UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

In the Matter of:	FAA Order No. 97-11
HAMPTON AIR TRANSPORT SYSTEMS, INC.	Served: February 20, 1997
	Docket No. CP94EA0194

DECISION AND ORDER

Complainant Federal Aviation Administration (FAA) and Respondent Hampton Air Transport Systems, Inc. (Hampton) have each filed an appeal from Administrative Law Judge Burton S. Kolko's initial decision in this case.[1] The law judge determined that Hampton violated the regulations[2] by operating its aircraft with an inoperative glide slope indicator, but he declined to impose a civil penalty. Hampton has appealed the law judge's finding of violations, while Complainant has appealed his decision not to assess a civil penalty. This decision grants Complainant's appeal.

Hampton is based at Gabreski Airport (formerly Suffolk County Airport), in Westhampton Beach, New York. (Tr. 130.) Hampton holds a certificate permitting it to operate as an air carrier under the rules for commuter and on-demand

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[1] Attached is a copy of the law judge's written initial decision.

[2] Specifically, 14 C.F.R. §§ 91.71(a) and 135.179(a)(1).

operations in 14 C.F.R. Part 135. Hampton's air carrier operation is small; it is a single aircraft, single pilot operation.[3] (Tr. 65, 130.)

Complainant alleged that Hampton operated its Piper Model PA-28-151 aircraft with one of the two glide slope indicators inoperative on 56 air carrier flights over the course of a year.[4] A glide slope assists a pilot making an instrument landing by indicating whether the aircraft is too high or too low on the glide slope. (Tr. 21-22.)

The air carrier flights at issue were flown under a contract between Hampton and the local Board of Cooperative Education Services. (Tr. 162.) Under the contract, Hampton flew three passengers -- a teacher, a social worker, and a speech therapist -- from Gabreski Airport to Fisher's Island, where the three adults worked with children with special needs. (*Id.*)

A Minimum Equipment List permits operation of an aircraft with inoperative instruments or equipment under certain specified conditions.[5] The parties stipulated that the aircraft did not have a Minimum Equipment List during the relevant time period. (Tr. 9.)

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[3] In addition to its air carrier operations, Hampton sells and services aircraft and brokers flight training. (Tr. 130-31.)

[4] The flights occurred from November 19, 1992, through November 23, 1993. *See* Amended Complaint.

[5] 14 C.F.R. § 135.179.

After a hearing, the law judge issued a decision finding that the glide slope indicator was inoperative and that Hampton violated 14 C.F.R. §§ 91.71(a)[6] and 135.179(a)(1).[7] (Initial Decision at 9.) Nevertheless, the law judge declined to impose a civil penalty on the grounds that the regulations did not clearly set out Hampton's obligations and the violations did not affect safety. (*Id.*, at 7, 10-11.)

In its appeal brief,[8] Hampton argues that the law judge erred in finding the glide slope indicator inoperative, given the lack of direct evidence to that effect. (Appeal Brief at 4.) This argument lacks merit.

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[6] 14 C.F.R. § 91.7(a) provides, "No person may operate a civil aircraft unless it is in an airworthy condition."

[7] 14 C.F.R. § 135.179(a) provides, in relevant part, "No person may take off an aircraft with inoperable instruments or equipment installed unless . . . (1) An approved Minimum Equipment List exists for that aircraft. . . ."

[8] Complainant has filed a motion to strike Hampton's *reply* brief for untimeliness. Section 13.210(b) of the Rules of Practice provides that a mailed document is considered filed on: "the mailing date shown on the certificate of service, the date shown on the postmark if there is no certificate of service, or other mailing date shown by other evidence if there is no certificate of service or postmark." 14 C.F.R. § 13.210(b). The certificate of service attached to Hampton's brief is undated. (Thus, it did not meet the requirements for a certificate of service as set forth in 14 C.F.R. § 13.211(c).) The postage meter stamp date on the envelope reads August 7, 1996, which is 7 days *after* the date on which the reply brief was due.

