

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

**In the Matter of: AIR CHARTER, INC.
d/b/a AIR FLAMENCO**

FAA Order No. 2013-1

Docket No. CP09SO0008
FDMS No. FAA-2009-0100¹

Served: May 14, 2013

ORDER ON RECONSIDERATION²

I. Introduction

In FAA Order No. 2012-11, the Administrator denied Complainant's appeal from a written initial decision issued by Administrative Law Judge Isaac D. Benkin ("ALJ"). The Administrator affirmed the ALJ's determination that Complainant failed to prove that Respondent Air Charter, Inc., *d/b/a* Air Flamenco ("Air Charter") had violated 14 C.F.R. §§ 119.5(g)³ and 91.13(a)⁴, as alleged in the complaint. Specifically, the Administrator affirmed the ALJ's determinations that Complainant did not prove that Air Charter committed three separate violations of the regulations by operating (1) an unauthorized air ambulance (2) with a

¹ Generally, materials filed in the FAA Hearing Docket (except for materials filed in security cases) are also available for viewing at <http://www.regulations.gov>. 14 C.F.R. § 13.210(e)(1).

² The Administrator's civil penalty decisions, along with indexes of the decisions, the rules of practice, and other information, are available on the Internet at the following address: www.faa.gov/about/office_org/headquarters_offices/agc/pol_adjudication/AGC400/Civil_Penalty/. See 14 C.F.R. § 13.210(e)(2). In addition, Thomson Reuters/West Publishing publishes Federal Aviation Decisions. Finally, the decisions are available through LEXIS (TRANS library) and WestLaw (FTRAN-FAA database). For additional information, see the Web site.

³ Section 119.5(g) provides in pertinent part: "No person may operate as a direct air carrier or as a commercial operator without, or in violation of, an appropriate certificate and appropriate operations specifications."

⁴ Section 91.13(a) provides that: "No person may operate an aircraft [for the purpose of air navigation] in a careless or reckless manner so as to endanger the life or property of another."

stretcher installed backwards and (3) with the wrong number of restraint belts on the stretcher. Complainant did not appeal from the ALJ's finding that Air Charter operated a Part 135 flight without a current approved flight manual on board in violation of 14 C.F.R. § 91.9(b)(1).⁵ The Administrator wrote in FAA Order No. 2012-11 that the \$550 civil penalty assessed by the ALJ for the violation of Section 91.9(b)(1) would remain in effect.⁶

In its petition for reconsideration, Complainant argues that the \$550 civil penalty for Air Charter's violation of Section 91.9(b)(1) is inconsistent with FAA sanction policy. In particular, Complainant argues, Air Charter's history of previous violations warrants a higher civil penalty than would otherwise be appropriate for this violation, and neither the ALJ nor the Administrator considered Air Charter's violation history in determining the sanction. Complainant also argues that the Administrator erred in FAA Order No. 2012-11 by finding that Complainant did not prove by the preponderance of the evidence that there were four restraints on the stretcher rather than two as called for under Technical Standard Order C22f. Accordingly, Complainant argues, the Administrator also should reverse FAA Order No. 2012-11 in part and hold that Air Charter violated 14 C.F.R. § 91.13.

As will be explained further in this decision, Complainant's petition for reconsideration is denied to the extent that Complainant seeks a reversal of the Administrator's finding that it failed to prove that the stretcher had the wrong number of restraints. Complainant's petition is granted

⁵ Section 91.9(b)(1), 14 C.F.R. 91.9(b)(1) provided that:

(b) No person may operate a U.S.-registered civil aircraft –

(1) For which an Airplane or Rotorcraft Flight Manual is required by § 21.5 of this chapter unless there is available in the aircraft a current, approved Airplane or Rotorcraft Flight Manual or the manual provided for in § 121.141(b)....

