Mary's. The law judge's statement that during Mr. Walker's first conversation with the customer, he was informed that the freight would be late is consistent with the evidence. By that time, however, Mr. Walker was already in St. Mary's.

freight.) However, when asked by Respondent's counsel what the planned completion time was, Mr. Walker responded "[i]t would have been 1030 the next morning."[14] (Tr. 151.) Also, there is an entry on the flight manifest that the freight was 5 hours late. (Complainant's Exhibit 1). Since in actuality the crew waited in St. Mary's for 8 hours, the freight would have been 8 hours late if, when they accepted the assignment, they had expected the freight to be at St. Mary's when they arrived.

All of this is very confusing. The evidence is in conflict. What appears most likely is that when Charter Airlines assigned this trip to fly freight from St. Mary's to El Paso and when Mr. Walker and Mr. Mort accepted it, there was no planned completion time. This would seem to be so regardless of whether the assignment was made and accepted while Mr. Walker and Mr. Mort were in Youngstown or after their arrival in St. Mary's.

If a planned completion time for the assignment to fly freight from St. Mary's to El Paso was not formulated when that assignment was made and accepted, Respondents cannot argue that the late freight delivery upset the original planning. Therefore, the protection offered by Section 135.263(d) in the event of circumstances beyond the control of the flight crew is unavailable to Respondents.

The Flights on October 25, 1990

Mr. Walker and Mr. Mort were the pilot and co-pilot respectively on flights on October 25, 1990. According to the flight manifest, the pilots reported for duty at

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[14] That testimony is unsubstantiated and appears to have been completely self-serving. Indeed, with a duty day beginning at 2030, 1030 would have been the latest planned completion time that the crew could have and still have at least 10 consecutive hours of rest during the 24-hour period preceding that completion time. Respondent Walker failed to relate that time (1030) to any of the flights.

0145 on that day. (Complainant's Exhibit 3.) They departed from Denver and flew to Brownsville, Texas, where they picked up freight. (Tr. 134.) From Brownsville, they flew to Mesa, Arizona, and delivered the freight. (Tr. 134.) Then they flew home to Las Vegas, arriving at 0753. At the airport in Las Vegas, according to Mr. Walker's testimony, they were notified that a customer wanted to fly to Idaho Falls, Idaho. (Tr. 134.) Mr. Walker testified that they already were scheduled to pick up a passenger in Scottsdale at "1:30 in the afternoon."[15] (Tr. 134.) Mr. Walker explained that they accepted the trip to Idaho Falls because they could visit Mr. Walker's son in Provo, Utah, on the way from Idaho Falls to Scottsdale. (Tr. 134-135.)

They flew from Las Vegas to Idaho Falls, dropped off the passenger, and then flew from Idaho Falls to Provo, arriving at 1143. (Complainant's Exhibit 3.) Mr. Walker testified that after visiting his son, they arrived late at the airport in Provo, and that their departure from Provo was then delayed by thunderstorms in the area. (Tr. 136.) They had to wait 45 minutes for a clearance, finally departing at 1427. (Tr. 136; Complainant's Exhibit 3.) They picked up the passenger in Scottsdale, departing from Scottsdale at 1552, and arrived at 1633 in Las Vegas, where they ended their duty day. (Tr. 136-137; Complainant's Exhibit 3.) Since they began their duty day at 0145, they had been on duty for 14 hours and 48 minutes by the time they turned off the engines in Las Vegas.

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[15] Mr. Walker did not specify the time zone. The law judge in his initial decision interpreted this testimony as meaning that they were scheduled to pick up a passenger in Scottsdale at 1330 PST. Respondents did not challenge that factual finding in their reply brief.

The following chart[16] summarizes the relevant flights made by Respondents:

October 25, 1990
(Reported for Duty at 0145)

City	Arrival Time	Departure Time
Denver, CO		0159
Brownsville, TX	0405	0432
Mesa, AZ	0658	0717
Las Vegas, NV	0753	0917
Idaho Falls, ID	1029	1107
Provo, UT	1143	1427
Scottsdale, AZ	1533	1552
Las Vegas, NV	1633	

In his initial decision, the law judge explained that Respondents Walker and Mort needed to end their duty day by 1545 to comply with the rest requirement set forth in 14 C.F.R. § 135.267(d). (Initial Decision at 10.) He held further that Respondents did not turn off their engines in Las Vegas until 1633, 48 minutes beyond the 14-hour limit. However, relying upon an interpretation prepared by the FAA's Assistant Chief Counsel for Regulations and Enforcement introduced as Respondents' Exhibit 2,[17] the law judge concluded that the bad weather in Provo constituted a circumstance beyond Respondents' control. Therefore, the law judge held, Respondents had not violated Section 135.267(d). (*Id.*) The law judge wrote:

> In this case, Respondents planned on departing Scottsdale, Arizona, at 1330 hours for a .7 hour flight to Las Vegas, Nevada. (Tr. at 135; CX-3(d)). But for the weather conditions in Provo, Utah,

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[16] This chart is based on Complainant's Exhibit 3.

