

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

**In the Matter of: AMERICAN AIR NETWORK, INC.**

FAA Order No. 2006-5

Docket No. CP04WP0014  
DMS No. FAA-2004-17657<sup>1</sup>

Served: February 10, 2006

**DECISION AND ORDER**<sup>2</sup>

Respondent American Air Network, Inc., (AAN) has appealed the written initial decision issued by Administrative Law Judge Richard C. Goodwin on July 27, 2005. The ALJ held that AAN violated 14 C.F.R. § 135.95(a),<sup>3</sup> as alleged, on March 14, 2002, when it operated a revenue flight using a pilot, as second in command, whose second-class medical certificate had expired. The ALJ held that the \$11,000 civil penalty sought by the FAA was too high in light of corrective action taken by AAN after this incident and instead assessed a \$7,000 civil penalty. AAN argues on appeal that the \$7,000 civil

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<sup>1</sup> Materials filed in the FAA Hearing Docket (except for materials filed in security cases) are also available for viewing through the Department of Transportation's Docket Management System (DMS) at the following Internet address: <http://dms.dot.gov>.

<sup>2</sup> 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: [http://www.faa.gov/about/office\\_org/headquarters\\_offices/agc/pol\\_adjudication/AGC400/Civil\\_Penalty/](http://www.faa.gov/about/office_org/headquarters_offices/agc/pol_adjudication/AGC400/Civil_Penalty/). In addition, Clark Boardman Callaghan publishes Federal Aviation Decisions. Finally, the decisions are available through LEXIS and WestLaw. For additional information, see the website.

<sup>3</sup> Section 135.95(a) provides as follows:

No certificate holder may use the services of any person as an airman unless the person performing those services (a) holds an appropriate and current airman certificate[.]

penalty is excessive in light of the facts of this case and AAN's financial circumstances. AAN's appeal is denied, and the ALJ's initial decision is affirmed.

AAN's general manager described AAN as a Part "135 management company." (Tr. 67.) It holds an air taxi operating certificate issued under 14 C.F.R. Part 135 of the Federal Aviation Regulations. The FAA authorized AAN to do business under other corporate names listed in its operations specifications. These other corporate entities do not hold Part 135 certificates, but own aircraft and employ pilots. While AAN does not employ any pilots or own any aircraft, it manages the aircraft owned by, and pilots employed by, the various corporate entities listed on its operations specifications.

On March 14, 2002, two FAA inspectors at Los Angeles International Airport (LAX) noticed large amounts of oil sprayed on the side of the fuselage and dripping off the right engine of a Lear LR-24-B,<sup>4</sup> registered as N600XJ. N600XJ is one of the aircraft listed on AAN's operations specifications. Earlier that day, AAN had operated N600XJ on a passenger-carrying flight for compensation under Part 135 from Las Vegas, Nevada to LAX.

One of the inspectors asked the pilots if he could see their pilot and medical certificates. The captain showed her certificates to the inspectors but the co-pilot, Jeremy Ng, stated that he had left his medical certificate at home in his other wallet. Ng had served as second in command on the passenger-carrying flight for compensation earlier that day. After meeting with the inspectors on March 14, 2002, Ng went to an aviation medical examiner (AME) and applied for a first-class medical certificate. Ng's second-

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<sup>4</sup> Two pilots are required to operate the Lear LR-24-B.

class medical privileges, which he needed to fly as the co-pilot on the Part 135 flight,<sup>5</sup> had expired 2 weeks earlier, on February 28, 2002.<sup>6</sup> The AME issued a first-class medical certificate to Ng at the end of the examination on March 14th.

AAN admitted that it dispatched Ng when he did not have a valid second-class medical certificate. (Tr. 10, 45.) Also, AAN acknowledged that it had operational control over this passenger-carrying flight for compensation under its Part 135 certificate on March 14, 2002. (Tr. 45.) AAN took the position that it did not intend to dispatch the aircraft with a pilot serving as second in command who did not have a current second-class medical certificate. (Tr. 10, 46.)

Stephen Gilliland, AAN's general manager, testified that on March 14, 2002, AAN used a spreadsheet to track when a pilot had had his last medical examination and when the next one was due. This system did not have an automatic warning utility. (Tr. 68-69.) Gilliland explained that this incident illustrated the inadequacy of this tracking system. To improve their tracking capability, about 30 days after the incident, AAN purchased and installed a flight operations computer tracking software program, called "Flight Ops." (Tr. 73.)