⁶ Air Charter did not appeal from the ALJ's determination that it had violated the Federal Aviation Regulations by failing to have a current approved flight manual on board or contest the appropriateness of the \$550 civil penalty assessed by the ALJ for this one violation.

to the extent that it seeks a modification of the civil penalty. As will be explained, the Administrator finds that under FAA sanction policy, a \$2,500 civil penalty is warranted under the circumstances of this case for the violation of Section 91.9 (not having a current approved flight manual on board during the flight).⁷

II. Background

Air Charter is a certificated air carrier based in Isla Grande, Puerto Rico. It is authorized to conduct on-demand operations under 14 C.F.R. Part 135. (Government's Exhibit 3 at A001-1.) On June 8, 2008, it operated a flight on board a Britten-Norman BN-2A-26 aircraft, registration number N906GD, from Culebra to Isla Grande, Puerto Rico, carrying an elderly female passenger on a stretcher. After the aircraft landed, the patient was carried off the aircraft on the stretcher and transferred from the stretcher to a gurney on the tarmac. Subsequently, she was driven to the hospital by a ground ambulance. FAA Inspector Eugene Jester, who was conducting surveillance operations at Isla Grande Airport that day, observed the transfer of the patient from N906GD to the ground ambulance.

III. The Restraints

Complainant alleged in paragraph II.7 of the complaint as follows: "The above-mentioned stretcher had an improper number of safety belts (four) and therefore did not meet the standards of the Technical Standard Order (TSO-C22f). Britten-Norman Maintenance Manual, Supplement 16 to Chapter 2.4." The FAA did not allege in the complaint that the safety belts were installed improperly or that the wrong safety belts were installed.

⁷ During his inspection, Inspector Jester asked the pilot for a copy of the aircraft flight manual. (Tr. 42.) The pilot provided a copy of Britten-Norman Islander Flight Manual FM-7. (Tr. 122; Government's Exhibit 12.) The current approved flight manual for this aircraft, when registered in the United States, was the FM-20. The aircraft was removed from the Anguilla, British West Indies Register of Civil Aircraft on May 13, 2005, and was issued a U.S. aircraft registration certificate on May 24, 2005. (Respondent's Exhibits 34 and 38.) The FAA issued a standard airworthiness certificate on July 22, 2005.

In FAA Order No. 2012-11, the Administrator wrote:

Regarding the restraint belts on the stretcher, Mr. Torres [Air Charter's president] testified that an M-915 stretcher unit kit was installed on the aircraft, and the belts were part of the kit. (Tr. 436.) According to the Britten-Norman representative who was consulted by Inspector Rodas, the NB-NM-0915 includes a stretcher which "comes with two safety belts, which ... are crossed across the patient. These belts are TSO'd to TSO-C-22f." (Government Exhibit 16.) It stands to reason that the stretcher unit that was installed in this aircraft had the correct number of safety belts, *i.e.*, two safety belts which, when fastened properly, would criss-cross the body of the patient.

The only photographs in which the belts can be seen are photograph 5 in Exhibits 3a and 3b. These photographs show the stretcher with the recumbent patient. It cannot be determined from the photographs how many belts are attached to the stretcher because the stretcher is behind the gurney from the ambulance. Only one belt on the stretcher can be viewed extending horizontally across the woman's thighs or lower torso, but it cannot be determined whether the belt is fastened incorrectly or fastened at all.

(FAA Order No. 2012-11 at 12-13.)

In its petition for reconsideration, Complainant argues that Inspector Jester testified that when he physically inspected the belts on the stretcher, he observed four belts, and therefore, the stretcher had two more belts than it should have had according to the manufacturer's manual. (Petition at 3, referring to Tr. 62-63.) Complainant argues that this "uncontroverted testimony" proved its allegation that the stretcher had the wrong number of belts, regardless of the fact that Inspector Jester could not determine from looking at Photograph 5 in Government's Exhibit 3b how many belts were on the stretcher. (Petition at 3.)

Here is what we know about the approved configuration of the safety belts on this stretcher. Government's Exhibit 5, which is Supplement No. 16 to Chapter 2.4 (Operator's Option NB/M/915, Issue 4 and NB/M/1002, Issue 1 of the Britten-Norman Maintenance Manual) contains schematic drawings showing the installation of one stretcher, two stretchers or three stretchers on this aircraft. The drawing for the single stretcher installation does not show the safety belts, but the drawings for the three-stretcher installation clearly depicts how the safety

belts should appear when buckled and how they should be installed. Copies of the three-stretcher installation diagrams from Chapter 2.4/Supplement 16, included in Government's Exhibit 5 are set forth below.