[17] It is stated in that interpretation, in pertinent part, as follows:

> As to what circumstances are beyond the control of the operator and crew, the FAA has taken the position that delays caused by late passenger or cargo arrivals, maintenance difficulties, and adverse weather are beyond the control of the certificate holder.

Letter to Kevin Wilson from Donald P. Byrne, Assistant Chief Counsel for Regulations and Enforcement dated March 30, 1992, introduced as Respondents' Exhibit 2.

> Respondents would have completed their duty time well within the 14 hour limit. ....
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> Thus, the weather conditions in Provo, Utah amounted to a circumstance beyond the control of the Respondents, and therefore Respondents were not in violation of § 135.267(d) when they decided to fly the last leg of the flight on October 25, 1990.

(Initial Decision at 10.)

In its cross-appeal brief, Complainant argues that it was error for the law judge to find that the bad weather in Provo, Utah, amounted to a circumstance beyond the control of the crew that caused them to exceed the duty time limit by 48 minutes. Complainant argues that it was not the bad weather that upset Respondents' plan to complete the assignment within the duty time limits, but the crew's decision "to go on a lark, midway through the assignment, to Provo, Utah, to see Respondent Walker's son." (Complainant's Appeal Brief at 12-13.) According to Complainant's argument, "[w]hile Respondents may not have foreseen the weather in Provo, they should have easily foreseen the likelihood that the unplanned trip could interfere with their compliance with the rest limitations." (Complainant's Appeal Brief at 13.)

In reply, Respondents argue that the FAA has never excluded stops for non-commercial or personal purposes from the exception for circumstances beyond the control of the crew. (Respondents' Reply Brief at 3-4.) Hence, Respondents argue, the law judge's decision finding that Respondents had not violated Section 135.267(d) on October 25, 1990, should be affirmed.

Considering the totality of the circumstances, it was not the adverse weather that prevented Respondents from completing the duty day as planned. Instead, the planned schedule was upset by Respondents' plan to stop at Provo, visit Mr. Walker's son, and still get to Scottsdale in time to pick up the passenger as

scheduled. The further delay caused by the adverse weather, which Respondents have not even attempted to show was unforeseeable, only made matters worse. Also, the trip to Provo was a pleasure trip, and therefore, completely within the control of Respondents. They could have decided not to go to Provo or to shorten their stop at Provo if they knew or should have known that there would be thunderstorms in Provo early that afternoon.

Respondents Walker and Mort departed from Idaho Falls at 1107 and landed at Provo at 1143. Realistically, that left little time to secure the aircraft, leave the airport, visit Respondent Walker's son, return to the airport, prepare for takeoff, and fly to Scottsdale, Arizona. Indeed, the trip from Provo to Scottsdale alone would consume over an hour of the available time. Respondent even acknowledged at the hearing that he was concerned about the duty time, but that he accepted the Idaho trip because it would give him an opportunity to stop in Provo on the way from Idaho Falls to Scottsdale. (Tr. 135.) He admitted arriving back at the Provo airport late. (Tr. 136.)

Mr. Walker testified that it was their common practice to depart from Provo under visual flight rules (VFR) and pick up a clearance in the air before entering the Salt Lake City TCA. Mr. Walker testified that departing VFR and picking up the clearance in the air saves time. Due to the thunderstorms, however, they were unable to depart VFR. (Tr. 136.) It goes without saying that Respondents should have checked the weather forecasts before planning to depart in that fashion. Respondents did not claim that they had considered the weather forecasts and other available weather information when they revised their plan to include a pleasure trip to Provo. They did not claim that the thunderstorms were unpredicted or that

they could not have known about them. Indeed, Mr. Walker's testimony suggests that thunderstorms were not uncommon during October afternoons. (Tr. 136.)

Simply stated, Respondents failed to establish that the bad weather was unforeseeable. Inherent in the concept of circumstances beyond the control of the operator and crew is the element of unforeseeabilty.[18] If thunderstorms were forecast for the early afternoon, then Respondents should have departed from Provo much earlier than they did, if necessary skipping the visit with Mr. Walker's son, to get to Scottsdale on time. Consequently, the law judge's finding that the adverse weather in Provo constituted a circumstance beyond the control of the crew, thereby permitting Respondents to continue beyond the 14-hour duty day limit, was erroneous. The law judge's finding that Respondents did not violate Section 135.267(d) on October 25, 1990, is reversed.

Section 135.267(b)

The Flights on September 12 and 13, 1990

Mr. Walker and Mr. Mort were also the pilots of a Charter Airlines Lear Jet on a series of flights that began at 0947 on September 12, 1990. On appeal, the issue regarding these flights is whether Respondents flew more than 10 hours of commercial flying between 0947 on September 12, 1990, and 0947 on September 13, 1990.