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<sup>5</sup> Under 14 C.F.R. §135.245(a), "no [Part 135] certificate holder may use any person, nor may any person serve, as second in command of an aircraft unless that person holds at least a commercial pilot certificate with appropriate category and class ratings and an instrument rating." A person must hold at least a second-class medical certificate when exercising the privileges of a commercial pilot certificate. 14 C.F.R. § 61.23(a) Hence, when Ng served as second in command on the Part 135 flight on March 14, 2002, he needed at least a commercial pilot certificate and a second-class medical certificate. His second-class medical privileges, however, had expired.

<sup>6</sup> Ng's second-class medical certificate was issued on February 1, 2001. Under 14 C.F.R. § 61.23(d)(2), second-class medical privileges expire at the end of the last day of the 12<sup>th</sup> month after the date of examination. Consequently, Ng's second-class medical privileges expired on February 28, 2002, 2 weeks before the FAA inspectors requested to see his medical certificate.

The Flight Ops software automatically alerts 30 days before a pilot's first-class medical privileges expire and provides this information to the dispatchers. (Tr. 69-70.)

In addition, Gilliland explained, AAN now has a centralized dispatch system. Before each flight is released, the pilots must call the St. Louis office number and the dispatcher will, among other things, check to see whether the pilots have current and appropriate medical certificates. (Tr. 70.) Prior to this incident, flights could be dispatched through the St. Louis office or through any of the local offices run by the corporate entities under which AAN did business. (Tr. 74.)

In 2002, AAN managed more than 30 aircraft. (Tr. 77.) Its net income for 2002 was \$287,062<sup>7</sup> (Tr. 80), and for 2003 was \$242,404.<sup>8</sup> (Complainant's Exhibits 10 and 11.)<sup>9</sup> Gilliland testified that AAN has ten full-time employees in its main office. (Tr. 77.)

The ALJ held that AAN violated 14 C.F.R. § 135.95(a) because Ng lacked an appropriate and current medical certificate when he operated as second in command on the March 14, 2002, flight of N600XJ. The ALJ determined that a \$7,000 civil penalty was appropriate under the circumstances.

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<sup>7</sup> Its gross profit in 2002 was \$1,106,566.14. AAN's expenses included \$342,830.80 that it paid its officers as salary. (Complainant's Exhibit 11.)

<sup>8</sup> Its gross profit in 2003 was \$1,142,890.07. Its expenses in 2003 included \$556,614.09 for officers' salaries. (Complainant's Exhibit 10.)

<sup>9</sup> The FAA asserted in its Post-Hearing Brief, that it was attaching AAN's Profit and Loss statements for 2003 as Complainant's Exhibit 10 and for 2004 as Complainant's Exhibit 11 as exhibits to its Post-Hearing Brief. However, the agency attorney mistakenly attached a copy of AAN's Profit and Loss statement for 2002 as Complainant's Exhibit 11. (Complainant's Exhibit 11 is identical to Respondent's Exhibit 2.) Consequently, there is no evidence in the record to support any of the FAA's allegations regarding AAN's net income or what AAN spent on officers' salaries in 2004.

On the issue of penalty, the ALJ found that AAN’s “implementation of a new and substantially upgraded recordkeeping procedure immediately following the event” warranted a lower sanction than the \$11,000 civil penalty sought by Complainant. (Initial Decision at 18.) The ALJ rejected AAN’s other arguments regarding sanction. The ALJ held that AAN “would not be materially financially harmed by the fine – even when considered in addition to the \$49,000 penalty” [that he assessed in another case against AAN in the same written initial decision.]<sup>10</sup> (Initial Decision at 17.) The ALJ based this conclusion on the evidence that the salaries of AAN officers increased by more than \$200,000 from 2002 to 2003 with the same number of officers, and increased by an additional \$80,000 from 2003 to 2004.<sup>11</sup> (*Id.*) The ALJ noted that the testimony that AAN did not encourage or condone Ng’s flight with an overdue medical certificate did not warrant a reduction in the sanction. The ALJ concluded that a \$7,000 civil penalty was “commensurate with the gravity of the offense while properly accounting for mitigating factors.” (Initial Decision at 18.) According to the ALJ, a \$7,000 civil penalty “will have sufficient ‘bite’ to deter AAN and other carriers from similar violations and will promote compliance with the FARs [Federal Aviation Regulations].” (*Id.*)

