No.

IN THE

Supreme Court of the United States

WARBIRD ADVENTURES, INC., PETITIONER

v.

FEDERAL AVIATION ADMINISTRATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION(S) PRESENTED

1. Is the FAA's reading of 14 CFR § 91.315 to prohibit paid flight instruction in Limited Category Aircraft—sometimes referred to as "warbirds"—reasonable when it contravenes the agency's own history since 1946 of encouraging the public's use and operation of these aircraft and when it has always considered flight training distinct from the carriage of persons or property for compensation or hire?

2. If paid flight instruction in petitioner's WW II-era Limited Category aircraft has always been prohibited because the flight student is being "carried for compensation or hire" under 14 C.F.R. § 91.315, as the FAA now argues, how did anyone learn to fly these vintage aircraft for the last seventy (70) years?

PARTIES TO THE PROCEEDING

All the parties in this proceeding are listed in the caption.

CORPORATE DISCLOSURE STATEMENT.

Petitioner Warbird Adventures, Inc. ("Warbird"), is a private business entity incorporated under the laws of Florida . It has no parent company and no publicly held company owns 10% or more of its stock.

STATEMENT OF RELATED CASES

None

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The unpublished *per curiam* Opinion of the United States Court of Appeals for the Eleventh Circuit in *Warbird Adventures, Inc. v. Federal Aviation Administration*, C.A. Docket No. 22-13765, decided and filed July 6, 2023, and reported at 2023 WL 4363998 (11th Cir. 7/06/2023), denying petitioner's petition for review of the final Decision and Order of the FAA finding that it violated 14 C.F.R. § 91.315 and assessing a civil penalty of $5,500 , is set forth in the Appendix hereto (App. 1-6).

The unpublished *per curiam* Judgment of the United States Court of Appeals for the District of Columbia Circuit in *Warbird Adventures, Inc. v. Federal Aviation Administration*, C.A. Docket No. 20-1291, decided and filed April 2, 2021, and reported at 843 Fed. App'x 331 (D.C. Cir. 2021), denying petitioner's petition for review of respondent FAA's emergency cease and desist Order that petitioner stop providing paid flight instruction in one of its vintage World War II military aircraft, is set forth in the Appendix hereto (App. 7-10).

The unpublished final Decision and Order of the Acting Administrator of the FAA (Billy Nolen) in *In the Matter of: Warbird Adventures, Inc.*, Dkt. No. FAA 2020-0534 & FAA Order No. 2022-04, dated and served October 6, 2022, denying petitioner's appeal from the Initial Decision of the Administrative Law Judge but modifying the assessed civil penalty for violation of 14 C.F.R. § 91.315 from $2,500 to $5,500, is set forth in the Appendix hereto (App. 11-30).

The unpublished Initial Decision of the Administrative Law Judge Douglas M. Rawald in *In the Matter of: Warbird Adventures, Inc.*, Dkt. No. FAA 2020-0534 & Case No. 2020SO150011, dated and served February 8, 2022, assessing a civil penalty of $2,500 for petitioner's found violation of 14 C.F.R. § 91.315, is set forth in the Appendix hereto (App. 31-43).

The unpublished Order of the Administrative Law Judge Douglas M. Rawald in *In the Matter of: Warbird Adventures, Inc.*, Dkt. No. FAA 2020-0534 & Case No. 2020SO150011, dated and served October 6, 2021, granting respondent FAA's motion for partial summary judgment establishing that petitioner violated 14 C.F.R. § 91.315, and denying petitioner's Motion for Decision, is set forth in the Appendix hereto (App. 44-54).

The unpublished Order of the United States Court of Appeals for the Eleventh Circuit in *Warbird Adventures, Inc. v. Federal Aviation Administration*, C.A. Docket No. 22-13765, decided and filed September 11, 2023, denying petitioner's timely filed petition for Panel rehearing or for rehearing *en banc*, is set forth in the Appendix hereto (App. 55-56).

JURISDICTION

The decision of the United States Court of Appeals for the Eleventh Circuit affirming respondent FAA's final agency decision, was entered on July 6, 2023; and its Order denying petitioner's timely filed petition for Panel rehearing or for rehearing *en banc* was decided and filed on September 11, 2023 (App. 1-6;55-56).

This petition for writ of certiorari is filed within ninety (90) days of the date the Court of Appeals denied petitioner's timely filed petition for Panel rehearing or for rehearing *en banc*. 28 U.S.C. § 2101(c). Revised Supreme Court Rule 13.3.

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

United States Constitution, Amendment V:

> No person shall...be deprived of life, liberty, or property, without due process of law....

5 U.S.C. § 551 (4) & (5) (Administrative Procedure Act):

Definitions

> For the purpose of this subchapter-
> ....
> (4) "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;

(5) "rule making" means agency process for formulating, amending, or repealing a rule....

5 U.S.C. § 553(b) & (c):

Rule making

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include -

(1) a statement of the time, place, and nature of public rule making proceedings;
(2) reference to the legal authority under which the rule is proposed;
and
(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply -
(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or
(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefore in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.
(c) After notice required by this section, the agency shall give interested persons an

opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose.

When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

5 U.S.C. § 706:

Scope of Review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.
The reviewing court shall—
(1) compel agency action unlawfully withheld or unreasonably delayed; and
(2) hold unlawful and set aside agency action, findings, and conclusions found to be—
(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
(B) contrary to constitutional right, power, privilege, or immunity;
(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
(D) without observance of procedure required by

law;
(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.
In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

14 CFR § 1.1:

General definitions.
....
Air carrier means a person who undertakes directly by lease, or other arrangement, to engage in air transportation.
....
Crewmember means a person assigned to perform duty in an aircraft during flight time.
....
Commercial operator means a person who, for compensation or hire, engages in the carriage by aircraft in air commerce of persons or property, other than as an air carrier or foreign air carrier or under the authority of Part 375 of this title. Where it is doubtful that an operation is for "compensation or hire", the test applied is whether the carriage by air is merely incidental to the person's other business or is, in itself, a major enterprise for profit.
....

Flightcrew member means a pilot, flight engineer, or flight navigator assigned to duty in an aircraft during flight time.

....

Person means an individual, firm, partnership, corporation, company, association, joint-stock association, or governmental entity. It includes a trustee, receiver, assignee, or similar representative of any of them.

14 CFR § 13.235(a) & (c):

Judicial review of a final decision and order.

(a) In cases under the Federal aviation statute, a party may seek judicial review of a final decision and order of the Administrator, as provided in 49 U.S.C. 46110(a), and, as applicable, in 49 U.S.C. 46301(d)(7)(D)(iii), 46301(g), or 47532.

....

(c) A party seeking judicial review of a final order issued by the Administrator may file a petition for review in the United States Court of Appeals for the District of Columbia Circuit or in the United States Court of Appeals for the circuit in which the party resides or has its principal place of business.

14 CFR § 91.13:

Careless or reckless operation.

(a) Aircraft operations for the purpose of air navigation. No person may operate an aircraft in a careless or reckless manner so as to endanger

the life or property of another.

14 CFR § 91.313(c):

Restricted category civil aircraft: Operating limitations.

(c) No person may operate a restricted category civil aircraft carrying persons or property for compensation or hire. For the purposes of this paragraph (c), a special purpose operation involving the carriage of persons or material necessary to accomplish that operation, such as crop dusting, seeding, spraying, and banner towing (including the carrying of required persons or material to the location of that operation), an operation for the purpose of providing flight crewmember training in a special purpose operation, and an operation conducted under the authority provided in paragraph (h) of this section are not considered to be the carriage of persons or property for compensation or hire.

14 CFR. § 91.315:

Limited category civil aircraft: Operating limitations.

No person may operate a limited category civil aircraft carrying persons or property for compensation or hire.

14 CFR § 119(e):

Applicability

(e) Except for operations when common carriage is not involved conducted with airplanes having a passenger-seat configuration of 20 seats or more, excluding any required crewmember seat, or a payload capacity of 6,000 pounds or more, this part does not apply to—
(1) Student instruction;
....

14 CFR [CAR] § 45.1 (1949):

Commercial Operator Certification and Operation Rules.

Adopted by the Civil Aeronautics Board at its office in Washington, D. C., on the 23d day of March 1949.

The problem of safety regulation of non-common carrier carriage of goods and persons for compensation or hire has tended to become acute since the termination of the war and the release by the armed forces of surplus aircraft purchasable with limited funds. Moreover, with the promulgation today of more rigid safety requirements for air carriers engaging in irregular carriage of goods and persons, the pressure to avoid regulation by engaging or purporting to engage only in contract operations is expected to increase.
....

Applicability of part.

The provisions of this part shall be applicable to citizens of the United States engaging in the carriage in air commerce of goods or passengers for compensation or hire, unless such carriage is conducted under the provisions of an air carrier operating certificate issued by the Administrator. For the purpose of this part, student instruction, banner towing, crop dusting, seeding, and similar operations shall not be considered as the carriage of goods or persons for compensation or hire.

Introduction

Starting a small business providing flight instruction in World War II vintage airplanes is financially challenging enough. But when the administrative agency which regulates your business changes the rules of the game in midstream, a policy change which is unexpected, contrary to its longstanding view of flight training and made without any procedural safeguards which should attend legitimate rule making, it is a wrongful assumption of power at odds with what Congress intended when it created the FAA to oversee domestic air operations.

From 1946 onward, the Civil Aeronautics Board ("CAB") and its successor agency the FAA have followed Congress' lead to encourage the civilian community to absorb airworthy WW II-era aircraft by promoting their use and enjoyment for air shows, exhibitions, personal use and other such undertakings. However, these aircraft were built under the exigencies

of war and did not undergo the normal certification process attendant to civilian aircraft. In order to convert these war orphans to civil use, the CAB created a "new category" of aircraft, the Limited Category Aircraft.

At the same time, in order to protect post-War civilian airlines from competition by these aircraft, the CAB issued a rule—now expressed in14 CFR § 91.315—that they could not be used to carry persons or property for compensation or hire, a reasonable restriction which allowed public use of these aircraft while keeping their operation cabined to mostly non-commercial undertakings.

But at some point, flight instruction in these magnificent machines became necessary; and since neither flight instructors nor the aircraft fly for free, a market emerged for paid flight training on these aircraft.

At no time, however, from the post-War period onward did the CAB or the FAA ever regulate their operation by providing—or even insinuating—that *paid flight instruction*, i.e., the act of learning to fly these vintage warplanes, was prohibited. Indeed, common sense, air safety concerns and the continuing vitality of flying vintage war planes support the notion that these aircraft need persons to fly them safely or they will become extinct. Yet the FAA, relying upon a nebulous 2014 guidance letter, now says 14 CFR § 91.315 prohibits petitioner's flight instruction operation. It has shut down petitioner's business, fining it and even putting its owner's pilot's license at risk.

The FAA's unreasonable, arbitrary reading of 14 CFR § 91.315 rewrites, if not flatly ignores, its own history dating back to 1946 of encouraging the public's ownership and operation of WW-II vintage aircraft. Moreover, its conflation of paid flight training in these aircraft with the "carriage of persons or property for compensation or hire" in order to penalize, if not effectively end, petitioner's business is administrative rule making run amok.

This is an ideal case to grant certiorari because petitioner's plight is precisely the one faced by thousands of other regulated small and family-owned businesses when an unresponsive Executive bureaucracy metes out untethered changes to its rules by fiat. It has the potential, as realized here, to destroy these businesses in their tracks. Upending the reasonable expectation of those like petitioner that the agency would continue to read and enforce its longstanding rules as written, the FAA's new interpretation defies its prior treatment of petitioner's business, is bereft of facts justifying its new policy, and is unreasonable on its face. Meaningful, robust judicial review will vindicate the separation of powers principle at stake here by giving these businesses a remedy to obtain a fair hearing *before* these new rules can be enforced against them. The Court can and should order such relief in this case.

STATEMENT

Petitioner Warbird Adventures, Inc. ("petitioner") was formed in 1998 in Florida by Thom Richard ("Richard"), an emigre from Sweden, to provide flight training in vintage World War II aircraft,

primarily "warbirds" like the famed Curtiss P-40N Warhawk, an aircraft that played a large role in defeating the Axis powers and ushering the United States into an aviation golden age. Richard is a certified flight instructor holding numerous FAA-issued pilot certificates, among them Airline Transport Pilot with Single and Multi-Engine Commercial ratings, as well as Helicopter and Glider ratings. Flight instruction has been Richard's career and passion for more than thirty (30) years.

Sometime in 2015, Richard investigated the possibility of purchasing a P-40N Warhawk for his flight training business. The P-40N is a vintage WWII war plane, a so-called Limited Category aircraft which requires a like-named airworthiness certificate from respondent Federal Aviation Administration ("respondent" or " the FAA") in order to fly. This certification requirement has existed for these vintage aircraft since 1946 and was prompted by the government's desire to convert surplus military aircraft to civilian use after World War II. Pilots have been learning to fly these aircraft and have been paying to do so for more than seventy (70) years.

While researching whether he could lawfully provide flight training "for hire" in a Limited Category aircraft like the P-40N, Richard encountered 14 CFR § 91.315, an FAA regulation. It reads:

> No person may operate a limited category civil aircraft carrying persons or property for compensation or hire.

On that score, Richard communicated with FAA

Aviation Safety Inspector Larry Enlow. Enlow wrote Richard on January 7, 2016, ("the Enlow Letter") stating that compensation for giving flight instruction is not compensation for the carriage of persons or property, but rather compensation for the flight instruction itself; and as long as the flight instruction is not contrary to the regulations associated with the aircraft's airworthiness certification, the flight instructor can be compensated for the flight instruction.

With regard to Limited Category aircraft like the P-40N, Safety Inspector Enlow wrote Richard that he could conduct flight instruction in this aircraft because the limitation expressed in 14 CFR § 91.315 "does not apply to flight training since payment for flight instruction is not considered to be compensation for [the] carriage of persons or property."

