UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

In the Matter of:	FAA Order No. 94-40
POLYNESIAN AIRWAYS, INC.	Served: December 9, 1994
	Docket No. CP91WP0455

DECISION AND ORDER

Complainant has appealed from Administrative Law Judge Burton S. Kolko's written initial decision[1] holding that Complainant failed to prove that Respondent Polynesian Airways, Inc., had violated Sections 135.185(a)[2] and 135.63(c)[3] of the Federal Aviation Regulations (FAR), 14 C.F.R. §§ 135.185(a) and 135.63(c). After consideration of the record on appeal, including the briefs filed by the parties, the law judge's decision is affirmed in part and reversed in part, and a $5000 civil penalty is assessed.

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

[2] Section 135.185, 14 C.F.R. § 135.185, entitled "Empty Weight and Center of Gravity: Currency Requirement," provides in pertinent part:

(a) No person may operate a multiengine aircraft unless the current empty weight and center of gravity are calculated from values established by actual weighing of the aircraft within the preceding 36 calendar months.

[3] Section 135.63, 14 C.F.R. § 135.63, provides in pertinent part:

(c) For multiengine aircraft, each certificate holder is responsible for the preparation and accuracy of a load manifest in duplicate containing information concerning the loading of the aircraft. The manifest must be prepared before each takeoff and must include:

(2) The total weight of the loaded aircraft;
(3) The maximum allowable takeoff weight for that flight;
(4) The center of gravity limits;
(5) The center of gravity of the loaded aircraft ....

Respondent holds a Part 135 certificate and during all relevant times operated one aircraft, a Beech H-18, N33AP. Respondent is owned by Robert Whittinghill.

During a base inspection of Respondent on September 21, 1989, FAA Aviation Safety Inspector Robert Scott Christiansen, who was Respondent's principal maintenance inspector, found an undated weight and balance form for N33AP. (Complainant's Exhibit B). After examining the form, Inspector Christiansen questioned the accuracy of the weight and balance figures and asked Respondent to have the aircraft reweighed.

According to the undated form, the aircraft had been weighed under both wings and under the tail. However, N33AP has a tricycle landing gear. At the hearing, Inspector Christiansen explained that:

> [I]f the weight and balance is done with platform scales, as [Mr. Whittinghill] indicated, and that's the most common way of performing weights and balances, you would have scale locations of the main landing gear and the nose landing gear, and in this particular case, the weight and balance form indicates a tail location for a weight of 125 pounds in lieu of a nose location weight, which would have been significantly higher.

(TR-42)[4] Hence, Inspector Christiansen found the weight, as indicated on the undated form, to be "highly questionable." (TR-42)

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[4] As will be explained, this weighing was performed on August 26, 1989. *See infra* text at 3 and note 6.

The witnesses presented testimony at the hearing regarding the many methods that can be used to weigh an aircraft. One method is to place a platform scale under each landing gear. Inspector Christiansen believed that N33AP had been weighed that way in 1989. However, he was concerned about the accuracy of the 1989 weighing because, according to the form, a tail weight, rather than a nose weight, was taken, despite the fact that this aircraft has a nose, not a tail, landing gear. (*See* Complainant's Exhibit B).

An aircraft can also be weighed by jacking the aircraft up, using the three jack points under the aircraft, and placing the scales or load cells either under the jacks or on top of the jacks. Two of the jack points on the Beech H-18 are located on the wing, forward of the main landing gear, and the other jack point is near the tail of the aircraft.

If the scales or load cells are placed under the jacks, then the weight of the jacks must be subtracted to determine the empty weight of the aircraft. Had the scales or load cells been placed under the jacks, then the weight of the jacks should have been noted in the

In addition, the form indicated that there were chairs in the aircraft when it was weighed, and that the weight of the chairs had been subtracted from the gross weight in determining the empty weight and the center of gravity of the aircraft. Inspector Christriansen said that this aircraft was used only to carry cargo, and that he had never seen any passenger chairs in the aircraft. He also testified that while he saw chairs that belonged to a Beech aircraft in Respondent's hangar, the chairs were so dirt-encrusted that he doubted that they had been in the aircraft recently.[5]

In April 1990, Inspector Christiansen returned to perform another base inspection. At that time, he found that the undated weight and balance form that

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column labelled "tare." There were no entries in the column marked "tare" on the 1989 form. (*See* Complainant's Exhibit B).