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[18] *See* Letter to Jimmie Young from Donald P. Byrne, Acting Assistant Chief Counsel for Regulations and Enforcement (August 1, 1989), *in* 2 Federal Aviation Decisions, at I-236, I-240 (Clark Boardman Callaghan 1993) interpreting the phrase "circumstances beyond the control of the certificate holder or flight crewmember" in 14 C.F.R. § 135.267(e); in that letter the FAA wrote that that phrase "connotes a condition that exceeds the reach or understanding of an operator and inherent in this idea is that the condition or circumstance is not foreseeable. *See also* Letter to Marvin E. Autry from Donald P. Byrne, Acting Assistant Chief Counsel for Regulations and Enforcement (November 9, 1990) *in* 2 Federal Aviation Decisions, at I-350, I-351 (Clark Boardman Callaghan 1993) in which the FAA explained that "[i]f the original flight planning on the part of the operator is upset due to *unforeseen circumstances*, the flight may nevertheless be conducted." (Emphasis added.)

Respondents Walker and Mort departed at 0947 on September 12, 1990, from El Paso, Texas, on a commercial flight to deliver freight to Detroit, Michigan. (Tr. 177.) They serviced the aircraft and decided to fly back home. (Tr. 131, 177-178.) They stopped to refuel in Amarillo, Texas, where they were informed by their secretary of a request for a flight from Winslow, Arizona, to Youngstown, Ohio. (Tr. 131, 177.) Mr. Walker testified that he figured that they could complete this trip to Youngstown within the duty day, and therefore, he accepted the assignment. They flew to Winslow, carrying no freight or passengers. (Tr. 131.) They picked up freight in Winslow, flew back to Amarillo for fuel, and then flew to Youngstown, Ohio, where they delivered the freight. (Tr. 132.)

The flying times for these flights *on September 12, 1990,* were as follows:

El Paso to Detroit	3.0 hours
Detroit to Amarillo	2.3 hours
Amarillo to Winslow	1.3 hours
Winslow to Amarillo	1.2 hours
Amarillo to Youngstown	2.2 hours
Total	10.0 hours

(*See* Complainant's Exhibit 2.) As the above table indicates, the total flying time on September 12, 1990, was 10 hours.

The next morning, at 0920, 27 minutes before the end of the rolling 24-hour period that began the day before when they left El Paso, they departed on a .8 hour flight to deliver freight to Portland, Indiana. (Tr. 132; Complainant's Exhibit 2.) Thus, in the 24-hour period beginning at 0947 on September 12 and ending at 0947 on September 13, Respondents' flying time totaled 10 hours and 27 minutes. (Tr. 55.) If all of those flights constituted "commercial flying," then Respondents violated Section 135.267(b) by flying more than 10 hours of commercial flights in a 24-hour period.

During the annual base inspection, Mr. Walker took the flight log and marked "FERRY" in red next to the flights from Detroit to Amarillo, and from Amarillo to Winslow.[19] (Tr. 53; *see* Complainant's Exhibit 2.) FAA Inspector Daigle testified at the hearing that for purposes of determining whether there had been a violation of Section 135.267(b), it did not matter whether these were ferry flights. He testified "... they're clearly repositioning flights, and even though conducted ... [under] Part 91 they're considered commercial flying and must be included in the total flight time added for that 24-hour period." (Tr. 53.) He noted that the flights marked as ferry flights preceded a flight conducted under Part 135. (Tr. 54.)

The law judge held that "between 9:47 AM on September 12, 1990 and 9:47 AM on September 13, 1990, Mr. Walker and Mr. Mort flew a total of 10 hours and 27 minutes." (Initial Decision at 7.) The law judge wrote that "[t]he issue ... is not whether the flights from Detroit to Amarillo, and from Amarillo to Winslow were Part 91 ferry flights, but whether these flights constituted commercial flying." (Initial Decision at 8.) He held that the ferry flights constituted "other commercial flying," relying upon the interpretation of the term by the National Transportation Safety Board (NTSB) in Administrator v. Richard, 5 NTSB 2198, 2202 (1987). In that decision, the NTSB held that the customary practice of paying pilots for ferry flights was sufficient in the absence of evidence to the contrary, and that if the pilot

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[19] The Airman's Information Manual defines "ferry flight" as follows:

> A flight for the purpose of:
> 1. Returning an aircraft to base.
> 2. Delivering an aircraft from one location to another.
> 3. Moving an aircraft to and from a maintenance base.

was paid for the flight, then the flight would be considered "other commercial flying."

