UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

In the Matter of: **CONQUEST HELICOPTERS, INC.**	FAA Order No. 94-20 Served: June 22, 1994 Docket No. CP92NM0500

DECISION AND ORDER

Complainant has appealed from the written initial decision issued by Administrative Law Judge Burton S. Kolko.[1] The law judge found that Respondent operated an aircraft under Part 135 of the Federal Aviation Regulations (FAR) without an air taxi/commercial operator operating certificate.[2] The law judge assessed a civil penalty of $4,500.

The only issue to be decided in this appeal concerns the amount of the civil penalty. Complainant argues that the $4,500 amount assessed by the law judge is too low, and that the penalty should be increased to $18,000, the amount specified in the complaint.

On July 23, 1991, Respondent flew a television news photographer and a reporter to the site of a helicopter crash near Mount St. Helens, Washington for $90. Respondent did not hold an air taxi/commercial operator certificate. Respondent's helicopter took off from Debris Dam, Mount St. Helens with the passengers, and landed at the crash site. The passengers got out of the helicopter, examined the site

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[1] A copy of the law judge's written initial decision is attached.

[2] Section 135.5 of the FAR, 14 C.F.R. § 135.5, provides in relevant part: "No person may operate an aircraft under this part without, or in violation of, an air taxi/commercial operator (ATCO) operating certificate."

for a few minutes, and then got back in the helicopter for the return flight to Debris Dam. The round-trip flight lasted less than one hour.[3] (TR 13.) Fourteen months before this incident, a helicopter operation affiliated with Respondent corporation was assessed a $500 civil penalty for operating a passenger-carrying flight without an air taxi/commercial operator operating certificate.[4]

The law judge initially reduced the civil penalty to $9,000, finding that although the round-trip flight to and from Debris Dam consisted of two flights, the incident giving rise to the complaint constituted one operation, and the two flights were functionally one violation. While the law judge was correct in finding that Respondent's round-trip flight with two takeoffs and landings consisted of two flights, he erred in concluding that the two flights constituted only one violation. Once the law judge found two flights, he should have found that each flight was a separate violation. *See* Section 901(a)(1) of the Federal Aviation Act of 1958, as amended, 49 U.S.C. App. § 1471(a)(1), which provides: "If such a violation is a continuing one ... each flight with respect to which such violation is committed ... shall constitute a separate offense." The law judge does however, have discretion to determine the amount of civil penalty to assess for each of the two violations.

The law judge imposed a civil penalty of $4,500 because he found that a penalty any higher than $4,500 would subject Respondent to severe financial hardship. The law judge based his finding of financial hardship entirely on statements about Respondent's financial condition made during closing argument by Earl Franck, the President of Respondent corporation and its only witness at the hearing.[5] Franck,

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[3] Respondent billed the television station for a 24-minute flight. (TR 25.)

[4] The law judge found that Earl Franck, pilot-in-command of the flight at issue and President of Respondent corporation, knew of the earlier infraction by the affiliate, Conquest Helicopter Service. Franck was a principal in both helicopter operations. (Initial Decision at 6.)

[5] The issue of financial hardship was raised briefly during Franck's direct testimony when the law judge asked Franck what Respondent's average gross income was, and Franck responded that: "You have to ask the bookkeeper. We have our tax returns and everything with us." (TR 105.) The law judge explained

who appeared pro se, was questioned extensively during closing argument by the law judge concerning Respondent's financial condition. (TR 129-133.) Complainant did not object or offer rebuttal argument.

The law judge erred in finding financial hardship when the only basis for such a finding was the unsworn statements made during closing argument by the President of Respondent corporation. Although financial hardship is a valid basis for reducing a civil penalty, In the Matter of Costello, FAA Order No. 93-10 at 9 (March 25, 1993), Respondent must prove financial hardship by a preponderance of the evidence. In the Matter of Giuffrida, FAA Order 92-72 at 2 (December 21, 1992). Statements made in closing argument are not evidence. *See, e.g.*, Shell v. Missouri Pacific Railroad Company, 684 F.2d 537, 542 (8th Cir. 1982) (noting with approval the trial judge's instructions to the jury that closing arguments are not evidence).

Since the law judge erred in finding a single violation and because his finding of financial hardship is not based on evidence, his decision must be reversed. Respondent, however, should not be penalized for the law judge's errors, particularly when the civil penalty at issue is so substantial.[6] The law judge's extensive examination of Franck during the hearing concerning Respondent's financial condition, without objection from Complainant, could have led Respondent to believe that it had properly presented financial hardship as an affirmative defense. In fact, at one point during the hearing, Franck told the law judge that he had brought his tax returns to the hearing. The law judge, however, did not indicate that such evidence was necessary.

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that financial hardship was an affirmative defense, but told Franck not to go into the issue then because he wanted to ask him about the incident itself. (TR 106.) The issue of financial hardship was not raised again until Respondent's closing argument.

[6] Complainant in this case seeks a civil penalty of $18,000.

This case is remanded to the law judge for a hearing to determine the appropriate amount of civil penalty. Respondent is reminded that it has the burden to prove financial hardship by a preponderance of the evidence. Vague and uncorroborated testimony regarding income and expenses is insufficient to prove financial hardship. In the Matter of Lewis, FAA Order No. 91-3 at 10 (February 4, 1991). Further, an unsworn and unsubstantiated statement by a respondent is insufficient evidence of inability to pay. Giuffrida, FAA Order No. 92-72 at 4. Records that may establish inability to pay include pay stubs, leases, tax returns and other such records as a reasonable person would accept as reliable and probative on the issues of income and expenses. *Id.* at 5.

Accordingly, the case is remanded to the law judge for a hearing solely to determine the appropriate amount of civil penalty.

DAVID R. HINSON, ADMINISTRATOR
Federal Aviation Administration

Issued this 21st day of June 1994.