UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC 20591

Served: August 16, 1990

FAA Order No. 90-21

In the Matter of:	**Docket No. CP89NE0285**
JOHN J. CARROLL	

DECISION AND ORDER

Respondent John J. Carroll ("Respondent") has appealed from the oral initial decision[1/] issued by Administrative Law Judge William A. Kane at the conclusion of the hearing held in this case on November 13, 1989, in Boston, Massachusetts. The law judge held that on May 19, 1988, Respondent piloted Precision Airlines ("Precision") Flight 2671 from Newark, New Jersey, to Philadelphia, Pennsylvania, with a piece of carry-on baggage (measuring approximately 12" x 18") in the aisle of the aircraft obstructing access to the emergency exit, the regular exit, and the aisle. The law judge found that the bag was in the aisle "during the carriage, during the takeoff, and during the landing . . . [i]n other words, . . . at all times during the course of [the] flight," in violation of sections 135.87(c)(4) and (6) of the Federal Aviation Regulations

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1/ A copy of the law judge's oral initial decision is attached.

(FAR).[2/] Although the law judge found this was a "serious violation," he modified the civil penalty sought by Complainant from $500 to $400, based on his dismissal of two additional charges (14 C.F.R. §§135.87(a) and (b)), and the 6-8 month delay between the date of the violation and the date the FAA first notified Respondent of its investigation.

On appeal, Respondent makes the following arguments:

1. This case should be dismissed under the doctrine of laches because Respondent's defense was prejudiced by the agency's inexcusable delay in asserting its claim against him.

2. The law judge erred in finding that Respondent operated the flight in question with carry-on baggage in the aisle, because the testimony of the passenger who said he observed the piece of carry-on baggage in the aisle during the entire flight was unreliable and incredible.

2/ Sections 135.87(c)(4) and (6) provide, in pertinent part:

> No person may carry cargo, including carry-on baggage, in or on any aircraft unless --
>
> (c) It is carried in accordance with each of the following:
>
> (4) It is not located in a position that obstructs the access to, or use of, any required emergency or regular exit, or the use of the aisle between the crew and the passenger compartment, . . .
>
> (6) It is stowed in compliance with this section for takeoff and landing.

14 C.F.R. §§135.87(c)(4) and (6). Although charged in the complaint, the law judge did not specifically address the violation of subsection (c)(6) in his initial decision. However, his finding that the bag remained in the aisle during takeoff and landing, accompanied by his clear finding of a violation of subsection (c)(4) is, in effect, a finding that the baggage was not "stowed in compliance with [section 135.87] for takeoff and landing," in violation of subsection (c)(6).

3. The law judge lacked authority to hear this case because the Rules of Practice in FAA Civil Penalty Actions (14 C.F.R. Part 13, Subpart G) are invalid in that they were implemented without notice and comment, they do not provide for adequate separation of functions, and they give unfair procedural advantages to the FAA.

Complainant responds to these arguments as follows:

1. The laches defense is not available in cases where, as here, the United States is acting in its sovereign capacity to protect the public interest, but even assuming the defense is applicable, it should fail because Respondent has proved neither inexcusable delay nor prejudice.

2. The law judge's factual finding that Respondent operated the flight in question with a piece of carry-on baggage in the aisle was based on a credibility finding and should not be disturbed.

3. Respondent has not shown that the Rules of Practice violate the Administrative Procedure Act (APA) or the Constitution.

For the reasons discussed below, Respondent's appeal is denied, and the initial decision is affirmed.

1. Laches

Respondent argues that the equitable doctrine of laches should be applied to this case, and that under that doctrine, the case should be dismissed. The elements of a laches defense are inexcusable delay in asserting a right or claim, and undue prejudice to the other party resulting from that delay. Armco, Inc. v. Armco Burglar Alarm Co., Inc., 693 F.2d 1155, 1161 (5th Cir. 1982); Gull Airborne Instruments, Inc. v. Weinberger, 694 F.2d 838, 843 (D.C. Cir. 1982).