The law judge noted Mr. Walker's testimony that his co-pilot was paid a monthly salary that was intended to compensate him for all of his commercial flying. The law judge held that those ferry flights constituted commercial flying because Respondent failed to introduce any evidence, such as an employment contract, to prove that Mr. Mort's monthly salary was not intended in part to compensate Mr. Mort for those ferry flights. (Initial Decision at 8-9.)

Respondents challenge the law judge's finding of a violation of Section 135.267(b) on September 13, 1990. Respondents argue that the law judge mischaracterized or ignored Mr. Walker's testimony that Mr. Mort was not compensated for ferry flights. Respondents argue further that ferry flights are not conducted under Part 135 and, therefore, the law judge should not have regarded the ferry flights on these dates as commercial flights. Respondents point to Section 135.1(b)(3), 14 C.F.R. § 135.1(b)(3), which provides that Part 135 does not apply to ferry or training flights.

Complainant argues in its reply brief that the law judge properly concluded that Respondents had not introduced sufficient evidence to prove that Mr. Mort was not paid for his services as a co-pilot on ferry flights. Complainant argues that Mr. Walker's testimony that Mr. Mort's monthly salary was not intended to compensate Mr. Mort for ferry flights was ambiguous. According to Complainant, Respondents needed to introduce something more, such as an employment contract, if they were to succeed in proving that Mr. Mort was not compensated for ferry flights. Complainant also refers to FAA-written interpretations of the relevant

regulations to prove that while Section 135.1(b)(3) provides that ferry flights are not governed by Part 135, ferry flights nonetheless may be considered as other commercial flying under the flight time limitations.

Complainant is correct in arguing that a flight conducted under Part 91 as a ferry flight nevertheless may be considered as "other commercial flying." The issue in this case is not whether the ferry flights were conducted pursuant to Part 135, but whether those flights nonetheless constituted commercial flying. Section 135.267(b)(2) provides in pertinent part that "... 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 ... 10 hours for a flight crew consisting of two pilots." 14 C.F.R. § 135.267(b)(emphasis added.) While ferry flights themselves are not operated pursuant to Part 135's limitations, the pilots flying flights for compensation or hire and the operators assigning those flights are subject to Part 135.

Under what circumstances would a ferry flight conducted under Part 91 be regarded as "other commercial flying?" In written interpretations of Section 135.267(b) on this issue, the FAA has explained, as follows:

> The general rule with respect to flight time limitations is that any "other commercial flying (e.g., flights conducted under Part 91) must be counted against the daily flight time limitations of Part 135 if it *precedes* the flight conducted under Part 135. If the Part 91 flight occurs *after* the Part 135 flying, the Part 91 flight is not counted against the daily flight time limitations Part 135.[20]

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[20] Letter to Jimmie E. Young from Donald P. Byrne, Acting Assistant Chief Counsel for Regulations and Enforcement (August 1, 1989), *in* 2 Federal Aviation Decisions at I-236, I-238 (Clark Boardman Callaghan 1993) (Emphasis added.)

Similar explanations were provided in numerous interpretations written by the FAA. *See, e.g.*, Letter to Bernard Flashman from Donald P. Byrne, Acting Assistant Chief Counsel for Regulations and Enforcement (December 6, 1990), *in* 2 Federal Aviation Decisions, at I-362, I-363-64 (Clark Boardman Callaghan 1993); Letter to Jeff J. Jacober from Donald P. Byrne, Assistant Chief Counsel for Regulations and Enforcement (June 24, 1991), *in* 3 Federal Aviation Decisions, at I-108, I-109-111 (Clark Boardman

In this case, Respondents had delivered freight in Detroit and had the aircraft serviced there. Then, intending to fly home, they departed from Detroit, stopping in Amarillo for fuel. After learning of a flight for compensation out of Winslow, they flew from Amarillo to Winslow. Clearly, the flight from Amarillo to Winslow, preceding a flight to carry freight for compensation out of Winslow, was a commercial flight. Although that flight itself may not have been for compensation, it put Respondents in a position to pick up the freight and deliver it for remuneration. In other words, this flight to Winslow was part of the assignment to fly freight for compensation from Winslow to Youngstown.

By the same token, once it was decided that they would carry freight from Winslow to Youngstown, regardless of when that decision was initially made, the character of the flight from Detroit to Amarillo also changed. That is, even if the Detroit to Amarillo flight was once "other than commercial," it could no longer be considered so once the decision was made to move on from Amarillo to Winslow to pick up the cargo for carriage to Youngstown. At that point, Respondents should have recomputed their flight times to determine whether accepting the Winslow-Youngstown assignment was consistent with the requirements of Section 135.267(b).

Mr. Walker testified that when pilots were hired, it was explained to them that they would receive a salary for commercial flying, and that they would not be

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Callaghan 1993); Letter to Andrew Donahue from Donald P. Byrne, Assistant Chief Counsel for Regulations and Enforcement (April 9, 1993), *in* (Current Developments) Federal Aviation Decisions, at I-22, I-23 (Clark Boardman Callaghan 1993).

