

UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

In the Matter of: SCENIC MOUNTAIN AIR, INC.

FAA Order No. 2001-5

Docket No. CP98AL0008
DMS No. FAA-1999-5568¹

Served: May 16, 2001

DECISION AND ORDER²

Respondent Scenic Mountain Air (Scenic) has appealed the law judge's initial decision, which found that Scenic violated 14 C.F.R. § 39.3 by failing to comply with three airworthiness directives.³ Airworthiness directives, which are issued by the FAA, prescribe corrective action when an unsafe condition exists or is likely to exist or develop. The law judge assessed Scenic a \$2,500 civil penalty. This decision denies Scenic's appeal and affirms the law judge's initial decision.⁴

¹ 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). Access may be obtained through the following Internet address: <http://dms.dot.gov>.

² The Administrator's civil penalty decisions are available on LEXIS and WestLaw. They can also be found in Hawkins's Civil Penalty Cases Digest Service and Clark Boardman Callaghan's Federal Aviation Decisions. For additional information, see 66 Fed. Reg. 7532, 7532 (January 21, 2001).

³ 14 C.F.R. § 39.3 provides: "No person may operate a product to which an airworthiness directive applies except in accordance with the requirements of that airworthiness directive."

⁴ A copy of the law judge's written initial decision is attached.

I. Background

Scenic is a small air taxi operator that conducts sightseeing flights and offers flight instruction. Scenic is based in Moose Pass, Alaska.

In July 1997, at the FAA's request, Scenic's Director of Maintenance brought Scenic's maintenance records to the FAA in Anchorage, Alaska for inspection.

(I Tr. 30-31.) This inspection of Scenic's maintenance records led to the instant civil penalty action.

In the complaint, Complainant alleged that Scenic:

- operated a Piper Model PA-18 aircraft during three separate periods for a total of 136 hours when an inspection of the exhaust muffler required by Airworthiness Directive 68-05-01 was due but had not been performed;
- operated the same Piper Model PA-18 aircraft during two separate periods for a total of 119.2 hours when the inspection of the fuel selector valve required by Airworthiness Directive 60-10-08 was due but had not been performed; and
- operated a Cessna Model CE-172-I aircraft during two separate periods for a total of 11.8 hours when the inspection of the air filter assembly required by Airworthiness Directive 96-09-06 was due but had not been performed.

Complainant alleged that Scenic had violated 14 C.F.R. § 39.3 and requested that a \$7,500 civil penalty be assessed.

II. The Law Judge's Initial Decision

After a hearing,⁵ the law judge issued a written initial decision holding that Scenic violated 14 C.F.R. § 39.3. The law judge's specific findings are described below.

A. The Exhaust Muffler. The law judge found that Scenic failed, on three separate occasions, to comply with Airworthiness Directive 68-05-01,⁶ which required

⁵ References to the transcript of the first day of the hearing, on April 21, 1999, are as follows: "I Tr. ____." References to the transcript of the second day of the hearing, on August 16, 1999, are as follows: "II Tr. ____."

that Scenic inspect its Piper Model PA-18's exhaust muffler every 100 hours.⁷ The law judge rejected Scenic's defense that on two of three occasions it simply failed to record the inspections, although it had performed them. According to the law judge, Scenic's "bare word" without a written record lacked "the requisite indicia of trustworthiness." (Initial Decision at 3.) Further, the law judge stated that a finding for Scenic "would eviscerate the ... requirement [in 14 C.F.R. § 91.417] that all inspections be duly recorded." (*Id.*)

The law judge also rejected Scenic's defense that it performed the last of the three inspections, but simply recorded it in the engine logbook instead of the aircraft logbook. According to the law judge,

[e]ven if the carrier could lawfully have placed this entry in a logbook different from the logbook in which all other A[irworthiness] D[irective]-mandated exhaust-muffler inspections had been recorded – a doubtful proposition – Scenic failed in its duty to so inform agency representatives FAA inspectors are not required to hunt through all of [Scenic's] records in order to piece together pertinent records. Plainly, that is an unreasonable burden to place on them.

(Initial Decision at 3.)

B. The Fuel Selector Valve. The law judge found that on two separate occasions, Scenic operated its Piper Model PA-18 aircraft past the 100-hour deadline specified in Airworthiness Directive 60-10-08⁸ for checking the fuel selector valve.⁹ The

⁶ (Complainant's Exhibit 2.)

⁷ On the first occasion, Scenic operated the Piper aircraft for 17.5 hours in violation of the airworthiness directive. On the second, it operated the aircraft for 99.3 hours after the deadline. On the third and final occasion, it operated the aircraft in violation of the airworthiness directive for 19.2 hours, yielding a total of 136 hours.