In response to Complainant's motion to strike, counsel for Hampton argues that the date on the envelope containing the reply brief is not a true postmark but instead was made by the postage meter in his office. According to Hampton's counsel, "[t]he practice in my office of setting postage meter dates is less than a top priority. In August 1995 a meter inspector . . . pointed out to me that the year . . . was set to 1999." (Answer to Strike at 3.) He added, ". . . the dates on the postage meter are changed from time to time by my children who are ages 11 and 13. As I checked the meter today, I find that it is *only* 12 days off." (*Id.*; emphasis added.) Thus, Hampton's counsel argues, the date stamped on the envelope is unreliable evidence of the date of mailing.

A postage meter stamp is not the same as a postmark from the U.S. Postal Service. The latter is more reliable evidence of mailing. But here, the *only* evidence of the mailing date for the reply brief is a postage meter stamp, and it indicates that the reply brief was mailed *after* the due date. Moreover, Hampton's counsel has neither claimed that he filed the reply brief in a timely fashion nor provided evidence of timely filing. Hampton's counsel admitted in his Answer to the Motion to Strike that he has no specific recollection of the date of the actual mailing. (Answer to Motion to Strike, at 3.) The party filing a document has

Complainant can use circumstantial evidence to sustain its burden of proof. In the Matter of Sweeney, FAA Order No. 93-29 at 7-8 (October 20, 1993), citing In the Matter of Continental Airlines, FAA Order No. 90-12 (April 25, 1990). The Rules of Practice require the law judge's findings of fact to be "supported by, and in accordance with, the reliable, probative, and substantial evidence contained in the record." 14 C.F.R. § 13.223. Circumstantial evidence can be reliable, probative, and substantial. *See, e.g.*, In the Matter of America West Airlines, FAA Order No. 96-3 at 31 (February 13, 1996) (referring to certain circumstantial evidence as "strong").

The following evidence supports the law judge's finding that the glide slope indicator was inoperative during the relevant time period (*i.e.*, from November 19, 1992, through November 23, 1993):

- The glide slope was placarded as inoperative in November 1992. Hampton does not dispute this. (Tr. 24, 44-45, 90.)[9]
- Hampton's President, Mr. Caccavalla, testified that after performing an annual avionics check in November 1992, he marked the glide slope "inoperative" on the appropriate form. (Complainant's Exhibit 2.)
- In a letter dated November 26, 1993, Mr. Caccavalla advised Complainant that the instrument was inoperative and under repair. (Complainant's Exhibit 5.)
- Mr. Caccavalla testified that at least two pilots had advised him that the glide slope was inoperative. (Tr. 133-34, 155-56.)

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the burden of proving the date on which it filed the document, and Hampton has failed to prove that it filed its reply brief on time. For these reasons, Hampton's reply brief is stricken for untimeliness.

[9] Mr. Caccavalla, the President of Hampton, testified that he believed that one of his employees who flew the airplane, either John MacKay or Vincent Fordonski, had placarded the glide slope as inoperative. (Tr. 133-34, 155.)

- A work order from an avionics repair shop dated December 12, 1993, contains the following statement under "Service Description":

> 1. ***#1 GLIDE SLOPE INOP***
> Ramp test verified. Swapped KX-170's to verify channeling.
> ***Unit inop*** . . . . (Complainant's Exhibit 6 at 1; emphasis added.)

Moreover, as the law judge found, even if the glide slope indicator worked intermittently, it could not be considered operable, because it did not work reliably. (Initial Decision at 5-6.) The law judge did not err in finding the glide slope indicator inoperative.

Hampton further argues that the law judge erred in accepting Complainant's position that it was insufficient for Hampton to placard the glide slope as inoperative. Complainant bases its position on Section 135.179(a), which expressly prohibits taking off an aircraft with an inoperative instrument unless the aircraft has a Minimum Equipment List that so permits. (Appeal Brief at 4, 13.) It was wrong, Hampton contends, for the law judge to permit Complainant to "make up" rules; the agency should have used formal notice-and-comment rulemaking procedures instead. (Appeal Brief at 4.)

Complainant did not "make up" any rules in this proceeding. It simply rejected Hampton's interpretation of existing rules.[10] Hampton argued that

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[10] Complainant argues in its Appeal Brief at 14-15 that:

> Respondent is not the subject of a first-time construction of a regulation or a new policy by the FAA. Rather, Respondent is the subject of the FAA's long-enforced and unambiguous positions that (1) no person shall take off an aircraft under Part 135 with inoperable instruments or equipment installed unless an approved MEL listing that instrument exists for that aircraft . . .

