UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

In the Matter of:	FAA Order No. 97-8
PACIFIC AVIATION INTERNATIONAL, INC. d/b/a INTER-ISLAND HELICOPTERS	Served: February 20, 1997
	Docket No. CP95WP0049

DECISION AND ORDER

Pacific Aviation International, Inc., d/b/a Inter-Island Helicopters (Inter-Island), has appealed from Administrative Law Judge Ann Z. Cook's initial decision[1] assessing Inter-Island a $7,000 civil penalty for operating its helicopter 400 hours beyond the mandatory replacement time for a life-limited part. This decision affirms the law judge's finding of violations and assessment of a $7,000 civil penalty.

On January 27, 1992, Inspector Tweet Coleman of the FAA Flight Standards District Office in Honolulu received a telephone call from Frank Perez, an airframe and powerplant mechanic then employed by Inter-Island. (Respondent's Exhibit 2.) Mr. Perez's "chief complaint," according to Inspector Coleman, was that Inter-Island

[1] Attached are copies of Judge Cook's: (1) "Order Denying Respondent's Motion for Dismissal and Granting in Part and Denying in Part Complainant's Motion to Deem Allegations Admitted and Motion for Summary Judgment," dated November 20, 1995; (2) "Order Denying [Inter-Island's] Motion to Set Aside," dated March 12, 1996; and (3) the portion of the hearing transcript containing the law judge's determination of the appropriate sanction, held on April 8, 1996.

had operated a Hughes Model 369D helicopter 400.9 hours beyond the 6,500 hour replacement time for the longitudinal idler bellcrank. (*Id.*)[2]

According to FAA Inspector David B. Soucie, who testified at the hearing, the longitudinal idler bellcrank controls the up-and-down movement of the helicopter. (Hearing held on April 4, 1996, at 14.) Inspector Soucie testified that if the bellcrank failed, the pilot would not be able "to pitch the aircraft down or up," making it impossible to land the helicopter. (*Id.*)

At the time of the alleged violations, Inter-Island flew sight-seeing tours over the Hawaiian Islands.[3] The company held a Part 135 air carrier certificate.[4] It performed its own maintenance work, employing three airframe and powerplant mechanics, one with an inspection authorization, for this purpose.[5]

After Complainant's own investigation confirmed Mr. Perez's report, Complainant sought to assess Inter-Island a civil penalty of $11,000 for allegedly violating the following regulations:

- 14 C.F.R. § 91.7(a), providing that no person may operate a civil aircraft in unairworthy condition;[6]
- 14 C.F.R. § 91.403(c), providing that no person may operate an aircraft unless mandatory replacement times for life-limited parts have been met;[7] and

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[2] The violations allegedly occurred from September 13, 1991, to December 13, 1991.

[3] Inter-Island has since given up its tour operation. According to the president and owner of Inter-Island, Kenneth D'Attilio, it now performs only county, state, and Federal government work. (Pre-Hearing Conference held on April 20, 1995, at 7.)

[4] Answer to Complaint, ¶ 1, § 1.

[5] Answer to Complaint, ¶ 1, § 2; Inter-Island's Motion to Dismiss dated May 30, 1995, ¶ 2(a).

[6] The exact text of this regulation is as follows: "No person may operate a civil aircraft unless it is in an airworthy condition." 14 C.F.R. § 91.7(a) (1991).

[7] The full text of 14 C.F.R. § 91.403(c) (1991) is as follows:
(Continued on next page.)

- 14 C.F.R. § 135.413(a), providing that each Part 135 certificate holder must maintain its aircraft according to the Federal Aviation Regulations.[8]

The president and owner of both Pacific Aviation and Inter-Island, Kenneth D'Attilio, represented Inter-Island in the proceedings before the law judge. Inter-Island is represented by counsel on appeal.