Complainant argues forcefully in its reply brief that the defense of laches is not available against the United States when it is acting in its sovereign capacity to enforce a public right or protect the public interest. This position finds support in the case law. See, U.S. v. St. John's General Hospital, 875 F.2d 1064, 1071 (3d Cir. 1989); United States v. Popovich, 820 F.2d 134, 136 (5th Cir.), cert. denied, 484 U.S. 976 (1987). In light of my findings, discussed below, that the elements of that defense have not been established in this case, I need not address that argument here. Nevertheless, in recent rulemaking proceedings the FAA has expressed its willingness to consider a laches-type defense in civil penalty actions by allowing respondents who believe they have been prejudiced by the agency's delay in initiating their case, to assert such prejudice as a defense in the administrative proceeding. See, 55 Fed. Reg. 15134, 15135 (April 20, 1990); 55 Fed. Reg. 27548, 27556 (July 3, 1990). Therefore, I will proceed to consider this defense.

In support of his assertion that the FAA unreasonably and inexcusably delayed in pursuing this enforcement action, Respondent points to the 8-month period between the subject flight on May 19, 1988, and the FAA's first notification to Respondent (by letter dated January 18, 1989) that it was investigating the matter, and the additional 4 months which passed before Respondent received the Notice of Proposed Civil Penalty on May 23, 1989. Respondent states that the agency offered no reasonable explanation for this delay. Respondent further asserts that his defense of this action was prejudiced

by the FAA's unreasonable delay. He cites the law judge's finding that the agency's delay in informing Respondent of the violations diminished his ability to defend himself, in that he could not recollect the specific flight in question, and could testify only about his general practice with regard to carry-on baggage on such flights. Respondent asserts that the delay "prohibited him from collecting or recollecting evidence that would have aided his defense."

Complainant contends that the time periods which elapsed before Respondent was notified of the investigation and enforcement action were brief, noting that 28 U.S.C. §2462 -- the only applicable statute of limitations -- imposes a 5 year limitations period on the Government for enforcement of a civil penalty. Complainant also argues that Respondent, who bears the burden of proving laches as an affirmative defense, failed to show that the delay was unreasonable or inexcusable, or that the delay caused him to lose crucial witnesses or documents or otherwise prejudiced his defense of this action. Complainant suggests that Respondent was not prejudiced by his inability to recall details of the flight in question because, in light of Respondent's testimony that he always follows his routine practice of ensuring that there is no baggage in the aisle, presumably there was nothing for him to recall more clearly. Accordingly, Complainant argues, his inability to recollect specifics about this incident would not have been cured by an earlier notification from the FAA.

Upon careful consideration of the facts in this case, I find that Respondent has shown neither inexcusable delay, nor prejudice as a result of delay, sufficient to warrant dismissal of this case.

The agency learned of the incident here at issue from Michael J. Starke, a passenger on the flight, approximately one month after it occurred, on June 16, 1988. See Exhibit R-2, p. 1. A record of Mr. Starke's complaint was transmitted to FAA Aviation Safety Inspector Wayne Smith for investigation. However, Inspector Smith was given an incorrect flight number, and this apparently hampered his initial investigation somewhat. Upon obtaining the correct flight number he reviewed Precision's company records to obtain further information about the flight's departure and arrival times, and the passengers and crew on board the flight.

At one point in his investigation, Inspector Smith asked Mr. Starke to submit a written statement, which Mr. Starke did on October 16, 1988. See, Exhibit R-2, p. 12-14. On January 18, 1989, approximately 8 months after the flight at issue, Inspector Smith sent Respondent a letter describing the incident under investigation, and offering Respondent an opportunity to submit written information or discuss the matter personally. Although this was the first notification Respondent received from the FAA that the matter was under investigation, Respondent acknowledged at the hearing that, by the time he received Inspector Smith's letter, he had already been questioned about the incident by Precision's Director of

Operations. It is unclear from the record when this questioning occurred, since Respondent testified only that it was prior to the FAA's January 18 letter, but still "months after" the incident. Respondent did not respond to the FAA's letter of investigation. He received the Notice of Proposed Civil Penalty on May 23, 1989, approximately one year after the incident.