Based upon that advice, Richard purchased a P-40N for petitioner's flight training business and began offering paid flight instruction in this certificated aircraft to its customers. On July 28, 2020, however, the FAA issued an emergency cease-and desist order that petitioner stop providing paid flight training in its P-40N claiming it violates 14 CFR § 91.315 as well as 14 CFR § 91.13(a) (careless or reckless operation), a "residual charge," one dependent on a found violation of 14 CFR § 91.315.

Petitioner immediately brought a petition for review of this emergency order before the Court of Appeals for the District of Columbia Circuit pursuant to 49 U.S.C. § 46110(a) and 14 CFR § 13.235(a) & (c). On April 2, 2021,the court of appeals denied the petition in an unpublished *per curiam* Judgment. *Warbird*

Adventures, Inc. v. Federal Aviation Administration, 83 Fed. App'x 331 (D.C. Cir. 2021) (App. 7-10). The Panel determined that 14 CFR § 91.315's plain language prohibits petitioner from flight training in a Limited Category aircraft like the P-40N because a flight student is a "person" within the regulation and when he is learning to fly the student is "carr[ied]" consistent with its terms (App. 9). Absent an exemption—which petitioner had not requested—the Panel concluded that petitioner's aircraft was not certified for paid flight instruction (*Id.*).

Without conceding that an exemption was necessary under § 91.315 to operate its flight training business, petitioner immediately applied for an exemption on April 2, 2021, the same day the court of appeals denied its petition for review(App. 27). Three months later, on July 12, 2021, following public concern over its pronouncement that paid flight training is the same as carriage by air for compensation or hire within § 91.315, the FAA publicly stated that it would consider an "expedited exemption process" to ensure that businesses like petitioner's could resume flight training with Limited Category aircraft. See 86 Fed. Reg. 36494-95 (July 12, 2021). Yet, over two years later, the FAA still refuses to issue petitioner an exemption or provide an explanation for failing to do so. Petitioner has in the interim suffered substantial business losses, its flight training operation remains grounded and Richard's pilot license is at risk.

While petitioner was pursuing his petition for review in the court of appeals, the FAA, on August 20, 2020, brought an administrative enforcement action against it in the Office of Hearings for the Department

of Transportation seeking a civil penalty of $6,750 stemming from its alleged violation of 14 CFR § 91.315 and 14 CFR § 91.13(a) when it provided a paid flight training session in the P-40N on January 31, 2020. On October 6, 2021, Administrative Law Judge Douglas M. Rawald granted the FAA's motion for partial summary judgment and denied petitioner's motion for decision in its favor (App. 44-54).

Relying in part on the D.C. Circuit's earlier decision in *Warbird Adventures, Inc. v. Federal Aviation Administration*, *supra*, Rawald reasoned that a flightcrew member who pays to receive flight training from another flightcrew member in petitioner's P-40N is a "person" as defined by 14 CFR § 91.315; that payment for flight training satisfies the "for compensation or hire" component of the regulation; and that there is no regulatory exception for flight instruction (App. 47-52). Finding a violation of 14 CFR § 91.315, the ALJ ordered a further hearing to determine the civil penalty (App. 53-54). On February 8, 2022, the ALJ, after a penalty hearing, issued his Initial Decision finding no aggravating factors and fining petitioner a civil penalty of $2,500 (App. 31-43).

Both parties appealed the Initial Decision to the FAA's Acting Administrator, Billy Nolen ("Nolen"), pursuant to 14 CFR § 13.233. On October 6, 2022, Nolen in a final agency Decision and Order, denied petitioner's appeal but granted the FAA's appeal to the extent of increasing the assessed civil penalty against petitioner from $2,500 to $5,500 (App. 11-30).In doing so, he rejected petitioner's arguments that the "carrying [of] persons" as used in 14 CFR § 91.315 does not encompass flight instruction; that the FAA improperly

changed its longstanding interpretation of the regulation; and that no penalty should be assessed (App. 14-19).

First, Nolen adopted the ALJ's analysis that the regulation's use of the term "person" includes a student learning to fly this Limited Category aircraft (App. 14). He also determined, like the D.C. Circuit's earlier decision in *Warbird Adventures, Inc. v. Federal Aviation Administration*, *supra*, that the term "carrying" is a broad term which—absent any exception, and there are none in the regulation—includes flight instruction (App. 15-16).

Second, as Nolen saw it, the FAA had not changed its position over time about whether flight instruction was prohibited by 14 CFR § 91.315 (App. 16-17). He pointed to the so-called "Morris Interpretation" published by the FAA in 2014 which states that "§ 91.315 does not set forth any exception for providing flight training for hire in a limited category aircraft" (App. 16 citing *Legal Interpretation to Mr. Gregory Morris*, 2014 WL 5319629 (Oct. 7, 2014)). Because "nothing has changed between the Morris Interpretation and the present day," Nolen ruled that the FAA had not changed its position and denied petitioner's appeal on this issue (App. 16-17).

Third, Nolen concluded that the violation was sanctionable because petitioner was expected to know the requirements of the FAA's regulations regardless of the "mistaken guidance [i.e., the Enlow Letter] provided [it] by an FAA office that did not have authority to change the regulatory requirements" (App. 17-18). "Inaccurate advice" like the Enlow Letter may

be a mitigating factor, but Nolen concluded that it could not excuse the violation or a resulting penalty (App. 18).

As for the penalty, Nolen found that Richard, petitioner's sole owner, knew on January 31, 2020, when it operated the P-40N for paid flight instruction that it was contrary to § 91.315 (App. 21-25). Nolen relied on the fact that the 2016 Enlow Letter sent to Richard did not mention the 2014 Morris Interpretation and was therefore incomplete and mistaken; that in April of 2019, Aviation Safety Inspector Joseph Gramzinski advised Richard that petitioner's flight training operation "may" violate § 91.315; and that Richard disagreed with this view and decided to continue to offer same to the public (App. 22-24).

But, Nolen determined, measured against petitioner's "knowing violation" was the FAA's issuance of the "mistaken" Enlow Letter to Richard together with its failure to definitively correct its "erroneous" advice after ASI Gramzinski spoke with Richard in April of 2019 (App. 27-28). Nolen therefore modified the ALJ's penalty by increasing it to reflect petitioner's "knowing violation" but did not maximize that increase due to the FAA's own misleading conduct (App. 28-29). Petitioner was assessed a civil penalty of $5,500 (App. 29).

Petitioner petitioned the court of appeals for review of this final agency Decision and Order pursuant to 49 U.S.C. § 46110(a). On July 6, 2023, the Panel denied the petition in a *per curiam* opinion (App. 1-6). It considered 14 CFR § 91.315 an unambiguous regulation and concluded, like the ALJ and the FAA

Administrator, that its use of word "carry" has a broad meaning and includes flight instruction (App. 4). That is, when a person receives flight instruction, that person is present in the aircraft and, as the Panel determined, "is being 'convey[ed] or transport[ed]' by the pilot who is giving the instructions" (App. 4-5). Thus, it concluded that a pilot giving paid flight instruction is carrying the student for the purposes of the regulation (App. 5).

Furthermore, the Panel noted that other regulations that address the operation of aircraft for compensation or hire have included exemptions for flight instruction; and had the FAA wanted to exempt flight instruction from the reach of 14 CFR § 91.315, it could have done so explicitly but did not do so (App. 5). Finally, it ruled that because the regulation is unambiguous, there is no occasion to exercise any deference toward the FAA's interpretation of this regulation (*Id.*).

On September 11, 2023, the Panel and the court of appeals, respectively, denied petitioner's timely filed petition for Panel rehearing or for rehearing *en banc* (App. 55-56).

REASONS FOR GRANTING THE PETITION

The FAA's Unreasonable Reading Of 14 CFR § 91.315 To Effectively End Petitioner's Flight Training Business Is Arbitrary, Capricious, An Abuse of Discretion or Not In Accordance With Law. It Rewrites By Fiat Its Own History Encouraging The Public's Operation Of Vintage WW II Aircraft Since 1946. To Conflate Flight Training In These Aircraft With The Carriage Of Persons Or Property For Compensation Or Hire Is Administrative Rule Making Run Amok.

Since1946, the FAA and its predecessor agency the Civil Aeronautics Board ("the CAB") have permitted paid flight instruction in vintage WW-II aircraft like petitioner's P-40N Warhawk because it furthered Congress' intent to encourage the civilian community to absorb airworthy WW-II vintage aircraft by promoting their use and enjoyment for non-commercial purposes. While these aircraft were regulated so that they could not compete in the post-War environment with an emergent civilian airline industry, i.e., they could not transport or carry persons or property from one place to another for compensation or hire, there was no prohibition against persons learning to fly these aircraft or operating them for purposes having nothing to do with the commercial transport of persons or property. In fact, learning to fly these war planes guaranteed their continued use and operation for successive generations of civilian aviators.

With the flight training business in WW-II vintage aircraft in this posture, petitioner's owner in 2015 investigated whether he could lawfully provide

flight training "for hire" in a Limited Category aircraft like the P-40N. As for 14 CFR § 91.315, which prohibits any person from "carrying persons or property for compensation or hire" in such an aircraft, FAA Aviation Safety Inspector Larry Enlow wrote petitioner's owner in January of 2016 that he could conduct flight instruction in this aircraft because the limitation expressed in this regulation "does not apply to flight training since payment for flight instruction is not considered to be compensation for [the] carriage of persons or property."

Yet the FAA in 2018, relying on a nebulous guidance letter authored in 2014, announced that flight training in Limited Category aircraft like the P-40N violates 14 CFR § 91.315. Its agent, Aviation Safety Inspector Joseph Gramzinski, later told petitioner's owner in April of 2019 that its flight training business "may"—*not* "did"—violate § 91.315; and when petitioner continued to operate its business, the FAA in 2020 began this enforcement action relying on its new, confected reading of § 91.315 that paid flight training in these aircraft is tantamount to the "carriage of persons or property for compensation or hire."

Petitioner submits this administrative enforcement proceeding by the FAA is founded upon an unreasonable reading of 14 CFR § 91.315, one which renounces the FAA's history of encouraging the public's use and operation of vintage war planes since 1946 by promoting flight instruction in these aircraft. It rewrites this unambiguous regulation to apply to paid flight instruction without any textual support in the regulation to do so. It creates *de facto* a new regulation which, in turn, produces unfair surprise, upsetting the

legitimate reliance interests of petitioner and the flight instruction industry generally.

The FAA's new version is also unsupported by any findings or new facts regarding safety, for example, which might justify a more expansive reading. There is lacking any "hallmarks of thorough consideration" by the FAA in its proffered reading; it is unattended by any substantiation and there is no indication that its version comports with Congress' intent to encourage the use and operation of airworthy WW-II vintage aircraft. Finally, the FAA's new, if not invented, reading is plainly inconsistent with the underlying regulation as written.

On the other hand, if § 91.315 is genuinely ambiguous, no deference to the FAA's reading of this regulation under *Auer v. Robbins*, 519 U.S. 452, 462-463 (1997), is warranted because the FAA's new interpretation does not reflect the agency's authoritative, expert-based, "fair[, or] considered judgment," *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012), quoting *Auer*, 519 U.S. at 462; because its reading unreasonably reduces itself to "a merely convenient litigating position" or "*post hoc* rationalization advanced" to "defend past agency action against attack," *Kisor v. Wilkie*, 588 U.S.__,___; 139 S.Ct. 2400, 2417 (2019), quoting *Christopher*, *supra*; and because it creates unfair surprise, upending justifiable reliance by petitioner. *Id.* at 2418.

This "interpretive rule" by the FAA not only advises the public, including petitioner, about the reach of prohibited conduct under § 91.315, but it also *binds* petitioner and the public by making law and providing

the basis for this enforcement proceeding. It therefore remains the responsibility of the judiciary under 5 U.S.C. § 706 to decide "whether the law means what the agency says it means." *Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 109 (2015) (Scalia, J., concurring).

Petitioner is accordingly entitled to a robust, *de novo* review by the judiciary under 5 U.S.C. § 706, absent any *Auer* deference, addressing whether the FAA's unreasonable reading of § 91.315 to close down its business is arbitrary, capricious, an abuse of discretion or not in accordance with law. In addition, the FAA should be ordered to pursue the notice-and-comment provisions of 5 U.S.C. § 553(b) & (c) so that petitioner and the general public have input before this *de facto* new regulation becomes law.

This petition raises the exceptionally important question of whether and under what circumstances persons regulated by an Executive agency may challenge that agency's changing the rules of regulation in midstream without any input from those persons affected, in contravention of its previous enforcement position, and without providing any substantial reason for doing so other than "because we said so." This after-the-fact rationalization by the FAA for its new rule is regulation by fiat, not lawful administrative rule making. It should not suffice on this record. It is an important question of federal law that has not been, but should be, settled by this Court. See Supreme Court Rule 10(c).

The Court should grant certiorari, identify the Panel's error in construing this regulation, and remand the matter to the court of appeals to decide under a

robust, *de novo* review, absent any *Auer* deference, "whether the law means what the agency says it means." In addition, this amended regulation should be judged unenforceable and the FAA should be ordered to pursue the notice-and-comment provisions of 5 U.S.C. § 553(b) & (c) so that petitioner and the public have input before this *de facto* new regulation becomes law.

A. The Status of the FAA's New "Interpretive Rule."

While"interpretive rules" are exempt from the notice-and-comment requirements of the APA, the FAA's re-interpretation of § 91.315 to create *de facto* a new regulation which is at odds with its existing version of 14 CFR § 91.315 invokes the rule making notice-and-comment protocol of the APA. See *Shalala v. Guernsey Memorial Hosp.*, 514 U.S. 87, 100 (1995); *Christensen v. Harris County*, 529 U.S. 576, 588 (2000). That is, an "interpretive rule" does not have the force of law, *Kisor*, 588 U.S. at ___; 139 S.Ct. at 2420, citing *Perez v. Mortgage Bankers Ass'n*, 575 U.S. at 103; and it cannot form the basis for an enforcement action because such a rule does not impose any "legally binding requirement on private parties." *Id.* at ___; 139 S.Ct. at 2420, quoting *National Min. Assn. v. McCarthy*, 758 F.3d 243, 252 (D.C. Cir. 2014).