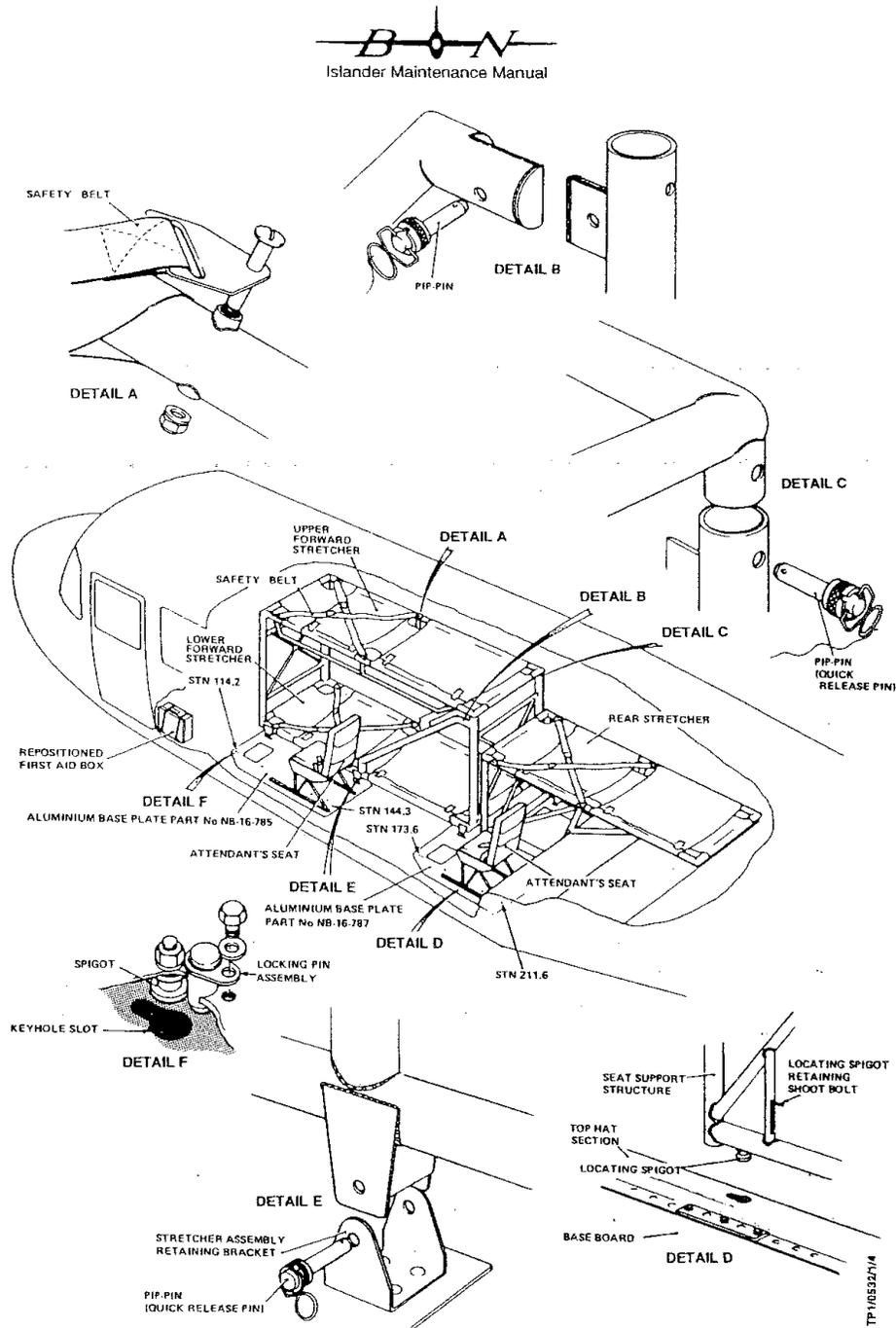


Fig 3. Installation : three stretchers and two attendants' seats

Detail A of these drawings shows that:

- There should be two safety belts on each stretcher.
- Each safety belt consists of two straps.
- One end of each strap should be bolted to the frame of the stretcher.
- When fastened correctly, a pair of straps (one safety belt) should extend diagonally across the stretcher and be buckled⁸ together over the fabric of the stretcher.
- When both pairs of straps are fastened correctly, the two safety belts should criss-cross over each other, making an X over the stretcher.

Hence, it may be concluded that if a patient was on the stretcher, the two safety belts, when fastened properly, should criss-cross over the patient's body.