Inter-Island argued, in proceedings before the law judge, that it had hired FAA-certified mechanics to maintain and inspect the aircraft, and that the mechanics, not Inter-Island, should be held responsible for the failure to replace the part. (*See, e.g.*, Inter-Island's Motion to Dismiss dated May 30, 1995.) Inter-Island also claimed that:

- It fired the mechanic who reported the deficiency, Frank Perez, for stealing parts.
- Frank Perez offered to tell the FAA his earlier report was a mistake if Inter-Island paid him $8,000, but Inter-Island refused to pay.[9]

> No person may operate an aircraft for which a manufacturer's maintenance manual or instructions for continued airworthiness has been issued that contains an airworthiness limitations section unless the mandatory replacement times, inspection intervals, and related procedures specified in that section or alternative inspection intervals and related procedures set forth in an operations specification approved by the Administrator under part 121, 127 or 135 of this chapter or in accordance with an inspection program approved under § 91.409(e) have been complied with.

[8] Following is the full text of 14 C.F.R. § 135.413(a) (1991):

> Each certificate holder is primarily responsible for the airworthiness of its aircraft, including airframes, aircraft engines, propellers, rotors, appliances, and parts, and shall have its aircraft maintained under this chapter, and shall have defects repaired between required maintenance under part 43 of this chapter.

[9] *See, e.g.*, Letter from Kenneth D'Attilio to FAA dated March 16, 1994.

Ruling on Complainant's motion for decision, the law judge held that Complainant was entitled to judgment as a matter of law because Inter-Island was responsible for its employees' actions. The law judge granted Complainant's motion for decision regarding the alleged violations of 14 C.F.R. §§ 91.7 and 91.403(c). The law judge did not, however, find a violation of Section 135.413(a). Complainant withdrew the Section 135.413(a) allegation[10] after Inter-Island stated in its answer[11] and in its motion to dismiss[12] that it conducted the air tour flights at issue under authority of Part 91, the general operating rules, rather than Part 135, the rules governing certain types of air carriers.

The law judge held a hearing to determine the appropriate sanction amount. After the hearing, the law judge imposed a $7,000 civil penalty.

On appeal, Inter-Island claims that it is unfair to assess it a civil penalty because:

> . . . Mr. Perez, the reporting mechanic, attempted to blackmail $8,000 from the company in return for remaining silent regarding the overtime part. Mr. Perez was the only person who was aware of the overtime part and he kept it to himself. He purposefully allowed this discrepancy and others to slide by his inspections simply because he wished to use the issue to extract monies from the company.

(Appeal Brief at 5.) The only evidence Inter-Island offered to support this claim was the testimony of Kenneth D'Attilio at the hearing on sanction held on April 8, 1996.

Assuming, for the sake of argument, that the claim is true, it does not relieve Inter-Island of responsibility for the violations in this case. Other Inter-Island

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[10] Pre-Hearing Conference held on February 6, 1996, at 4.

[11] ¶ 1, § 1.

[12] ¶ 2(c).

employees besides Mr. Perez certified the aircraft as airworthy during the period in question.[13] Inter-Island was responsible for adequately supervising its mechanic employees, which it failed to do. Under the safety regulations, the owner or operator of an aircraft is primarily responsible for its airworthiness.[14] Inter-Island has not alleged that Mr. Perez "covered up" the failure to replace the bellcrank in some way--*e.g.*, that he altered the records so that it would appear falsely to Mr. D'Attilio or to the other Inter-Island employees that the part had been replaced. (Hearing held on April 8, 1996, at 39.) Anyone looking at the records could see that the part needed to be replaced. (*Id.*, at 21.) Mr. D'Attilio, the president and owner of Inter-Island, served as its Director of Maintenance. It was his responsibility to ensure that Inter-Island had an effective system in place to ensure the proper performance of required maintenance.

Inter-Island also argues that this case is distinguishable from In the Matter of Flight Unlimited, in which the Administrator assessed an air taxi operator $10,000 for operating an aircraft beyond the time for a required inspection.[15] According to Inter-Island, Flight Unlimited is distinguishable because the respondent in Flight Unlimited probably could recover the civil penalty from a

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[13] The logbook sign-offs contain the signatures of Michael May and Joe Zaremba. (Complainant's Exhibit F-1.) *See also* Inspector Soucie's testimony that Michael May certified the aircraft as airworthy after several inspections during the relevant time period. (Hearing held on April 4, 1996, at 28-29.)