However, the FAA's new rule prohibiting petitioner's flight instruction business is not merely an interpretation of its regulation. It is an *amendment* of its legally binding regulation which already survived notice and comment under the APA. As such, the FAA's proposed amendment is a legislative or "substantive

rule," a *binding* regulation which will—and did—support this enforcement action against petitioner. See *Kisor*, 588 U.S. at ___; ___; 139 S.Ct. at 2420 (Kagan, J.); 2434 (Gorsuch, J., concurring). See also *Perez v. Mortgage Bankers Ass'n*, *supra*, 575 U.S. at 109-110 (Scalia, J., concurring) (interpretive rules merely advise the public and cannot *bind* the public but judicial deference may give them the force of law).

For these reasons, petitioner submits that the FAA's interpretation of its regulation to now prohibit petitioner's flight instruction business constitutes a legislative or substantive rule, one which supported this enforcement proceeding and one which now requires notice and comment under the APA before it can issue as a final, enforceable regulation.

B. 14 CFR § 91.315 Is Not Ambiguous. Its Terms Unmistakably Exclude From Its Ambit Petitioner's Flight Instruction.

Petitioner agrees with the Panel in one respect: the regulation is not ambiguous. It means exactly what it says. To be subject to its scope, the subject aircraft must be "carrying" persons or property for compensation or hire. But the concept of "carriage" is defined by the FAA in its own public Advisory Circular No. 120-12A as the "transport[ing] of persons or property *from place to place* for compensation." (emphasis supplied) (found at https://www.faa.gov/regulations_policies/advisory_circulars/index.cfm/go/document.information/documentid/22647).

That the FAA uses the term "carrying" in § 91.315 to mean the transporting of persons or property from one place to another is buttressed by the FAA's Director of Airport Compliance and Management. He determined that "flight training does *not* involve transporting persons or property from one place to another for compensation." *Nishio v. Saipan International Airport*, 2016 WL 9685577 at **17 & 22 (FAA 4/29/ 2016) (emphasis supplied). Accord, *FAA Medical Certificate Opinion*, 62 Fed. Reg. 16242 (April 4, 1997) ("A certificated flight instructor...is not carrying passengers or property for compensation or hire...."); *FAA Letter authored by D.P. Byrne*, Assistant Chief Counsel, Regulations Division (9/18/1995) (same).

Thus, by the FAA's own admission, flight training is *not* the carrying of persons or property from place to place for compensation or hire. Flight instruction is itself the object of the exercise; it is education, *not* the carriage of anyone or anything from one place to another. This common sense reading of § 91.315 undercuts the FAA's—and the Panel's—reading of the regulation. Simply put, the unambiguous terms of § 91.315 regulate the use of Limited Category aircraft like petitioner's, *but only when it is used to "carry"persons or property from one place to another.* Petitioner's business does not do so.

The FAA has always treated flight instruction and "carriage" as separate activities. In 14 CFR § 1.1, a "commercial operator" is defined as "a person who, for compensation or hire, engages in the carriage by aircraft in air commerce of persons or property...." If the FAA's interpretation of the regulation is correct, then petitioner is a "commercial operator" who would

need an air carrier operator certificate issued by the FAA in order to train its students, pursuant to14 CFR § 119.1(1). Yet *no* flight school in the United States has such a certificate from the FAA because Part 119 of the CFR does *not* apply to "student instruction." 14 CFR §119(1)(e)(1). If paid flight instruction is not the "carrying of persons for compensation or hire" in one part of the Federal Aviation Regulations, it cannot be so in *any* other part of those Regulations.

Moreover, the very definition of "commercial operator" completely guts the FAA's *nuevo* interpretation of the regulation. Indeed, by its own regulatory admission, "[w]here it is doubtful that an operation is for 'compensation or hire,' the test applied is whether the carriage by air is merely incidental to the person's other business or is, itself, a major enterprise for profit." 14 CFR § 1.1. The FAA cannot credibly argue that the purpose of flight instruction is to provide transportation for hire, or that the transportation during flight instruction is a "major enterprise for profit." The agency should know this better than anyone.

14 CFR § 91.325 likewise discriminates between flight instruction and the "carriage" of persons or property for compensation or hire. It prohibits the same "carriage" as § 91.315, except it applies to planes flown solely for pleasure or personal use. The FAA notes on its website that while these aircraft "may be available for rental *and flight instruction*..., the carrying of persons or property for hire is prohibited." (emphasis supplied). See https://www.faa.gov/aircraft/air_cert/airworthiness_certification/sp_awcert/primary/. See also 14 CFR § 91.409 (making the same

distinction between paid flight instruction and the "carrying" of persons for hire).

Finally, the FAA's flawed reading is contradicted by the history of § 91.315. The Limited Category type of aircraft certificate was created in 1946 by the CAB, the FAA's predecessor agency. It was charged with making available to the public "without further delay" surplus military, i.e., Limited Category, aircraft "so long as [their] operation is confined to flights in which neither passengers nor cargo are carried for hire." (CAR Part 09, November 21, 1946; 11 Fed. Reg. 14098; 14099, December 5, 1946). By 1950, the CAB created a new Part 1 of the Civil Air Regulations ("CAR"), § 1.71 of which provided that "aircraft in the Limited Category may not be used for the carriage of persons or property for hire."

In 1959, the newly created FAA once again reiterated in its Manual this prohibition for Limited Category aircraft. See Civil Regulations Manual 9, Pub. August 1959. Re-codification of the CAR in the 1960's made no substantive changes to the prohibition, and in 1964 it was made part of the CFR as § 91.40 which ultimately became 14 CFR § 91.315. *None* of these iterations of the regulation preclude flight training for Limited Category aircraft; the limitations were aimed at paid passenger and cargo operations, *not* flight instruction, paid or otherwise. Silence is not ambiguity, and § 91.315's ambit cannot reasonably be read to include petitioner's flight instruction business.

It therefore defies logic, if not common sense, to assert—as the FAA does—that the policy of making these aircraft "available to the public without further

delay" should be knee-capped by a regulation prohibiting paid flight training in these same aircraft—the very activity that would permit their continued use by the public and guarantee their vitality for generations of civilian aviators!

The FAA's reliance on the 2014 "Morris Interpretation" does not help the agency's cause. Like the Panel's bare analysis of the regulation's language, it ignores the regulation's history and its treatment of flight instruction as a discrete activity from the "carriage" of persons or property for compensation or hire. It offers no new fact, policy change, or even one safety concern which would prompt its amended version. Last, it fails to answer the most reasonable question flowing from the FAA's distorted reading: If providing paid flight instruction in aircraft like petitioner's vintage aircraft has always been prohibited because the flight student is being "carried for compensation or hire," how did any flight student learn to fly these vintage aircraft for the last seventy (70) years?

The question answers itself. The FAA *never* prohibited flight instruction in Limited Category aircraft because learning to fly vintage war planes guarantees their continued use and enjoyment for successive generations of civilian aviators, as Congress, the CAB and the FAA originally intended. The FAA's new position runs counter not only to § 91.315's plain language, but also to its own history of allowing flight instruction with these vintage aircraft.

Petitioner submits, however, that if this unambiguous regulation can somehow be read to

prohibit its flight instruction business, then its reach is unreasonable and subject to robust judicial review under the APA. Specifically, this legislative or substantive rule does not represent the FAA's authoritative, expert-based, "fair[, or] considered judgment," *Christopher v. SmithKline Beecham Corp.*, 567 U.S. at 155, quoting *Auer*, 519 U.S. at 462; its reading unreasonably reduces itself to "a merely convenient litigating position" or "*post hoc* rationalization advanced" to "defend past agency action against attack," *Kisor v. Wilkie*, 588 U.S. at ___; 139 S.Ct. at 2417, quoting *Christopher*, *supra*; it lacks the hallmark of a thorough consideration of facts which could justify its reading; and it creates unfair surprise, upending justifiable reliance by the parties affected, including petitioner. *Id.* at 2418.

C. *If 14 CFR § 91.315 Is Genuinely Ambiguous, Auer Deference Is Not Warranted Because The FAA's Reading Conflicts With Its Own Prior Treatment Of Flight Instruction With These Vintage Aircraft; Because It Abused Its Discretion By Failing To Clarify The Issue For The Flight Training Industry; And Because Its Belated Interpretation Is Unreasonable On Its Face.*

The touchstone for assessing any regulation or its interpretation is its reasonableness. *Kisor*, 588 U.S. at ___; 139 S.Ct. at 2419; *Perez*, 575 U.S. at 106 (Sotomayor, J.) & 110-111 (Scalia, J., concurring); *Fed. Commc'cns Comm'n v. Fox Television Stations, Inc.*, 556 U.S. 502, 515-516 (2009) (Scalia, J.) & 535 (Kennedy, J., concurring). The APA requires an agency to provide more substantial justification when "its new policy rests upon factual findings that contradict those which

underlay its prior policy; or when the prior policy has engendered serious reliance interests that must be taken into account...[and i]t would be arbitrary and capricious to ignore such matters." *Perez*, *supra*, 575 U.S. at 106, quoting *Fox Television Stations*, 556 U.S. at 515.

Here the FAA has offered *no justification at all* for its revised reading of § 91.315. It has adduced no new facts or findings which could justify its new reading; and it ignores the serious reliance interests which have been created by its own history of allowing flight instruction with these vintage aircraft and by its failure over the years to clarify the new reach of its regulation, one in force since 1946. Moreover, for the reasons identified in Part B., *supra*, this rule interpretation runs counter to the FAA's own history of treating flight instruction and the "carriage" of persons or property as discrete activities.

For these reasons, the FAA's interpretation of this regulation is unreasonable, arbitrary, capricious or an abuse of discretion. Because this new regulation is a legislative or substantive rule having the force of law—supporting, as it did, this enforcement proceeding—petitioner should be entitled to a robust, *de novo* judicial review of this regulation under 5 U.S.C. § 706, absent any *Auer* deference, one which addresses whether the FAA's unreasonable reading to close down its business is arbitrary, capricious, an abuse of discretion or not in accordance with law. In addition, the FAA should be ordered to pursue the notice-and-comment provisions of 5 U.S.C. § 553(b) & (c) so that petitioner and the general public may have input before this *de facto* new regulation becomes law.

CONCLUSION

For all of the reasons identified herein, Court should grant certiorari, identify the Panel's error, and remand the matter to the court of appeals to decide under a robust, *de novo* review absent any *Auer* deference, "whether the law means what the agency says it means." In addition, this amended regulation should be judged unenforceable and the FAA should be ordered to pursue the notice-and-comment provisions of 5 U.S.C. § 553(b) & (c), so that petitioner and the public have input before this *de facto* new regulation becomes law; or provide petitioner with such other relief as is fair and just in the circumstances.

Respectfully submitted,

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United States Court of Appeals, Eleventh Circuit.

WARBIRD ADVENTURES, INC., Petitioner,

v.

FEDERAL AVIATION ADMINISTRATION,

Respondent.

No. 22-13765Non-Argument Calendar
Filed: 07/06/2023

Petition for Review of a Decision of the Federal Aviation Administration, Agency No. FAA 2020-0534

Attorneys and Law Firms

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Before Wilson, Jordan, and Branch, Circuit Judges.

Opinion

PER CURIAM:

Warbird Adventures, Inc. (Warbird) petitions for review of a Federal Aviation Administration (FAA) decision finding that, by providing flight instruction in a

"limited category civil aircraft," it violated the prohibition against operating such an aircraft "carrying persons or property for compensation for hire," contained in 14 C.F.R. § 91.315 and ordering it to pay a civil penalty. After careful review, we deny the petition.

I.

The following material facts are not disputed. Thom Richard owns and operates Warbird, a flight school in central Florida. Warbird provides flight instruction in vintage aircraft classified as Limited Category aircraft. On January 31, 2020, Warbird operated one of its Limited Category aircraft with Ray Allain on board. Allain paid Warbird for flight instruction.

The FAA issued a Cease and Desist Order to Warbird to stop flight instruction in Limited Category aircraft[1] and instituted an administrative enforcement action for violating 14 C.F.R. § 91.315. As to the administrative enforcement action, Warbird and the FAA cross-motioned for summary judgment with Warbird arguing that the prohibition on "carrying persons" under § 91.315 does not cover flight instruction. The ALJ held that "carrying" under the regulation is a broad term that includes flight instruction and found Warbird violated the regulation. The ALJ assessed a civil penalty of $2,500.

Both parties appealed the ALJ's decision. The Federal Aviation Administrator affirmed the finding of the violation but modified the civil penalty by increasing it to $5,500. Warbird now seeks review of the Administrator's decision.

II.

We have statutory authority to "affirm, amend, modify, or set aside any part" of the Administrator's order. 49 U.S.C. § 46110(c). But our standard of review is deferential; "we will uphold the agency's decision unless it is arbitrary and capricious, an abuse of discretion, or otherwise contrary to law." *Aerial Banners, Inc. v. FAA*, 547 F.3d 1257, 1260 (11th Cir. 2008) (per curiam); *see* 5 U.S.C. § 706(2). Thus, "we will set aside the FAA's order on substantive grounds only if the agency relied on improper factors, failed to consider important relevant factors, or committed a clear error of judgment that lacks a rational connection between the facts found and the choice made." *Aerial Banners, Inc.*, 547 F.3d at 1260 (internal quotation marks omitted). And the Administrator's findings of fact "are conclusive" if supported by substantial evidence. 49 U.S.C. § 46110(c).