I do not believe that the agency's pursuit of this case against Respondent, at the pace described above, was unreasonably or inexcusably dilatory. The issue here is not whether the agency could have notified Respondent sooner of the allegations, but whether its failure to do so was unreasonable or inexcusable. I find that, under the circumstances of this case, the 1-year interval between the alleged violation and the notification to Respondent of the agency's proposed civil penalty did not constitute an unreasonable or inexcusable delay. The notice of proposed civil penalty was issued well within the 5-year limitations period imposed by 28 U.S.C. §2462 for enforcement of civil penalties. Although I recognize that the evaluation of a laches-type defense must depend on the circumstances of each individual case, I note that the courts have rejected that defense in cases involving delays far longer than the instant case. See, e.g., Armco, 639 F.2d at 1162 (6-year delay in filing suit for trademark infringement held not sufficient to establish laches as a matter of law); Roto-Rooter Corp. v. O'Neal, 513 F.2d 44, 46 (5th Cir. 1975) (delay of slightly less than 5 years after knowledge of alleged

trademark infringement before filing suit did not support defense of laches); Thurn v. Thurn, 310 N.W.2d 539 (Iowa 1981) (22-year delay in seeking enforcement of judgment for child support payments held not unreasonable).[4/]

Respondent has also failed to demonstrate that he was prejudiced by the FAA's delay in this case. Although he claims that the delay prevented him from "collecting or recollecting evidence that would have aided his defense," he has failed to support that assertion. Respondent has not alleged the type of prejudice that has been held to support a laches defense: that the delay resulted in a loss of evidence or witnesses supporting his position, or that he changed his position in a way that would not have occurred but for the delay. See, Gull Airborne Instruments, 694 F.2d at 844. For example, Respondent does not claim that, as a result of the delay, he was unable to procure the testimony of other passengers on the flight who could have contradicted Mr. Starke's testimony that there was a piece of carry-on baggage in the aisle during the entire flight.

4/ Respondent cites the NTSB's 6-month "stale complaint" rule for certificate actions (49 C.F.R. §821.33), and argues that a similar limitation is equally necessary in civil penalty cases. The agency considered this issue and, in its final rule issued on June 27, 1990, adopted a 2-year limitations period in civil penalty cases subject to the Rules of Practice. 55 Fed. Reg. 27548, 27552-57 (July 3, 1990) (to be codified at 14 C.F.R. §13.208(d)). The agency's reasons for adopting a 2-year, rather than a 6-month, period are fully discussed in the final rule and will not be repeated here. The newly adopted limitations period does not apply to this case, see, 55 Fed. Reg. at 27556, but even if it did, the facts of this case clearly would not warrant dismissal under that rule. Accordingly, Respondent is not prejudiced by the agency's subsequent adoption of the rule.

While I recognize that memory of events may fade with time, I am not convinced that a more detailed recollection of the events on this flight would have substantially aided Respondent's defense. Respondent testified that he always ensures that baggage is properly stowed and that there is no baggage in the aisle of the aircraft before takeoff and landing, and that he is sure he did so on the flight in question. Although Respondent testified that he had no specific recollection of the flight, he held firmly to his position that there was no baggage in the aisle, or if there was, that it was not there at the time of the pre-flight and pre-landing passenger briefings. He stated that he always looks back at the passenger cabin to check proper stowage of baggage during these passenger briefings. It is difficult to imagine how a more detailed memory of the flight could have altered his testimony that that there was nothing in the aisle. Nevertheless, the law judge rejected this testimony in light of the testimony of the passenger witness.[5/]

5/ While affirming the alleged violations of sections 135.87(c)(4) and (6), the law judge reduced the sanction based in part on his finding that the agency's delay in notifying Respondent of the alleged violations "diminish[ed] his ability to defend himself in this proceeding." The National Transportation Safety Board has recently noted, and I agree, that "actual prejudice [due to the agency's delay in notifying a respondent of alleged violations] would logically bear more on whether or not an alleged violation should be affirmed, rather than the issue of mitigation." Administrator v. Jones, NTSB Order No. EA-3154 (3/13/90) p. 8, n. 6. However, because the issue was not raised on appeal, I will not disturb the sanction in this case as modified by the law judge.

2. The law judge's credibility finding.

The only factual witness called by Complainant at the hearing was Michael J. Starke, the passenger who testified that a 12" by 18" piece of carry-on baggage obstructed the aisle next to him during the entire flight. Based on his finding that Mr. Starke's testimony was "totally credible," the law judge concluded that Respondent violated 14 C.F.R. §135.87. Respondent argues that the law judge erred in accepting Mr. Starke's testimony, because that testimony was unreliable and incredible. Specifically, Respondent points to Mr. Starke's inability to remember whether the crew made the required pre-flight announcement about stowing baggage and whether the aircraft was of high- or low-wing design; Mr. Starke's frequent use of the phrase "if I remember correctly" during his testimony; and Mr. Starke's admission that at the time of the incident he was frustrated and upset because Precision personnel had forced him to carry on board a piece of his checked luggage.