Section 91.213(d) permitted it to operate with the glide slope inoperative. Section 91.213(d) provides that a person may take off an aircraft in operations conducted *under Part 91* with an inoperative instrument, even when the aircraft has no Minimum Equipment List, if the inoperative instrument is deactivated[11] and placarded "inoperative."[12] According to Hampton, Section 91.213(d) applied, even

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and (2) no person shall operate a civil aircraft unless it is in an airworthy condition.

[11] As stated above, there is no evidence in the record that Hampton had deactivated the malfunctioning glide slope indicator. The fact that the part was working intermittently (Tr. 142) indicates that it had not been deactivated.

[12] The exact text of 14 C.F.R. § 91.213(d) is as follows:

> . . . [A] person may take off an aircraft in operations conducted under this part [Part 91] with inoperative instruments and equipment without an approved Minimum Equipment List provided--
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> (1) The flight operated is conducted in a--. . .
>
> (i) Rotorcraft, nonturbine-powered airplane, glider, or lighter-than-air aircraft for which a Master Minimum Equipment List has not been developed; . . .
>
> (2) The inoperative instruments and equipment are not--
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> (i) Part of the VFR-day type certification instruments and equipment prescribed in the applicable airworthiness regulations under which the aircraft was type certificated;
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> (ii) Indicated as required on the aircraft's equipment list, or on the Kinds of Operations Equipment Lists for the kind of flight operation being conducted;
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> (iii) Required by § 91.205 or any other rule of this part for the specific kind of flight operation being conducted; or
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> (iv) Required to be operational by an airworthiness directive; and
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> (3) The inoperative instruments and equipment are-- . . .
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> (ii) Deactivated and placarded "Inoperative." If deactivation of the inoperative instrument or equipment involves maintenance, it must be accomplished and recorded in accordance with Part 43 of this chapter; and
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> (4) A determination is made by a pilot, who is certificated and appropriately rated under part 61 of this chapter, or by a person, who is certificated and appropriately rated to perform maintenance on the aircraft, that the inoperative instrument or equipment does not constitute a hazard to the aircraft.
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> An aircraft with inoperative instruments or equipment as provided in paragraph (d) of this section is considered to be in a properly altered condition acceptable to the Administrator.

though the flights were conducted under Part 135, because Section 135.411(a)(1) provides that aircraft that are type-certificated for nine or fewer passenger seats, like the aircraft at issue, shall be maintained under Parts 91[13] and 43.[14]

One of the problems with Hampton's argument is that Section 135.411(a)(1) expressly applies only to maintenance -- not to operations.[15] Section 135.411(a)(1) provides that aircraft type certificated for nine or fewer seats shall be *maintained* under Part 91, which means that Part 91's *maintenance rules,* not its operation rules, apply to such aircraft. Part 91's maintenance rules are found in Subpart E of

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[13] 14 C.F.R. Part 91 is entitled "General Operating and Flight Rules."

[14] 14 C.F.R. Part 43 is entitled "Maintenance, Preventive Maintenance, Rebuilding, and Alteration."

[15] The exact language of Section 135.411(a)(1), in relevant part, is as follows:

> (a) This subpart prescribes rules in addition to those in other parts of this chapter for the maintenance, preventive maintenance and alterations for each [Part 135] certificate holder . . . :
> (1) ***Aircraft that are type certificated for a passenger seating configuration, excluding any pilot seat, of nine seats or less, shall be maintained under parts 91*** and 43 of this chapter and §§ 135.415, 135.417, and 135.421 . . . .

14 C.F.R. § 135.411(a)(1) (emphasis added).

Complainant points out that the regulatory scheme itself demonstrates the error of Hampton's interpretation. For example:

- Section 135.411 is found in Subpart J of Part 135, which is entitled "Maintenance, Preventative Maintenance, and Alterations."
- Section 135.411(a)(1) does not even mention operation of an aircraft, much less provide exceptions to either Section 91.7(a) or Section 135.179(a).
- The remainder of Section 135.411 sets out additional maintenance requirements.

