

UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

Served: 12/21/92

FAA Order No. 92-70

In the Matter of:)

USAIR, INC.)
_____)

) Docket No. CP91NM0183
)
)
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)

ORDER DENYING PETITION FOR RECONSIDERATION

Respondent USAir, Inc., seeks reconsideration of the Administrator's decision in In the Matter of USAir, Inc., FAA Order No. 92-48 (July 22, 1992). In that decision the Administrator reversed the law judge, and held that Respondent operated an unairworthy aircraft in a careless or reckless manner.^{1/} Respondent was assessed a civil penalty of \$5,000. For the reasons set forth below, Respondent's petition for reconsideration is denied.

The Administrator found Respondent responsible for the acts and omissions of its pushback operator and captain during the pushback of Respondent's aircraft which led to the

^{1/} Respondent was found to have violated Sections 121.153(a)(2) and 91.13 of the Federal Aviation Regulations (FAR), 14 C.F.R. §§ 121.153(a)(2) and 91.13. See In the Matter of USAir, Inc., FAA Order No. 92-48 (July 22, 1992).

violations of the regulations.^{2/}

In its petition Respondent asserts that Elsinore, the company that conducted the pushback operation, was solely responsible for the incident during pushback.^{3/} Respondent argues that it should not be held responsible for the acts or omissions of Elsinore because Elsinore is an independent contractor.^{4/} Respondent cites no law in support of its argument.

^{2/} The incident in question occurred at Seattle-Tacoma International Airport on June 9, 1989, when Respondent's aircraft, a McDonnell-Douglas 80 (MD-80), was pushed back from the gate for a regularly scheduled flight. Respondent's pushback operator failed to tell Respondent's captain that the aircraft's nose gear water deflector rode up onto a chock and popped in and out when the aircraft was pulled back. The chock had been placed improperly behind the aircraft's nose wheel by Respondent's ground crew. When the red nose gear warning light came on following takeoff, the captain decided to return to the airport, where the broken water deflector was discovered subsequently.

The captain failed to investigate the loud noise he heard during the pushback coming from the nose wheel area underneath his seat in the cockpit. He relied on the pushback operator's opinion that everything was "okay" underneath the aircraft instead of investigating the noise himself or calling a mechanic. Testimony at the hearing established that the broken water deflector could have prevented the nose wheel landing gear doors from closing completely after takeoff, thereby causing the red warning light to go on. Testimony further established that water or debris can be ingested by an engine during takeoff or landing when the nose landing gear doors are not closed, causing safety problems.

^{3/} Elsinore conducted Respondent's pushback operations at Seattle-Tacoma International Airport under a contract that is not in the record.

^{4/} Respondent raises this issue for the first time in its petition for reconsideration. See FAA Order 92-48 at 2, n.4 (1992) (noting that Respondent did not deny responsibility for the actions of its contract pushback operations personnel). For the sake of judicial economy, absent good cause, all appellate arguments before the Administrator should be raised on appeal. This rule will be applied prospectively.

The testimony of the three USAir officials at the hearing established that Respondent directed and supervised Elsinore, trained Elsinore personnel, assigned duties to Elsinore, and monitored Elsinore's performance of Respondent's pushback operations. Respondent, therefore, consented to have Elsinore act on Respondent's behalf and under Respondent's control, as Respondent's agent with respect to its pushback operations at Seattle-Tacoma International Airport. See Restatement (Second) of Agency § 1 (1957). Respondent is responsible for the acts of its agent-servants committed while acting within the scope of their employment. Id. at §§ 219, 220, 228 (1957). Elsinore appears to be an agent-servant, rather than an independent contractor, because Elsinore's performance of pushback operations is subject to Respondent's control or right to control. Id. at § 2, Comment b; §220(1), Comment d (1957).^{5/} The pushback operations are clearly within Elsinore's scope of employment because it contracted to perform that function for Respondent. Id. at §228 (1957).

However, even if Elsinore is an independent contractor, as Respondent claims, Respondent would still be responsible for Elsinore's negligent acts because Respondent is under a duty to perform its pushback operations with care. See Restatement

^{5/} Other factors that indicate that Elsinore is an agent-servant include: Respondent closely supervises Elsinore; highly educated or skilled persons are not required for the pushback operation; the pushback is an essential part of an air carrier's regular operations and is regarded as work done by servants. Restatement (Second) of Agency § 220(1), Comment e; §220(2), Comment h.

(Second) of Agency § 251(a) (1957). Air carriers have the duty to perform their services with the highest possible degree of safety under the Federal Aviation Act. See Section 601(b) of the Act of 1958, as amended, 49 U.S.C. App. § 1421(b). If Elsinore was an independent contractor, Respondent would remain responsible for its acts or omissions because the duty of care to protect others or their property is non-delegable. See Restatement (Second) of Agency § 214 (1957).

In Alaska Airlines, Inc. v Sweat, 568 P.2d 916 (Alaska 1977) the Supreme Court of Alaska found the air carrier liable for the negligence of a contract air taxi. The court stated:

We believe that the responsibility of a common carrier for the safety of its passengers is so important that the carrier should not be permitted to transfer it to another....If this were permissible, an air carrier could avoid liability by engaging in independent contracts for furnishing food, maintenance of its planes and conceivably even for supplying crews.