[14] 14 C.F.R. § 91.403(a) provides that: "The owner or operator of an aircraft is primarily responsible for maintaining that aircraft in airworthy condition . . . ."

[15] In the Flight Unlimited case, the Administrator held an air taxi operator responsible for operating an aircraft on 46 flights after the expiration of the deadline for conducting an radiographic inspection of the right engine mount beams. Flight Unlimited had hired a repair station to perform the maintenance on its aircraft. In the Matter of Flight Unlimited, FAA Order No. 92-10 (February 6, 1992).

repair station, whereas Inter-Island cannot because it hired its own mechanics to do the work. (Appeal Brief at 6.)

It makes no difference that Inter-Island cannot recover the civil penalty from a repair station. Inter-Island chose to hire its own mechanics to perform its maintenance. It was Inter-Island's responsibility to supervise their work adequately.

Inter-Island argues further on appeal that the $7,000 civil penalty assessed by the law judge is too harsh. Inter-Island argues that there were fewer violations here than in In the Matter of Watts Agricultural Aviation, FAA Order No. 91-8 (April 11, 1991), *petition for review denied*, 977 F.2d 594 (9th Cir. 1992), in which the Administrator affirmed the law judge's assessment of a $1,400 civil penalty. Complainant responds that Watts Agricultural involved an operation on a single date, whereas in the instant case, there were numerous flights during a 70-day period. (Reply Brief at 9, n.2.)

Inter-Island's claim that it committed fewer violations than the respondent in Watts Agricultural is inaccurate, given that Inter-Island operated its aircraft in an unairworthy condition on 70 separate days.[16] Under the statute, a separate violation occurs for each day the violation continues or for each flight involving the violation. 49 U.S.C. § 46301(a)(4). In addition, the penalty in the instant case is $3,000 less than the penalty in another case, In the Matter of Flight Unlimited, FAA Order No. 92-10 (February 6, 1992), even though Inter-Island apparently operated an unairworthy aircraft on considerably more flights than the respondent

[16] Hearing held on April 8, 1996, at 11-12.

in Flight Unlimited.[17] An important caveat is that it is often difficult to compare sanctions across cases because there are so many variables involved in each case.

Inter-Island also argues that it operated the aircraft "only" 400 hours beyond the mandatory replacement time. Inter-Island argues that 400 hours exceeds the 6,500 hour replacement time by only 6%, and is therefore "de minimus." (Appeal Brief at 2.) The $7,000 civil penalty, however, already reflects the number of hours that Inter-Island operated an unairworthy aircraft. If Inter-Island had operated an unairworthy aircraft for a longer period of time, a higher penalty may have been appropriate.

Inter-Island asserts that the part in question has no history of failure in service on this type of aircraft. Assuming that this is true, arguably there has been no failure because operators generally replace the part at the required time. The FAA need not wait until deaths occur before it can hold operators responsible for violating the safety regulations. Moreover, any suggestion on Inter-Island's part that it is a better judge of the operating limits of a particular aircraft part than the manufacturer must be rejected.

Inter-Island claims a lower penalty is appropriate because the aircraft was dismantled for overhaul when the FAA inspectors came to inspect it, and the aircraft would not have been flown until the overhaul was complete. This argument

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[17] Flight Unlimited involved 46 flights with an unairworthy aircraft, while the instant case involves more than 70. Inspector Soucie testified that Inter-Island operated the aircraft on 70 separate days (Hearing held on April 8, 1996, at 11-12), and it is unlikely that Inter-Island flew only one flight per day, given the nature of Inter-Island's operation.

is rejected because the $7,000 penalty was for the flights already flown.[18]

For all of these reasons, Inter-Island's arguments that the $7,000 sanction is too harsh must fail. Moreover, several of Inter-Island's arguments regarding the penalty amount suggest that it still does not realize the seriousness of the violations. Contrary to Inter-Island's claim that "the infraction charged did not threaten anyone" (Appeal Brief at 7), the company's failure to ensure that the part was replaced threatened the safety of the passengers on its sightseeing flights, the pilots, and persons and property on the ground.