(Appeal Brief at 16.)

Part 91, which is entitled "Maintenance, Preventive Maintenance, and Alterations," 14 C.F.R. §§ 91.400-91.499. Section 91.213 (which Hampton argues permitted it to operate with the inoperative glide slope indicator) is *not* a maintenance regulation. Moreover, maintenance means "inspection, overhaul, repair, preservation, and the replacement of parts . . . ." 14 C.F.R. § 1.1. It does not mean operating, or operating without repair, as Hampton did in the instant case.

Furthermore, Hampton's argument is not compelling because Section 91.213(d) expressly applies only to operations conducted under Part 91. It provides: "A person may take off an aircraft ***in operations conducted under this part [Part 91]*** with inoperative instruments without an approved Minimum Equipment List provided . . . the inoperative instruments are deactivated and placarded "inoperative." (Emphasis added.) The flights at issue were not conducted under Part 91; rather, they were passenger-carrying flights for compensation or hire conducted under Part 135.

Accepting Hampton's interpretation of Sections 135.411(a)(1) and 91.213 would lead to the logical conclusion that Part 135's operating rules (which provide a higher level of safety for passenger-carrying flights for compensation or hire like those at issue here) simply do not apply to aircraft type certificated for nine or fewer seats. (Tr. 180.) Even Hampton acknowledges that it must comply with Part 135's operating rules. Thus, Hampton's interpretation of the regulations was unreasonable, and the law judge rightly rejected it. Hampton's appeal is denied.

Turning now to Complainant's appeal, Complainant argues that the law judge erred in declining to impose a civil penalty. One of the law judge's principal reasons for declining to impose a penalty was that Hampton's obligations were not

clear from the regulations. The law judge stated that although it may be permissible for an agency to interpret rules through adjudication, the result falls unfairly on the party against whom it is first applied, because the party has inadequate warning of the regulation's reach. (Initial Decision at 10.) According to the law judge, the agency's two rationales for assessing a penalty -- compliance and deterrence -- do not apply where an agency is defining a policy for the first time through adjudication. (*Id.*)

Contrary to the law judge's finding, it was clear from the regulations that Hampton violated the regulations by operating an aircraft under Part 135 with an inoperative glide slope indicator but no Minimum Equipment List.[16] If, indeed, Hampton was unsure of the applicability of the FAA's longstanding policy to its operation with an inoperative glide slope indicator, it should have checked with the FAA. Had Hampton done so, its erroneous construction of the regulations could have been corrected before a violation occurred, and this case would never have arisen.

Further, contrary to the law judge's finding, compliance and deterrence *are* advanced by assessing a penalty in this case. *See* In the Matter of Schultz, FAA Order No. 89-5 at 13 (civil penalty deters respondents and others from committing similar violations in future). Part 135 operators cannot operate aircraft in passenger-carrying flights for compensation without complying with all the applicable Federal Aviation Regulations. Only rarely would it be appropriate to find

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[16] *See* the discussion beginning at page 7 above, rejecting Hampton's interpretation of the rules as unreasonable.

that violations have occurred but no penalty is warranted, and this is not such a case.

The law judge stated that the flights as operated did not implicate safety concerns because:

- Every flight was operated under VFR conditions, so the glide slopes were not needed.
- Neither Gabreski Airport nor the airport on Fisher's Island operated instrument landing systems (ILS), so the glide slopes would have been useless in any event.

(Initial Decision at 10-11.) Citing the testimony of one of the FAA inspectors (Tr. 67), the law judge stated that the agency had "conceded that none of the 56 flights affected safety." (*Id.*, at 11.)[17]

Nevertheless, a preponderance of the reliable, probative, and substantial evidence adduced at the hearing shows that the margin of safety that glide slopes provide was reduced because on 56 flights, one of the glide slope indicators was inoperative. Weather can change abruptly. (Tr. 205-06, 209.)[18] This is one reason why Hampton's operations specifications required Hampton's pilots to be instrument-rated, even though Hampton's operations specifications permit VFR flight only. (Tr. 205; Hampton's Exhibit 2.) Mr. Caccavella, Hampton's President,

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[17] When the law judge asked one of the FAA inspectors, "Was this a violation that affected safety?" the inspector responded, "It was not." (Tr. 67.) Nonetheless, Complainant's position throughout these proceedings has been that though safety may not have been *directly* affected, safety considerations are nevertheless present. *See, e.g.*, further testimony of the FAA inspectors (Tr. 206, 209), and Complainant's closing argument (Tr. 216).

