

assignment." Hence, the planned completion time of the assignment should be no later than 14 hours after the time that the pilots report for duty. However, if the original planning was realistic, but was upset due to circumstances beyond the control of the pilots and operator, the flight may be conducted even though the crew duty time may exceed 14 hours. The key to interpreting Section 135.267(d) is to look at the original planning. Duty time includes more than a pilot's flight time. Duty time is any time that is not a rest period.

*Circumstances beyond the control of the crew and the operator not proven.* On a series of flights begun on August 2, 1990, and ending on August 3, 1990, Respondents flew over 18 hours. Part way through their duty day, Charter Airlines amended the crew's assignment, adding an assignment to pick up freight in St. Mary's and transport it to El Paso. The crew accepted this amendment. Respondents claim that they had to wait 10 hours for the freight to be delivered at St. Mary's, and that the late delivery of the freight constitutes a circumstance beyond the control of the operator and the crew.

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

The evidence is very confusing and in conflict regarding when they expected the freight to arrive in St. Mary's. What appears most likely is that when Charter Airlines assigned this trip to fly freight

from St. Mary's to El Paso and when Mr. Walker and Mr. Mort accepted it, there was no planned completion time. If a planned completion time for the assignment to fly freight from St. Mary's to El Paso was not formulated when that assignment was made and accepted, Respondents cannot argue that the late freight delivery upset the original planning. Therefore, the protection offered by Section 135.263(d) in the event of circumstances beyond the control of the flight crew is unavailable to Respondents.

*Circumstances beyond the control of the crew and the operator not proven.* On October 25, 1990, the crew was on duty for 14 hours and 48 minutes. Respondents argued that the thunderstorm that they encountered in Provo, Utah, while they were visiting Mr. Walker's son, constituted circumstances beyond their control. Considering the totality of the circumstances, it was not the adverse weather that prevented Respondents from completing the duty day as planned. Instead, the planned schedule was upset by Respondents' plan to stop at Provo, visit Mr. Walker's son, and still get to Scottsdale in time to pick up the passenger as scheduled. By the time that they arrived in Provo, there was little time left, realistically, to secure the aircraft, leave the airport, visit Mr. Walker's son, return to the airport, prepare for takeoff and fly to Scottsdale, Arizona. The further delay caused by the adverse weather, which Respondents have not even attempted to show was unforeseeable, only made matters worse. Inherent in the concept of circumstances beyond the control of the operator and crew is the element of unforeseeability. If thunderstorms were forecast for the early afternoon, then Respondents should have departed from Provo much earlier than they did, if necessary skipping the visit with Mr. Walker's son. Also, the trip to Provo was a pleasure trip, and therefore, completely within the control of Respondents.

*Other commercial flying.* On appeal, the question regarding the flights on September 12-13, 1990, is whether Respondents flew more than 10 hours of commercial flying in a 24-hour period. Between 0947 on September 12, 1990, and 0947 on September 13, 1990, Respondents' flying time totaled 10 hours and 27 minutes.

A flight conducted under Part 91 as a ferry flight may be considered as "other commercial flying." The issue in this case is not whether the ferry flights were conducted pursuant to Part 135, but whether those flights constituted commercial flying. Section 135.267(b)(2)

provides in pertinent part that ". . . during any 24 consecutive hours the total flight time of the assigned flight when added to any other commercial flying by that flight crewmember may not exceed . . . 10 hours for a flight crew consisting of two pilots." 14 CFR 135.267(b)(2) (emphasis added.) While ferry flights themselves are not operated pursuant to Part 135's limitations, the pilots flying flights for compensation or hire and the operators assigning those flights are subject to Part 135.

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

Respondents delivered freight in Detroit. Then, intending to fly home, they departed from Detroit, stopping in Amarillo for fuel. After learning of a flight for compensation out of Winslow, they flew from Amarillo to Winslow. The flight from Amarillo to Winslow, preceding a flight to carry freight for compensation out of Winslow, was a commercial flight. Although that flight from Amarillo to Winslow itself may not have been for compensation, it put Respondents in a position to pick up freight and deliver it for remuneration.

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

While some ferry flights would not be regarded as commercial flying, such as a flight back to base after the completion of an assignment, other ferry flights for the purpose of positioning an aircraft for a flight for compensation or hire would constitute commercial flying.

It is held that the law judge correctly found that the ferry flights on September 12, 1990, constituted "other commercial flying" for purposes of determining compliance with 14 CFR 135.267(b).

*Other commercial flying.* Within a 24-hour period, starting from 2200 on