III.

In its petition, Warbird challenges the Administrator's decision finding that "carry" under 14 C.F.R. § 91.315 includes flight instruction. Specifically, Warbird argues that "carrying persons ... for compensation or hire" in 14 C.F.R. § 91.315 does not include flight instruction. Because Warbird provided flight instruction to students, it could not have violated 14 C.F.R. § 91.315.

When interpreting an unambiguous regulation, "[t]he regulation ... just means what it means—and the court must give it effect, as the court would any law." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019) (majority). "[T]he possibility of deference [to an agency] can arise

only if a regulation is genuinely ambiguous." *Id.* at 2414. "[I]f the regulation satisfies the 'genuinely ambiguous' requirement, the agency reading must be 'reasonable.' " *Rafferty v. Denny's, Inc.*, 13 F.4th 1166, 1179 (11th Cir. 2021) (quoting *Kisor*, 139 S. Ct. at 2415). Then, "a court must make an independent inquiry into whether the character and context of the agency interpretation entitles it to controlling weight." *Kisor*, 139 S. Ct. at 2416.

The regulation at issue states that "[n]o person may operate a limited category civil aircraft carrying persons or property for compensation or hire." 14 C.F.R. § 91.315.

Warbird argues that the regulation is unambiguous and that the ordinary definition of "carry" does not include flight instruction. Warbird argues that even if the regulation is ambiguous, then we should not rely on the FAA's interpretation because it is inconsistent with the regulation.

We agree with Warbird that the regulation is unambiguous, but we do not agree that "carry" does not include flight instruction. Like the Administrator and the ALJ, we find that "carry" has a broad meaning and includes flight instruction.

The FAA has not defined "carry" within its regulations. When construing regulations, we "give effect to the natural and plain meaning of the words." *Washington v. Comm'r of Soc. Sec.*, 906 F.3d 1353, 1362 (11th Cir. 2018). When determining the plain meaning, we look to the relevant dictionaries, such as Black's Law Dictionary, which defines "carry" as "[t]o convey or transport." *Carry*, Black's Law Dictionary (11th ed. 2019). When a person receives flight instruction, that person is present in the aircraft. While in the aircraft, the person receiving flight instruction is being

"convey[ed] or transport[ed]" by the pilot who is giving the instructions. *Id.* Thus, a pilot giving flight instructions is carrying the student for the purpose of the regulation.

Further, as the FAA points out, other regulations that address operation of aircraft for compensation or hire have included exemptions for flight instruction. *See* 14 C.F.R. § 91.327; 14 C.F.R. § 119.1(e)(1). Thus, had the FAA wanted to exempt flight instruction from 14 C.F.R. § 91.315, it could have explicitly done so.

Warbird also argues that the FAA's interpretation of 14 C.F.R. § 91.315 has changed and is not entitled to any deference. Because we conclude that the regulation is unambiguous and covers Warbird's conduct (Warbird does not contest the ALJs underlying factual determinations), we need not address Warbird's remaining arguments about the FAA's interpretation of this regulation. *See Palm Beach Cnty. v. FAA*, 53 F.4th 1318, 1330 (11th Cir. 2022) ("[I]f we find [the FAA] regulations to be unambiguous, we needn't and won't defer to the FAA's view.").

IV.

We find no reversible error in the agency's final decision finding that Warbird violated 14 C.F.R. § 91.315 and assessing a civil penalty of $5,500. Warbird's petition for review is **DENIED.**

Footnotes

1Once affirmed by the FAA, Warbird appealed the Cease and Desist order to the U.S. Court of Appeals for the District of Columbia. In an unpublished opinion, the

D.C. Circuit denied Warbird's petition and addressed the argument that flight instruction was not carrying under the regulation very briefly:

> Warbird argues that § 91.315 does not prohibit paid flight training. We disagree. A flight student is a "person." When a student is learning to fly in an airplane, the student is "carr[ied]." And when the student is paying for the instruction, the student is being carried "for compensation."

Warbird Adventures, Inc. v. Fed. Aviation Admin., 843 F. App'x 331, 332 (D.C. Cir. 2021) (per curiam) (internal citations omitted).

See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of App. D.C.Cir. Rule 32.1 and Rule 36.

United States Court of Appeals, District of Columbia Circuit.

WARBIRD ADVENTURES, INC. and Thom Richard,
Petitioners

v.

FEDERAL AVIATION ADMINISTRATION,
Respondent

No. 20-1291September Term, 2020
Filed on: April 2, 2021

On Petition for Review of an Action of the Federal Aviation Administration

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Lauren Lacey Haertlein, General Aviation Manufacturers Association, Washington, DC, for Amicus Curiae General Aviation Manufacturers Association, National Association of Flight Instructors, International Council of Air Shows, North American Trainer Association

Before: Pillard and Walker, Circuit Judges, and Randolph, Senior Circuit Judge.

JUDGMENT

Per Curiam

We heard this petition on the record from the Federal Aviation Administration, the parties' briefs, and oral argument. We fully considered the issues and decided that a published opinion is unnecessary. *See* D.C. Cir. R. 36(d).

We **DENY** the petition for review of the FAA's Emergency Cease and Desist Order.

* * *

Thom Richard, through his company Warbird Adventures, Inc., offers flight instruction in vintage and WWII military aircraft. In 2020, the FAA ordered Warbird to stop providing paid flight instruction in one of the company's planes — the Curtiss-Wright model P-40N — because it was not certified for that purpose.

Warbird petitions for review of the FAA's emergency cease and desist order. We deny the petition because the aircraft is not certified for paid flight instruction and substantial evidence supports the order.

* * *

Under 14 C.F.R. § 91.315, "[n]o person may operate a limited category civil aircraft carrying persons or property for compensation or hire." Warbird's P-40N is a limited category aircraft. Although the owner of a limited category aircraft can sometimes obtain an exemption from § 91.315, Warbird has not requested one. *See id.* § 11.81.

Instead, Warbird argues that § 91.315 does not prohibit paid flight training. We disagree. A flight student is a "person." *Id.* § 91.315; *see also id.* § 1.1. When a student is learning to fly in an airplane, the student is "carr[ied]." *Id.* § 91.315. And when the student is paying for the instruction, the student is being carried "for compensation." *Id.*

Of course, the FAA *could* have chosen to make an exception to this rule for flight instruction. In fact, for other regulations, that's exactly what it did. *See id.* § 91.313. But it made no such exception for § 91.315. And the contrast between the two regulatory schemes reinforces what the plain language suggests: § 91.315's broad text includes no exception for a flight student who is "carr[ied] ... for compensation."

Warbird also argues that there is not substantial evidence to support the emergency order, which depends on a determination by the FAA that "an emergency exists related to safety in air commerce and requires immediate action." 49 U.S.C. § 46105(c). For three reasons, considered together, we disagree. First, after FAA inspectors advised Warbird that § 91.315 prohibits paid flight instruction in the P-40N, Warbird continued to use the P-40N for paid instruction. Second, after the FAA memorialized its notice to Warbird in a letter from the FAA Office of Chief Counsel, and after the FAA initiated an administrative action against

Warbird, Warbird continued to advertise paid flight instruction in the P-40N. And third, Warbird refused to disavow future use of the P-40N for paid flight instruction, even after repeated communications from the FAA.

Perhaps no one of those reasons alone would be enough, but together they amount to substantial evidence supporting the FAA's emergency order. We therefore deny Warbird's petition.

* * *

This disposition is unpublished. *See* D.C. Cir. R. 36(d). We direct the Clerk to withhold this mandate until seven days after resolution of a timely petition for rehearing or for rehearing en banc. *See* Fed. R. App. P. 41(b); D.C. Cir. R. 41(b).

UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

In the Matter of:	)	
	)	
Warbird Adventures, Inc.	)	FAA Order No. 2022-04
	)	
Dkt. No. FAA 2020-0534	)	Served: October 6, 2022

Appearances:

FOR THE RESPONDENT: Robert D. Shulte, Esq.

FOR THE AGENCY: Christopher R. Stevenson, Esq.

DECISION AND ORDER

In 2020, Respondent Warbird Adventures, Inc. ("Warbird") carried a paying student pilot on a flight in a P-40 Warhawk, a vintage fighter plane from World War II classified as a limited category civil aircraft. Administrative Law Judge ("ALJ") Douglas M. Rawald's Initial Decision assessed a $2,500 civil penalty against Warbird for violating Federal Aviation Administration ("FAA") regulations that prohibit such operations.[1] Both parties have appealed. I affirm the

[1] The Initial Decision, served on February 8, 2022, is contained in attachment A to this Decision and Order. The Initial Decision

finding of violation but modify the assessed civil penalty by increasing it to $5,500.

I. Standard of Review

In any appeal from an initial decision, the FAA decisionmaker considers only: "(1) whether each finding of fact is supported by a preponderance of reliable, probative, and substantial evidence; (2) whether each conclusion of law is made in accordance with applicable law, precedent, and public policy; and (3) whether the administrative law judge committed any prejudicial errors."[2]

II. Background

The material facts are not disputed and are not the subject of this appeal. On January 31, 2020, Warbird operated its P-40 civil aircraft with Mr. Ray Allain aboard.[3] Mr. Allain paid Warbird to receive flight training on that flight.[4] Mr. Thom Richard was the pilot in command.[5] Based on these events and circumstances,

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relied on facts found in the ALJ's "Order Granting Complainant's Motion for Partial Summary Judgment and Denying Respondent's Motion for Decision" ("Summary Judgment Order"), served on October 6, 2021. The Summary Judgment Order is contained in attachment B to this Decision and Order. Service certificates are omitted from both attachments.

[2] 14 C.F.R. § 13.233(b) (2022).

[3] Complaint at 1, ¶¶ II. l-4(b); Respondent's First Amended Answer, at 1-2, ¶¶ II. 1-4(b).

[4] *See* Summary Judgment Order at 2, 6.

[5] Complaint at 1, ¶ II. 4(a); Respondent's First Amended Answer, at 2, ¶ II. 4(a).

Complainant charged that Warbird violated 14 C.F.R. § 91.315,[6] which states:

> **§ 91.315 Limited category civil aircraft: Operating limitations.**
>
> No person may operate a limited category civil aircraft carrying persons or property for compensation or hire.[7]

Complainant also charged Warbird with a residual violation under 14 C.F.R. § 91.13(a). It sought a civil penalty of $6,750.[8]

Both parties filed motions for decision, i.e., motions for summary judgment, under 14 C.F.R. § 13.218 (f)(5) (2021).[9] The ALJ found that Warbird violated both regulations as charged but scheduled a hearing to determine the appropriate civil penalty.[10] After the hearing, the ALJ found that Warbird's actions were careless but not intentional.[11] He also found that the violation of § 91.315 was inadvertent and gave Warbird credit for taking corrective action.[12] In addition, he rejected the Complainant's aggravation arguments regarding the operation of military aircraft and for having a poor compliance disposition. The net

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[6] Complaint at 2, ¶ III. 1(a).
[7] 14 C.F.R. ¶ 91.315 (2022). The regulation has not changed since its publication in 1989. *See Revision of General Operating and Flight Rules*, 54 Fed. Reg. 34284, 34308 (Aug. 18, 1989).
[8] Complaint at ¶ III. 4.
[9] *See* Complainant's Motion for Partial Summary Judgment and Respondent's Motion for Decision.
[10] Summary Judgment Order at 6-7.
[11] Initial Decision at 4-5.
[12] *Id.* at 6.

result of these various findings reduced the requested civil penalty of $6,750 to $2,500.[13]

III. Warbird's Appeal

Warbird makes three arguments on appeal. First, it argues that the phrase "carrying persons," used in § 91.315, does not encompass flight instruction.[14] Next, Warbird contends that the FAA has improperly changed its interpretation of the regulation.[15] Finally, based mainly on the first two arguments, it claims it should not be penalized.[16] All three arguments lack merit.

A. Warbird violated § 91.315.

The body of § 91.315 consists of one sentence, with only seventeen words. It does not expressly state exceptions. Nevertheless, Warbird claims that the prohibition against "carrying persons" does not ban flight instruction for compensation in limited category civil aircraft.

First, and beyond reasonable debate, a student pilot is a person.[17] On this point, I fully adopt the ALJ's analysis, which merits no changes.[18]

Second, as to the word "carrying" in § 91.315, Warbird argues that analogies drawn from the "enormous regulatory scheme" found in Title 14 of the Code of Federal Regulations show that "carrying" a

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[13] *Id.* at 7.
[14] Respondent's Appeal Brief at 13-21.
[15] *Id.* at 22.
[16] *Id.* at 25.
[17] 14 C.F.R. § 1.1 (2022).
[18] *See* Summary Judgment Order at 3, part 2.a.

person does not include providing flight instruction to a person aboard the aircraft.[19] Warbird relies on dispersed regulatory texts relating to commercial operations, medical certificates, sport pilot certifications, instructor certifications, passengers, and airworthiness certificates.[20] Tediously explaining each of Warbird's attempted analogies is not necessary.[21] Fairly summarized, Warbird fundamentally collects *expressly stated exceptions* in the cited regulatory analogies to claim that the *general meaning* of "carry," "carrying," or "carriage" (and for light-sport aircraft, "operating") excludes flight training. This approach is patently unreasonable because the regulatory schemes are not analogous; section 91.315 does not contain an express exception. Like the ALJ and the United States

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[19] Respondent's Appeal Brief at 14.

[20] Respondent's Appeal Brief at 15-20.