[18] Although Gabreski Airport and the airport at Fisher's Island are only about 29 nautical miles apart, at all times during the relevant period, Hampton's operations specifications permitted it to fly throughout the contiguous United States and most of Canada. (Hampton's Exhibit 2 at 18.)

acknowledged that flight under instrument flight rules (IFR) might become necessary even though the operator intends VFR flight only. (Tr. 177-78.) Even if it were true, as the law judge found (Initial Decision at 10-11), that neither airport[19] had an Instrument Landing System,[20] weather or other circumstances may require a pilot to divert to another airport. Moreover, even though the other glide slope indicator on the aircraft was functioning, the margin of safety was still reduced by the unreliability of the one glide slope indicator on these flights. In many contexts, the regulations require redundancy, because redundancy enhances safety of operations. (Tr. 209.) Even Mr. Caccavalla testified that he normally used both glide slope indicators to land under difficult conditions:

> Well, normally, . . . I would use both [glide slope indicators] if I had to pull an instrument approach that was low. If it was low, especially if it's an unfamiliar airport, I'm going to throw both of them on . . . .

(Tr. 156-57.)

Although Hampton alleged financial hardship, which may justify reduction of an otherwise appropriate sanction,[21] Hampton failed to sustain its burden of proof on this issue. Hampton's financial statement contains the following prominent disclaimer:

> MANAGEMENT HAS ELECTED TO OMIT SUBSTANTIALLY ALL OF THE DISCLOSURES REQUIRED BY GENERALLY ACCEPTED

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[19] The flights at issue were between Gabreski Airport and the airport at Fisher's Island.

[20] In order to use a glide slope, the airport at which one is landing must have an Instrument Landing System (ILS). The testimony at the hearing was that: (1) the airport at Fisher's Island does not have an ILS (Tr. 152); and (2) although Gabreski Airport has an ILS, it is not always operational. (Tr. 156, 208.)

[21] In the Matter of Larry's Flying Service, FAA Order No. 95-17 at 5 (1995).

> ACCOUNTING PRINCIPLES. IF THE OMITTED DISCLOSURES WERE INCLUDED IN THE FINANCIAL STATEMENTS, THEY MIGHT INFLUENCE THE USER'S CONCLUSIONS ABOUT THE COMPANY'S FINANCIAL POSITION, RESULTS OF OPERATIONS, AND CHANGES IN CASH FLOWS. ACCORDINGLY, THESE FINANCIAL STATEMENTS ARE NOT DESIGNED FOR THOSE WHO ARE NOT INFORMED ABOUT SUCH MATTERS.

(Hampton's Exhibit 4 at 1.) Without adequate proof, the civil penalty cannot be reduced on the basis of financial hardship. In the Matter of Giuffrida, FAA Order No. 92-72 at 3 (December 21, 1992) (hearsay evidence insufficient to support factual finding of inability to pay).

Complainant sought a civil penalty of $5,000, citing the small size of Hampton's operation and the nature of the violations. (Tr. 67.) Given all the circumstances of this case, I find that a $5,000 civil penalty is appropriate.

For the reasons delineated above, this decision denies Hampton's appeal and grants Complainant's appeal. It affirms the law judge's determination that Hampton Air violated 14 C.F.R. §§ 91.7 and 135.179, and it reverses the law judge's determination not to impose a civil penalty. Hampton is ordered to pay a civil penalty of $5,000.[22]

BARRY L. VALENTINE
Acting Administrator
Federal Aviation Administration

Issued this 19th day of February, 1997.

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[22] 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. § 46110), this decision shall be considered an order assessing civil penalty. *See* 14 C.F.R. §§ 13.16(b)(4) and 13.233(j)(2) (1996).