⁸ (Complainant's Exhibit 1.)

law judge rejected Scenic's defense that the aircraft had a different type of valve than the one specified in the airworthiness directive, one that could not be taken apart and checked. The law judge reasoned that the airworthiness directive applied to all Piper Model PA-18 aircraft equipped with two fuel or wing tanks, which fit Scenic's aircraft, so Scenic could not simply ignore the airworthiness directive. The law judge stated that the airworthiness directive was applicable to Scenic "unless and until Scenic showed that the directive's provisions were inapposite and that the carrier had been released from its requirements,"¹⁰ which did not occur until Scenic received a letter from the FAA Atlanta Aircraft Certification Office, well after the inspection.¹¹ The law judge noted that the letter did not have retroactive effect. According to the law judge, Scenic had a responsibility to record or otherwise communicate to the FAA that it installed a fuel selector valve that made the "otherwise governing" airworthiness directive inapplicable, but Scenic failed to do so. (Initial Decision at 6.)

C. The Air Filter. The law judge found that on two separate occasions, Scenic operated its Cessna Model CE-172-I aircraft past the 100-hour deadline specified in Airworthiness Directive 96-09-06¹² for inspecting the air filter assembly.¹³ Although Scenic had replaced the air filter assembly, which ordinarily ends the 100-hour inspection

⁹ On one occasion, Scenic operated the Piper 99.3 hours after the deadline for the check; on the other occasion, the overflight was 19.2 hours, yielding a total overflight of 118.5 hours of operation.

¹⁰ (Initial Decision at 5.)

¹¹ The letter was dated almost 21 months after the inspection. (Initial Decision at 5.)

¹² (Complainant's Exhibit 4.)

¹³ On one occasion, Scenic was out of time for only 0.3 hours, while on the other, Scenic's inspection was 11.5 hours overdue, yielding a total of 11.8 hours of operation past the deadline.

requirement, the law judge determined that the inspections were still required because Scenic had not yet obtained approval of the alternative method of compliance from the Los Angeles Aircraft Certification Office. (Initial Decision at 6.) According to the law judge, "a mere recital" in the logbook of the replacement of the air filter assembly "was not enough." (*Id.*) Instead, Scenic "was obligated to make an entry containing the part number of the new filter and a notation that the change terminated the inspection requirements" of the airworthiness directive." (*Id.*) Since Scenic did not, it "remained subject to the requirements of the [airworthiness directive]." (*Id.*) The law judge also noted that Scenic had continued to sign off on the airworthiness directive at "more or less regular intervals," which, in the law judge's view, led the FAA inspector reasonably to believe that the airworthiness directive remained applicable. (Initial Decision at 6.)

D. Logbook Entries. The law judge rejected Scenic's argument that only "current" logbook entries may be considered. (Initial Decision at 7.) The law judge characterized this argument as "absurd." (*Id.*) According to the law judge, earlier entries are just as much a part of the logbook as later entries, and FAA inspectors need earlier entries to form a complete picture of the a carrier's maintenance practices. (*Id.*) The law judge also rejected the implication of Scenic's argument – *i.e.*, that the FAA must uncover violations prior to entry of the next notation in the logbook or forfeit any action against the alleged offender. (*Id.*) According to the law judge, accepting Scenic's argument would defeat the civil penalty program's goals of compliance and deterrence.

E. Penalty. Although the complaint sought a \$7,500 civil penalty, the law judge assessed Scenic a \$2,500 civil penalty -- \$1,500 for the exhaust muffler violation, \$500 for the fuel selector valve, and \$500 for the air filter. (Initial Decision at 8.)

Regarding the exhaust muffler, the law judge said that Scenic failed to inspect it on three occasions, creating an unreasonable risk to air safety. The law judge found that \$1,500 appropriately reflected the scale of Scenic's transgression and would best effectuate the agency's policies of compliance and deterrence. (Initial Decision at 8.)

As for the fuel selector valve and the air filter, the law judge found they were less serious in that they were essentially recordkeeping problems. Although he recognized that recordkeeping is the "linchpin" behind the FAA's regulatory scheme, the law judge nevertheless found that these violations deserved smaller civil penalties than if airworthiness violations had been alleged. (Initial Decision at 8.) In each case, Scenic had installed a part not governed by the airworthiness directive. Although the airworthiness directives technically applied until Scenic either notified the agency of the change, obtained a waiver, or both, the law judge stated that the airworthiness directives did not apply as a practical matter. For this reason, the law judge assessed civil penalties of only \$500 each for the fuel selector valve and air filter violations. (*Id.* at 9.) In the law judge's view, \$500 per violation was a significant amount to a small company Scenic and would further the agency's policies of compliance and deterrence.