Inspector Daigle's testimony on this issue was similar to the interpretations quoted or referred to above. (*See* Tr. 44-46.)

paid by the hour or by the mile. (Tr. 123.) He subsequently testified that he did not consider that they were paying Mr. Mort for ferry flights, but only for commercial flying. (Tr. 146-147.) Apparently, what Mr. Walker did not understand is that while some ferry flights would not be regarded as commercial flying, such as a flight back to base after the completion of an assignment, other ferry flights for the purpose of positioning an aircraft for a flight for compensation or hire would constitute commercial flying.

Based upon the foregoing, it is held that the law judge correctly found that the flights on September 12, 1990, from Detroit to Amarillo and from Amarillo to Winslow constituted "other commercial flying" for purposes of determining compliance with Section 135.267(b). Therefore, the law judge's finding that Respondents violated Section 135.267(b) with regard to the flights on September 12-13, 1990, as alleged, is affirmed.

The Flights on November 5 and 6, 1990[21]

Mr. Walker and Mr. Mort were the captain and co-pilot respectively on flights on November 5 and 6, 1990. Respondents departed from Las Vegas, where they lived, at 2200 on November 5, 1990, and flew to Brownsville, Texas. (Tr. 140; Complainant's Exhibit 4.) They picked up freight in Brownsville and transported it to Mesa, Arizona. (Tr. 140.) Mr. Walker testified that they rested 10 hours in Mesa before taking off for Milwaukee, Wisconsin, to pick up contract fuel. (Tr. 142.) While in Milwaukee, Mr. Walker testified, they were informed by their office about

[21] Complainant had alleged in the complaints that Respondents had violated Section 135.267(d) as well as Section 135.267(b) on these dates, but Complainant neither put on evidence in support of that alleged violation of Section 135.267(d) nor argued that Respondents had violated Section 135.267(d). The law judge held that Respondents did not violate Section 135.267(d) on November 5-6, 1990. (Initial Decision at 11.)

a request for a trip to transport freight from Mosinee, Wisconsin,[22] to Brownsville, Texas. (Tr. 143.) Mosinee is about 100 miles away from Milwaukee. They arrived in Brownsville on November 6 at 2108. (Complainant's Exhibit 4.)

The length of time of each of the flights was as follows:

November 5, 1990	
Las Vegas to Brownsville	2.4 hours
Brownsville to Mesa	2.4 hours
Total on 11/5/90	4.8 hours
November 6, 1990	
Mesa to Milwaukee	2.6 hours
Milwaukee to Mosinee	.5 hours
Mosinee to Brownsville	3.4 hours
Total on 11/6/90	6.5 hours

(*See* Complainant's Exhibit 4.) Consequently, within a 24-hour period, starting from 2200 on November 5, and ending at 2200 on November 6, 1990,[23] Respondents accumulated 11.3 flight hours.

During the base inspection, Mr. Walker wrote in the flight log the notation "FERRY" next to the entries for the flights from Las Vegas to Brownsville on November 5, 1990, and from Mesa to Milwaukee and from Milwaukee to Mosinee on November 6, 1990. Mr. Walker explained that these ferry flights under Part 91 should not be counted as part of their flight time for purposes of determining compliance with the flight time restriction in Section 135.267(b). Mr. Walker contended that if those flights were subtracted from total flying time, then the crew had not exceeded the 10-hour limitation. (Tr. 140-144.)

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[22] During the hearing, Inspector Daigle and Mr. Walker referred to CWA, which is the identifier for the Central Wisconsin Airport in Mosinee, Wisconsin.

[23] Respondent's next flight, from Brownsville to Mesa, did not begin until 2305 on November 6, 1990. (Complainant's Exhibit 4.)

The law judge held that Respondents violated Section 135.267(b) on November 6, 1990, finding that the three ferry legs under Part 91 constituted "other commercial flying" and therefore, should be counted toward the total flying time. (Initial Decision at 12.) As with the flights on September 12-13, 1990, the law judge held that Respondents had failed to prove that Mr. Mort was not compensated for those ferry flights, and therefore, those flights should be considered "other commercial flying." (*Id.*) Consequently, the law judge held that Respondents violated Section 135.267(b) during the flights on November 5-6, 1990. (*Id.*)

As with the flights on September 12-13, 1990, Respondents argue on appeal that the law judge either mischaracterized or ignored Mr. Walker's testimony that his co-pilot was not paid for the ferry flights and therefore, it was error for the law judge to consider those flights as "other commercial flying." Complainants made the same arguments in reply regarding the November 5-6, 1990, flights as with regard to the September 12-13, 1990, flights.