Respondent also challenges the reliability of Mr. Starke's October 16, 1988, letter to Inspector Smith documenting the incident, and questions the value of the notes Mr. Starke made on board the flight concerning the bag's presence in the aisle during takeoff. Respondent points out that the letter was not written until five months after the incident, and the notes were written before takeoff, before any alleged violation occurred. Based on these alleged deficiencies in Mr. Starke's

account of the incident, Respondent argues that Complainant "failed to prove its case by a clear preponderance of the evidence."

In its reply brief, Complainant argues that the law judge's credibility finding should not be overturned. Complainant cites the National Transportation Safety Board's (NTSB) policy, applied in its review of FAA certificate actions appealed to that agency, of not disturbing a law judge's credibility determination unless it finds the credited testimony to be "inherently incredible" or "inconsistent with the overwhelming weight of the evidence," and urges me to adopt a similar standard in reviewing civil penalty actions. Complainant asserts that Mr. Starke's testimony in this case was neither inherently incredible nor inconsistent, and the law judge's credibility finding should not be disturbed. Complainant argues that Mr. Starke's testimony that he remembered seeing the bag in the aisle during the entire flight is not weakened by his imprecise memory of other details of the flight that were less noteworthy to him as a passenger, and that were, in any event, irrelevant to the violation at issue.

With regard to Mr. Starke's letter to Inspector Smith, Complainant asserts that the simple memory of seeing a bag in the aisle of the aircraft would not have been affected by the passage of five months before Mr. Starke's October 16, 1988, letter. As for the fact that Mr. Starke's notes were written before the flight took off, Complainant minimizes their importance by pointing out that Mr. Starke's testimony at the

hearing that he observed a bag in the aisle was also supported by his independent memory of that observation.

I will first address Complainant's suggestion that I adopt the NTSB's standard for reviewing credibility determinations. It is well-settled that, because law judges are in the best position to evaluate the demeanor of witnesses in administrative proceedings, their credibility determinations are entitled to special deference on review by the agency. Mattes v. United States, 721 F.2d 1125, 1129 (7th Cir. 1983); Penasquitos Village, Inc. v. NLRB, 565 F.2d 1074, 1078 (9th Cir. 1977). But notwithstanding this principle of deference, an agency is not inextricably bound by its law judges' credibility determinations. Rather, it is free to to substitute its own judgment for that of the law judge. Mattes, 721 F.2d at 1129, citing, section 557(b) of the APA (5 U.S.C. §557(b)) and Universal Camera Corp. v. NLRB, 340 U.S. 474, 496 (1951); Parker v. Bowen, 788 F.2d 1512, 1520-21 (11th Cir. 1986).[6/]

The NTSB appears to afford more than the required deference to its law judges' credibility findings. The NTSB holds that the resolution of a credibility determination is within the "exclusive province" of the law judge unless it is made in an arbitrary or capricious manner (see, Administrator v. Smith,

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6/ The fact that the agency has reached a different conclusion than its law judge "is simply one factor to be considered" by a reviewing court in determining whether the agency's final decision is supported by substantial evidence. Parker v. Bowen, 788 F.2d at 1517, citing, Universal Camera Corp., 340 U.S. at 496.

NTSB Order No. EA-2438, p. 8 (1987), and cases cited therein), and that it will not disturb a law judge's credibility finding absent a "compelling reason" or "clear error" in the record. Administrator v. McCraw, 3 NTSB 2345 (1980); Administrator v. Bargen, NTSB Order No. EA-2248 (1985), affirmed, No. 86-7086 (9th Cir. 1986). Specifically, the NTSB has disbelieved testimony which it found to be "inherently incredible" or "inconsistent with the overwhelming weight of the evidence." See, Chirino v. NTSB, 849 F.2d 1525, 1530 n. 6 (D.C. Cir. 1988), and cases cited therein. In adopting this policy the NTSB has erected "a high threshold before it will overturn ALJ credibility determinations." Id., at n. 5. Because in applying only a minimum of deference I find no reason to question the law judge's credibility finding in this case, I need not decide here whether I will adopt the NTSB's standard of deference.