[21] An example of Warbird's analogies sufficiently demonstrates its argument. Warbird first cites the definition in 14 C.F.R. § 1.1 (2022): "*Commercial operator* means a person who, for compensation or hire, engages in the carriage by aircraft in air commerce of persons or property." Respondent's Appeal Brief at 16. This language is similar to the text of § 91.315. Warbird then cites Part 119, which addresses certification of commercial operators and contains a limited exception explaining when that part does not apply:

> (e) Except for operations when common carriage is not involved conducted with airplanes having a passenger-seat configuration of 20 seats or more, excluding any required crewmember seat, or a payload capacity of 6,000 pounds or more, this part does not apply to
>
> (1) Student instruction;

14 C.F.R. § 119.1(e)(1) (2022). Thus, according to Warbird, because there is an exception ("student instruction," *id.*), the phrase "carriage ... of persons" (defined in § 1.1) generally does not include flight instruction. Respondent's Appeal Brief at 17.

Court of Appeals for the District of Columbia Circuit,[22] I hold that the need for express exclusions in so many instances establishes that "carrying," as related to a person, is a broad term that includes flight instruction.

Warbird has not appealed the finding that Mr. Allain paid Warbird for the flight. Accordingly, the record and law support the conclusion that Warbird operated a limited category civil aircraft carrying a person for compensation, thereby violating 14 C.F.R. § 91.315. The appeal on this issue is denied.

B. The FAA has not changed a regulatory interpretation.

Warbird argues that the FAA has improperly changed its interpretation of § 91.315, but it fails to identify any guidance to the public that has changed.[23] Before the events in question, in 2014, the FAA published the "Morris Interpretation," which stated, "§ 91.315 does not set forth any exception for providing flight training for hire in a limited category aircraft."[24] Throughout this litigation, the Complainant maintained the same position. Likewise, the FAA advocated the same position in a cease and desist action that culminated in the previously mentioned appellate

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[22] Summary Judgment Order at 5; *Warbird Adventures, Inc. v. FAA*, 843 Fed. Appx. 331 (Mem) (DC Cir. 2021).

[23] Respondent's Appeal Brief at 22-25.

[24] *See* Respondent's Appeal Brief, Ex. A-1. The FAA provides this published interpretation online at https://www.faa.gov/about/office_org /headauarters_offices/agc/practice_areas/regulations/internretations/. last visited Sept. 12, 2022. The interpretation is also available through Westlaw. *See* Legal Interpretation to Mr. Gregory Morris, 2014 WL 5319629 (Oct. 7, 2014).

decision.[25] Finally, Warbird cites a Federal Register Notice from the FAA issued on July 12, 2021, but that notice also concluded that "a flight instructor providing flight training" in a limited category civil aircraft "is acting contrary to the regulations."[26] In short, nothing has changed between the Morris Interpretation and the present day. The appeal on this issue is also denied.

C. A civil penalty is appropriate.

Warbird states that "no penalty should accrue" because it "violated no Federal Aviation Regulation."[27] On the contrary, the discussion above demonstrates that Warbird violated § 91.315, so assessing a penalty is appropriate under 49 U.S.C. § 46301.

Warbird also asserts that the FAA permitted it to conduct paid flight training in its P-40, and "on that basis alone, no civil penalty should accrue."[28] The "permission" in question concerns a letter written by FAA Aviation Safety Inspector ("ASI") Larry Enlow.[29] ASI Enlow's letter is discussed in greater detail below,[30] but it does not provide a basis to avoid a civil penalty for violating the regulation. An operator of a limited category civil aircraft is expected to know the requirements of the Federal Aviation Regulation, regardless of "mistaken guidance provided by an FAA

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[25] *See Warbird Adventures, Inc. v. FAA*, 843 Fed. Appx. 331 (Mem) (DC Cir. 2021).
[26] *Notification of Policy for Flight Training in Certain Aircraft*, 86 Fed. Reg. 36493, 36494 (July 12, 2021).
[27] Respondent's Appeal Brief at 25.
[28] *Id.*
[29] *See* Ex. R-2. The same exhibit is included in the appendix to Respondent's Appeal Brief as A-3.
[30] *See infra* Part IV.C.1. and D.

office that did not have authority to change the regulatory requirements."[31] Inaccurate advice can be a mitigating factor in appropriate circumstances, but it does not completely absolve a respondent from liability for a regulatory violation or the resulting penalty.[32]

D. Warbird's appeal is denied.

For the reasons discussed above, I conclude that the ALJ correctly determined that Warbird violated 14 C.F.R. § 91.315 by conducting paid flight training in its P-40 aircraft. As a result, it also committed a residual violation of 14 C.F.R. § 91.13(a). Further, I reject Warbird's assertions that the FAA improperly changed its regulatory interpretation and that no penalty should be assessed. Accordingly, Warbird's appeal is denied.

IV. The Agency's Appeal

The Agency argues that the assessed penalty is too low because the ALJ improperly determined: (1) Warbird's actions were merely careless; (2) mitigation factors applied; and (3) aggravating factors did not apply.[33] As explained below, I agree that the assessed penalties are too low.

A. FAA Order No. 2150.3C provides the FAA's method to achieve consistent and fair civil penalties.

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[31] *Offshore Air*, FAA Order No. 2001-4 at 17 (May 16, 2001), *petition for recon. dismissed*, FAA Order No. 2002-7 (Apr. 16, 2002).
[32] *Offshore Air*, FAA Order No. 2001 4 at 18.
[33] *See* Complainant's Appeal Brief at 7-15.

The Agency's sanction guidance is in Chapter 9 of FAA Order 2150.3C, "FAA Compliance and Enforcement Program" (September 18, 2018) (as amended).[34] An ALJ presiding over an FAA civil penalty case is not an agency employee, but "[n]onentheless, concerning matters of agency law and policy, administrative law judges are subject to the agency."[35] When the Administrator reviews an ALJ's sanction determination, the Administrator may reverse the initial decision if it does not comply with Agency sanction policy in FAA Order 2150.3C.[36] If a civil penalty assessed in an initial decision is inconsistent with the sanction guidance, the Administrator on appeal has "both the authority and duty to impose the agency's policy on appeal."[37] By imposing civil penalties using the policy, the Agency promotes relative consistency in penalties for similar violations.[38] Consistent penalties ensure fairness and deterrence to others similarly situated.[39]

B. The ALJ's Determination under FAA Order 2150.3C

Chapter 9 of FAA Order No. 2150.3C provides the process to identify the sanction range applicable to a specific violation. That process requires identifying

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[34] Chapter 9 of the FAA Order 2150.3C (as amended) was admitted into evidence as Hrg. Ex. A-1.
[35] *Robert M. Riter d/b/a Riter Aviation*, FAA Order No. 2019-1 at 5 (May 15, 2019).
[36] *Id.* at 6.
[37] *Id.* (citing *Warbelow's Air Ventures, Inc.*, FAA Order No. 2000-3 at 20 (Feb. 2, 2000)).
[38] *Regency Air, LLC*, FAA Order 2020-2 at 15 (May 27, 2020).
[39] *Id.*

the severity level of the violation, with Level 1 representing the least severe and Level 3 representing the most severe.[40] Next, the culpability of the violator is judged as either "Careless" or "Reckless or Intentional."[41] The severity level and culpability are then used to identify the specific penalty range using figure 9-1,[42] restated below:

Figure 9-1: Sanction Matrix.

	Careless	Reckless or Intentional
Severity Level 1	Low	Moderate
Severity Level 2	Moderate	High
Severity Level 3	High	Maximum

The ALJ correctly found that Warbird's single violation[43] of § 91.315 is a "[f]ailure to comply with operating limitation," which falls in the Severity Level 2 category.[44] The ALJ also correctly determined that Warbird is a Category I small business.[45] But the ALJ determined that Warbird's culpability rose only to the level of "Careless," which leads to a moderate penalty range of $2,500-$5,500.[46] After applying two mitigating

[40] FAA Order 2150.3C (as amended) at 9-2.
[41] *Id.* at 9-3
[42] *Id.* at 9-3. *See also* Figures 9-1: Sanction Matrix and 9-2: Sanction Ranges Table at 9-4.
[43] The residual violation of 14 C.F.R. § 91.13(a) (2022) was not a distinct act of violation with a distinct and/or separate penalty.
[44] Initial Decision at 4, 7; *see also* Hrg. Ex. A-1 at 9-21 (Fig. 9-9-b(33)).
[45] Initial Decision at 5.
[46] *Id.* at 4-5.

factors and rejecting alleged aggravating factors, the ALJ assessed a penalty of $2,500.[47]

C. The AU's civil penalty determination was inconsistent with FAA policy.

Complainant appeals the culpability determination, the finding of mitigating factors, and the rejection of aggravating factors. I agree that the ALJ erred in finding that the violation was "Careless" and applying mitigation factors. These errors are prejudicial. But I do not find that aggravating factors apply, and I recognize that FAA personnel failed to provide written correction of ASI Enlow's erroneous advice to Warbird.

1. Warbird's violation was intentional, not merely careless.

As FAA Order 2150.3C explains, all violations of FAA regulations are at least careless. On the other hand, a "violation is intentional when the violator's conduct is deliberate and the violator knows that the conduct is contrary to statute or regulation, or is otherwise prohibited."[48]

Before the operation on January 31, 2020, Mr. Thom Richard, the sole owner of Warbird Adventures, Inc.,[49] knew that the operation was contrary to § 91.315. The record shows the following timeline:

- In 2014, the FAA's Office of the Chief Counsel

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[47] *Id.* at 7.
[48] FAA Order 2150.3C (as amended) at 9-3.
[49] Tr. 72:8-14 (Richard).

issued the previously mentioned Morris Interpretation, which explained that flight training in limited category civil aircraft may only be conducted under an exemption from the regulation issued under 14 C.F.R. Part 11.[50]

- In 2015, Mr. Richard researched the authority to provide compensated flight instruction in limited category civil aircraft and contacted the Orlando Flight Standards District Office ("FSDO").[51]
- In 2016, ASI Larry Enlow from the FSDO responded by letter to Mr. Richard (the "Enlow Letter").[52] That letter mistakenly concludes:

> Additionally, flight training may be conducted in an aircraft holding a limited category airworthiness certificate. Although 14 CFR 91.315 states that, "no person may operate a limited category civil aircraft carrying persons or property for compensation or hire", such limitation does not apply to flight training since payment for flight instruction is not considered to be compensation for carriage of persons or property.

Notably, the Enlow Letter does not mention the Morris Interpretation issued in 2014.

- In April of 2019, Warbird Adventures, Inc.

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[50] Respondent's Appeal Brief, Ex. A-1. *See also* Complainant's Motion for Partial Summary Judgment, Ex. A.
[51] Initial Decision at 4.
[52] *See supra* Part III.C.

participated in a six-day fly-in airshow in Lakeland, Florida, called "Fun 'n Sun." Airshow personnel contacted the FAA to express concern that Warbird was "giving rides for compensation" in the P-40 but had not provided the airshow organizers with documentation showing authorization to conduct such operations.[53]

- As a result of the organizers' concerns, on April 3, 2019, while still at the airshow, ASIs Joseph Gramzinski and David Fernandez spoke with Mr. Richard.[54]
- ASI Gramzinski asked Mr. Richard for documentation permitting his operations, and Mr. Richard produced a binder. The binder contained the Morris Interpretation from 2014 and the Enlow Letter from 2016.[55] ASI Gramzinski also presented a copy of the Morris interpretation to Mr. Richard.[56] Both parties agree that the inspectors advised Mr. Richard that he "may" be in violation of § 91.315.[57] The inspectors also stated at that time that Enlow had no authority to issue the letter as written.[58] A

[53] Tr. 116:7-15 (Gramzinski). In quoting this testimony, I make no finding as to whether Warbird was providing instruction or rides at the airshow in 2019. The testimony, however, explains the inspector's reason for subsequently conferring with Mr. Richard. *See infra* p. 9.
[54] Tr. 80:15-21 (Richard); 115:8-116:19 (Gramzinski).
[55] Tr. 118:4-12 (Gramzinski); Tr. 111:20-24 (Richard); Hrg. Ex. A-2.
[56] Tr. 117:5-7 (Gramzinski); Tr. 111:20-24 (Richard).
[57] Hrg. Ex. A-2; Tr. 122:5-10 (Gramzinski); Tr. 82:12-15 (Richard).
[58] Tr. 1266:1-6 (Gramzinski).

contemporaneous memo by ASI Gramzinski memorialized the conversation:

> I [Gramzinski] advised Mr. Thom Richard that he may be in violation of CFR 91.315 and he advised he and his attorneys do not agree. He stated he would continue to operate as he always has. I explained the Morris interpretation letter is the most recent and current legal interpretation. Mr. Thom Richard advised he does not agree with it and if we want to proceed with a violation against him then we should because, he will not stop operating.[59]

This evidence, viewed in its entirety, demonstrates that Warbird's operation on January 31, 2020, was not merely careless. Warbird's owner, Mr. Richard, knew that § 91.315 posed a problem for his firm's operations, researched the issue, and consulted with attorneys. He possessed a copy of the Morris Interpretation, but he consciously favored the flawed Enlow Letter even after two other inspectors gave him reason to question its reliability. In short, he was not careless! his action was deliberate, and he knew his interpretation did not align with § 91.315, the FAA's published interpretation, and the most recent oral advice from two ASIs. I find, therefore, that Warbird's violation was intentional under the sanction guidance.

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[59] Hrg. Ex. A-2.

2. Warbird's violation was not inadvertent.

In analyzing mitigation, the ALJ determined Warbird's actions were inadvertent.[60] FAA's sanction policy considers a violation inadvertent "when it is the result of both inattention and a lack of purposeful choice." [61] Further, the guidance states that "[a] violation is not inadvertent if it results from the violator's conscious decision to take or not take any action that could have prevented the violation."[62]

As discussed in the previous section, Warbird's violation in January 2020 was intentional, not careless. Similarly, Warbird's action was the conscious result of a purposeful choice. Moreover, Warbird could have prevented the violation by either refraining from its training operations or seeking an exemption under Part 11. As Warbird admits, it conducted the operation on January 31, 2020. Further, Warbird did not apply for a Part 11 exemption until April 2, 2021.[63]

There is no basis in the record to conclude that the action was inadvertent. I find that the ALJ committed an error on this point.

