U.S. Department
of Transportation
Federal Aviation Administration

Office of the Chief Counsel

800 Independence Ave., S.W.
Washington, D.C. 20591

DEC 05 2012

Mr. James Nyerges
President
Western Air Express, Inc.
P.O. Box 60064
Midland, TX 79711

Dear Mr. Nyerges,

This letter responds to your request for a legal interpretation that was forwarded through the Lubbock Flight Standards District Office (FSDO) regarding the applicability of 14 C.F.R. § 135.421 to cargo aircraft and other requirements relating to overhauling of engines on Western Air Express aircraft.

On June 9, 2009, the Honorable Judge William R. Mullins issued a decision ordering the indefinite suspension of Air Carrier Certificate WX5A854H held by Western Air Express, Inc. (Docket SE-18376). The suspension was based upon noncompliance with §§ 119.5(1) and 135.421(a). On October 29, 2009, the National Transportation Safety Board (NTSB) issued an Opinion and Order denying your appeal to overturn Judge Mullin's decision (NTSB Order No. EA-5486, 2009 WL 3718801 (N.T.S.B.)). For the reasons stated below, we agree with the findings and decisions of the Administrative Law Judge and the NTSB.

Your primary contention is that § 135.421(a) and (b) do not apply to cargo aircraft. This is a misreading of the regulation and recent precedent established by court decision. *See*, Gorman v. NTSB and FAA, 558 F.3d 580, 385 U.S.App.D.C. 64, C.A.D.C., March 17, 2009 (No. 07-1532). In that case, petitioner Gorman challenged an FAA interpretation, upheld on appeal by the NTSB, that the language "having a passenger-seat configuration of less than 20 seats" found in § 119.23 would also include an aircraft with zero seats. The court stated:

> In common parlance, the phrase "airplanes having a passenger-seat configuration of less than 20 seats" may be reasonably understood to include aircraft having no passenger seats at all, as the FAA interpreted it. As the ALJ explained: "Zero is, in fact, a number" and "[i]f you have zero seats, you do have less than 20."

The same analysis would apply to the language in § 135.421. Your comparison to flight attendant requirements is not persuasive. The requirement in § 135.107 is triggered when

an aircraft has a passenger seating configuration of *more* than 19. It is not based on the type certificated maximum number of seats, but on the actual number of seats. Likewise, your argument that § 135.85, which provides regulations for the carriage of persons without complying with the passenger-carrying provisions of part 135, exempts your aircraft from § 135.421 has no foundation or applicability in this case.

Thus, consistent with the findings in *Gorman*, § 135.421(a) applies to a cargo aircraft with zero seats and requires a certificate holder to follow "the manufacturer's recommended maintenance program, or a program approved by the Administrator, for each aircraft engine." Section 135.421(b) states that the "manufacturer's maintenance program is contained in the maintenance manual or maintenance instructions set forth by the manufacturer."

In this interpretation, we are not opining on the evidence as presented in the above mentioned hearings. In its denial of your appeal of the ALJ decision, the NTSB stated:

> Here, the evidence establishes that Western operated 66 flights in N6AQ when one of the aircraft's engines was beyond the time for overhaul, and that, subsequent to learning of the need to overhaul the engine, Mr. Nyerges replaced both engines with engines that were also beyond the time for overhaul. *Western does not dispute this evidence, but instead challenges the Administrator's interpretation of the regulations at issue*, and the application of these regulations to Mr. Nyerges's conduct. In general, we will defer to the Administrator's interpretation of the FAA regulations, as Congress has directed such deference under 49 U.S.C. § 44709(d) (3) (*emphasis added*).

As a result, consistent with these proceedings, you are required to follow the time between overhaul (TBO) requirement recommended by the manufacturer and documented in Western Air Express' operations specification D101. You argue that the the Lycoming Service Instruction 1009 (SI-1009) does not apply to your engines since you have used other than "genuine Lycoming parts." We read the reference to using Lycoming parts as limiting Lycoming's ability to establish a TBO for a given manufactured engine and not to an operator's requirement to follow SI-1009. There are a number of service instructions, including the hard limit of 12 calendar years between overhauls and how to treat an engine that has been placed in storage, which would still be applicable. Using other than Lycoming parts may impact whether an operator can take advantage of the full Lycoming TBO recommendation. In Western Air Express' D101, this is listed as 1200 hours or 12 years. SI-1009 is merely stating that the 1200 hour TBO recommendation may be affected by the use of non-Lycoming parts. This could have the effect of reducing the 1200 hour Lycoming TBO recommendation depending upon the parts being substituted. The enforcement cases dealt only with violations of the 1200 hour and 12 calendar year limitations.

Your secondary argument is that § 43.10, which provides that a "product does not accumulate time in service while the part is removed," would supersede compliance with §135.421 (a) and (b) and the manufacturer's recommended TBO. Engines are not life-

limited parts and § 43.10 would not apply to the removal of an engine. The Lycoming SI-1009 document recommends overhaul 12 years from the date of overhaul even if the engine is not being used, partly to address the inactivity of engines that have been in storage. The 12 year clock starts ticking once an overhaul is completed.

We appreciate your patience and trust that the above responds to your concerns. If you need further assistance, please contact my staff at (202) 267-3073. This letter has been prepared by Robert H. Frenzel, Manager, Operations Law Branch, Office of the Chief Counsel and coordinated with the Air Transportation and Aircraft Maintenance Divisions of Flight Standards Service.

Sincerely,

Rebecca B. MacPherson
Assistant Chief Counsel for International
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