

UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC 20591

Served: April 5, 1990

FAA Order No. 90-0016

In the Matter of:)
)
)

Docket No. CP89S00498

ROCKY MOUNTAIN HELICOPTERS, INC.)
_____)

ORDER

This case comes before me for resolution of a dispute as to whether an Order Assessing Civil Penalty was properly issued against Respondent Rocky Mountain Helicopters, Inc.

("Respondent"). Although the Rules of Practice in FAA Civil Penalty Actions (14 C.F.R. §13.16 and Part 13, Subpart G) do not appear to contemplate appeals from Orders Assessing Civil Penalty, I have decided to take cognizance of this dispute. As further explained below, I have determined that the Order Assessing Civil Penalty shall be withdrawn, and Respondent shall be given an opportunity to request a hearing on the allegations contained in the Notice of Proposed Civil Penalty.

A discussion of the procedural history of this case will be helpful to an understanding of my disposition of the dispute. On February 21, 1989, Complainant, through an agency attorney in the FAA's Southern Regional Office, sent Respondent a Notice of Proposed Civil Penalty (NPCP). The NPCP proposed to assess a civil penalty of \$15,000, pursuant to the authority in section 901 of the Federal Aviation Act (49 U.S.C. App. §1471), based on violations of the Federal Aviation Regulations (FAR)

in connection with Respondent's operation of an allegedly unairworthy aircraft on 13 flights, and its continued operation of that aircraft after an FAA inspector had advised Respondent to cease operations until the allegedly unairworthy condition was repaired and a cockpit checklist was onboard the aircraft.

On February 28, 1989, Respondent responded to the NPCP by requesting an informal conference at the local FAA Flight Standards District Office in Salt Lake City, Utah.

(Respondent's corporate offices are located in Provo, Utah.)

By letter dated April 6, 1989, the agency attorney in the FAA's Southern Region informed Respondent's counsel that his request for an informal conference was being forwarded to the FAA's Northwest Mountain Region. Respondent apparently received no further correspondence from the FAA's Southern Region relating to this case until the Order Assessing Civil Penalty was issued on November 28, 1989.

The pleadings in this case reveal that during January and February of 1988, while these initial events related to the NPCP were occurring, the FAA conducted a special inspection of Respondent's operations under the Flight Standards National Aviation Safety Inspection Program (NASIP). As a result of that inspection, on March 17, 1989 (just one month after issuing the NPCP), the FAA, through an agency attorney in the Northwest Mountain Region, sent Respondent a lengthy civil penalty letter outlining numerous alleged violations of the FAR which were discovered during the NASIP inspection. Citing section 901 of the Federal Aviation Act (49 U.S.C. App. §1471) as the statutory authority under which Respondent was subject

subject to a civil penalty for each violation, the civil penalty letter sought an offer of \$712,000 in full settlement of the matter.

In May 1989, an informal conference was scheduled in the NASIP matter in the Northwest Mountain Region, to discuss the ten cases which formed the basis for that civil penalty letter. In June 1989, at the local agency attorney's request, Respondent's counsel agreed to include the NPCP which had been forwarded from the Southern Region in the informal conference already scheduled in the NASIP matter. The consolidated informal conference was held on August 9 and 10, 1989.

By letter dated September 6, 1989, the agency attorney who represented the FAA at the informal conference informed Respondent's attorney of the agency's revised position regarding one of the ten NASIP cases and stated that the agency attorney's settlement recommendations would be forwarded to FAA Headquarters during the first week of October, 1989. In addition, the letter advised that any written settlement offer Respondent wished to make in the NASIP cases would need to be received before October 2, 1989. The closing paragraph of the letter also noted that Respondent's counsel had agreed at the informal conference to submit a written settlement offer on the NPCP, and that no correspondence on that case had yet been received. The letter stated that a final FAA decision in that case would be deferred until October 2, 1989, in order to provide Respondent with a final opportunity to submit any information or arguments in writing.

On October 13, 1989, Respondent's attorney responded to the agency attorney's September 6 letter. He stated Respondent's position on each of the NASIP cases, but failed to mention the NPCP here at issue. Respondent's attorney subsequently admitted that this failure was an oversight, but asserted that the NASIP violations clearly dominated the discussions at the informal conference.

On November 28, 1989, the agency attorney who originally issued the NPCP from the FAA's Southern Region issued an Order Assessing Civil Penalty. Based upon the facts and FAR violations contained in the NPCP, Respondent was ordered to pay the \$15,000 civil penalty immediately. In reply, Respondent's counsel filed an "Answer to Order of Civil Penalty/Complaint," explaining in his cover letter to the agency attorney that he assumed the Order Assessing Civil Penalty was intended to be an Order of Civil Penalty.