3. Neither lowering the penalty for corrective action nor increasing the penalty for a poor compliance disposition is appropriate.

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[60] Initial Decision at 6.
[61] FAA Order 2150.3C (as amended) at 9-8.
[62] *Id.* at 9-8, 9-9.
[63] Tr. 85:9-10 (Richard).

Complainant asserts that the ALJ erred by finding that Warbird mitigated the offense by taking meaningful corrective action.[64] On the contrary, it charges that an aggravating factor should be applied for having a poor compliance disposition.[65]

The FAA civil penalty guidance discusses when corrective action is a mitigating factor for determining a civil penalty. It states:

> (6) *Corrective Action.* Corrective action is a mitigating factor when it exceeds regulatory or statutory requirements, corrects the underlying violation, and is designed to prevent future violations. The significance of corrective action as a mitigating factor is determined by the timeliness of the action (e.g., before FAA discovery of the violation, after discovery but before legal enforcement action is initiated, or after legal enforcement action is taken) and how extensive it is. Prompt corrective action ordinarily warrants greater mitigation than delayed corrective action. Systemic change intended to prevent future violations should be given greater mitigation consideration. Corrective action that simply places the violator in compliance with the regulations is not a mitigating factor.[66]

Warbird ceased providing flight training in its P-40 aircraft only after the FAA issued a cease and desist

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[64] Complainant's Appeal Brief at 12-13.
[65] Id. at 13-15.
[66] FAA Order 2150.3C (as amended) at 9-8.

order. [67] Further, Warbird delayed filing for an exemption under Part 11 until April 2, 2021, i.e., the day the Court of Appeals denied its petition for review of the cease and desist order.[68] Nothing about Warbird's compliance effort demonstrates commendable actions beyond bringing itself into compliance with the regulation. Merely complying with regulatory requirements is not considered a mitigating factor when assessing a civil penalty.[69] I find that the ALJ erred on this point.

While insufficient evidence supports mitigation based on corrective action, the same lack of proof proscribes applying an aggravation factor for a poor compliance disposition. Complainant cites incomplete testimony regarding Warbird's advertising campaign after the complainant issued the notice of violation[70] and refers to the previously mentioned cease and desist litigation. Still, the details are not well developed in the record. I find the ALJ did not err in refusing to apply an aggravating factor for a poor compliance disposition.

D. Failure to expressly correct the Enlow Letter mitigates the severity of the violation.

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[67] Tr. 84:11-14 (Richard).

[68] *Compare* Tr. 85:9-10 (Richard) (stating exemption request filed on April 2, 2021) *with Warbird Adventures, Inc. v. FAA*, 843 Fed. Appx 331 (D.C. Cir. Apr. 2, 2021) (denying petition for review of the FAA's emergency cease and desist order).

[69] *Id. See also Regency* Air, LLC, FAA Order No. 2020-2 (May 27, 2020); *Air Solutions, LLC and Air Solutions Group, Inc.*, FAA Order No. 2009-1 at 10 (Jan. 12, 2009).

[70] Complainants' Appeal Brief at 14 (citing Tr. 108-109 (Richard)).

Warbird argues that FAA employees contributed to Warbird's failure to abide by the regulation, and it should not be further penalized.[71] Warbird cites *Administrator v. Smith*, NTSB Order EA-4088 (1994), and I have recognized above that erroneous advice contributing to a violation can serve as a mitigating factor.[72] The circumstances surrounding this violation support reducing the penalty.

The ALJ found that between the conversations on April 3, 2019, at the Fun 'n Sun airshow, and the violation on January 31, 2020, no FAA official took specific measures to correct or retract the Enlow Letter.[73] The complainant does not challenge this finding, and evidence to the contrary is not in the record. Without qualifying or decreasing Warbird's overarching obligation to comply with the plain language of § 91.315, I recognize that FAA personnel erred by: (1) issuing the Enlow Letter in the first instance; and (2) failing to definitively correct the erroneous advice in writing after the airshow. Without these mistakes, the violation on January 31, 2020, might not have occurred.

E. Absent prejudicial errors, the appropriate civil penalty is $5,500.

An ALJ's error "is prejudicial when it creates 'substantial doubt' that the forum below would have

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[71] Respondent's Reply Brief at 3.

[72] *See supra* Part III.C. (citing *Offshore Air*, FAA Order No. 2001-4 at 17 (May 16, 2001), *petition for recon. dismissed*, FAA Order No. 2002-7 (Apr. 16, 2002)).

[73] Initial Decision at 6-7 ("... never followed by a more official, or definitive, statement from an FAA official before the date of the alleged violation.").

reached the same result but for the error."[74] The ALJ's errors in this matter are prejudicial because they inappropriately reduced the civil penalty assessment. The penalty must therefore be reevaluated under FAA Order 2150.3C.

Modifying the culpability assessment from "Careless" to "Reckless or Intentional" yields a "High" penalty for a Severity Level 2 violation.[75] A high penalty range for a small business like Warbird is between $5,500 and $8,000.[76] The starting point for applying aggravating and mitigation factors is the middle of the range, which in this case, is $6,750.[77]

Without aggravating factors, I find no reason to increase the amount. Moreover, decreasing the amount based on mitigation factors for corrective action and inadvertence is inappropriate in this case. Nevertheless, I recognized above that FAA personnel provided erroneous advice without prompt, written correction before the violation. This warrants reducing the penalty to the bottom of the penalty range, i.e., $5,500.

V. Conclusion

Based on the preceding discussion and analysis, I deny Warbird's appeal in its entirety. I grant Complainant's appeal to the extent described above and modify the civil penalty determination for the violation of 14 C.F.R. § 91.315. I assess a civil penalty in this matter of $5,500.*

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[74] *Felts Field Aviation*, FAA Order 2020-6 at 5 (Oct. 28, 2020).
[75] FAA Order 2150.3C (as amended), at 9-4, Figure 9-1 Sanction Matrix and 9-2: Sanction Ranges Table.
[76] FAA Order 2150.3C (as amended) at 9-4, Figure 9-2: Sanction Ranges Table.
[77] *Id.* at 9-3.

Billy Nolen
ACTING ADMINISTRATOR
Federal Aviation Administration

* This order shall be considered an order assessing civil penalty unless Respondent files a petition for review within 60 days of service of this decision in the U.S. Court of Appeals for the District of Columbia Circuit or the U.S. Court of Appeals for the Circuit in which the Respondent resides or has its principal place of business. 14 C.F.R. §§ 13.16(k), 13.233(j)(2), 13.235 (2022).

SERVED: February 8, 2022

U.S. DEPARTMENT OF TRANSPORTATION
OFFICE OF HEARINGS
WASHINGTON, DC

In the Matter of: Warbird Adventures, Inc. Respondent	))))))	 Docket No. FAA-2020-0534 Case No. 2020SO150011

INITIAL DECISION

1. Pertinent Procedural History

On July 6, 2020, the Complainant served the Respondent a Notice of Proposed Civil Penalty in the amount of $6,750. On July 28, 2020, the Complainant served the Respondent a Final Notice of Proposed Civil Penalty for the same amount.

On July 28, 2020, the Respondent timely filed a Request for Hearing. On August 3, 2020, the Complainant timely filed its complaint. On August 5, 2020, the Respondent timely filed its Answer, followed by an Amended Answer on November 23, 2020.

On January 19, 2021, the undersigned judge appointed himself to this proceeding.

On August 20, 2021, the Complainant filed a Motion for Partial Summary Judgment in which it argued that there were no genuine issues of material fact with respect to the alleged violations, and that it was entitled to partial summary judgment on the alleged violations. That same date, the Respondent filed

a Motion for Decision in which it also claimed that there were no genuine issues of material fact in dispute, but argued that the case should instead be decided in its favor.

On September 3, 2021, the Complainant filed its Opposition to Respondent's Motion for Decision. On September 10, 2021, the Respondent filed its Opposition to Complainant's Motion for Partial Summary Judgment.

On October 6, 2021, the undersigned judge issued an Order Granting Complainant's Motion for Partial Summary Judgment and Denying Respondent's Motion for Decision. Specifically, the undersigned judge determined that the Respondent had committed the alleged violation of 14 C.F.R. § 91.315 and, as a result, committed a residual violation of 14 C.F.R. § 91.13(a). The undersigned judge further directed that the matter should proceed to a hearing to determine the appropriate civil penalty.

On October 27, 2021, the undersigned judge provided notice that a hearing in this matter would be held virtually through the use of videoconferencing software beginning on January 11, 2022.[1]

At the hearing, Andrew Lambert appeared on behalf of the Complainant and Robert Schulte appeared on behalf of the Respondent.

Based upon the evidence presented at the hearing and the applicable law, the undersigned judge has come to the following decision.

2. Summary of Violations

[1] Both parties waived any objection to a virtual hearing in light of travel restrictions and a lack of hearing room availability due to the ongoing COV1D-19 pandemic.

As noted above, the undersigned judge previously found that the Respondent violated 14 C.F.R. § 91.315, and, as a result, committed a residual violation of 14 C.F.R. § 91.13(a). Specifically, the Respondent violated 14 C.F.R. § 91.315 on or about January 30, 2020, when it operated a limited category' civil aircraft while a person, Ray Allain, was aboard the subject flight and had paid the Respondent to receive flight training on the flight, thus qualifying as payment of compensation for the flight. While the Respondent argued that Mr. Allain's payment for flight training should not be considered compensation for carriage, the undersigned judge found no such exception in the applicable regulations. Because the Respondent's violation of 14 C.F.R. § 91.315 was an operational violation, the Respondent's operation of the flight was in a careless or reckless manner so as to endanger the life or property of another, thus also violating 14 C.F.R. § 91.13(a).

3. Civil Penalty

The Complainant seeks a total civil penalty of $6,750 for the alleged violations.[2] The burden of justifying the proposed civil penalty falls upon the Complainant.[3] In attempting to meet this burden, the Complainant provided testimonial evidence from Aviation Safety Inspector ("ASI") Thomas Leahy that

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[2] *See* Complaint at 2. During closing argument, Complainant's counsel confirmed that the civil penalty sought was not increased by the residual violation of 14 C.F.R. § 91.13(a). See Jan. 11, 2022 Hearing Transcript at 141.

[3] *See In re Northwest Airlines, Inc.*, FAA Order No. 1990-37 at 7 (Decision and Order, Nov. 7, 1990) (finding the FAA bore the burden of justifying the amount of the civil penalty it sought.).

related to the Complainant's assessment of the civil penalty.[4] Additionally, the Complainant submitted into evidence an excerpt of Chapter 9 of FAA Order No. 2150.3C, the FAA's Legal Enforcement Action Sanction Policy.[5]

An appropriate civil penalty must reflect the totality of the circumstances surrounding the violation,[6] while providing enough "bite" to serve as a deterrent to both the current violator and the industry as a whole in order to promote the goal of safety.[7] Section g of Paragraph 6 of Chapter 9 of FAA Order No. 2150.3C provides a non-exhaustive list of mitigating or aggravating factors and elements that may be considered:

> 1. degree of hazard; 2. violation history; 3. level of certificate and experience; 4. compliance disposition of violator; 5.

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[4] ASI Leahy testified regarding the safety concerns associated with flying surplus World War II aircraft, such as the aircraft involved in this case, that have a limited category special airworthiness certificate. Specifically, ASI Leahy testified that these aircraft received special airworthiness certificates because they were built as war machines to accomplish wartime missions, as opposed to being designed, engineered, or manufactured to meet any civil safety standard. As a result, these aircraft can present operational challenges to someone not familiar with how to pilot the aircraft. *See* Jan. 11, 2022 Hearing Transcript at 23-27.

[5] *See* Ex. A-1.

[6] *See In re Ventura Air Services, Inc.*, FAA Order No. 2012-12 at 26 (Decision and Order, Nov. 1, 2012); *In re Folsom's Air Service, Inc.*, FAA Order No. 2008-11 at 14 (Decision and Order, Nov. 6, 2008).

[7] *See In re Toyota Motor Sales, USA, Inc.*, FAA Order No. 1994-28 at 11 (Order and Decision, Sept. 30, 1994); *In re Charter Airlines, Inc.*, FAA Order No. 1995-8 at 28 (Decision and Order, May 9, 1995).

> systemic/isolated violations; 6. corrective action; 7. inadvertence; 8. voluntary reporting of violations; and 9. criminal conviction.[8]

While the undersigned judge is not expressly required to follow the provisions of FAA Order No. 2150.3C,[9] it does provide guidance.[10] Further, the Administrator has stated that "similar criteria should be considered in assessing civil penalties in non-hazardous materials types of cases"[11] to the following statutorily required factors in considering a civil penalty involving hazardous materials violations:

> (1) the nature, circumstances, extent, and gravity of the violation; (2) with respect to the violator, the degree of culpability, any history of prior violations, the ability to pay, and any effect on the ability to continue to do business; and (3) other matters as justice may require.[12]

The undersigned judge considered all the pertinent factors to assess a civil penalty that will deter

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[8] *See* Ex. A-1 at 6-9.

[9] *See Folsom's Air Service, Inc.*, FAA Order No. 2008-11 at 14 (finding that because administrative law judges are not agency personnel, they are not expressly required to follow the FAA's civil penalty guidance).

[10] *See In re Air Carrier*, FAA Order No. 1996-19 at 7 (Decision and Order, June 4, 1996) (*citing Northwest Airlines, Inc.*, FAA Order No. 1990-37 at 8).

[11] *In re Luxemburg*, FAA Order No. 1994-18 at 6 (Order and Decision, June 22, 1994) (*citing Northwest Airlines, Inc.*, FAA Order No. 1990-37 at 12 n. 9).