Inspector Joel Rodas's testimony concerning the approved configuration of the two safety belts is consistent with the above description based upon Government's Exhibit 5. Inspector Rodas did not observe the stretcher or interview anyone about the stretcher. He relied upon the photographs and information that he received from Inspector Jestor as the factual predicate for his investigation. He contacted a Britten-Norman representative, who informed him by e-mail that "this stretcher comes with two safety belts which, as you rightly say, are crossed across the patient. These belts are TSO'd to TSO-C22f."⁹ (Government Exhibit 16.) Inspector Rodas also testified that he had learned that each safety belt consisted of two straps. He testified "[t]he seatbelts are to be used two and two only." (Tr. 125.)

⁸ There is no evidence in the record regarding the operation of the buckles and the drawings are not detailed enough to make clear the type of buckles that should be on these safety belts.

⁹ The Britten-Norman representative wrote further: "Unfortunately we do not have a modification for four belts directly traversing the body..." (Government Exhibit 16.) Inspector Rodas testified that the stretcher had "four seatbelts, one across the shins, one across the thighs, and maybe one across the waist and another one across the chest." (Tr. 126-127.) Inspector Rodas, however, had no personal knowledge about that stretcher and there is no picture in the record that shows four safety belts on N906GD's stretcher in that configuration.

Contrary to Complainant's argument, Inspector Jestor never testified that he observed four seat belts during his inspection of the stretcher at the airport on June 8, 2008. Neither counsel asked Inspector Jestor how many safety belts he observed during his inspection, and the ALJ did not ask that question. This is odd because Inspector Jestor was the only FAA witness who observed the stretcher to testify at the hearing, and the only witness who could have established in Complainant's case in chief the number of safety belts on that stretcher. Inspector Jestor's only testimony about his observation of the stretcher was that he did not observe TSO labels on the belts and that he did not know at the time of his inspection whether the stretcher had an adequate number of belts. (Tr. 58.) He did not otherwise describe the safety belts that he saw. He did not explain how many straps each safety belt consisted of, the types of buckles, how the straps were attached to the frame, or what type of safety belts this stretcher should have had.

Inspector Jestor looked at photograph 5 of Government's Exhibit 3b, and testified that he could not determine from this photograph how many safety belts were on this stretcher. (Tr. 61.) On cross-examination, Inspector Jestor was asked to look at a photograph that Air Charter's counsel referred to as "number five," describing this photograph as depicting the inspector bending over the stretcher. Air Charter's counsel asked the inspector how many seat belts could be seen "hanging" from the stretcher in photograph "number 5." The inspector indicated that the photograph that he was being shown was not the same as photograph 5 in Government's Exhibit 3b. After apparently figuring out which photograph Air Charter's counsel wanted him to look at, the inspector responded "four" without specifying whether he meant four straps or four safety belts (each consisting of two pairs of straps). (Tr. 62.) The inspector testified that "there should only be two belts" and that the stretcher "had two more than it should have had." (Tr. 63.) Because each safety belt should consist of two straps, Inspector Jestor may have meant that he

saw four straps, each one ending with a buckle, hanging from the stretcher. He never indicated in his testimony that he was aware that each safety belt consisted of two straps.

As the Administrator wrote in FAA Order No. 2012-11, it cannot be determined from any of the photographs introduced into evidence how many safety belts were on this stretcher on June 8. The record does not contain a photograph “number 5” other than the photograph number 5 in Government Exhibits 3a and 3b, which do not correspond with Inspector Jestor’s testimony. An examination of the pictures that are in the record provides no greater clarity. In some of the pictures in the record, the stretcher is obscured by the gurney which had straps hanging down, and someone looking at those photographs might count the gurney’s straps as straps hanging from the stretcher.

Consequently, it is impossible to obtain any certainty from Inspector Jestor’s cryptic and conclusory statement which was based upon a photograph that is not in the record. There is simply no way to know on this record what he meant.

Hence, Complainant’s argument that the Administrator had erred because he failed to consider Inspector Jestor’s testimony of his observation of the stretcher is rejected. The testimony that Complainant relies upon in its petition for reconsideration was based upon an inadequately identified photograph at the hearing – not upon a direct personal observation – and there is no photograph in the record to clarify or confirm his testimony about that photograph.

