

UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

Served: March 10, 1994

FAA Order No. 94-4

In the Matter of:)

NORTHWEST AIRCRAFT RENTAL, INC.)
d/b/a AURORA AVIATION)

) Docket No. CP93NM0031
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)

DECISION AND ORDER

Respondent Northwest Aircraft Rental, Inc., d/b/a Aurora Aviation, has appealed from the oral initial decision of Administrative Law Judge Burton S. Kolko.^{1/} The law judge found that Respondent violated the Federal Aviation Regulations (FAR) when it failed to conduct timely visual inspections of its aircraft's cabin heater shroud as required by Airworthiness Directive (AD) 83-14-04. The law judge assessed a civil penalty of \$3,000.

Complainant alleged that on six occasions in 1990 and 1991, Respondent operated civil aircraft N5163U, a Cessna 172RG, beyond 50 hours time-in-service, without conducting the

^{1/} A transcript of the law judge's oral initial decision is attached.

inspection required by AD 83-14-04.^{2/} FAA Airworthiness Directive 83-14-04 (July 20, 1983), for Cessna Model 172RG aircraft, provides in relevant part:

To reduce the possibility of carbon monoxide contamination entering the cabin area, accomplish the following:

(a)(2) Within 50 hours time-in-service after the modification required by paragraph (a)(1) of this AD and each 50 hours time-in-service thereafter, visually inspect the shroud for security and proper location and the flanges on the outer diameter of the ends of the muffler for cracks and prior to flight, repair or replace any cracked components. Removal of the shroud for this inspection is not required.

At the hearing, Respondent's president, Bruce Bennett, testified that Respondent did conduct the AD inspections within the 50-hour time-in-service requirement of the AD, but did not keep a permanent record of the inspections. According to Bennett, the AD inspections were recorded in a notebook which was used as a scratch pad by the Director of Maintenance and disposed of when full. Bennett testified that Respondent did the AD inspection again when the aircraft subsequently underwent 50-and 100-hour inspections. At the time of the subsequent AD inspection, Respondent recorded the AD

^{2/} The complaint alleged that Respondent violated the following Federal Aviation Regulations.

Section 39.3, 14 C.F.R. § 39.3, which provides: "[n]o person may operate a product to which an airworthiness directive applies except in accordance with the requirements of that airworthiness directive."

Section 91.29(a), 14 C.F.R. § 91.29(a), redesignated as Section 91.7(a), 14 C.F.R. § 91.7, which provides: "[n]o person may operate a civil aircraft unless it is in an airworthy condition."

inspection in the aircraft maintenance records. Bennett testified that the tardy AD inspection dates in the aircraft maintenance records reflected the AD inspections conducted with the 50-and 100-hour inspections.

FAA Airworthiness Maintenance Inspector Will Hicks, who conducted the investigation in this case, testified that prior to the hearing, Respondent never mentioned the AD inspection process described by Bennett at the hearing. Hicks testified that at the informal conference, Respondent had explained that the untimely AD inspections resulted from renters keeping the aircraft out longer than anticipated. In support of Hicks' testimony, the agency attorney moved into evidence a written summary of the informal conference.^{3/}

On appeal, Respondent argues that Complainant did not establish that its aircraft was flown past the 50-hour time-in-service requirement of the AD. According to Respondent, Complainant proved only that the AD inspections were recorded after the 50 hours had passed.

Respondent's argument is not persuasive. The aircraft maintenance record and the engine log, introduced by Complainant, showed that the AD inspections were conducted

^{3/} The written summary of the informal conference was prepared by the agency attorney who appeared for Complainant at the hearing. In that written summary, the agency attorney noted that Respondent had presented rental records showing that the AD inspections were overflowed because renters kept the aircraft longer than anticipated. It does not mention the AD inspection process testified to by Bennett at the hearing.

after the aircraft had logged 50 hours time-in-service, and, therefore, established Respondent's non-compliance with the AD. Respondent's defense that the AD inspections were conducted in a timely fashion, but recorded late, was not found credible by the law judge.^{4/} The law judge stated that if Respondent had conducted timely AD inspections in the manner testified to by Bennett, the company would have presented this defense to Complainant long before the hearing. The credibility findings of law judges are entitled to deference on review. See In the Matter of Park, FAA Order No. 92-3 (January 9, 1992). Respondent has presented no reason why the law judge's credibility determinations should be reversed.

Respondent argues further on appeal that the law judge erred in admitting the written summary of the informal conference because it was "partial" and "slanted." Respondent states that the written summary excluded the explanation given by its mechanic at the informal conference that AD inspections were timely conducted but untimely recorded.

Complainant, in its reply brief, responds that the matter of the written summary is not at issue on appeal because Respondent failed to object to the admission of the summary at the hearing. Complainant argues alternatively that evidence pertaining to the informal conference is admissible to show

^{4/} Respondent's defense was based solely on Bennett's testimony. None of Respondent's mechanics or its Director of Maintenance testified concerning Respondent's AD inspection process.

inconsistent statements by Respondent.