[12] 49 U.S.C. § 46301(e). *See also* 14 C.F.R. § 13.16(c).

future violations by the Respondent and the industry as a whole. In considering the relevant factors, it is important to note that the Respondent did not provide evidence of financial hardship regarding its ability to absorb a sanction.[13]

In accordance with the guidance found at FAA Order No. 2150.3C, the Complainant first determined that the Respondent's alleged violations should be considered a "[f]ailure to comply with operating limitation", which falls in the Severity Level 2 category.[14] After reviewing the various violations listed in the tables in fig. 9-9 of FAA Order No. 2150.3C, the undersigned judge concurs that this is the most accurate category for the Respondent's violations.

The guidance than directs the Complainant to assess the culpability level of the Respondent. The Complainant contends that the Respondent's actions in

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[13] Mr. Richard, the owner of Respondent, testified that his company has had a severe financial loss due to his inability to continue to provide flight training in the limited category aircraft, but did not provide specific details of the Respondent's current financial situation or submit any documentary evidence in support of this statement. *See* Jan. 11, 2022 Hearing Transcript at 89-90. Further, Respondent's counsel argued that Mr. Richard has already spent tens of thousands of dollars on this matter but did not further discuss the Respondent's financial situation. *See* Jan. 11, 2022 Hearing Transcript at 150. In FAA civil penalty matters, respondents must present more than mere vague statements in order to raise the issue of an inability to pay a sanction. *See In re Conquest Helicopters, Inc.*, FAA Order No. 94-20 at 4 (Decision and Order, June 22, 1994), *citing In re Lewis*, FAA Order No. 91-3 at 10 (Decision and Order Feb. 4, 1991) (finding that "[v]ague and uncorroborated testimony regarding income and expenses is insufficient to prove financial hardship.").

[14] *See* Jan. 11, 2022 Hearing Transcript at 131 and Ex. A-1 at 21 (Fig. 9-9-b(33).

this case were intentional.[15] The Respondent, however, presented evidence that suggests its actions did not rise to this level of culpability. Specifically, Mr. Richard testified that prior to "acquiring [Respondent's] limited category aircraft for the purposes of… flight instruction for hire," he "conducted extensive research on the subject" and "also contacted the Orlando FSDO."[16] In response to his queries, Mr. Richard received a letter from ASI Larry Enlow on January 7, 2016.[17] In this letter, ASI Enlow advised Mr. Richard that paid flight training was allowed in a limited category aircraft.[18] After receiving this letter, the Respondent purchased a limited category aircraft, a P-40 Warhawk, and started offering flight training for payment.[19] Mr. Richard further testified that the Respondent would not have invested in this limited category aircraft had ASI Enlow's letter stated that 14 C.F.R. § 91.315 prohibited offering paid flight

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[15] *See* Jan. 11, 2022 Hearing Transcript at 131 and 136.

[16] *See* Jan. 11, 2022 Hearing Transcript at 74-75.

[17] *See* Jan. 11, 2022 Hearing Transcript at 75-77. During the hearing, ASI Joseph Gramzinski opined that the letter from ASI Enlow may not be authentic. *See* Jan. 11, 2022 Hearing Transcript at 117. The undersigned judge gives this statement no weight, as there is no evidence that this letter was fraudulent. Complainant's counsel conceded in closing argument that they were not alleging the letter was fake. *See* Jan. 11, 2022 Hearing Transcript at 153.

[18] *See* Jan. 11, 2022 Hearing Transcript at 75-77 and Ex. R-2. Notably, the last paragraph of the January 7, 2016 letter reads: "flight training may be conducted in an aircraft holding a limited category airworthiness certificate. Although 14 CFR 91.315 states that, [']no person may operate a limited category civil aircraft carrying persons or property for compensation or hire[‘], such limitation does not apply to flight training since payment for flight instruction is not considered to be compensation for carriage of persons or property." *See* Ex. R-2.

[19] *See* Jan. 11, 2022 Hearing Transcript at 76-78.

instruction in a limited category aircraft.[20] This written statement from an FAA official provides sufficient basis for understanding why the Respondent would have reasonably believed it was lawful to provide flight training for payment in 2016.

The Respondent's understanding, however, should have been called into question after Mr. Richard met ASI Gramzinski at an airshow in April 2019. Upon learning the Respondent was offering flight training for hire in the P-40 Warhawk, ASI Gramzinski told Mr. Richard that the Respondent may be in violation of 14 C.F.R. § 91.315 if it continued to offer flight training for payment in a limited category aircraft.[21] By choosing to rely upon the past advice of ASI Enlow even after learning of this possible concern from ASI Gramzinski, the Respondent carelessly violated the applicable regulations when it provided paid flight training in the P-40 on or about January 30, 2020.

According to the FAA's enforcement guidance, a civil penalty in the moderate range, $2,500- $5,500, is recommended for a careless Severity Level 2 violation by a small business such as the Respondent.[22] Given the enforcement guidance's recommendation to start in the middle of the range,[23] a civil penalty in the amount of $4,000 is the appropriate starting point for the Respondent's regulatory violations. In deciding where in the range this case falls, there is additional mitigation to consider: inadvertence and corrective action.

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[20] *See* Jan. 11, 2022 Hearing Transcript at 112.
[21] *See* Jan. 11, 2022 Hearing Transcript at 82-85 and Ex. A-2.
[22] *See* Ex. A-1 at 4 (Figs. 9-1 and 9-2).
[23] *See* Ex. A-1 at 3 (stating "Enforcement counsel begins with a sanction at the midpoint of the applicable range...").

According to the FAA civil penalty guidance, "[a] violation is inadvertent when it is the result of both inattention and a lack of purposeful choice."[24] As discussed in detail above, the Respondent's actions in this case were careless, not reckless or intentional, in that Mr. Richard relied upon a letter from ASI Enlow that was never rescinded by the FAA.[25] The record clearly indicates that ASI Gramzinski only told Mr. Richard that he "may" be in violation of 14 C.F.R. § 91.315 if he continued his operations,[26] an equivocal statement that was never followed by a more official, or definitive, statement from an FAA official before the date of the alleged violation. Further, the FAA's own statements in the Federal Register attest to the possibility of industry-wide confusion on this point.[27] In light of these facts, the undersigned judge finds the Respondent's violation of these rules inadvertent.

The FAA civil penalty guidance further explains that corrective action "is a mitigating factor when it… is designed to prevent future violations."[28] The Respondent in this case has petitioned for an exemption

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[24] See Ex. A-1 at 8.

[25] *See* Jan. 11, 2022 Hearing Transcript at 84 and Ex. R-2.

[26] ASI Gramzinski's inspector statement, which was written the same afternoon he met with Mr. Richard, clearly states: "I reiterated three more times that he *may* be in violation if he continues to operate for compensation." Ex. A-2 (emphasis added). While ASI Gramzinski's testimony at the hearing differed on the details of this conversation, the inspector statement was made closer in time to the conversation and is therefore the more credible source of information on this discussion. *Cf.* Jan. 11, 2022 Hearing Transcript at 117 and 126 with Ex. A-2.

[27] *See* Ex. R-11 at 3 (stating that "[t]he FAA acknowledges that the disconnect between the regulations and the guidance to inspectors has created confusion in industry.").

[28] *See* Ex. A-1 at 8.

to the applicable regulations in order to continue to provide paid flight training in this aircraft.[29] If the exemption is granted, the Respondent will be able to provide flight training in its limited category aircraft without committing future violations.[30] Notably, Complainant's counsel acknowledged that the Respondent's corrective action in petitioning for an exemption constituted mitigation.[31]

The Complainant's arguments regarding possible aggravation are not convincing. The Complainant argued that the potential operational challenges posed by an aircraft designed for military purposes created a degree of hazard sufficient enough to warrant aggravation.[32] In this case, however, the facts as presented by the Respondent, and not rebutted by the Complainant, are that the carriage for compensation was in order to train the paying party, Mr. Allain, how to properly fly the aircraft to avoid these very same operational challenges. While these safety concerns could be deemed aggravating where payment was for passengers brought aboard merely for a ride (as opposed to flight instruction), those concerns do not seem to apply here where the purpose of the flight was to help train the paying party to safely handle the aircraft.[33] Further, it is noteworthy on this point that the Respondent has an accident-free record

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[29] *See* Jan. 11, 2022 Hearing Transcript at 85.
[30] *See* Jan. 11, 2022 Hearing Transcript at 28-29.
[31] *See* Jan. 11, 2022 Hearing Transcript at 140-141.
[32] *See* Jan. 11, 2022 Hearing Transcript at 133-134.
[33] During closing arguments, Complainant's counsel conceded that the proposed civil penalty calculation was unaffected by any belief that the Respondent was possibly providing the paying party a flight that was non-instructional in nature. *See* Jan. 11, 2022 Hearing Transcript at 151.

and that no one has ever been injured as a result of its operation of this limited category aircraft.[34] The Complainant also argued that the Respondent's compliance disposition was aggravating.[35] However, none of the examples cited by the Complainant during closing argument rise to the level explained in FAA Order No. 2150.3C.[36] If anything, they amount to contesting the violation, something the guidance specifically states is not evidence of a poor compliance attitude.[37]

In light of all the circumstances in the case, the undersigned judge finds a civil penalty in the amount of $2,500 is appropriate for the Respondent's violation of 14 C.F.R. § 91.315 and residual violation of 14 C.F.R. § 91.13(a).

Therefore, pursuant to 14 C.F.R. § 13.205(a)(9), **IT IS HEREBY ORDERED:**[38] the Respondent shall pay a civil penalty in the amount of $2,500.[39]

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[34] *See* Jan. 11, 2022 Hearing Transcript at 84-85.

[35] *See* Jan. 11, 2022 Hearing Transcript at 134-135.

[36] *See* Ex. A-1 at 8.

[37] *See* A-1 at 8. (stating "[i]n evaluating compliance disposition, the FAA does not view a violator as having a poor attitude because the violator ...contests the violation.").

[38] Pursuant to 14 C.F.R. § 13.233(a), "A party may appeal the initial decision, and any decision not previously appealed pursuant to §13.219, by filing a notice of appeal with the FAA decisionmaker. A party must file the notice of appeal in the FAA Hearing Docket using the appropriate address listed in § 13.210(a). A party shall file the notice of appeal not later than 10 days after entry of the oral initial decision on the record or service of the written initial decision on the parties and shall serve a copy of the notice of appeal on each party."

[39] 14.C.F.R, § 13.232(d), governing an order assessing a civil penalty states: "Unless appealed pursuant to §13.233 of this subpart, the initial decision issued by the administrative law judge shall be considered an order assessing civil penalty if the

DOUGLAS M. RAWALD
Administrative Law Judge

Attachments:
1. Service List
2. Appendix A: Complainant's Exhibits
3. Appendix B: Respondent's Exhibits

Docket No. FAA-2020-0534
(Civil Penalty Action)

Appendix A: Complainant's Exhibits

A-1 Excerpt from FAA Order 2150.3C, Chapter 9 - Legal Enforcement Action Sanction Policy

A-2 Aviation Safety Inspector Joseph Gramzinski Inspector Statement (dated April 3, 2019)

Docket No. FAA-2020-0534
(Civil Penalty Action)

Appendix B: Respondent's Exhibits

R-1 AC 21-37 (dated June 14, 1994)

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administrative law judge finds that an alleged violation occurred and determines that a civil penalty, in an amount found appropriate by the administrative law judge, is warranted."

R-2 Letter from Larry Enlow, Federal Aviation Inspector, to Thom Richard (dated Jan. 7, 2016)

R-3 *Withdrawn*

R-4 *Withdrawn*

R-5 *Withdrawn*

R-6 *Withdrawn*

R-7 *Admission denied due to lack of relevance*

R-8 Letter from Robert C. Carty, Deputy Executive Director, Flight Standards Service, to Experimental Aircraft Association (dated July 22, 2021)

R-9 Letter from Mark Bury, Acting Chief Counsel, to Thom Richard (dated September 9, 2021)

R-10 FAA Compliance Program (https://www.faa.gov/about/initiatives/cp. last updated November 19, 2021)

R-11 86 FR 36493-36496 (dated July 12, 2021)

SERVED: October 6, 2021

U.S. DEPARTMENT OF TRANSPORTATION
OFFICE OF HEARINGS
WASHINGTON, DC

In the Matter of: Warbird Adventures, Inc. Respondent	))))))	 Docket No. FAA-2020-0534 Case No. 2020SO150011

ORDER GRANTING COMPLAINANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND DENYING RESPONDENT'S MOTION FOR DECISION

On August 20, 2021, the Complainant filed a Motion for Partial Summary Judgment in which it argues that there are no genuine issues of material fact with respect to the alleged violations, and that it is entitled to partial summary judgment on the alleged violations. Specifically, the Complainant argues that the undisputed evidence shows that on January 31, 2020, the Respondent operated a limited category aircraft for compensation while a person was on board. The Complainant therefore asks that the undersigned judge find the Respondent violated 14C.F.R. § 91.315.

That same date, the Respondent filed a Motion for Decision in which it also claims that there are no genuine issues of material fact in dispute, but argues that the case should instead be decided in its favor. Specifically, the Respondent argues that the

Complainant "unreasonably interprets § 91.315 to apply to flight training for compensation" and that there would be no basis for the alleged residual violation of 14 C.F.R. § 91.13(a) without the alleged violation of 14 C.F.R. § 91.315.[1]

On September 3, 2021, the Complainant filed its Opposition to Respondent's Motion for Decision. The Complainant argues that the language of 14 C.F.R. § 91.315 is "unambiguous and self-explanatory" and that "the unequivocal plain language of section 91.315 prohibits operators from accepting compensation for carrying persons in a limited category aircraft."[2]

On September 10, 2021, the Respondent filed its Opposition to Complainant's Motion for Partial Summary Judgment, arguing that the Complainant's civil penalty action is without basis in fact or law.

For the reasons explained below, the Complainant's Motion for Partial Summary Judgment is granted, and the Respondent's Motion for Decision is denied.

