United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17-1230 **September Term, 2018**

FILED ON: NOVEMBER 6, 2018

PETER JOHN DECRUZ,
PETITIONER

v.

DANIEL K. ELWELL, ACTING ADMINISTRATOR, FEDERAL AVIATION ADMINISTRATION AND NATIONAL TRANSPORTATION SAFETY BOARD,
RESPONDENTS

On Petition for Review of an Order of the
National Transportation Safety Board

Before: HENDERSON and MILLETT, *Circuit Judges*, and EDWARDS, *Senior Circuit Judge*.

J U D G M E N T

This case comes before the court on a petition for review from the National Transportation Safety Board's order affirming the Federal Aviation Administration's revocation of Petitioner Peter Decruz's commercial pilot certificate. The court has afforded the issues full consideration and has determined that they do not warrant a published opinion. *See* D.C. CIR. R. 36(d). It is

ORDERED AND ADJUDGED that the order of the National Transportation Safety Board be affirmed.

For obvious public-safety reasons, the Federal Aviation Administration requires that pilots who want to provide commercial flight services to the public must meet stringent regulatory criteria. *See* 14 C.F.R. Part 119 (identifying the administrative requirements for certification); *id*. Part 135 (listing the operating requirements for "commuter or on-demand" operations). Pilots who hold themselves out as providing flight services to the public for compensation are deemed "common carriers." *See Flytenow, Inc. v. F.A.A.*, 808 F.3d 882, 886–887 (D.C. Cir. 2015); 14 C.F.R. § 110.2. Parts 119 and 135 apply when a pilot engages in common carriage and has control over the operational functions performed in providing that transportation. *See* 14 C.F.R. §§ 1.1, 110.2, 119.1, 135.1.

Peter Decruz did not meet the heightened regulatory standards to provide commercial flight services to the public, but he was licensed to fly planes privately under the Administration's general rules. *See* 14 C.F.R. Part 91. Nevertheless, in January 2017, Decruz flew three passengers on a round trip from Jackson, Mississippi to Bessemer, Alabama, and did so for compensation. Decruz's passengers on that flight were Rick Webster, the owner of a company called Key Constructors, and two of the company's employees.

The January 2017 flight was not the first time that Decruz provided transportation services to Webster. The two had met years earlier when a friend recommended Decruz to Webster as someone who could provide "a charter service to use from time to time." J.A. 397–398. Webster had then hired Decruz to provide flight services on at least four occasions prior to the January 2017 flight. When Webster did so, he paid invoices for Decruz's services to two companies: Decruz Enterprises and JAP Leasing. Decruz owned Decruz Enterprises, and Decruz had owned JAP Leasing until 2015, when he transferred his interest to his sister, Fidelis Campion. For the flight services he sought, Webster interacted exclusively with Decruz, and never with Campion or JAP Leasing. As far as Webster knew, when he contacted Decruz to arrange the January 2017 flight, Decruz "was part of JAP Leasing." J.A. 457.

When Webster arrived at the Jackson airport for the flight on January 20, 2017, Decruz gave him a contract to sign. The contract was labeled a "Dry lease" and listed the price of the flight. J.A. 128. In aviation parlance, a "dry lease" means "[l]easing of an aircraft without the crew." Federal Aviation Admin., Advisory Circular 91-37B, Truth in Leasing ¶ 5 (Feb. 10, 2016). The signature line for the "Lessor" had already been filled in, with Campion's name typed (but not actually signed) next to a line for JAP Leasing and dated January 1, 2017. Webster signed his name on the line below.

The flights to and from Bessemer proceeded without incident. When Decruz landed back in Jackson at the end of the trip, an Administration inspector, Mallory Woodcock, performed a ramp inspection as part of an ongoing investigation of Decruz's "involvement or engaging in common carriage." J.A. 472. Woodcock and a sheriff's deputy interviewed Decruz before he left the airport.

A few weeks later, the Administration notified Decruz that it was revoking his commercial pilot certificate because he had provided common carrier services without meeting the Part 119 and 135 standards. Decruz challenged the decision administratively. An administrative law judge conducted a lengthy hearing in which Decruz, all of Decruz's passengers from the January 2017 flight, Decruz's sister Fidelis Campion, Inspector Woodcock, and another Administration inspector testified. Based on the evidence before it, the administrative law judge found that Decruz was acting as a common carrier and had exercised operational control over the January 2017 flight, and so sustained the revocation of Decruz's license. *See* 49 U.S.C. § 40102(a)(2), (5), (25); 14 C.F.R. §§ 110.2, 119.1(a)(1), 135.1(a)(1). The National Transportation Safety Board affirmed that decision. *Huerta v. Decruz*, NTSB Order No. EA-5827, 2017 WL 4404282, at *16 (2017).