Id. at 926; see also W. Prosser and W. Keeton, The Law of Torts § 71 (5th ed. 1984) (the non-delegable character of a duty is based on a finding by a court that the duty is so important to the community that it should not be transferred to another). Likewise it was held in Roberts v. Gonzalez, 495 F. Supp. 1310, 1315 (D.V.I. 1980) (citing Restatement (Second) of Torts § 428 (1965)), that an air carrier's responsibility for safety is not delegable to a contractor. The court in Roberts found an air taxi company liable for the

negligence of a contractor of substitute aircraft. Roberts v. Gonzalez, 495 F. Supp. at 1318.

As Complainant correctly points out in its reply to Respondent's petition:

The implication of USAir's argument is that liability for the airworthiness of the aircraft it operates may be avoided if it contracts certain services that directly or indirectly affect the airworthiness of those aircraft. Not only is this argument legally incorrect, it is adverse to the interests of aviation safety.^{6/}

Respondent's remaining arguments are unavailing. Although the captain did investigate the loud noise that he heard during pushback by asking the pushback operator to look underneath the aircraft to see if the tow bar had broken, that investigation was insufficient. Once the pushback operator responded that the tow bar had not broken, the captain should have investigated further to determine what had caused the loud noise before proceeding to taxi and take off. The captain should not have relied on the pushback operator's response that everything was "okay." A pushback operator lacks the expertise to make such a decision. The captain should have asked his copilot or a mechanic to examine the nose wheel area before takeoff. Respondent is responsible for

^{6/} The Civil Aeronautics Board consistently recognized the general principle that an air carrier is responsible for the acts and omissions of its agents, in part because of the high duty of care imposed on air carriers by statute. See, e.g., F.A. Conner, d/b/a Conner Air Lines, Air Carrier Certificate, 13 C.A.B. 178 (1949).

the acts and omissions of its pilot that are within his scope of employment. See Administrator v. Reeves Aviation, Inc., NTSB Order EA-2675 (February 2, 1988).^{7/}

Respondent argues that there is no legal basis for the Administrator's finding that Respondent operated the MD-80 in a careless or reckless manner in violation of Section 91.13, 14 C.F.R § 91.13. Respondent, however, does not dispute the Administrator's finding that the MD-80 was unairworthy. The Administrator found that the aircraft was unairworthy because the broken water deflector did not conform to the aircraft's type design, and caused the aircraft to be unsafe for operation. Ample legal authority exists indicating that absent extraordinary circumstances, careless or reckless operation follows as a residual violation once operation of an unairworthy aircraft is established.^{8/} Respondent's assertions to the contrary notwithstanding, a finding that

^{7/} The fact that Complainant in its appeal brief described the flight crew's efforts to determine whether there was any damage as "reasonable" is not binding on the Administrator. This statement was made by Complainant in arguing that Respondent could not shift its responsibility for the pushback incident to the pushback operator.

The matter of the captain's acts and omissions during the incident is not new, as Complainant states in its reply to Respondent's petition. That matter was raised in the complaint, at the hearing, and in the law judge's decision. There is no need to give the parties further opportunity to submit briefs on this issue under Section 13.233(j)(1).

^{8/} See In the Matter of USAir, Inc., FAA Order No. 92-48, at 9 (July 22, 1992), citing Administrator v. Valley, NTSB Order No. EA-3283, at 6 (May 3, 1991); Administrator v. Gasper, NTSB Order No. EA-3242, at 3, n. 4 (January 14, 1991).

Respondent operated an unairworthy aircraft supports a finding that Respondent operated carelessly or recklessly. Section 91.13, 14 C.F.R § 91.13, prohibits any careless or reckless practice in which danger is inherent. See In the Matter of Terry and Menne, FAA Order No. 91-12, at 9 (April 12, 1991), aff'd, No. 91-1414, 1992 U.S. App. LEXIS 27483 (D.C. Cir. Oct. 21, 1992).

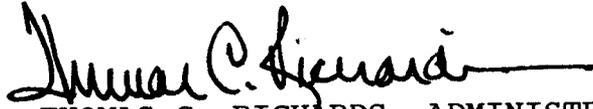
Respondent's final argument, that the Administrator failed to defer to the law judge's credibility determinations, is erroneous. The Administrator's decision was based to a large extent on the testimony of Respondent's witnesses. The testimony of the captain concerning his conduct and that of the pushback operator during the incident was essential for finding that Respondent knew or should have known that the MD-80 was unairworthy before takeoff. The testimony of Respondent's Quality Assurance Director supported the FAA Aviation Safety Inspector's testimony concerning the unairworthiness of the MD-80. The testimony of Respondent's Station Manager, Maintenance Training Director, and Quality Assurance Director established the relationship between Respondent and Elsinore.

The Administrator, thus, did not reverse any credibility determination made by the law judge. Rather, the Administrator reversed the law judge because the law judge's legal conclusions were not supported by the evidence.

Complainant sought a \$15,000 civil penalty from Respondent. The Administrator, however, found that a \$5,000

civil penalty adequately reflected the seriousness of the violations and would deter future similar violations. Respondent has not presented any convincing reason for further reduction of the civil penalty.

Respondent's petition for reconsideration is denied.



THOMAS C. RICHARDS, ADMINISTRATOR
Federal Aviation Administration

Issued this 17th day of December, 1992.