1. Legal Authority

Pursuant to 14 C.F.R. § 13.218(f)(5):

> A party may make a motion for decision, regarding all or any part of the proceedings, at any time before the administrative law judge has issued an initial decision in the proceedings. The administrative law judge shall grant a party's motion for decision if the

[1] *See* Respondent's Mot. Decision at 2-3.
[2] *See* Complainant's Opp. Respondent's Mot. Decision at 1-2.

> pleadings... show that there is no genuine issue of material fact and that the party making the motion is entitled to a decision as a matter of law. The party making the motion for decision has the burden of showing that there is no genuine issue of material fact disputed by the parties.

An issue is "genuine" if the evidence is such that a reasonable trier of fact could return a verdict for the non-moving party,[3] and a fact is "material" if it can affect the substantial outcome of the litigation.[4] While the regulations governing Federal Aviation Administration ("FAA") civil enforcement proceedings do not discuss motions for summary judgment, such motions are treated as motions for decision.[5]

2. Discussion

Based upon the pleadings in this matter, it is clear there are no genuine issues regarding any

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[3] *See Scott v. Harris*, 550 US 372, 380 (2007) (finding no genuine issue where the record could not support a rational trier of fact finding in favor of the nonmoving party). *See also Holcomb v. Powell*, 433 F.3d 889, 895 (D.C. Cir. 2006) (citing *Anderson v. Liberty Lobby Inc.*, 477 US 242, 248 (1986) (finding an issue to be genuine if it supports a finding in favor of the nonmoving party)).

[4] *See Holcomb*, 433 F.3d at 895 (finding a fact to be material if it could affect the outcome). *See also Anderson*, 477 US 242 at 248 (stating that to be material, a fact must be more than irrelevant or unnecessary; a material fact must be able to affect the outcome of the case).

[5] *See In re Pacific Aviation lnt'l, Inc.*, FAA Order No. 97-8 at 8 (Decision and Order, Feb. 20, 1997) (stating that motions for summary judgment are "analogous to motions for decision under the FAA Rules of Practice.").

material facts in this case. Under 14 C.F.R. § 91.315 "[n]o person may operate a limited category civil aircraft carrying persons or property for compensation or hire." The Respondent admitted that, on or about January 31, 2020, it operated civil aircraft N977WH, a limited category aircraft.[6] The Respondent further admitted that Ray Allain was aboard the subject flight, and that Mr. Allain paid the Respondent for the flight, albeit "to receive flight training/instructions as a flightcrew member."[7] There are, then, no genuine issues regarding any material facts due to these admissions. The only questions pertain to applying the law to these facts. The positions of the parties on how to do so differs. As further explained below, the undersigned judge agrees with the position put forward by the Complainant.

a. A flightcrew member is a "person" as defined in the regulations.

Because 14 C.F.R. § 91.315 prohibits the carrying of persons for compensation or hire in a limited category civil aircraft, the definition of a "person" is essential to this proceeding. The Respondent argues that Mr. Allain was aboard the subject flight as a flightcrew member, and so does not qualify as a person under the regulation.[8] This interpretation finds no support in the applicable regulations. The regulatory definition of a person is

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[6] *See* Complaint at 1, ¶¶ 1-4 and Respondent's First Amended Answer at 2, ¶¶ 1-4.

[7] *See* Complaint at 1, ¶¶ 4a-c and Respondent's First Amended Answer at 2, ¶¶ 4a-c.

[8] *See* Respondent's Mot. Decision at 5.

broad and includes an "individual."[9] Courts have long held that the "'plain meaning' rules of statutory construction apply to the [i]nterpretation of administrative regulations,"[10] and that regulations should be construed in the same manner as statutes, "by ascertaining its plain meaning."[11] The dictionary definition of individual includes a "human being."[12] Given the unambiguous language used, and the lack of any exception to the term, there is no reason to look beyond the plain words of the pertinent regulations, which support a finding that a flightcrew member would be included in the regulatory definition of a "person." Therefore, Mr. Allain qualifies as a person for the purposes of applying 14 C.F.R. § 91.315.

b. Payment for flight instruction constitutes operation for compensation.

As discussed above, the Respondent admitted that Mr. Allain paid the Respondent to receive flight training as a flightcrew member on a limited category civil aircraft on a flight operated by the Respondent. The remaining legal issue is whether Mr. Allain's payment for flight instruction constitutes operation for compensation or hire.

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[9] Pursuant to 14 C.F.R. § 1.1 "[p]erson means an individual, firm, partnership, corporation, company, association, joint-stock association, or governmental entity. It includes a trustee, receiver, assignee, or similar representative of any of them."

[10] *Whelan v. US.*, 529 F.2d 1000, 1002-03 (Ct.Cl. 1976), *citing Akins v. U.S.*, 439 F.2d 175,179 (Ct.Cl. 1971).

[11] *Tesoro Hawaii Corp. v. U.S.*, 405 F.3d 1339, 1346 (Fed. Cir. 2005) *citing Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414-415 (1945).

[12] *See* https://www.merriam-webster.com/dictionary/individual.

i. National Transportation Safety Board ("NTSB") case law defines "for compensation or hire" broadly.

The NTSB has broadly construed the term "for compensation or hire" to include an intent to conduct a business transaction, especially where the operator furthers its economic interest by transporting persons.[13] While NTSB holdings are not binding upon the Administrator, the undersigned judge may decide to follow persuasive NTSB precedent.[14] There is good reason to do so here because the Administrator has not addressed this issue in past cases; the NTSB precedent provides the best indication of the publicly accepted understanding of the term "for compensation or hire."[15] In this case, Mr. Allain's payment of money to the Respondent for flight training on the flight in question would constitute operation for compensation under the NTSB precedent.

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[13] *See Montley*, NTSB Order No. EA 450 (Opinion and Order, Apr. 18, 1973) (finding that an "actual profit need not be shown to constitute compensation or hire; it is sufficient that the pilot be furthering his economic interest through the operation.")

[14] *In re Richardson & Shimp*, FAA Order No. 92-49 at 9 n. 13 (Decision and Order, July 22, 1992).

[15] This NTSB principle has been applied by other Administrative Law Judges in FAA civil penalty proceedings. For example, Administrative Law Judge Kolko stated that the test for determining whether a flight was operated for compensation or hire is objective, requiring the decisionmaker to look at what an entity "actually did rather than upon the label ... attached to it or the purpose behind it." *In re Richardson*, 1992 WL 12036669 at 2 (Initial Decision of Administrative Law Judge Burton S. Kolko, May 29, 1992). *See also In re Humble*, 1992 WL 12036184 at 2 (Initial Decision of Administrative Law Judge Burton S. Kolko, May 29, 1992).

ii. An FAA legal interpretation and a D. C. Circuit Court of Appeals judgment support a finding that this payment for flight instruction constitutes operation for compensation.

In a parallel proceeding, the D.C. Circuit Court of Appeals issued a judgment denying the Respondent's petition to review an FAA Emergency Cease and Desist Order,[16] finding that the subject aircraft at issue in this case "is not certified for paid flight instruction and substantial evidence supports the [FAA's Emergency Cease and Desist] order."[17] The court further found that a "flight student is a 'person'" and that "when a student is learning to fly in an airplane, the student is 'carr[ied]'".[18] The court went on to conclude that "when the student is paying for the instruction, the student is being carried 'for compensation.'"[19]

Similarly, the FAA addressed this question in an October 7, 2014 legal interpretation provided in a response to a question from Gregory Morris. Specifically, the interpretation answered the question "whether flight instruction in a limited category civil aircraft is considered operating an aircraft for

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[16] On July 28, 2020, the FAA served an Emergency Cease and Desist Order on the Respondent because it continued to offer compensated training in a limited category aircraft after the FAA had advised it to stop because such activity violated the regulations. *See* Complainant's Mot. Partial Summary Judgment, Ex. A at 1-7.

[17] *See* Complainant's Mot. Partial Summary Judgment, Ex. B at 1.

[18] *See* Complainant's Mot. Partial Summary Judgment, Ex. B at 2.

[19] *See* Complainant's Mot. Partial Summary Judgment, Ex. B at 2.

compensation or hire under 14 C.F.R. § 91.315."[20] The interpretation noted that 14 C.F.R. §91.315 does not contain "any exceptions for providing flight training for hire in a limited category aircraft," and so "the only way to provide such training is pursuant to an exemption from this section of the regulations."[21]

While neither the legal interpretation nor the D.C. Circuit Court of Appeals judgment are binding in this case, the undersigned judge finds there is good reason to follow this persuasive precedent in that they provide the accepted understanding of the term at issue and a clear explanation of the Administrator's position on this question.

iii. There is no exception in 14 C.F.R. § 91.315 for flight training.

Other sections of 14 C.F.R. Subpart D have carved out exceptions to the ban on the carriage of persons for compensation when the carriage is for the purposes of flight instruction.[22] The lack of any exception for flight training under 14 C.F.R. § 91.315 is therefore all the more notable, as the Administrator clearly had the opportunity to carve out such regulatory exceptions and chose not to do so for limited

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[20] *See* Complainant's Mot. Partial Summary Judgment, Ex. A at 8.
[21] *See* Complainant's Mot. Partial Summary Judgment, Ex. A at 8.
[22] *See e.g.* 14 C.F.R. §91.313(c), which prohibits the operation of a "restricted category civil aircraft carrying persons ... for compensation or hire," but states that "an operation for the purpose of providing flight crewmember training ... [is] not considered to be the carriage of persons ... for compensation or hire." *See also* 14 C.F.R. §91.319(e)(2) listing "flight training" as an exception to the bar of operating "an aircraft that is issued an experimental certificate ... for compensation or hire."

category aircraft. Because there is no regulatory exception, the Respondent should have sought an exemption from 14 C.F.R. §91.315 before carrying persons for compensation in a limited category aircraft for the purpose of flight instruction.[23] Without such an exemption, the Respondent's actions were in violation of 14 C.F.R. § 91.315.

c. Because the Respondent committed an operational violation, its operation was in a careless or reckless manner so as to endanger the life or property of another.

Pursuant to 14 C.F.R. § 91.13(a), "no person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another." The Administrator has stated that "the finding of a violation of an operational provision ..., without more, is sufficient to support a finding of a 'residual' ... Section 91.13(a) violation" and explained that "[a] residual violation is one that flows solely from a respondent's violation of another, independent regulation."[24] Because the undisputed facts show the Respondent violated 14 C.F.R. § 91.315, an operational provision, the

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[23] Although it played no role in deciding this motion, the undersigned judge notes that the Respondent is aware of the process for applying for an exemption from 14 C.F.R. § 91.315, as it admittedly applied for an exemption from 14 C.F.R. § 91.315 pursuant to 14 C.F.R. Part 11 on April 9, 2021. *See* Complainant's Mot. Partial Summary Judgment, Ex. C at 9, Response to Interrogatory No. 11.

[24] *In re Pacific International Skydiving Center, Ltd.*, FAA Order No. 2017-3 at 13 (Decision and Order, Dec. 26, 2017) (*citing In re Richard*, NTSB Order No. EA-4223 (Opinion and Order, July 21, 1994)).

Respondent has also committed a residual violation of 14 C.F.R. § 91.13(a).[25]

It is important to note that the NTSB has long held that a "residual violation has no effect on sanction."[26] In addition to citing this NTSB finding in civil penalty cases,[27] the Administrator has held that a separate sanction is not justified for a residual violation, where the "residual violation is not based on any independent event."[28] Accordingly, although the undersigned judge finds the Respondent committed a residual violation of 14 C.F.R. § 91.315, this additional violation will not increase the amount of any civil penalty that may be assessed in this case.

Therefore, pursuant to 14 C.F.R. §§ 13.205(a)(8) and 13.218(e)(2), **IT IS HEREBY FOUND:**

1. On or about January 30, 2021, the Respondent operated a limited category civil aircraft while Mr. Allain, a person, was aboard the subject flight.
2. Mr. Allain paid the Respondent to receive flight training on the flight.

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[25] The Complainant conceded that the alleged violation of 14 C.F.R. § 91.13(a) was raised as a residual violation. *See* Complainant's Mot. Partial Summary Judgment at 2, n. 1

[26]. *In re Richard*, NTSB Order No. EA-4223 at 5, n. 17 (Opinion and Order, July 21, 1994).

[27] *See In re Rushmore Helicopters, Inc.*, FAA Order No. 2012-8 at 12 (Decision and Order, Oct. 11, 2012).

[28] *In re Gojet Airlines, LLC*, FAA Order No. 2012-5 at 16 (Decision and Order, May 22,2012). *See also In re Pacific International Skydiving Center, Ltd.*, FAA Order No. 2017-3 at 10 (Decision and Order, Dec. 26,2017) (finding that "residual violations do not increase the sanction").

3. Mr. Allain's payment to the Respondent for flight training qualifies as payment of compensation for the flight.
4. The Respondent therefore operated a limited category civil aircraft carrying persons or property for compensation or hire, in violation of 14 C.F.R. § 91.315.
5. The Respondent's violation of 14 C.F.R. § 91.315 resulted in a residual violation of 14 C.F.R. § 91.13(a).

AND ORDERED:

1. The Complainant's Motion for Partial Summary Judgment is granted.
2. The Respondent's Motion for Decision is denied.
3. The matter shall proceed to hearing to determine the appropriate civil penalty.

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DOUGLAS M. RAWALD
Administrative Law Judge

Attachment: Service List

In the

United States Court of Appeals

For the Eleventh Circuit

No. 22-13765

WARBIRD ADVENTURES, INC.,

Petitioner,
versus

FEDERAL AVIATION ADMINISTRATION,

Respondent.

Petition for Review of a Decision of the
Federal Aviation Administration
Agency No. FAA 2020-0534

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC

Before WILSON, JORDAN, and B RANCH, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. FRAP 35. The Petition for Panel Rehearing also is DENIED. FRAP 40.