On January 30, 1990, in response to the docket clerk's request for the agency's response to Respondent's answer, the agency attorney filed a motion to strike Respondent's answer as an unauthorized pleading. The agency attorney pointed out that under section 13.16(g) of the Rules of Practice (14 C.F.R. §13.16(g)), Respondent was required to do one of three things within 10 days after the informal conference or its receipt of an interim reply: (1) submit the amount of the proposed civil penalty, (2) submit additional written information, or (3) request a hearing, in which case an order of civil penalty is issued as the complaint. She argued that the agency was

required to issue the Order Assessing Civil Penalty under section 13.16(j) of the Rules of Practice (14 C.F.R. §13.16(j)^{1/}), because Respondent did not timely respond to the interim reply sent on September 6, 1989, and/or did not comply with an agreement reached between the parties during an informal conference (i.e., to submit additional information or arguments.)

In reply to the agency attorney's motion to strike Respondent's unauthorized pleading, counsel for Respondent stated that he clearly believed he had fully responded to the FAA's September 6 offer to compromise, and had indicated a willingness to continue discussions with the FAA, however, no further correspondence or discussions took place until the issuance of the Order Assessing Civil Penalty. He asserted that Respondent was never advised of a 10-day deadline within which it was required to act after the informal conference, but, rather, was led to believe "the ball was in the FAA's court following the informal conference."

1/ Section 13.16(j) (14 C.F.R. §13.16(j)) provides, in pertinent part:

(j) An order assessing civil penalty shall be issued if the person charged with a violation --

* * * * *

(3) Does not respond in a timely manner to interim replies from the agency attorney under paragraph (g) of this section; or

(4) Does not comply with any agreement reached between the parties during an informal conference.

Respondent also argued that by citing only section 901 of the Federal Aviation Act (49 U.S.C. App. §1471) as its authority, the NPCP gave no notice that the civil penalty was being proposed under the "new" civil penalty assessment authority in section 905 of the Federal Aviation Act (49 U.S.C. App. §1475), which carries with it a different set of rules than the traditional system of civil penalties pursued exclusively under section 901. Respondent points out that the civil penalty letter related to the NASIP inspection was issued under the FAA's "old" civil penalty system (which is still used for civil penalties of greater than \$50,000), whereby Respondent had only to refuse to pay the civil penalty in order to be entitled to a trial in a United States District Court. However, under the "new" system a respondent is required to file a written request for a hearing or take other action within a specific time period in order to avoid the issuance of a binding Order Assessing Civil Penalty.

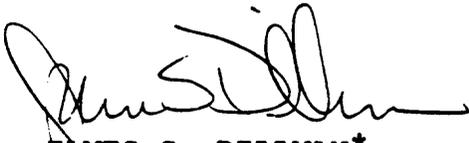
Upon consideration of the somewhat unique facts and circumstances in this case, I have determined that Respondent may have been understandably confused as to which set of rules applied to the instant civil penalty action. I note particularly that the agency attorney's letter of September 6, 1989, discussed settlement of both the NASIP cases and the non-NASIP NPCP, but made no clear reference to the crucial differences between the two proceedings, especially the consequences of failing to respond. In light of the potential confusion resulting from the consolidated informal conference

and the agency attorney's September 6 letter, I cannot uphold the issuance of the Order Assessing Civil Penalty in this case. Accordingly, I have determined that the Order Assessing Civil Penalty should be withdrawn, and proceedings in this case should be resumed from the point of the informal conference. This will result in no prejudice to the agency.

Respondent will have 30 days from service of this Order to exercise one of the options set forth in section 13.16(g) of the Rules of Practice (14 C.F.R. §13.16(g)), i.e.: 1) submit the amount of the proposed civil penalty; 2) submit additional written information to the agency attorney for consideration; or 3) request a hearing pursuant to paragraph (i) of that section, in which case an order of civil penalty shall be issued and filed with the hearing docket clerk as the complaint in the proceedings.

THEREFORE, this matter is remanded to the Southern Regional Counsel's Office for withdrawal of the Order Assessing Civil Penalty and further proceedings in accordance with this order.

JAMES S. BUSEY, ADMINISTRATOR
Federal Aviation Administration


by: JAMES S. DILLMAN*
Assistant Chief Counsel

Issued this 5th day of April, 1990.

* Issued under authority delegated to the Chief Counsel and the Assistant Chief Counsel for Litigation by Memorandum dated January 29, 1990, pursuant to 49 U.S.C. §322(b) and 14 C.F.R. §13.202.