Decruz petitioned this court to overturn the license revocation. We must affirm the Board's decision unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The Board's findings of fact are conclusive if supported by substantial evidence. 49 U.S.C. §§ 44709(f), 46110(c).

Decruz admits that he does not meet the Part 119 and 135 standards for providing commercial flight services as a common carrier, but argues that they do not apply because he was not providing pilot services as a common carrier. Specifically, his petition argues that (i) the Board's findings that Decruz was acting as a "common carrier" and had "operational control" over the plane on January 20, 2017 were not supported by substantial evidence; (ii) erroneous evidentiary rulings were made during the hearing before the administrative law judge; and (iii) the Administration's actions before the hearing commenced violated his constitutional right to due process. None of Decruz's arguments succeed.

1. Substantial evidence supported the Board's decision that Decruz served as a "common carrier" for the January 20, 2017 flight. A "common carrier" is someone who (1) holds herself or himself out as willing to (2) transport persons or property (3) from place to place (4) for compensation. *Flytenow*, 808 F.3d at 886–887; Federal Aviation Admin., Advisory Circular 120-12A, Private Carriage Versus Common Carriage of Persons or Property ¶ 4 (Apr. 24, 1986). Decruz does not dispute that he transported persons from place to place. He focuses his appeal on the first and fourth prongs.

With respect to the first prong, Decruz argues that he did not hold himself out as willing to provide the flight services that he in fact provided. The record supports the Board's contrary finding. Under settled agency precedent—which Decruz does not challenge—an "expression of willingness to all customers with whom contact is made that the operator can and will perform the requested service is sufficient" to constitute holding oneself out as a common carrier. Advisory Circular 120-12A ¶ 4(c); *see also Flytenow*, 808 F.3d at 887. In addition, the Administration's expert testified that a person "can hold [herself or himself] out through reputation," a legal proposition that Decruz does not dispute. J.A. 627. The record contains evidence of Decruz's expressions of willingness to provide transportation to multiple individuals—including Webster and other Key Constructors employees—as well as Decruz's reputation for providing such transportation. To illustrate, a friend had introduced Decruz to Webster years earlier as a pilot available to provide flight services, and Decruz does not deny that he had previously provided flight services to Webster for compensation. Decruz, for his part, presented no contrary evidence. That is sufficient to sustain the Board's factual finding that Decruz held himself out as willing to provide flight services.

With respect to the fourth prong, Decruz argues that the flight was not "for hire" because he never got paid. That is irrelevant. What matters is that Decruz offered his services in exchange for compensation, charged a specific price for the flight, and sent Key Constructors a bill. *See Flytenow*, 808 F.3d at 891 (noting that the Administration "construes the term compensation very broadly").

The Board's conclusion that Decruz exercised operational control over the flights meant that Decruz, rather than Key Constructors, was "responsible for regulatory compliance." Advisory Circular 91-37B ¶ 4.6; *see also* 14 C.F.R. § 110.2. Substantial evidence supports this conclusion too. "Operational control" is "the exercise of authority over initiating, conducting or terminating a flight." 14 C.F.R. § 1.1. In addition to the undisputed fact that Decruz alone flew the plane, Decruz (i) decided which types of airplanes would be appropriate for the flight, (ii) allowed Webster only to select from among the plane types that Decruz designated, (iii) singlehandedly completed the pre-flight planning, (iv) determined from where the flight would depart, (v) decided alone if the weather conditions were safe for the flight to be undertaken, (vi) purchased fuel and fueled the airplane, and (vii) exercised exclusive responsibility for aircraft maintenance. Evidence also showed that Decruz acted as if he worked for himself and was the person who ensured that the flight complied with federal regulations. *See* Advisory Circular 91-37B ¶ 6.3 (listing factors for operational control). "'Substantial' does not do justice to the extent of the evidence" of Decruz's operational control. *Aacon Auto Transport, Inc. v. I.C.C.*, 792 F.2d 1156, 1160 (D.C. Cir. 1986).

Decruz argues that he could not have been in operational control because the lease labeled the flight arrangement a "Dry lease," and under a dry lease the lessee (here, Key Constructors) has operational control and the pilot is just a contractor. *See* Advisory Circular 91-37B ¶ 5.1 ("Normally, in the case of a dry lease, the lessee exercises operational control of the aircraft."). The law, however, is not fooled by mere labels. The operational-control test looks beyond the words of a lease to the real-world circumstances of the flight. *Id*. ¶¶ 6.3, 8.1. And the Board's conclusion that the relevant indicia put Decruz in operational control was well-grounded in the record.