The law judge's finding that the three flights under Part 91 on November 5-6, 1990, constituted "other commercial flying" is affirmed. The Las Vegas-Brownsville leg on November 5, 1990, preceded the freight-carrying flight for compensation under Part 135 from Brownsville to Mesa. It was clearly part of the assignment to get and transport the freight. As a result, it should be regarded as "other commercial flying."[24] The flight from Mesa, Arizona, to Milwaukee,

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[24] Mr. Walker testified that the flight to Brownsville from their homes in Las Vegas should not count toward the flight time limitation because, he claimed, the crew had the option of flying to Brownsville in the morning and checking into a motel to rest for 10 hours. Instead, he explained, they chose to rest at home and fly to Brownsville shortly before they needed to pick up the freight. (Tr. 140.)

The holding that the Las Vegas-Brownsville flight constituted part of the assignment, and therefore should be considered as "other commercial flying" is consistent with a past interpretation prepared by the FAA concerning a similar factual situation. In that interpretation, the FAA responded to an inquiry regarding whether a repositioning flight in the morning preceding a morning flight for compensation had to be counted toward the daily flight time limitations. The person seeking the interpretation represented that it

Wisconsin, also must be considered as a commercial flight at least because it was for the purpose of getting contract fuel. Also, this flight leg from Mesa to Milwaukee was one of two legs to reposition the aircraft to pick up freight in Mosinee, Wisconsin, which was only about 30 minutes away from Milwaukee.[25] The repositioning flight from Milwaukee to Mosinee preceded the flight for compensation from Mosinee to Brownsville, and therefore, it too should be considered other commercial flying. As discussed above, Mr. Walker's unsubstantiated assertion that Mr. Mort was not compensated for the ferry flights was insufficient to establish that these flights should not be regarded as "other commercial flying."

Section 135.263

Finally, the law judge refused to find that Respondents had violated Section 135.263 on any of these dates because that section, he concluded, "is a general,

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had been explained to him previously that such a repositioning flight did not count toward the flight time limitation because "the crew had the option of leaving the night before and getting ten hours rest in a hotel, or staying home and getting better rest ...." Letter to Jeff J. Jacober from Donald P. Byrne, Assistant Chief Counsel for Regulations and Enforcement (June 24, 1991), *in* 2 Federal Aviation Decisions at I-108, I-110 (Clark Boardman Callaghan 1993). The FAA responded to this inquiry as follows:

> Repositioning flights are governed by Part 91.... [T]he rule with respect to flight time limitations is that any "other commercial flying" (*e.g.*, flights conducted under Part 91) must be counted towards the daily flight time limitations of Part 135 if such flying *precedes* the flight conducted under Part 135. In contrast, if the Part 91 flight occurs *after* the Part 135 flying, the Part 91 flight is *not* counted against the daily flight time limitations of Part 135.
>
> If you were advised previously that the crew could reposition early in the morning without counting as part as of the duty period, you were advised wrong. Since the repositioning precedes the Part 135 flying, the time spent repositioning the aircraft *must* be counted against the daily flight time limitations of Part 135.

(*Id.*, at I-111.)

[25] Mr. Walker testified that they did not learn of the request for the trip out of Mosinee until after they arrived in Milwaukee. It is difficult to believe, however, that the crew flew all the way from Mesa, Arizona, to Milwaukee, Wisconsin, to get contract fuel, unless they had some other reason to go to Wisconsin.

introductory section that can only be violated by reference to specific sections of the FAR." (Initial Decision at 12-13.) He wrote "... this general, introductory section cannot independently support a violation." (Initial Decision at 13.) The law judge relied upon two orders by administrative law judges, In the Matter of Pony Express Courier Corp., FAA Docket No. 89-4 (HM), initial decision of Administrative Law Judge Ronnie Yoder (September 23, 1993), *modified,* FAA Order No. 94-19 (June 22, 1994), and In Re Glidden Company, FAA Docket No. 84-30 (HM), Order on Motion for Judgment on the Pleadings (December 19, 1986) at 4-7.[26] Both of these cases arose under the Hazardous Materials Transportation Act, 49 U.S.C. App. § 1801 *et. seq*

In his initial decision in In the Matter of Pony Express Courier Corp., Administrative Law Judge Ronnie Yoder held that 49 C.F.R. §§ 171.2(a), 172.200(a), and 172.300 are general introductory sections that only can be violated by reference to other sections of the Hazardous Materials Regulations (HMR), and consequently the general introductory sections of the HMR cannot independently support a violation. (*Id.*, at 15.) He also held that 49 C.F.R. §§ 172.202 and 172.204 do not exist apart from their subsections and do not create separate violations or impose separate penalties. (*Id.*, at 14.) In addition, Judge Yoder held