III. Civil Penalty for Violation of Section 91.9(b)(1)

Complainant contends that the Administrator failed to consider its argument on appeal that the ALJ’s sanction analysis regarding the violation of Section 91.9(b)(1) was flawed. Complainant argues in its petition that a “sanction in the moderate range (\$2,200 - \$4,399) is supported by Respondent’s violation history.” (Petition at 2-3.)

Preliminarily, Complainant did not argue specifically on appeal that the Administrator should assess a moderate range civil penalty between \$2,200 and \$4,399 for Air Charter's violation of 14 C.F.R. § 91.9(b)(1). Instead Complainant argued in its appeal brief that the Administrator should assess an \$11,000 civil penalty against Air Charter, as sought in the complaint, for all of the alleged violations. (Appeal Brief at 20.) As a result of Complainant's failure to argue clearly in its appeal brief for a particular penalty for the violation of Section 91.9(b)(1),¹⁰ the Administrator did not analyze the sanction for this violation alone in FAA Order No. 2012-11. Accordingly, Complainant's petition that the Administrator examine the \$550 civil penalty in light of agency sanction guidance is granted.

The Enforcement Sanction Guidance Table, set forth in FAA Order No. 2150.3B, Appendix B, recommends minimum, moderate or maximum civil penalty ranges for different types of violations. The penalty ranges reflect a variety of factors, including the nature of each violation and the violation's potential effect on aviation safety. These ranges are based on the assumption that the violator has a violation-free history and that the violation was not deliberate or reckless. (FAA Order No. 2150.3B, Chapter 7 at 7-7 and 7-9.)

The Table does not provide specific guidance pertaining to situations in which an air carrier failed to carry a current *flight* manual on board an aircraft during an operation. The Table does, however, provide guidance regarding a somewhat analogous violation, *i.e.*, an air carrier's failure to maintain a current *maintenance* manual, and recommends a minimum range civil penalty for such violations. (FAA Order No. 2150.3B, Appendix B, at B-12.)

¹⁰ The closest that Complainant came in its appeal brief to challenging the sanction amount for the one violation was in a sentence near the end of the sanction argument in which Complainant wrote that the "\$550 civil penalty is below the minimum amount in the sanction guidance for one violation (\$850)." (Appeal Brief at 19.)

The FAA sanction guidance sets forth proportional civil penalty ranges, depending upon the size of the carrier or operator, for minimum, moderate and maximum level violations. (FAA Order No. 2150.3B, Appendix B, at B-3-B-5.) The guidance divides air carriers and operators into four “groups,” with the largest entities in Group I and the smallest entities in Group IV. (*Id.*) The ALJ found that the record contained no evidence regarding Air Charter’s size, “either in terms of its gross annual revenues or the number of aircraft in its inventory or the number of employees on its staff.” (Initial Decision at 13-14.) The ALJ held, therefore, it would be appropriate to consider Air Charter as a Group IV operator for sanction purposes. However, the ALJ apparently overlooked the page in Air Charter’s operations specifications indicating that Air Charter was authorized to operate 8 aircraft in Part 135 operations. (Government’s Exhibit 4 at D085-1.) Group III air carriers and operators are defined in Appendix B as those air carriers and operators operating under 14 C.F.R. Part 135 with 6 to 49 pilots or 6 to 49 aircraft. (FAA Order No. 2150.3B, Appendix B at B-3.) Hence, Air Charter was a Group III carrier for civil penalty sanction purposes.

Under FAA Order No. 2150.3B, a minimum civil penalty for an air carrier or commercial operator with 6 to 24 aircraft, like Air Charter, for violations arising under 49 U.S.C. § 46301(a)(5)(A) would be between \$825 and \$3,299 per violation.¹¹ (FAA Order No. 2150.3B, Appendix B at B-4.) According to the guidance, the “middle of each recommended sanction range would be for a single violation without aggravating or mitigating factors.” (FAA Order

¹¹ Complainant argues in the petition for reconsideration that a penalty in the \$2,200 to \$4,399 range – which is the moderate civil penalty range for Group IV operators for violations under 49 U.S.C. § 46301(a)(5)(A) – would be appropriate. As explained above in the text, the only analogous violation in the Table calls for a minimum civil penalty. At most, Air Charter’s violation history warrants a penalty at the higher end of the minimum range for a Group III operator, and does not justify a moderate range civil penalty for any size carrier.