III. Briefs

Before addressing the merits of Scenic's appeal, it is necessary to address a few preliminary matters regarding the briefs.

A. **Extra-Record Material.** Scenic's 95-page appeal brief contains a great deal of information that is not part of the record, including documents that the law judge excluded. The Rules of Practice, like other rules of procedure, prohibit basing a decision on material outside the record. In the Matter of Hereth, FAA Order No. 1995-26 at 8

(December 19, 1995). For this reason, the extra-record material in Scenic's appeal brief was not considered in deciding this appeal.

B. Unsigned Amicus Brief. Scenic submitted an unsigned amicus brief purporting to contain comments of Lawrence W. Havard, Sr., Scenic's Director of Maintenance. Although the omission of the signature was called to Scenic's attention, Scenic failed to correct the problem. As a result, the unsigned amicus brief is stricken.

IV. Logbook Entries

Scenic argues on appeal, as it did before the law judge, that the FAA has no right to require operators to produce anything other than the most current entry in its maintenance records at the time of the inspection. According to Scenic, the law judge erred in admitting Scenic's airworthiness directive records because they contain not just the latest entry, but earlier entries as well. (Appeal Brief at 61.) Complainant used these records to show the violations. For example, regarding the exhaust muffler, Scenic argues that there was no violation if the FAA was limited to looking at "current" records, because by the time the FAA found the problem, "several inspections had been recorded since the time [Scenic] overflow the inspection." (Appeal Brief at 28.)

Scenic bases its argument on several regulations. First, Scenic argues that 14 C.F.R. § 13.7 permits only those records and documents that the Federal Aviation Regulations require to be maintained to be used in FAA civil penalty actions.¹⁴ Second,

¹⁴ Section 13.7 provides as follows:

§ 13.7 Records, documents and reports.

Each record, document and report that the Federal Aviation Regulations requires to be maintained, exhibited or submitted to the Administrator may be used in any investigation conducted by the Administrator; and, except to the extent the use may be specifically limited or prohibited by the section which imposes the requirement, the records, documents and reports may be used in any civil penalty action, certificate action, or other legal proceeding.

Scenic contends that under 14 C.F.R. §§ 91.417¹⁵ and 135.439,¹⁶ Scenic was not required to retain the entries that showed the violations.

Scenic has misinterpreted 14 C.F.R. § 13.7. Scenic's airworthiness directive records were each clearly a "record, document, and report that the Federal Aviation Regulations require to be maintained, exhibited or submitted to the Administrator" within

¹⁵ Section 91.417 provides, in relevant part, as follows:

§ 91.417 Maintenance records.

(a) ... [E]ach registered owner or operator shall keep the following records for the periods specified in paragraph (b) of this section:

...

(2) Records containing the following information:

...

(v) The current status of applicable airworthiness directives (AD) including, for each, the method of compliance, the AD number, and revision date. If the AD involves recurring action, the time and date when the next action is required.

(b) The owner or operator shall retain the following records for the periods prescribed:

...

(2) The records specified in paragraph (a)(2) of this section shall be retained and transferred with the aircraft at the time the aircraft is sold.

...

(c) The owner or operator shall make all maintenance records required to be kept by this section available for inspection by the Administrator

¹⁶ Section 135.439 provides, in relevant part, as follows:

§ 135.439 Maintenance recording requirements.

(a) Each certificate holder shall keep ... the following records for the periods specified in paragraph (b) of this section:

...

(2) Records containing the following information:

...

(v) The current status of applicable airworthiness directives, including the date and methods of compliance, and, if the airworthiness directive involves recurring action, the time and date when the next action is required.

...

(b) Each certificate holder shall retain the records required to be kept by this section for the following periods:

...

(3) The records specified in paragraph (a)(2) of this section shall be retained and transferred with the aircraft at the time the aircraft is sold.

(c) The certificate holder shall make all maintenance records required to be kept by this section available for inspection by the Administrator

the meaning of 14 C.F.R. § 13.7. These records conformed with 14 C.F.R. §§ 91.417(a)(2)(v) and 135.439(a)(2)(v) by containing information regarding “the current status of applicable airworthiness directives, including the date and methods of compliance and the time and date when the next action is required.” Thus, the records contained information Scenic was required to keep, and the law judge properly admitted them. Nor was the law judge wrong in declining to exclude particular entries. Each entry on the form indicates the current status of Scenic’s compliance with the airworthiness directive at the time Scenic completed the entry.