[26] In In re Glidden Company, Administrative Law Judge Head refused to find separate violations of what he found to be general introductory sections of the Hazardous Materials Regulations (HMR), in addition to violations of those HMR sections that set forth the specific standards to be followed. Hence, the law judge dismissed the separate allegations involving 49 C.F.R. §§ 171.2(a), 172.200(a) and 172.202 (while granting a motion for judgment on the pleadings on the separate allegations that the respondent violated 49 C.F.R. §§ 172.202(a)(1), 172.202(a)(2), 172.202(a)(3), 172.202(a)(4), and 172.203(f). Likewise, the law judge dismissed the separate allegation of a violation of 49 C.F.R. § 171.204(a), because it was simply a general introductory section, but granted the motion for judgment on the pleadings on the allegation that the respondent had violated either 49 C.F.R. § 171.204(a)(1) or 171.204(c)(1) by not including the certifications set forth therein on the shipping papers. The law judge also dismissed as a separate violation the allegation regarding 49 C.F.R. § 173.3(a) because he found that that section was merely a general introductory section.

that the Double Jeopardy Clause[27] prohibited the assessment of multiple sanctions for violations of different regulations arising from the same factual circumstances. He explained as follows:

> In determining the number of violations we have considered the Supreme Court's decision in Blockburger v. United States, 284 U.S. 299 (1932) and subsequent decisions that absent clear congressional intent allowing multiple punishments, the Double Jeopardy Clause prohibits finding multiple violations for the same act or transaction absent proof of an additional fact for each offense. The Double Jeopardy Clause is applicable in any proceeding where "the character of the actual sanctions imposed on the individual by the machinery of the state" cannot "fairly be characterized as remedial, but only as a deterrent or retribution." Since the goal of the FAA civil penalty program is to punish and deter, the Double Jeopardy Clause is applicable to these proceedings. Moreover, we find nothing in the legislative history of the Federal Aviation Act and Regulations or the Hazardous Materials Transportation Act and Regulations that clearly indicates that Congress intended a respondent to be punished multiple times for the same act without proof of an additional fact for each violation.

(Id., at 16.)

On appeal, Complainant argues that the law judge in this case relied upon decisions by other law judges that had not resulted in final decisions of the Administrator, and therefore, do not constitute precedent in any other civil penalty action.[28] (Complainant's Appeal Brief at 9.) In addition, Complainant points to FAA v. Landy, 705 F.2d 624, 636 (2d Cir.), *cert. denied,* 464 U.S. 895 (1983) to support the proposition that a finding of multiple violations of the Federal Aviation Regulations is appropriate when the same conduct is prohibited by several

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[27] The Double Jeopardy Clause provides "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Constit. amend. V, cl. 2.

[28] The Administrator subsequently issued a final decision in In the Matter of Pony Express Courier Corporation, FAA Order No. 94-19 (June 22, 1994). However, the Administrator did not address the issue of the applicability of the Double Jeopardy Clause to the FAA Civil Penalty program or to civil penalties assessed under the Hazardous Materials Transportation Act.

regulations. (Complainant's appeal brief at 10.) Finally, Complainant argues that even if a Blockburger-type analysis is appropriate, there was not an impermissible assessment of multiple punishments because different types of prohibited conduct form the basis of the different regulatory violations alleged in the complaint. (Complainant's Appeal Brief at 10-11.)

While Respondents reject Complainant's position, essentially adopting the simplistic view that Blockburger v. United States prohibits a finding of multiple violations in this case, Respondents fail to address the crux of Complainant's argument that *assigning* and *accepting* a prohibited flight are violations separate and distinct from *operating* a prohibited flight. The law judge also failed to appreciate this distinction, and for that reason his finding of no violation of Section 135.263(a) is reversed.

Sanction

Complainant sought a $10,000 civil penalty against Charter Airlines, and $2000 against both Respondent Mort and Respondent Walker. To justify the $10,000 civil penalty against Charter Airlines, and the $2000 civil penalties against Respondent Walker and Respondent Mort, it is not necessary to give separate effect to the alleged violations of Section 135.263(a).[29] Respondents violated Section

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[29] Hence, the issue of whether a finding of multiple violations in this case would run afoul of the Double Jeopardy Clause is more academic than real. Nevertheless, this decision should not be construed as a determination that the Double Jeopardy Clause applies to the civil money penalties assessed under the Federal Aviation Act, as amended. Whether the Double Jeopardy Clause applies to such civil penalties has not been established.

The Double Jeopardy Clause has been interpreted as follows:

> The Double Jeopardy Clause protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.

United States v. Bizzell, 921 F.2d 263,266 (10th Cir. 1990) *quoting* Brown v. Ohio, 432 U.S. 161,165 (1977), *quoting* North Carolina v. Pearce, 395 U.S. 711,717 (1969).