On appeal, AAN argues that the \$7,000 civil penalty assessed by the ALJ is excessive because:

1. it neither intended for Ng to fly without current and appropriate medical certification nor condoned the flight;

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<sup>10</sup> On December 16 and 17, 2004, the ALJ presided over hearings involving two unrelated cases against AAN: CP04WP0013 and CP04WP0014. He issued a written initial decision resolving both of these cases on July 27, 2005. The ALJ assessed a \$49,000 civil penalty against AAN in Docket CP04WP0013, and a \$7,000 in this case, Docket CP04WP0014.

<sup>11</sup> See n. 9 *supra*.

2. it instituted changes to prevent pilots from flying without current and appropriate medical certification in the future;
3. in its opinion, a \$7,000 civil penalty is excessive relative to its financial means.

(Appeal Brief at 2.)

The starting point for this analysis should be the Sanction Guidance Table, which is included in FAA Order No. 2150.3A, the Enforcement and Compliance Program, as Appendix 4.<sup>12</sup> The FAA explained its policy regarding appropriate penalties in enforcement cases in the table. In the Matter of Northwest Airlines, FAA Order No. 1990-37 at 9; In the Matter of Broyles, FAA Order No. 1990-23 at 8 (September 14, 1990).

According to the Sanction Guidance Table, a civil penalty in the maximum range is appropriate for an air carrier, like AAN, for a violation involving the use of an unqualified crewmember. FAA Order No. 2150.3A, Appendix 4, Section I, paragraph O. It is explained in the introductory sections of Appendix 4 that the maximum civil penalty range for a violation committed by an air carrier is from \$7,500 to \$10,000.<sup>13</sup>

This guidance is modified by Compliance/Enforcement Bulletin No. 92-1, regarding proportional civil penalties. This bulletin provides penalty ranges for air carriers, depending upon the size of the air carrier. According to Bulletin No. 92-1, the maximum civil penalty range for an air carrier of AAN's size<sup>14</sup> is from \$6,500 to

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<sup>12</sup> The ALJ took judicial notice of Appendix 4 of FAA Order No. 2150.3A, the Enforcement and Compliance Program.

<sup>13</sup> Under the guidance set forth in Appendix 4, the minimum civil penalty range for an air carrier is from \$1,000 to \$3,999, and the moderate civil penalty range is from \$4,000 and \$7,499. FAA Order No. 2150.31, the Enforcement and Compliance Program, Appendix 4 at 3.

<sup>14</sup> The Bulletin divides carriers into 4 "groups" depending upon the carrier's size. AAN would fall into Group II, which is defined as "[a]ll air carriers that hold Part 121 operations

\$10,000.<sup>15</sup> Compliance/Enforcement Bulletin No. 92-1, FAA Order No. 2150.3A, Appendix 1, page 106 (1/16/92).<sup>16</sup>

The relevant policy in the Sanction Guidance Table is modified further by the FAA's regulations published at 14 C.F.R. Part 13, subpart H, providing a mechanism for the regular adjustment for inflation of civil monetary penalties in conformity with the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended by the Debt Collection Improvement Act of 1996. 14 C.F.R. § 13.301(a). Under Section 13.305(d), 14 C.F.R. § 13.305(d), \$11,000 is the maximum civil penalty for a violation involving the operation of an aircraft for the transportation of passengers for compensation.

Consequently, under the relevant agency sanction policy, as explained above, the maximum civil penalty range for an air carrier AAN's size is \$6,500 to 11,000. The \$7,000 civil penalty assessed by the ALJ is at the lower end of this range.

The ALJ found that the swift and comprehensive corrective action that AAN adopted constituted a mitigating factor.<sup>17</sup> As the Administrator has held, "[c]orrective action may mitigate a civil penalty where there is sufficient, specific evidence of swift or comprehensive corrective action." In the Matter of Westair Commuter Airlines, FAA

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specifications and large Part 135 operators (50 or more pilots or 25 or more aircraft on operations specifications), with annual operating revenue of less than \$100,000,000." Compliance/Enforcement Bulletin No. 92-1, FAA Order No. 2150.3A, Appendix 1, page 106 (1/16/92).