I turn now to the contested finding in this case. Based on my review of the entire hearing record in this case, I agree with the law judge's credibility finding. Mr. Starke's testimony on the key fact here at issue -- whether there was a piece of baggage obstructing the aisle during takeoff, while en route, and upon landing of the flight -- was quite clear and unequivocal. His inability specifically to recall certain other incidental details of the flight, such as the baggage announcement and the design of the aircraft, does not render his testimony on that key fact unreliable. Moreover, I do not believe, as Respondent suggests in his brief, that Mr. Starke's use of the term "if I remember correctly," necessarily

constitutes an admission of poor memory. To the contrary, it could just as well indicate a sincere effort to testify as precisely and accurately as possible. Nor do I believe Mr. Starke's frustration with Precision's handling of the flight shaded his testimony in this case. The law judge, who had the opportunity to observe Mr. Starke's demeanor, found that his testimony was motivated by concern for his own safety, and not by vindictiveness against Precision.

As for the fact that Mr. Starke's October 16, 1988, letter to Inspector Smith was written five months after the incident, and the fact that his notes were written before any violation actually occurred, neither detracts from the law judge's finding that Mr. Starke's testimony was "totally credible." I note that by the time of his letter to Inspector Smith, Mr. Starke had already filed his complaint with the FAA and spoken with Inspector Smith about the event, both of which likely reinforced his memory of the event. Furthermore, while I recognize that Mr. Starke's notes cannot be used to prove what occurred after they were written, they do show that he had fixed his attention on the presence of the bag in the aisle very early in the flight, which adds credence to his testimony that he observed it there throughout the flight.

For the reasons discussed above, I accept the law judge's credibility determination, and find that the preponderance of the reliable, probative, and substantial evidence supports the law judge's finding that there was a bag in the aisle during the entire flight in question, in violation of 14 C.F.R. §135.87(c)(4) and (6) [see footnote 2].

3. Validity of the Rules of Practice.

Respondent asserts that the law judge lacked authority to hear this case because the rules of practice then in effect were invalid. Specifically, Respondent argues that the rules were improperly and unconstitutionally promulgated without prior notice and comment, that they fail to adequately separate investigative and prosecutorial functions from decisionmaking functions, and that they give unfair procedural advantages to the FAA.

The issue of whether the Rules of Practice were properly promulgated without prior notice and comment has already been disposed of by the U.S. Court of Appeals for the District of Columbia Circuit. In Air Transport Association v. Department of Transportation, 900 F.2d 369 (D.C. Cir. 1990), the court ruled that pre-promulgation notice and comment was required, and that the FAA was barred from initiating new civil penalty actions or prosecuting pending actions until new rules were promulgated.[8/] In response to the court's decision, the agency initiated a new rulemaking and, after notice and comment, promulgated a revised set of procedural rules. 55 Fed. Reg. 27548 (July 3, 1990) (to be codified at 14 C.F.R. §13.16 and part 13, subpart G). Those rules became effective

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8/ At the time of this decision, the Justice Department is considering whether to seek further review of this decision in the United States Supreme Court.

on August 2, 1990, and upon the extension of the civil penalty assessment authority on August 15, 1990, the agency resumed prosecution and disposition of pending cases, including this one. See, 55 Fed. Reg. at 27549.

The court noted that respondents whose cases were initiated and partially processed under the "old" rules can raise the defense that the FAA could not have successfully prosecuted the case "but for the agency's reliance on some aspect of the . . . Rules abandoned in the new scheme." Air Transport Association v. DOT, 900 F.2d at 380-81. I have reviewed this case with that potential defense in mind, and I find nothing in the new rules that would have changed the result in this case. Respondent's argument that the rules were improperly promulgated without notice and comment, standing alone, provides no ground for reversal of the law judge's decision in this case.