Inter-Island claims that the law judge violated its right to procedural due process when she granted Complainant's motion for decision, obviating a hearing on the merits. Inter-Island cites no case law indicating that due process requires a hearing where there is no genuine issue of material fact and where one party is entitled to a decision as a matter of law. If Inter-Island's claim had merit, the Federal Rules of Civil Procedure would not provide for the granting of motions for summary judgment, which are analogous to motions for decision under the FAA Rules of Practice. Note too, that at the hearing to set the sanction amount, the law judge provided Inter-Island the opportunity to introduce essentially the same evidence it wished to provide at a hearing on the merits--*i.e.*, evidence regarding Inter-Island's lack of knowledge, its mechanics' responsibility for the violations, and Frank Perez's alleged blackmail attempt.

Furthermore, contrary to Inter-Island's claim, due process is not offended by

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[18] Note, too, that Inter-Island's previous maintenance had failed to ensure that the part was replaced at the appropriate time. Given this history, it would be unwise to assume that the part would be replaced during the overhaul.

Inter-Island's lack of counsel prior to the appeal. Inter-Island chose not to hire counsel until the appeal; instead, it chose to be represented by its president and owner, Kenneth D'Attilio. There is no right to assigned counsel in FAA civil penalty proceedings.

In its appeal brief, Inter-Island asserts that Mr. D'Attilio stated that he did not receive some of the correspondence associated with the case. (Appeal Brief at 6-7.) However, as Complainant points out, Inter-Island neglects to specify which documents Inter-Island did not receive and what prejudice it suffered as a result.[19]

Inter-Island also argues that it was denied due process because there is no evidence in the record proving that the Rules of Practice were provided to it before late 1994 or early 1995. This argument is rejected for the following reasons:

- Inter-Island has not asserted that it did not *have* the Rules of Practice until late 1994 or early 1995--just that there is no evidence in the record to show this.

- At the beginning of the proceedings, the law judge notified Inter-Island that the proceedings were governed by the Rules of Practice.[20]

- Assuming that Inter-Island did not obtain the Rules of Practice until late 1994 or early 1995, as Inter-Island claims, it has not shown how it was prejudiced by this--*i.e.*, how the outcome would have been any different if Inter-Island had obtained the rules earlier. For example, Inter-Island claims that Mr. D'Attilio, who was representing Inter-Island at the time, did not know he could respond to Complainant's motion for decision, but Complainant's

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[19] Counsel for Inter-Island appears to be confusing the instant case with another case against Pacific Aviation--In the Matter of Pacific Aviation d/b/a Smoky Mountain Helicopters, CP95WP0316. The two cases were both discussed at one of the pre-hearing conferences, at which time Mr. D'Attilio stated, specifically in reference to the Smoky Mountain Helicopters case, that he never received the Letter of Investigation. (Prehearing Conference held on February 6, 1996, at 15, 18.)

[20] Inter-Island was so advised in the first order issued in this matter. (Order Denying Motion to Set Aside, at 1.) Inter-Island has not explained why it did not, on its own initiative, obtain a copy of the Rules of Practice before late 1994 or early 1995.

motion for decision was filed on June 2, 1995--*i.e.*, *after* late 1994 or early 1995.

Finally, Inter-Island alleges that "[t]here is a clear disparity in the treatment of various operators by the FAA," and that "there was and is a discriminatory attempt to put respondent out of business by taxing its meager resources" (Appeal Brief at 7-8). Inter-Island, however, has provided no evidence to support these claims. Inter-Island promised the law judge several times that it would mail the agency attorney evidence to support its claim of financial hardship. (Pre-Hearing Conference held on February 6, 1996, at 4; Pre-Hearing Conference held on February 27, 1996, at 5, 9, 12, 32.) Ultimately, however, Inter-Island declined to provide evidence of the effect of a civil penalty on its ability to continue in business, stating that "Ken D'Attilio, owner of Inter-Island, will not be forwarding any financial documents." (Inter-Island's "Notice of Withdraw" dated March 4, 1996, at 1.)

For all of the above reasons, this decision denies Inter-Island's appeal and affirms the law judge's assessment of a $7,000 civil penalty.[21]

BARRY L. VALENTINE
Acting Administrator
Federal Aviation Administration

Issued this 19th day of February, 1997.

[21] 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).