Respondent, who appeared pro se, made sufficient objection to the admission of the written summary at the hearing to preserve the matter for appeal.^{5/} In rejecting Respondent's defense that the AD inspections were conducted on time but recorded late, the law judge implicitly rejected Bennett's testimony that Respondent's mechanic had explained its AD inspection process at the informal conference. The law judge instead accepted Hick's testimony that Respondent had not mentioned its AD inspection process before the hearing. The law judge's credibility findings were reasonable and not arbitrary. Respondent has not presented, and the record does not contain, any reason for overturning the credibility findings of the law judge.^{6/}

The law judge did not err in admitting the summary of the informal conference.^{7/} Agency policy prohibits the use of the informal conference to gather evidence to prove the allegations in an enforcement action. See FAA Order 2150.3A, FAA Compliance and Enforcement Program, p. 157 (1988).

^{5/} When asked by the law judge if he had any objections to the admission of the document containing the written summary of the informal conference, Respondent stated that he did not agree with it. Respondent agreed only that the document was authentic. (TR-44).

^{6/} See In the Matter of Park, cited above.

^{7/} This decision, however, should not be read to encourage agency counsel to introduce into evidence statements that they wrote. Such a practice is, at a minimum, inappropriate because it could require agency counsel to testify while serving as trial counsel.

This policy correctly seeks to encourage settlement discussions at the informal conference. Statements made at an informal conference, however, may be introduced at subsequent proceedings for the limited purpose of impeachment of the credibility of witnesses.^{8/}

Agency policy is similar to the interpretation of Federal Rule of Evidence 408 that permits the admission of evidence obtained at compromise negotiations when offered not to prove liability but to impeach the credibility of witnesses. See e.g., Brocklesby v. United States, 767 F.2d 1288, 1292 (9th Cir. 1985) (indemnity agreement entered into between the two defendants at compromise negotiations was admissible at trial to attack the credibility of defendants' witnesses). A contrary view, that such evidence may not be used for impeachment purposes because of the danger that it may be considered as substantive evidence of liability, or because it would hinder settlement, has been espoused by other courts. See e.g., EEOC v. Gear Petroleum, Inc., 948 F.2d 1542, 1545 (10th Cir. 1991) (letter from defendant's counsel made during compromise negotiations offered at trial to impeach defendant's witnesses could be excluded due to the risks of

^{8/} Section 1207 of FAA Order 2150.3A, p. 157, states in relevant part:

(4) The informal conference should not be used as a means to gather additional evidence or admissions to prove the charges in the enforcement action. However, any additional information obtained may be used for impeachment purposes if the alleged violator changes his story with regard to a material fact in subsequent proceedings.

prejudice and confusion in admitting them for the limited purpose of impeachment).^{9/}

In both Brocklesby and Gear Petroleum, it was held that the trial judge had not abused his discretion to determine whether to admit or exclude evidence obtained at compromise negotiations. Brocklesby at 1293; Gear Petroleum at 1546.

The law judge in Respondent's case did not abuse his discretion when he admitted evidence of Respondent's prior inconsistent statements at the informal conference. The law judge did not use the statements made at the informal conference as substantive evidence of Respondent's violation of the regulations. The law judge found Respondent's testimony that the inspections were done on time but recorded late, not credible, because Respondent had not mentioned this defense earlier at the informal conference.^{10/} The law judge correctly used the informal conference summary to determine the credibility of witnesses in accordance with agency policy and the applicable case law.^{11/}

^{9/} For further discussion of this issue, see generally, 23 Wright and Graham, Federal Practice and Procedure § 5314 (1980); 2 Weinstein's Evidence § 408(05) (1992); 2 McCormick's Handbook on the Law of Evidence § 266 (4th ed. 1992).

^{10/} In contrast, had the law judge found Respondent's explanation at the informal conference more persuasive than the defense presented at the hearing, then the law judge would have used the informal conference as substantive evidence. Such substantive use would be prohibited under agency policy.

^{11/} Agency counsel's introduction of the written summary of the informal conference was also for the limited purpose of impeachment. Agency counsel introduced the written summary during Inspector Hicks's rebuttal testimony to impeach Bennett's credibility by demonstrating that Respondent had previously given a different explanation for the late inspection record entries.

In its appeal brief, Respondent argues that the \$3,000 civil penalty is too high and that payment would cause it financial hardship.^{12/} Respondent did not raise the issue of financial hardship at the hearing, thus failing to preserve this issue or introduce any evidence of inability to pay for consideration on appeal. The law judge reduced the civil penalty from the \$3,300 sought in the complaint to \$3,000, finding the reduced civil penalty appropriate for the violations. The \$3,000 civil penalty adequately reflects the seriousness of the violations resulting from Respondent's repeated failure to comply with AD 83-14-04.

The decision of the law judge is affirmed.^{13/}



DAVID R. HINSON, ADMINISTRATOR
Federal Aviation Administration

Issued this 10th day of March , 1994.

^{12/} Respondent filed an additional brief with tax returns attached, seeking to present evidence of its alleged inability to pay the civil penalty. Respondent did not petition the Administrator for leave to file an additional brief as required by 14 C.F.R. § 13.233(f). Respondent has not demonstrated that the information in his additional brief was not previously available. Respondent has not shown good cause for allowing its additional brief. Complainant's motion to strike is granted.

^{13/} Unless Respondent files a petition for review with a Court of Appeals of the United States within 60 days of service of this decision (under 49 U.S.C. App. § 1486), this decision shall be considered an order assessing civil penalty. See 14 C.F.R. §§ 13.16(b)(4) and 13.233(j)(2) (1992).