2. Decruz also raises a number of evidentiary challenges to the agency proceeding, but they fail to surmount our abuse-of-discretion standard of review. *See Veritas Health Services, Inc. v. N.L.R.B.*, 671 F.3d 1267, 1273 & n.1 (D.C. Cir. 2012).

For starters, Decruz challenges the administrative law judge's decisions (i) to exclude the testimony of his proposed expert witness, Joe Bryant; (ii) to allow the Administration's expert Tim Allen to remain in the courtroom while other witnesses testified; (iii) to allow a lay witness to testify about the qualifications required to be a common-carrier pilot under 14 C.F.R. Parts 119 and 135; (iv) to admit certain text messages into evidence; (v) to allow Woodcock to testify about various documents; and (vi) to make various credibility determinations. Each of those arguments is forfeited because they were not raised before the agency, and Decruz has not advanced any reasonable ground for overlooking that forfeiture. *See* 49 U.S.C. § 46110(d) ("[T]he court may consider an objection * * * only if the objection was made in the proceeding" below, "or if there was a reasonable ground for not making the objection in the proceeding.").

The challenges Decruz has preserved lack merit. *First*, Decruz argues that the agency's expert Tim Allen should not have been allowed to testify because Decruz was not given sufficiently specific notice of the subject matter of Allen's testimony before the hearing began. But the Board reasonably found that Allen was properly allowed to testify because Decruz received

notice consistent with Federal Rule of Civil Procedure 26. In any event, Decruz makes no argument that he suffered actual prejudice from the perceived notice flaw, so the asserted procedural misstep was harmless anyhow. *See Moshea v. National Transp. Safety Bd.*, 570 F.3d 349, 353 (D.C. Cir. 2009) (taking "due account * * * of the rule of prejudicial error" pursuant to 5 U.S.C. § 706).

Second, Decruz argues that two of Key Constructors' airplane leases—the ones associated with the January 20, 2017 flight and an earlier flight Webster arranged with Decruz—should have been admitted into evidence. Because those contracts were not properly authenticated, their exclusion was not an abuse of discretion. The record showed no evidence of any actual contractual interaction between JAP Leasing and Key Constructors; Key Constructors interacted exclusively with Decruz, who presented the leases to it. Also, as the administrative law judge noted, nobody from JAP Leasing actually signed the contracts: "The name is printed out." J.A. 543. Anyhow, the administrative law judge extensively discussed the contracts in his decision, and as a result, Decruz has made no colorable claim of prejudice from the contracts' exclusion.

3. Finally, Decruz argues that his commercial pilot certificate was revoked without due process of law. This court has already rejected that same argument. *See Taylor v. Huerta*, 723 F.3d 210, 215 (D.C. Cir. 2013). Decruz "was given written notice and an opportunity to respond before the * * * revocation order went into effect." *Id*. Then, after the revocation order issued, Decruz was afforded "a full hearing and an opportunity to present his case before an ALJ, as well as an opportunity to appeal to the full Board." *Id*. In addition, Decruz had "the right to petition this court for review of the Board's order." *Id*. Given all of that, "there can be no dispute that he was accorded due process of law." *Id*.

Decruz alludes to what he calls "dirty work" during the January 20, 2017 ramp inspection, and objects to the Administration's method of delivering "some documents" related to proceedings before the administrative law judge. Decruz Br. 17, 20. Neither argument gets off the ground.

As to the claim that "the ramp inspection * * * was rampant with constitutional violations," Decruz Reply Br. 18, Decruz neither identifies what particular actions he believes violated his constitutional rights nor provides a legal argument to support his claim of constitutional violations, *cf. Davis v. Pension Benefit Guar. Corp*, 734 F.3d 1161, 1166–1167 (D.C. Cir. 2013) ("In this circuit, it is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work, create the ossature for the argument, and put flesh on its bones.") (internal quotation marks and brackets omitted). The gravamen of Decruz's argument appears to be that he "was the subject of an illegal search and seizure and illegal interviews." Decruz Reply Br. 19. Even if we were to assume that makes out a colorable legal claim, the argument goes nowhere because Decruz does not contend that the agency used any evidence stemming from the challenged actions in this case.

Decruz's complaint about the agency's method of service fails in light of his own admission that the agency "adhere[d] to the minimum form of notice authorized by regulation." Decruz Br. 30. Decruz also fails to explain how he suffered any injury—let alone a

constitutionally cognizable harm—because of the timing or manner of the Administration's document delivery.

For all of those reasons, the Board properly sustained the revocation of Decruz's commercial pilot certificate.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or rehearing en banc. *See* FED. R. APP. P. 41(b); D.C. CIR. R. 41(a)(1).

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk