

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

In the Matter of: HUSTED AND HUSTED AIR CHARTER, INC.

FAA Order No. 2010-9

Docket No. CP08CE0001
FDMS No. FAA-2007-0361¹

Served: June 16, 2010

DECISION AND ORDER²

After a two-day hearing,³ Administrative Law Judge Richard C. Goodwin issued a written initial decision,⁴ finding that Husted and Husted Air Charter, Inc. (“H & H”) operated an aircraft that was unairworthy due to an improperly repaired radome and excessive oil leaks on five flights under 14 C.F.R. Part 135. He also found that required entries in this aircraft’s maintenance logbooks had not been made. Based on these findings, the ALJ held that H & H violated the following Federal Aviation Regulations (FAR): 14 C.F.R. §§ 91.7(a), 91.405(b), 135.65(c), and 135.413(a).⁵

¹ Generally, materials filed in the FAA Hearing Docket (except for materials filed in security cases) are also available for viewing at <http://www.regulations.gov>. See 14 C.F.R. § 13.210(e)(1).

² The Administrator’s civil penalty decisions, along with indexes of the decisions, the rules of practice, and other information, are available on the Internet at the following address: www.faa.gov/about/office_org/headquarters_offices/agc/pol_adjudication/AGC400/Civil_Penalty. See 14 C.F.R. § 13.210(e)(2). In addition, Thomson Reuters/West Publishing publishes Federal Aviation Decisions. Finally, the decisions are available through LEXIS (TRANS library) and WestLaw (FTRAN-FAA database). For additional information, see the Web site.

³ The hearing was held on September 4 and 5, 2008.

⁴ A copy of the ALJ’s initial decision is attached.

⁵ Section 91.7(a) provides: “No person may operate a civil aircraft unless it is in an airworthy condition.”

The ALJ held that while a substantial civil penalty was necessary due to the seriousness of the violations, H & H proved that the \$11,000 civil penalty sought by Complainant was too high due to the company's poor financial condition. The ALJ assessed a \$7,500 civil penalty against H & H.

H & H appealed from the initial decision, challenging the ALJ's finding that it violated the regulations and arguing that it cannot afford to pay the assessed civil penalty.⁶ The ALJ's findings of violations are affirmed to the extent explained in this decision, and the civil penalty is reduced to \$4,000.

Section 91.405(b) provides:

Each owner or operator of an aircraft:

(b) Shall ensure that maintenance personnel make appropriate entries in the aircraft maintenance records indicating the aircraft has been approved for return to service.

Section 135.65(c) provides:

Each person who takes corrective action or defers action concerning a reported or observed failure or malfunction of an airframe, powerplant, propeller, rotor, or appliance, shall record the action taken in the aircraft maintenance log under the applicable maintenance requirements of this chapter.

Section 135.413(a) provides:

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.

⁶ H & H filed a motion requesting that the Administrator reject Complainant's reply brief. Among other things, H & H argued in the motion that Complainant served the reply brief late. H & H wrote in its motion that the agency attorney called H & H's president at 7:45 PM on June 29, the date on which the brief was due, and said that she would send the brief to H & H by facsimile the next day. It appears that agency counsel provided a copy of her brief by facsimile as a courtesy, as she also submitted a certificate of service stating that she served the reply brief by U.S. Mail on the due date. The Rules of Practice provide for service by personal delivery or by mail only. 14 C.F.R. § 13.211(b). Under the Rules of Practice, the date of service by mail set forth in the certificate of service is controlling. 14 C.F.R. § 13.210(b). Consequently, H & H's motion to reject Complainant's reply brief is denied.

I. The Facts

H & H, a Kansas corporation, holds an air carrier certificate, authorizing it to operate under Part 135 and its operations specifications. (1 Tr. 7, 198.) H & H carries both cargo and passengers. Under its operations specifications, H & H is authorized to operate a Beechcraft aircraft, Model BE-58, registration number N6751C, in its Part 135 operations. (1 Tr. 7-8.) H & H's president, John Husted, owns N6751C and leases it to H & H. (1 Tr. 206, 2 Tr. 271.) In 2007, when the incident giving rise to this case occurred, H & H employed one pilot, James H. Jupe.