Respondent also argues that the Rules of Practice fail to separate investigative and prosecutorial functions from decisionmaking functions until after a notice of proposed civil penalty is issued (see 14 C.F.R. §13.203), contrary to section 554(d) of the Administrative Procedure Act (APA) (5 U.S.C. §554(d)). However, he has not alleged any actual breach of the required separation of functions, and, in my review of this case, I have found none. In any event, as the agency explained in response to criticism of the original rules, section 13.203 as originally promulgated did satisfy the requirements of the APA. See, 54 Fed. Reg. 11914, 11915-16 (March 22, 1989) (Disposition of Comments); 54 Fed. Reg. 46196, 46196-98

(November 1, 1989) (Equal Access to Justice Act - Interim Final Rule); 55 Fed. Reg. 15112, 15114-15 (April 20, 1990) (Final Rule). Furthermore, in re-promulgating section 13.203, the agency made clear that it has always been its practice to separate investigative as well as prosecutorial functions from adjudicative functions, even prior to issuance of the notice of proposed civil penalty. See, 55 Fed. Reg. 7980, 7982 (March 6, 1990) (Notice of Proposed Rulemaking); 55 Fed. Reg. 15110, 15112-17 (April 20, 1990) (Final Rule).

Respondent also asserts that the rules violate the APA by failing to separate adjudicatory from appellate functions because "FAA decisions are [appealable] not to an independent United States District Court of Appeals [sic], but back to the FAA decisionmaker." However, the APA expressly contemplates intra-agency adjudication and appellate review. See, 5 U.S.C. §556 and §557.[9/]

9/ Respondent also fails to recognize that the FAA decisionmaker's final decision is appealable to the United States Court of Appeals, pursuant to 49 U.S.C. App. §1486.

Finally, Respondent cites 14 C.F.R. §13.220(l)(3)[10/] and §13.227[11/], claiming that these two rules give procedural advantages to the FAA. However, Respondent has not alleged, and the record does not reveal, any prejudice to Respondent as a result of either of these rules.[12/]

In sum, none of Respondent's arguments regarding the Rules of Practice is properly made in this case.

10/ At the time of the hearing in this matter, but since revised, section 13.220(l)(3) (14 C.F.R. §13.220(l)(3) (1988)) provided:

> Effect of admission. Any matter admitted or deemed admitted under this section is conclusively established for the purpose of the hearing and appeal. Any matter admitted or deemed admitted under this section that results in a finding of violation may be used by the Administrator in a subsequent enforcement proceeding.

11/ At the time of the hearing in this matter, but since revised, section 13.227 (14 C.F.R. §13.227 (1988)) provided:

> An employee of the agency may not testify as an expert or opinion witness, for any party other than the agency, in any proceeding governed by this subpart. An employee of the agency may testify in a proceeding governed by this subpart only as to facts, within the the employee's personal knowledge, giving rise to the incident or violation.

12/ In connection with his argument that the Rules of Practice unfairly favor the FAA, Respondent does allege that he was prejudiced by the lack of a "reasonable statute of limitations." As discussed in part 2 of this decision, I find there was no such prejudice.

THEREFORE, in light of the foregoing, Respondent's appeal is denied, and the law judge's initial decision is affirmed.[13/] A civil penalty in the amount of $400 is hereby assessed.[14/]

JAMES B. BUSEY, ADMINISTRATOR
Federal Aviation Administration

Issued this 16th day of August, 1990.

13/ I have also considered whether any changes made in the Rules of Practice during the pendency of this case may have affected the result in this case, and have concluded that no change in the Rules is pertinent to this case. If Respondent believes that changes in the rules would have affected the outcome of this case, he may file a petition for reconsideration of this decision and order, pursuant to 14 C.F.R. §13.234. Such a petition for reconsideration must include a particularized showing of harm, citing the specific rule change (or changes) and its relevance to the challenged findings or conclusions. See, 55 Fed. Reg. 15110, 15125 (April 20, 1990). Although the filing of a petition for reconsideration does not normally stay the effectiveness of the Administrator's decision and order, under these circumstances, if Respondent files such a petition I will stay the effectiveness of this decision and order pending disposition of the petition.

14/ Unless Respondent files a petition for reconsideration within 30 days of service of this decision (as described in the footnote above), or a petition for judicial review within 60 days of service of this decision (pursuant to 49 U.S.C. App. §1486), this decision shall be considered an order assessing civil penalty. See, 55 Fed. Reg. 27574 and 27585 (1990) (to be codified at 14 C.F.R. §§13.16(b)(4) and 13.233(j)(2)).