No. 2150.3B, Appendix B at B-2.)¹² Consideration must be given to whether any mitigating or aggravating factors existed that warrant a penalty that is above or below the midpoint of the \$825-3,299 minimum range.¹³

In this case, the ALJ found that a penalty at the lower end of the range¹⁴ was appropriate for the flight manual violation because the aircraft had a “serviceable flight manual” on board. (Initial Decision at 14.) The preponderance of the evidence established that at the time of the investigation, Britten-Norman flight manual FM-7 was on board the aircraft. The current approved flight manual for this aircraft was the FM-20 version. The FM-7 was not appropriate for aircraft registered in the United States. After this incident, Air Charter ordered the appropriate version of the manual. (Tr. 239, 417-418.)

Fernando Otero, who testified on Air Charter’s behalf, testified that there was only a “slight difference” between the FM-7 and the FM-20. Air Charter’s president, Francisco Torres, testified that the only difference between the FM-7 and the FM-20 involved aircraft gross weight. (Tr. 416.) The FM-20 had performance data for this aircraft up to 6,200 lbs gross weight, (Respondent’s Exhibit 37), and the FM-7 had data for this aircraft up to 6,300 lbs gross weight. (Tr. 416.) Torres testified that under Section 3 of Air Charter’s operations manual, Air

¹² Also, it is stated in FAA Order No. 2150.3B as follows: “When determining a specific sanction amount within a range, FAA enforcement personnel begin with an amount in the middle of the range and increase that amount toward the higher end of the range for aggravating factors or decrease that amount toward the lower end of the range for mitigating factors.” (FAA Order No. 2150.3B, at 7-9.)

¹³ There may be circumstances in which mitigating or aggravating factors would justify the imposition of a civil penalty that is outside of the sanction range recommended in the guidance. Proof of inability to pay a sanction might justify a penalty below the sanction range, and proof of deliberate violations might warrant a penalty above the recommended range. FAA Order No. 2150.3B at 7-9 through 7-10.)

¹⁴ The ALJ, as discussed previously, used the Group IV penalty range, rather than the Group III penalty range in making his determinations.

Charter does not fly aircraft any heavier than 6,200 lbs. (Tr. 416.) Hence, Air Charter contended, safety was not impaired by the failure to carry the FM-20.

This factor, however, does not justify a sanction at the lower end of the minimum range. It is important that operators have current approved manuals on board their aircraft, and while it is fortunate that there were not greater differences between the two manuals, that “luck” does not warrant a lower sanction.

In its petition for reconsideration, as in its appeal brief, Complainant argues that the ALJ ignored Air Charter’s violation history. A violation-free history is the norm, and a respondent’s history of prior violations is an aggravating factor. *Pinnacle Airlines, Inc.*, FAA Order No. 2012-2 at 19 (May 22, 2012). “[A] violation history can justify imposing a sanction at the higher end of the normal range or a sanction beyond the normal range.” FAA Order No. 2150.3B at 7-7. The evidence indicated that Air Charter had paid a \$6,500 civil penalty for a violation of 14 C.F.R. Part 135 three years earlier by using a pilot who did not have the minimum number of flight hours. (Tr. 230, 240-242.) However, the violation in the previous case is not factually similar with the flight manual violation in the present case and the two cases did not involve the same or similar regulations.¹⁵ Consequently, while a civil penalty that is somewhat higher than the mid-point is warranted due to Air Charter’s violation history, there is no need to assess a penalty at the top of the minimum range or in the moderate range.

In light of the above analysis, it is determined that the \$550 civil penalty assessed by the ALJ is inconsistent with agency sanction policy. A \$2,500 civil penalty is appropriate under the

¹⁵ “In deciding whether a violation history justifies aggravating the sanction or changing the usual type of sanction, the FAA considers the length of time that has elapsed between violations, whether the violations involved the same or similar regulations, and whether the violations are factually similar.” FAA Order No. 2150.3B at 7-7.

policy, taking into consideration the nature of the violation, the size of the operator, and the operator's violation history.

IV. Conclusion

Based upon the foregoing, Complainant's petition for reconsideration is granted in part and denied in part. A \$2,500 civil penalty is assessed.¹⁶

[original signed by Michael P. Huerta]

MICHAEL P. HUERTA, ADMINISTRATOR
Federal Aviation Administration

¹⁶ Respondent may file a petition for review in the appropriate Federal court under 49 U.S.C. § 46110 and 14 C.F.R. § 13.235.