Mr. Whittinghill testified that he weighed the aircraft himself in August 1989, with the help of Mark Kippen. He testified that his platform scales had disappeared, so he borrowed the Hickum Rescue Squadron's load cells. He said that the aircraft was weighed as a "tail dragger." He explained that to weigh the aircraft load cells were placed on jacks, each jack was placed on the jack points, and then the airplane was jacked up. According to Mr. Whittinghill, Mr. Kippen used the weights found during this weighing to do the necessary weight and balance calculations.

The law judge did not make a specific factual finding regarding how the aircraft was weighed in August, 1989. The law judge wrote that he found Mr. Whittinghill "generally to have been an evasive and incredible witness," and he rejected Mr. Whittinghill's testimony "except where specfically credited." (Initial Decision at 9). When he explained why he considered the August 1989, weighing to be unreliable, the law judge wrote that "the apparent use of the tail rather than the nose location worked to understate the aircraft's weight." Initial Decision at 7.

For purposes of this decision reviewing the written initial decision of the law judge, a resolution of the question of how the aircraft was weighed in August 1989, is not necessary. *See* text at 11.

[5] Inspector Christiansen was also concerned about the accuracy of the weights reflected in Complainant's Exhibit B for two other reasons. Comparing this form with another weight and balance computation form from 1967 for this aircraft, it appeared that the aircraft was the same weight as in 1967. Inspector Christiansen questioned this because of an aircraft's tendency to gain weight over time. Also, Inspector Christiansen testified, when he asked to examine the scales that had been used to weigh the aircraft to see if the scales had current calibration dates, Mr. Whittinghill indicated that he no longer had the scales that he had used to weigh the aircraft.

he had examined during his last inspection now had the date August 26, 1989 on it.[6] In addition, he found that the aircraft had been reweighed on January 24, 1990, by Panorama Air, a certificated repair station. According to the receipt provided to Respondent by Panorama, the aircraft had been weighed with seven gallons of oil and full fuel and the weights were as follows: nose - 2220 lbs; left main - 2810 lbs; and right main - 2820 lbs.[7] Inspector Christiansen testified that he did not find any documents indicating that the weights established during the January 1990 weighing had been used to calculate the aircraft's empty weight or center of gravity.[8]

Inspector Christiansen returned to perform a ramp inspection on August 16, 1990, accompanied by Aviation Safety Inspector Albert E. Bauman, who was at the time, Respondent's principal operations inspector. The inspectors found that Respondent was still using the August 1989 empty weight to determine weight and balance. Inspector Christiansen sent a letter, dated August 17, 1990, to Respondent, stating that he regarded Respondent's failure to have the most current weight and center of gravity report in the aircraft to be a discrepancy. Inspector Christiansen requested in the letter that Respondent take appropriate action to correct this discrepancy before additional flights were made.

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[6] As the law judge wrote in the decision, "Christiansen evidently accepted this date as correct -- as did the agency, at least for purposes of this proceeding -- although there is no evidence in the record (other than the report itself) tending to show when the weighing was actually performed." Initial Decision at 2.

[7] The receipt also indicated the serial numbers of the scales and that these scales had been calibrated on January 31, 1989.

[8] Inspector Christiansen testified that once an owner has an aircraft reweighed, new calculations for empty weight and center of gravity must be made, either by the repair station that weighed the aircraft or by the operator responsible for the calculations. In this case, Panorama Air weighed the aircraft but did not use the weight established during that weighing to calculate the aircraft's new empty weight and center of gravity. There was no compelling evidence that such calculations were ever made.

Inspector Bauman returned on August 30, 1990, to inspect Respondent's operation again. He again found that the operator was using empty weight and center of gravity figures based upon the August 1989 weighing. He checked the flight manifests for the four flights that day. Three of those flights had been for hire. The load manifests for August 30, 1990, revealed that the pilot was making the weight and balance calculations based upon the August 26, 1989, weighing. The pilot of those flights said that he was unaware of more recent weight and balance figures.

Under 14 C.F.R. § 135.63(c), before each takeoff of a multiengine aircraft on a Part 135 flight, a load manifest reflecting the loading of the aircraft must be prepared. The load manifest must include the following: the total weight of the loaded aircraft; the maximum allowable takeoff weight for that flight; the center of gravity limits; and the center of gravity of the loaded aircraft. Under 14 C.F.R. § 135.185, "No person may operate a multiengine aircraft unless the current empty weight and center of gravity are calculated from values established by actual weighing of the aircraft within the preceding 36 calendar months."

As indicated on the empty weight and balance form, dated August 26, 1989, the empty weight was 6418 pounds. As calculated by Inspector Christiansen using the January 1990 weights, the aircraft's empty weight was 6662 pounds. However, the pilot was still using 6418 pounds as the empty weight of the aircraft to prepare the load manifests for the flights on August 30, 1990. (*See* Complainant's Exhibit G).

At the hearing, Mr. Whittinghill testified that he was not present when Panorama Air reweighed the aircraft, and he did not know how the aircraft was reweighed. Referring to the reweighing by Panorama Air in January 1990, Mr. Whittinghill testified that "I didn't feel that the weight was accurate." (TR-174) He testified that he did not use the Panorama Air weighing because the weights

determined during that weighing "seemed kind of heavy." (TR-174) Nonetheless, he testified, he thought that the aircraft had gained weight between August 1989, and January 1990, due to the installation of floorboards.

The law judge held that Complainant failed to prove that Respondent had violated Sections 135.185(a) and 135.63(c). With regard to Section 135.185(a), the law judge explained that there was no dispute that this regulation required that an aircraft operating under Part 135 be weighed no less often than every three years. He rejected Complainant's argument that under Section 135.185(a), the most current weighing, or in this case, the weighing during January 1990, must be used to compute the empty weight and center of gravity. The law judge wrote:

> The plain language of the regulation permits weight and balance calculations to be derived from data up to thirty-six months old, and the calculations in question originate in a weighing less than thirteen months prior to the flights which are the subject of the complaint. While Complainant would require calculations based on the results of the latest weighing, the regulation contains no such proviso. It allows by its terms a "current" empty weight and center of gravity to reach back up to three years.

(Initial Decision at 5). While the law judge understood Complainant's concern for the accuracy of weight and balance calculations, he did not believe that Section 135.185(a)'s plain language could be interpreted so broadly as to require that the most recent weighing be used. As the law judge explained, "The agency's remedy lies not in attempting to require Respondent to utilize its latest weighing, but in changing the regulation or in conditioning Respondent's particular operations in an appropriate manner." (Initial Decision at 7).

The law judge found that the August 1989 weighing was untrustworthy, in contrast to the January 1990 weighing performed by Panorama Air. Nonetheless, the law judge explained, Complainant "might have prevailed had it alleged violation(s) of the FARs grounded on the accuracy of the weighing dated August 26,

1989, or on Respondent's refusal to utilize the January 1990 weighing in light of its greater reliability." (Initial Decision at 7). As the law judge explained, Complainant's allegation that Respondent had violated Section 135.185(a) was based not upon the unreliability of the August 1989 weighing but upon its contention that the August 1989 weighing was not current. (Initial Decision at 9).

The law judge also found that the allegation that Respondent had violated Section 135.63(c) had not been proven. Specifically, he wrote:

> The agency's section 135.63(c) allegation must also fail. This charge flows from the agency's allegations concerning weight and balance. The complaint charges Respondent with a § 135.63(c) violation because the load manifest "was inaccurate in that it had not been computed using information from the latest weighing of the aircraft." ... Under the language of the complaint, the failure of the weight-and-balance allegation also brings down the § 135.63(c) charge.

(Initial Decision at 9-10).