On January 31, 2007, Jupe served as pilot in command of N6751C on five flights conducted under Part 135 for H & H. The first flight originated at Charles B. Wheeler Downtown Airport in Kansas City, Missouri, and the fifth flight ended at that airport. (1 Tr. 8-9.)

A few days before these flights, Jupe noticed some pinholes in the aircraft's nose cone. The nose cone in this aircraft is also the radome, which is the part of the airframe that protects the weather radar antenna. (Tr. 182, Exhibit A-4.) "Electrically, a radome should permit the passage of the radar's transmitted signals and return echoes with minimum distortion and absorption." (Exhibit A-4 at 1.)

Due to his concern that moisture would affect the avionics equipment behind the radome, Jupe obtained a couple of strips of tape from a mechanic and put the tape over part of nose cone to cover the pinholes. (1 Tr. 182-183.) Jupe does not hold a mechanic certificate. (1 Tr. 84.) The mechanic, Jupe testified, was about 20 to 25 feet away from him when he was doing the work. (1 Tr. 182.) Jupe testified that at the time he did not consider the application of tape to constitute maintenance. (1 Tr. 194.)

FAA Airworthiness Inspector Thomas Bartels began a ramp inspection of the aircraft after it returned to Downtown Airport in Kansas City about 4:30 PM on January 31, 2007. Bartels inspected N6751C because he had been told by another FAA inspector the previous day, on January 30, 2007, that the aircraft had significant oil leaks and tape on its nose cone. (1 Tr. 61.)

As he walked around the aircraft, Bartels noticed streaks of oil on the left engine nacelle flaps and that oil was dripping from the left engine nacelle itself. (1 Tr. 64; see Exhibits A-1(A), A-1(C) – A-1(H)). He also observed tape on the radome and ice on top of the tape. (1 Tr. 64-65.) Bartels took photographs of the nose cone and of the oil on the airframe. (Exhibit A-1.) Jupe informed Bartels that he had applied the tape to cover pinholes in the radome to prevent moisture from getting inside the radome and on the radar antenna. (1 Tr. 67, 68, 133, 185-186.)

Although Bartels had not yet completed his inspection, he prepared an aircraft condition notice (FAA Form 8620-1) and gave it to Jupe. Bartels wrote on the condition notice that the nose cone repair and the left engine oil leak constituted discrepancies.⁷ He indicated further on the form that:

- these discrepancies “are not” considered to present an imminent hazard to safety;
- operation of the aircraft prior to correction “will not” be contrary to the FAR;⁸ and
- a Special Flight Permit⁹ “will not” be required prior to operation if the discrepancies are not corrected.

⁷ Other discrepancies not pertinent to this case also were listed on the condition notice.

⁸ The inspector testified that he did not conclude that the aircraft was unairworthy until he completed the inspection the next day. (1 Tr. 176.)

⁹ See 14 C.F.R. § 21.197(a)(1).

(Exhibit R-1; 1 Tr. 130-132.)

The next day, Bartels returned to the airport and continued the ramp inspection. By this time, the ice had melted. He took additional photographs, depicting the tape on the radome and what he called “significant erosion, even outside the boundaries of the tape.” (1 Tr. 77, Exhibit A-2.) He noticed that the edges of the tape were wrinkled and lifting from the surface. (1 Tr. 77, 79.) He testified that he did not observe any pinholes in the radome because he did not remove the tape. (1 Tr. 78.) The inspector testified that he should have re-marked the condition notice, after completing the inspection, to indicate that a ferry permit was necessary to fly N6751 to another location for repairs. (1 Tr. 178.)

Complainant introduced Exhibit A-4, which is Advisory Circular (AC) No. 43-14, pertaining to the maintenance of weather radar radomes. The AC advises that radomes must have certain physical and electrical properties.

Physically, a radome should be strong enough to withstand the airload that it will encounter and it should be contoured to minimize drag. ... Electrically, a radome should permit the passage of the radar’s transmitted signals and return echoes with minimum distortion and absorption. In order to do this, it should have a certain electrical thickness. ... Radar efficiency, definition and accuracy of display depend upon a clear, nondistorted, reflection-free antenna view through the radome. Consequently, a radome should be precisely built for optimum performance.