<sup>15</sup> The minimum range for a Group II carrier is from \$850 to \$3,500, and the moderate range for a Group II air carrier is from \$3,500 to \$6,500. Compliance/Enforcement Bulletin No. 92-1, FAA Order No. 2150.3A, Appendix 1, page 106 (1/16/92).

<sup>16</sup> Agency counsel failed to take this policy regarding proportional civil penalties into account. If agency counsel takes issue with the application of this policy by the Administrator as explained in this decision, counsel should file a petition for reconsideration.

<sup>17</sup> The FAA has not appealed from the ALJ's finding that AAN's corrective action mitigated the penalty.

Order No. 1993-18 at 11 (June 10, 1993). The ALJ gave adequate consideration to AAN's purchase within a month of the violation of a new, more effective and efficient software system and its change in dispatching procedures. The \$7,000 civil penalty gives AAN credit for its corrective action while taking into account the potential risks to aviation safety posed by a violation of Section 135.95(a). As the ALJ aptly wrote about the gravity of AAN's violations:

The § 135.95(a) violation in this case is much more than a paperwork oversight. It is a serious and even potentially grave transgression. An aircraft whose co-pilot cannot show that he or she meets the medical requirements for flight is an aircraft operating outside established safety parameters. Flights in such an aircraft place unacceptable risks on the safety of passengers and crew. The situation is of particular concern because the degree of danger posed is unknown (Tr. 27). As a Part 135 operator, AAN is held to the highest standard of care (Tr. 50). The fine must appropriately reflect the gravity of the offense.

(Initial Decision at 17.)

The other factors suggested by AAN as warranting a further reduction are not compelling. As the ALJ explained, evidence that the violation was unintentional does not mitigate an otherwise reasonable sanction. On the contrary, evidence that a violation was intentional constitutes an aggravating factor, making a higher sanction appropriate. In the Matter of Trans World Airlines, FAA Order No. 1999-12 at 10 (October 7, 1999). The penalty assessed by the ALJ reflects the inadvertent nature of the violation in this case.

AAN's argument that the penalty is excessive in light of its financial circumstances must be rejected. The Administrator has held that financial hardship, when proven, may constitute grounds for a reduction of an otherwise appropriate civil penalty. In the Matter of Blue Ridge Airlines, FAA Order No. 1999-15 at 10 (December 22, 1999). If a violator proves that it cannot absorb an otherwise appropriate



civil penalty, a civil penalty below the penalty range set forth in agency guidance may be imposed. *See e.g., In the Matter of Blue Ridge Airlines*, FAA Order No. 1999-15 at 10.

As the ALJ correctly found, the evidence does not show that AAN, which had a net income of \$287, 062.60 in 2002 and \$242, 404.55 in 2003,<sup>18</sup> could not absorb a \$7,000 civil penalty. There was no evidence that its financial position has deteriorated significantly since that time. Consequently, AAN failed to prove that the \$7,000 civil penalty would constitute an undue financial hardship, justifying a reduction of the sanction below \$7,000.<sup>19</sup>

In light of the foregoing, AAN's appeal is denied. The \$7,000 civil penalty assessed by the ALJ in his written initial decision is affirmed.<sup>20</sup>

MARION C. BLAKEY, ADMINISTRATOR  
Federal Aviation Administration

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<sup>18</sup> See n. 7 and n. 8, *supra*, for additional information about AAN's financial circumstances.

<sup>19</sup> Complainant bears the burden of proving that the penalty that it seeks is appropriate. *In the Matter of Warbelows*, FAA Order No. 2000-3 at 19 (February 3, 2000). However, the burden of proving the affirmative defense of inability to pay a sanction (so as to justify a reduction of an otherwise appropriate civil penalty) is on the respondent. 14 C.F.R. § 13.224(c); *In the Matter of Giuffrida*, FAA Order No. 1992-72 at 2(December 21, 1992); *see e.g., In the Matter of Trans World Airlines*, FAA Order No. 1999-12 at 10 (October 7, 1999).

<sup>20</sup> Under the rules of practice, unless Respondent files a petition for review with a Court of Appeals of the United States under 49 U.S.C. § 46110 within 60 days of service of this decision, this decision is an order assessing civil penalty. 14 C.F.R. §§ 13.16(d)(4) and 13.233(j)(2).