On appeal, Complainant argues that the law judge has interpreted Section 135.185(a) improperly. According to Complainant, the law judge's interpretation of Section 135.185(a) rendered the word "current" superfluous, and the regulation itself inadequate to deter Part 135 operators from knowingly using inaccurate weight information to calculate empty weight and center of gravity. Complainant argues that Section 135.185(a) is intended to require persons operating under Part 135 to calculate current empty weight and center of gravity values for multiengine aircraft. The empty weight and center of gravity, Complainant argues, are not current under Section 135.185 if they are taken from a superseded weighing. Complainant refers to a dictionary definition of the word "current" to further support its argument.

Complainant argues further that the law judge erred by summarily dismissing the alleged violation of Section 135.63(c). According to Complainant, when Respondent used the August 1989 weighing, instead of the January 1990

weighing, to prepare the load manifests for the August 30, 1990, flights, the load manifests necessarily were inaccurate, and Section 135.63(c) makes the operator responsible for the preparation and accuracy of the load manifests. Also, Complainant argues, under Section 135.63(c), the relevant inquiry is whether the weight and center of gravity information included on the load manifest is accurate, and not whether that information is based upon a weighing that occurred within the last 36 months.

In its reply brief, Respondent presents two due process arguments. One is that Respondent did not have notice that Section 135.185(a) required it to use the latest actual weighing to compute the empty weight and center of gravity and to prepare the load manifests. According to Respondent, the plain meaning of the regulation is that an actual weighing is current as long as it was performed within 36 months of the flight. Respondent also notes that Complainant has not produced any document, such as an official interpretation or advisory circular, to support its litigation position regarding the meaning of the word "current" as used in Section 135.185.[9] Respondent contends that it would be unfair to interpret the word "current" for the first time as Complainant does in this proceeding and to impose a civil penalty against Respondent based upon that interpretation. In Respondent's view, Complainant should not be allowed to accomplish by adjudicative action what it should have done through the regulatory process.

Respondent's second due process argument is that Complainant's arguments on appeal exceed the allegations of the complaint. Respondent argues that since it was not alleged in the complaint that the August 1989 weighing was inaccurate, Complainant cannot argue in these proceedings that Respondent violated the regulations by using an inaccurate weighing, and that Complainant should be

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[9] Respondent argues that both 14 C.F.R. §§ 135.185 and 135.63 use the word "current." Respondent is wrong. The word "current" does not appear in Section 135.63.

limited to its allegation that the August 1989 weighing was not current, rather than not accurate. Respondent argues that Complainant is bound by its complaint, citing In the Matter of Webb, FAA Order No. 90-10 and In the Matter of Koller, FAA Order No. 91-53.

Finally, Respondent argues that it is being denied equal protection of the law because civil penalty actions against Part 135 certificate holders are reviewable before the Administrator of the FAA rather than before the independent National Transportation Safety Board (NTSB). In contrast, Respondent argues, under the FAA Civil Penalty Administrative Assessment Act of 1992, any person acting in the capacity of a pilot, flight engineer, mechanic or repairman can obtain review before the NTSB.

As to Respondent's first due process argument, to determine the meaning of the word "current,"as used in Section 135.185(a), the place to begin is the language of the regulation itself. When this regulation is examined, the inescapable conclusion is that the law judge interpreted it correctly.

Section 135.185(a) provides:

> Empty Weight and Center of Gravity: Currency Requirement.
> (a) No person may operate a multiengine aircraft unless the current empty weight and center of gravity are calculated from values established by actual weighing of the aircraft within the preceding 36 calendar months.

14 C.F.R. § 135.185(a). This regulation does not provide that no person may operate a multiengine aircraft unless the current empty weight and center of gravity are calculated from the values established by the latest or the most recent actual weighing of the aircraft. That appears to be the way that Complainant wants this regulation to read, and indeed, it may be that the regulation should have been written in a way to convey that meaning. Moreover, Complainant's use of the dictionary definition of the word "current" to bolster its argument is not compelling.

Complainant, quoting from Webster's II New Riverside Dictionary at 337 (1984), writes that "current" means "belonging to the present time." However, what Complainant fails to recognize is that Section 135.185 sets forth a currency requirement for the actual weighing of multiengine aircraft operated under Part 135, and as a result, in essence, sets forth its own definition of the word "current." According to this regulation, the values from an actual weighing may be used as long as that weighing occurred within the preceding 36 months.

In any event, Complainant did not prove the factual allegation associated with the alleged violation of Section 135.185(a). Paragraph 4 of the complaint states as follows:

> 4. On said day, the current empty weight and center of gravity had not been calculated from values established by actual weighing of the aircraft within the preceding 36 calendar months.

(Emphasis added.) It is undisputed that on August 30, 1990, the day of the flights in question, the empty weight and center of gravity had been calculated from values established by the actual weighing that had taken place approximately 12 months earlier, on August 26, 1989. It may be that the method used to establish that empty weight was incorrect and that the empty weight itself was inaccurate, but neither of these matters was alleged or proved. What was alleged was that the empty weight and center of gravity being used on August 30, 1990, had not been established by an actual weighing done within the preceding 36 calendar months. Hence, the law judge's finding that Complainant failed to prove a violation of Section 135.185(a) must be affirmed.

That does not mean, however, that when the weight of an aircraft changes dramatically during the 36-month period following the actual weighing of that aircraft, that the operator may continue to use the values derived from that actual weighing. While Section 135.185(a) itself does not require actual weighings to be

performed more often than within 36 months of the operation of the aircraft, another section of the regulations does require that actual aircraft weight be used to calculate the aircraft weight and balance for every flight. Specifically, Section 135.63(c) makes the Part 135 operator responsible for the accuracy of the load manifest. In meeting the requirements of Section 135.63(c), an operator cannot use an aircraft empty weight that he knows is inaccurate, even when that empty weight was established by an actual weighing done within the previous 36 months. It is undisputed that if the empty weight and center of gravity figures are wrong, then all of the calculations based thereon, such as the weight and balance for a loaded aircraft, likewise will be wrong.[10]

Hence, as Complainant argues, it was error for the law judge to dismiss summarily the allegation that Respondent had violated Section 135.63(c). By using the values from the August 1989, rather than the January 1990 weighing, Respondent guaranteed that much of the data recorded on the load manifest would be wrong.

In reaching this conclusion, it is not necessary to evaluate which of the two weighings was more reliable at the time that each was taken. It is only necessary to recognize that at the time of the flights in question Respondent knew that the aircraft weight established in August 1989 was no longer accurate. In addition to the possibly questionable method used to establish the aircraft weight at that time, floorboards had been installed since the August 1989 weighing, and

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[10] Inspector Christiansen testified at the hearing that Part 43, which applies to all aircraft, requires that an aircraft undergo an actual reweighing "if there is a change to the aircraft either through modifications or repairs, alterations to" the extent that the weight of the aircraft can not longer be computed with the known figures from the last actual weighing. (TR-197-98). He mentioned re-skinning and repainting the aircraft as examples of such a modification, repair or alteration that would make a reweighing necessary under Part 43.

Mr. Whittinghill himself believed that the installation of the floorboards necessitated a reweighing. Mr. Whittinghill testified that:

> Well, I didn't feel that -- I thought the airplane had gained weight, for one thing, and we had the boards in there then, the floorboards in the airplane, so we couldn't calculate the weight too close, the overall boards, so it was easier to weigh the whole airplane.

(TR-185). While Respondent's attorney on cross-examination introduced several possible theories to explain why the weight from the January 1990 weighing exceeded that of the August 1989 weighing, Respondent failed to introduce any evidence to support any of those theories.[11]

As to Respondent's equal protection argument, there is no merit to the suggestion that as a holder of a Part 135 certificate, Respondent is being treated differently than other similarly situated certificate holders. It is true that under the FAA Civil Penalty Assessment Act of 1992 civil penalty actions against persons acting in the capacity of a pilot, mechanic or flight engineer, are reviewable before the NTSB, while all other civil penalty actions are reviewable before the Administrator. 49 U.S.C. App. § 1471(a)(3). However, the provisions of the FAA Civil Penalty Administrative Assessment Act of 1992 do not apply to violations, such as the ones in this case, that occurred prior to August 26, 1992.[12]

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[11] During cross-examination, Respondent's lawyer introduced the possibility that Panorama Air had weighed the aircraft in the open air, and that the wind might have affected the values determined during that weighing. However, Respondent failed to introduce any evidence to support this theory.