135.267(b) on September 13 and November 6, 1990, and Section 135.267(d) on August 3, and October 25, 1990. Since a commercial operator may be assessed $10,000 per violation,[30] a $10,000 civil penalty against Charter Airlines for its

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In United States v. Halper, the United States Supreme Court addressed the question "whether and under what circumstances a *civil* penalty may constitute punishment for the purpose of the Double Jeopardy Clause." United States v. Halper, 490 U.S. 435, 446 (1989)(emphasis added.) In that case, Halper had submitted 65 separate false claims for reimbursement for medical services, ultimately costing the Government $585. After a criminal proceeding, Halper was sentenced to 2 years imprisonment and assessed a $5000 fine. Then, in a separate proceeding under the civil False Claims Act, the Government sought $130,000 in civil penalties. The Supreme Court held that "under the Double Jeopardy Clause a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution." (*Id.*, at 448-449.) The Court acknowledged that it may be difficult to determine the precise dollar amount of a civil money penalty that will make the Government whole, thereby serving a remedial purpose, and beyond which will become punitive in nature. Thus, the Court wrote, the assessment of a civil penalty to compensate the Government for its costs "inevitably involves an element of rough justice." (*Id.*, at 449.) The Court explained:

> What we announce now is a rule for the rare case, the case such as the one before us, where a fixed-penalty provision subjects a prolific but small-gauge offender to a sanction overwhelmingly disproportionate to the damages he has caused. The rule is one of reason: Where a defendant previously has sustained a criminal penalty and the civil penalty sought in the subsequent proceeding bears no rational relation to the goal of compensating the Government for its loss, but rather appears to qualify as "punishment" in the plain meaning of the word, then the defendant is entitled to an accounting of the Government's damages and costs to determine if the penalty sought in fact constitutes a second punishment.

(*Id.*) The Supreme Court remanded the case to the U.S. district court for a determination of what the Government's expenses (including the costs of investigating and prosecuting the case) had been, so that a further determination of whether the $130,000 penalty assessed against Halper was rationally related to the Government's expenses in this matter.

It is doubtful that the $10,000 civil penalty assessed herein against Charter Airlines and the $2000 civil penalties assessed against Mr. Walker and Mr. Mort exceed the Government's costs in investigating and prosecuting this case. Hence, while these penalties may serve as a deterrent and have a punitive element, they also serve a remedial purpose of making the Government whole.

Also, the goal of promoting aviation safety, which is the underpinning of the civil penalty program, should be considered. In United States v. WRW Corporation, 986 F.2d 138 (6th Cir. 1993), it was held that the $90,350 of civil penalties assessed against the officers and directors of a corporation for violations of the Federal Mine Safety Act did not constitute punishment under the Double Jeopardy Clause. The court held in that case that "imposing a civil penalty for health and safety violations which varies in amount based upon the severity of the violation and the operator's attempts to come into immediate compliance may as readily be ascribed to the remedial purpose of promoting mine safety. (*Id.*, at 141-142.) The court held that the $90,350 penalty was not so excessive in relation to the remedial purpose served by the penalty as to constitute a second impermissible punishment under the Double Jeopardy Clause. Likewise, while the penalties assessed against Respondents Charter Airlines, Walker and Mort may serve a deterrent and punitive purpose, these sanctions may also be regarded as remedial in light of their fundamental goal of promoting aviation safety.

[30] *See* 49 U.S.C. § 46301(a)(2) (formerly codified as 49 U.S.C. App. § 1471(a)(1)).

conduct contrary to the flight and duty time regulations on those four sets of flights is reasonable and well below the maximum allowable civil penalty. Likewise, because a pilot may be assessed a $1000 civil penalty for each violation,[31] $2000 civil penalties against Mr. Walker and Mr. Mort for violations of the flight and duty time regulations on these four sets of flights are reasonable and well below the maximum allowable civil penalty. Such significant penalties are justified not only by the numerous violations committed by Respondents, but by the cavalier attitude displayed by Respondents toward the flight and duty time restrictions.[32]

THEREFORE, in light of the foregoing, the law judge's initial decision is affirmed in part and reversed in part. Respondent Charter Airlines is assessed a $10,000 civil penalty, and Respondents Walker and Mort are each assessed $2,000 civil penalties.[33]

DAVID R. HINSON, ADMINISTRATOR
Federal Aviation Administration

Issued this 9th day of May, 1995.

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[31] *See* 49 U.S.C. § 46301(a)(1) (formerly codified as 49 U.S.C. App. § 1471(a)(1)).

[32] In the complaints, Complainant sought a $10,000 civil penalty against Respondent Charter Airlines and $2000 civil penalties against Respondent Mort and Respondent Walker. Although Complainant had alleged violations by Respondents of Section 135.267(d) on November 6, 1990, Complainant did not put on any evidence to prove that violation. Nonetheless, in light of the above discussion, the penalties originally sought by Complainant are appropriate. *See* In the Matter of Pony Express Corp., FAA Order No. 94-19 at 4 (June 22, 1994).

[33] 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).