Section 13.7 was not intended to restrict the agency; it was not intended to prevent the agency from taking enforcement action when an operator’s maintenance records show violations of the safety regulations. Section 13.7 is written in a permissive sense – it provides that records required to be kept *may* be used. It does *not* provide that *only* the particular records required to be maintained may be used, or that older entries in the records may *not* be used. Note that there are any number of other records, documents, and reports not mentioned in the regulation that parties use without objection in legal and administrative proceedings – *e.g.*, air carrier and manufacturer maintenance and operating manuals, FAA advisory circulars, and FAA orders.¹⁷ Further, as the law judge pointed

¹⁷ Scenic notes that the law judge did not provide any case law to support his determination that all the entries on each of Scenic’s airworthiness directive records were admissible, rather than just the most recent entry. In contrast, Scenic argues that United States v. Evaschuk, 65 F. Supp. 2d 1360 (M.D. Fl. 1999), supports its position. However, Evaschuk is distinguishable in several respects. First, it was a criminal case. Second, Evaschuk involved a different regulatory provision because airworthiness directives were not at issue – Evaschuk discussed 14 C.F.R. § 91.417(b)(1), which requires maintenance records to be kept for a year – rather than § 91.417(b)(3), which requires records containing the current status of airworthiness directives to be retained and transferred with the aircraft when it is sold. Third, the Evaschuk court did not suppress all maintenance records which were older than 1 year and therefore no longer required to be kept. Fourth, the court declined to suppress documents contained in the same logbooks as those within the search warrant’s parameters. In contrast, the entries that

out, it would be both unreasonable and detrimental to safety to require the FAA to uncover violations prior to entry of the next notation in the logbook under penalty of forfeiting any enforcement action against the alleged offender.

When the regulations intend that a certain type of record may not be used in a civil penalty action, they state so explicitly. For example, 14 C.F.R. §§ 121.359(h) and 135.151(c) state, in pertinent part, as follows: "Information obtained from the record (produced by the cockpit voice recorder) is used ... in determining the cause of accidents The Administrator does not use the record in any civil penalty ... action." Notably absent from 14 C.F.R. §§ 91.417 and 135.439 are statements to the effect that only the latest entry in maintenance records involving maintenance records may be used. For all of these reasons, the law judge correctly admitted Scenic's airworthiness directive records.

V. Exhaust Muffler Violation

Scenic states in its appeal brief that it did "make a little mistake" and forget to write down the inspections of its exhaust muffler, but its owner and operator, Vernon Kingsford, "was not too worried" because he always uses a carbon monoxide indicator in the cockpit. (Appeal Brief at 28.) According to Scenic, the carbon monoxide indicator is a much more accurate indicator of whether the muffler is leaking than a visual inspection because it detects carbon monoxide long before the human eye can detect small cracks in the muffler. (*Id.*)

The law judge, however, rejected Scenic's defense that it performed the inspections of the exhaust muffler and simply failed to record them. According to the law

Scenic seeks to exclude are contained not just in the same *logbooks* but also in the same *documents* as the entries that Scenic agrees are admissible.

judge, Scenic's word without a written record of the inspection lacked "the requisite indicia of trustworthiness." (Initial Decision at 3.)

Further, Scenic's claims regarding the carbon monoxide indicator are unsubstantiated. Even if the record did contain evidence that: (1) Scenic had installed a carbon monoxide indicator; and (2) a carbon monoxide indicator is better from a safety standpoint than a visual examination of the exhaust muffler, it still would be contrary to the interest of public safety to permit operators to decide for themselves whether and when to comply with airworthiness directives. Operators may not simply disregard an airworthiness directive; instead, they must obtain a waiver from the FAA.¹⁸

VI. Fuel Selector Valve and Air Filter Violations

Scenic argues that it could not have violated two of the three airworthiness directives, given that the law judge expressly stated that Scenic had installed parts not governed by the directives. (Initial Decision at 8.) Scenic had replaced the fuel selector valve with a new type of valve on which it was impossible to perform the check required

¹⁸ One of the exhibits Scenic introduced at the hearing was Advisory Circular 39-7C, entitled "Airworthiness Directives." It provides as follows:

Every AD applies to each product identified in the applicability statement, regardless of whether it has been modified, altered, or repaired in the area subject to the requirements of the AD. For products that have been modified, altered, or repaired so that performance of the requirements of the AD is affected, the owner/operator must use the authority provided in the alternative methods of compliance provision of the AD (see paragraph 12) to request approval from the FAA. This approval may address either no action, if the current configuration eliminates the unsafe condition; or different actions necessary to address the unsafe condition described in the AD. In no case, does the presence of any alteration, modification, or repair remove any product from the applicability of this AD.

(Respondent's Exhibit 1.)

by the airworthiness directive. Similarly, it had replaced the air filter with a new type of filter that did not need such frequent inspections.

As the law judge noted, the problem was with Scenic's recordkeeping. Scenic's entries in its maintenance records that documented the change in parts did not indicate in any way that the changes were terminating actions for the airworthiness directives. Scenic's principal maintenance inspector testified that as a mechanic, he would expect to see a specific entry indicating that it was a terminating action. I Tr. 46-48.¹⁹

VII. Letter from FAA Employee

Scenic argues that the law judge erred in excluding a letter from an FAA engineer stating that Airworthiness Directive 60-10-08 did not apply to the fuel valve at issue in this case. (Appeal Brief at 85.) The law judge properly excluded the letter given that it was not authenticated. The law judge stated, "We have an authentication problem We don't know the circumstances under which this was produced" I Tr. 77. It is standard practice to require documents to be authenticated before admitting them. *See, e.g.,* Rule 901 of the Federal Rules of Evidence.

VIII. Constitutional Claims

Scenic has many complaints about the behavior of the FAA inspectors and counsel in this case, including the following:

- FAA inspectors and counsel in this case allegedly conspired to offer fraudulent testimony and evidence. (Appeal Brief at 89.)

¹⁹ Scenic is correct that the law judge was wrong when he said that no record existed informing agency officials that the new fuel selector valve had been installed. Actually, as Complainant's Exhibit 3 at 2, shows, Scenic did log the change in valves. But as with the air filters, Scenic was obligated to make an entry indicating that the change terminated the inspection requirements of the airworthiness directive.

- FAA inspectors photocopied Scenic's aircraft records against the wishes of Scenic's owner, Vernon Kingsford, and refused to return the photocopies to him. (Appeal Brief at 10.) They allegedly trespassed on Mr. Kingsford's property after he told them to leave and stole the electricity used to power their copier. (Appeal Brief at 12.) The inspectors allegedly failed to show official identification badges. (Appeal Brief at 13.)
- The inspectors allegedly harassed Mr. Kingsford during his busy season, causing him stress and anxiety that affected the safety of his operation. (Appeal Brief at 14.)

According to Scenic, these complaints rise to the level of constitutional violations. The record simply does not contain evidence regarding these claims. As a result, they are rejected as unsubstantiated.

IX. Financial Hardship

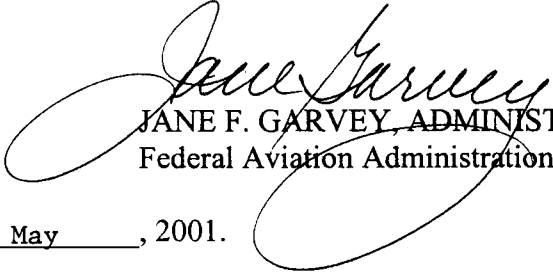
While Scenic argues that it cannot afford to pay a civil penalty (Appeal Brief at 4), it did not raise the issue of financial hardship at the hearing, and thus failed to preserve the issue for appeal. In the Matter of Northwest Aircraft Rental, FAA Order No. 1994-4 at 9 (March 10, 1994). The record contains no evidence of Scenic's financial hardship or inability to pay.

The Administrator has held numerous times that financial hardship, when proven, may constitute grounds for reduction of an otherwise appropriate civil penalty. In the Matter of Blue Ridge Airlines, FAA Order No. 1999-15 at 10 (December 22, 1999). However, unsworn and unsubstantiated statements by alleged violators are insufficient evidence of inability to pay. In the Matter of Conquest Airlines, FAA Order No. 1994-20 at 3 (June 22, 1994), citing In the Matter of Giuffrida, FAA Order No. 1992-72 at 3 (December 21, 1992). Scenic bore the burden of proving its claim of financial hardship,

In the Matter of Conquest Helicopters, FAA Order No. 1994-20 at 3 (June 20, 1994), but failed to substantiate its claim.²⁰

X. Conclusion

For the foregoing reasons, the law judge's initial decision is affirmed and a civil penalty of \$2,500 is assessed.²¹


JANE F. GARVEY, ADMINISTRATOR
Federal Aviation Administration

Issued this 15th day of May, 2001.

²⁰ The other arguments contained in Scenic's appeal brief have been considered, rejected, and determined to be unworthy of discussion.

²¹ 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 shall be considered an order assessing civil penalty. See 14 C.F.R. §§ 13.16(b)(4) and 13.233(j)(2) (2000.)