[12] Under 49 U.S.C. App. § 1471(a)(3)(F), the provisions of the FAA Civil Penalty Assessment Act of 1992, as set forth in 49 U.S.C. App. § 1471(a)(3), only apply to violations occurring on or after August 26, 1992, which was the date of enactment of that Act. Public Law 102-345, entitled the FAA Civil Penalty Administrative Assessment Act of 1992, specifically repealed the Civil Penalty Demonstration Program, which had been authorized under Section 905 of the Federal Aviation Act of 1958, as amended, 49 U.S.C. App. § 1475. However, section 2(c)

Turning to the issue of sanction, a $5000 civil penalty will be assessed even though it is found that only Section 135.63(c) was violated. Under Section 901(a) of the Federal Aviation Act of 1958, 49 U.S.C. § 1471(a) as amended,[13] an operator under Part 135 is subject to a civil penalty of $10,000 for each violation. A $5000 civil penalty is appropriate in light of the totality of the circumstances in this case. The violation in this case had serious safety implications. As Inspector Bauman explained, a pilot needs to be able to compute the weight of the aircraft to be able to determine the correct speed at which to fly, to avoid structural failures, to decide how much runway is needed for takeoff and landing, and to land without exceeding the limits of the brakes. He explained that a pilot needs to know the weight so that if the aircraft gets into turbulent weather, the necessary adjustments to the aircraft's speed can be made. An accurate computation of the center of gravity envelope is also necessary to enable the pilot to control the stability of the aircraft. If the aircraft is not loaded within its center of gravity envelope, then, among other things, the pilot might not be able to keep the nose from pitching up or down, depending upon the way that the aircraft is loaded. Hence, the potential safety implications from the violation in this case were quite serious, and a stiff penalty is

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of Public Law 102-345 also specifically provided that "sections 901(a)(3) and 905 of the Federal Aviation Act of 1958 as in effect on July 31, 1992, shall continue in effect on and after such date of enactment with respect to violations occurring before such date of enactment." Under sections 901(a)(3) and 905, 49 U.S.C. App. §§ 1471(a)(3) & 1475, as in effect on July 31, 1992, all civil penalty actions, regardless of whether they were brought against a person acting in the capacity of a pilot, flight engineer, mechanic or not were subject to review before the Administrator of the FAA, and not before the NTSB.

[13] Section 901(a) of the Federal Aviaton Act of 1958, as amended, provides in pertinent part: "a person who operates aircraft for the carriage of persons or property for compensation or hire ... shall be subject to a civil penalty not to exceed $10,000 for each violation of title III, VI, or XII of this Act, or any rule, regulation, or order issued thereunder, occurring after the date of enactment of the Airport and Airway Safety and Capacity Expansion Act of 1987 ...." 49 U.S.C. App. § 1471(a).

appropriate even though there was no evidence that the weight or center of gravity limits actually were exceeded on any of the flights in question in this action. Also, it is a matter for concern that Respondent continued to use the August 1989 weighing despite the FAA inspectors efforts to help Respondent come into compliance. In light of the egregiousness of the violations and the fact that the requested penalty is well below the maximum allowable civil penalty, the full $5000 civil penalty sought in the complaint is justified, even though only one of the two alleged regulations was violated. See In the Matter of Pony Express Courier Corporation, FAA Order No. 94-19 at 4 (June 2, 1994).

In light of the foregoing, the law judge's decision is affirmed in part and reversed in part. A $5000 civil penalty assessed.[14]

DAVID R. HINSON, ADMINISTRATOR
Federal Aviation Administration

Issued this 9th day of December, 1994

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[14] 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. App. § 1486), this decision shall be considered an order assessing civil penalty. *See* 14 C.F.R. §§ 13.16(b)(4) and 13.233(j)(2) (1992).