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NTSB Order No. EA-4647

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 12th day of March, 1998

JANE F. GARVEY,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	Docket No. SE-14617
)	
JAY M. HAMILTON,)	
)	
Respondent.)	

OPINION AND ORDER

The Administrator has appealed from the oral initial decision issued by Administrative Law Judge William A. Pope, II, on January 17, 1997, at the conclusion of an evidentiary hearing.¹ By that decision, the law judge dismissed the Administrator's order in its entirety. The Administrator's order alleged that on January 2 and 3, 1995, respondent served as second in command on a passenger revenue flight, in a Lear 55 jet that was operated by Alamo Jet, Inc., under Part 135 of the Federal Aviation Regulations (FAR), when he had not passed a

¹The initial decision, an excerpt from the hearing

written or oral test and a competency check within the last 12 months prior to that operation, as required by FAR §§ 135.293(a) and (b).² Respondent has filed a brief in reply. For the reasons that follow, the Administrator's appeal is denied.

The law judge's initial decision makes clear that his dismissal of the complaint was based on his determination that, as a matter of law, the subject flights were not operated under Part 135. This legal finding was based on his factual finding that the passengers on the subject flights were the aircraft's owner and his nonpaying guests. Moreover, the law judge specifically found credible respondent's testimony that when he was asked to serve on the subject flights, he questioned whether the flights were to be operated under Part 135 because he knew that he had not yet completed the Part 135 requirements for pilot qualification for his new employer, Alamo Jet. Respondent, as the former FAA Principal Operations Inspector for Alamo Jet, was well aware of the regulatory requirements. Respondent testified that he had been assured by Alamo's Director of Operations, George Stevens, that the flights were to be operated under FAR

(..continued)

transcript, is attached.

²FAR § 135.293 sets forth various initial and recurrent testing requirements for Part 135 pilots. Both parties argue in their briefs before the Board the validity of the law judge's finding that respondent met the requirements of § 135.293(a) because of a competency check administered to the respondent by the FAA within 12 months of this operation, as a requirement for his then-current position as an FAA aviation operations inspector. Because this finding was not necessary for the law judge's dismissal of the complaint, we need not address this issue and our affirmation of the dismissal of the complaint does not encompass that part of the initial decision.

Part 91. Mr. Stevens had been employed by Alamo Jet at that time for eleven years, and he served as the pilot in command of these same flights.

The law judge also found Mr. Stevens' testimony credible. Mr. Stevens testified that in response to respondent's concerns and in addition to telling respondent, before the flight, that it would be a Part 91 flight, he annotated the flight log with the words "FAR 91." Mr. Stevens explained that he did not consider this a Part 135 operation because Dr. David C. Brown, a passenger on the flight, is the sole owner of Alamo Jet and DCB Enterprises, as well as other companies. Whenever the Lear 55 jet, which was the only aircraft on Alamo's operating certificate, was operated for Dr. Brown's personal use, Mr. Stevens testified, the actual operating costs were charged to one of Dr. Brown's other companies in accordance with instructions Mr. Stevens received from Dr. Brown's chief financial officer. According to Mr. Stevens, he was called by Dr. Brown's secretary three weeks in advance and asked to reserve the aircraft for the subject flights. Mr. Stevens testified that he was told by the secretary that it would be a recreational flight to and from the Sugar Bowl for Dr. Brown and his friends. Mr. Stevens subsequently issued an invoice, charging the operating costs to DCB Enterprises.³ Mr. Stevens testified that he did not believe it was necessary to mention this billing practice to respondent

³There is no evidence that DCB Enterprises ever paid Alamo Jet. Respondent's Exhibit 4 appears to suggest that DCB Enterprises is not actually incorporated to do business.

when respondent queried him about the status of the flights, because he did not think it was pertinent, nor was it any of respondent's business. And, we note, as the former FAA principal operations inspector for Alamo Jet, respondent apparently knew Dr. Brown and recognized him and his girlfriend as passengers, as well as two other doctors and their wives.

The Administrator's position before the law judge was that notwithstanding this testimony, documents obtained from Alamo Jet constituted substantial evidence that the flights were a Part 135 operation. These documents included the invoice from Alamo to DCB Enterprises and the aircraft flight log that indicates DCB Enterprises as the "customer."⁴ In addition, a letter written by Mr. Stevens to a county judge was introduced by the Administrator. That letter requests the removal of an electronic monitoring device worn by respondent that, according to Mr. Stevens, would have hindered respondent's ability to be gainfully employed with Alamo Jet.⁵ The letter notes that respondent's "first income producing trip will be on a charter to go to the Sugar Bowl on January 2nd." (Administrator's Exhibit A-4). The law judge accepted respondent's explanation, corroborated by Mr. Stevens, that this sentence meant only that respondent would be

⁴The FAA's investigator apparently made no effort to question respondent, Mr. Stevens, or Dr. Brown on why "Part 91" would be noted on the flight log, nor did she interview them on any other matter related to the investigation.

⁵The record does not reveal the circumstances regarding respondent's legal problems.

paid by Alamo for a trip that commenced on January 2nd.⁶

The Administrator's appeal offers us no persuasive reason to disturb the law judge's essential conclusion that the flights could legally be operated under Part 91 because the only passengers were the aircraft owner and his nonpaying guests.⁷ In fact, the Administrator's brief does not even mention the law judge's findings concerning Dr. Brown's ownership of both Alamo Jet and DCB Enterprises; it simply reiterates her trial position that her documentary evidence supported her allegations. In sum, the Administrator has identified no error of fact or law which would warrant reversing the law judge's decision.

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's appeal is denied; and
2. The law judge's order dismissing the complaint and the initial decision are affirmed, except as discussed in this opinion.

HALL, Chairman, FRANCIS, Vice Chairman, HAMMERSCHMIDT, GOGLIA, and BLACK, Members of the Board, concurred in the above opinion and order.

⁶As an ATP-rated pilot, respondent is of course entitled to be compensated for his services.

⁷See Administrator v. Conahan, NTSB Order No. EA-4044 at 14-15 (1993) (Where corporate owners are the passengers, aircraft is not operated under Part 135).