AC No. 43-14 ¶ 3 (Exhibit 4 at 1).

Paragraph 6a of this AC states that “[a]ll repairs to radomes, no matter how minor, should return the radome to its original or properly altered condition, both electrically and structurally.” Further paragraph 6b provides:

These electrical properties [transmissivity, reflection and diffraction] when altered by improper repair, may cause loss of signal, distortion and displacement of targets, and can clutter the display to obscure the target. Poor radome electrical performance can produce numerous problems which may appear to be symptoms of deficiencies in other units of the radar system. *The following are examples of improper repair:*

* * *

(8) Tape (including electrical tape) over hole or crack and covered with resin.

(Exhibit A-4 at 2-3) (Emphasis added.)

Complainant also introduced Exhibit A-5, an excerpt from the Hawker Beechcraft Corporation Maintenance Manual for this aircraft pertaining to repair of fiberglass components and radome protective boot maintenance, removal and installation. The instructions provided in the manual did not include the use of abrasion tape. (1 Tr. 92.)¹⁰

The inspector testified that placing the tape on the radome constituted maintenance because it was “an attempt to take a corrective action by applying materials to a portion of the airplane to overcome an unacceptable situation.” (1 Tr. 85.) He testified on cross-examination that the use of tools is not necessary for a corrective action to constitute maintenance. (1 Tr. 162.)

Bartels testified that the use of tape had not returned the radome to its original or properly altered or repaired condition. (1 Tr. 89-90.) The tape repair, he testified, was inappropriate because it was not an approved or acceptable method. (1 Tr. 92, 94-95.)

¹⁰ Bartels also testified about an excerpt from Advisory Circular (AC) No. 43.13-1B, entitled “Acceptable Methods, Techniques and Practices for Aircraft Inspection and Repair.” This excerpt describes acceptable fiberglass laminate repairs, similar to those in Exhibit A-5. The repair techniques described in AC No. 43.13-1B do not include repairs using tape. The inspector concluded that as a result, tape is not appropriate because it is not specifically provided that tape is appropriate for repair of fiberglass laminates. The inspector pointed out, in addition, that this excerpt specifies that the included techniques for fiberglass repairs should not be used on radomes. (1 Tr. 94-95.)

Bartels explained that it was possible that moisture or rain would penetrate through the pinholes and tape, which was lifting and wrinkling. If that occurred, he explained, the weather radar would not operate reliably. (1 Tr. 139, 140-141.)

According to Bartels, N6751C was unairworthy on the flights in question because the application of tape was not an approved or acceptable method for repairing the radome and because Jupe was not authorized to perform the maintenance. (1 Tr. 84, 100.) The inspector explained that Jupe was not authorized to perform maintenance on N6751C because he did not hold a mechanic certificate. (1 Tr. 84, 97-100, 104.)

Bartels also testified that the oil leak was excessive and a cause for concern due to the potential for fire and because the leak indicates that “something is not quite right in that engine compartment.” (1 Tr. 65.) He explained that oil leaks can result in oil depletion, and if bad enough, the engine can run out of oil. (1 Tr. 71.) However, he noted on cross-examination that he had not stated during his direct testimony that the oil leak alone rendered N6751C unairworthy. (1 Tr. 160-161.)

Bartels testified that he had reviewed the maintenance records but did not find an entry regarding the application of tape to the radome. (1 Tr. 101.) He testified that under the FAR, it is the responsibility of a properly certificated person, such as the mechanic who performed the repair, to make maintenance entries, and the operator is responsible for ensuring that the maintenance records are accurate. (1 Tr. 102.)

Husted testified at the hearing that he had not known that Jupe had applied the tape to the nose cone prior to these flights. (1 Tr. 198.) He testified that he knew that the aircraft was leaking oil. He explained that N6751C was dirty when the FAA inspectors

observed it because he had been using it to haul freight and had not bothered to clean it. (2 Tr. 320.)

Regarding sanction, Husted testified that the corporation could not afford to pay the proposed civil penalty. He testified about the corporation's poor financial circumstances and stated that there was a "good possibility" the corporation would go out of business. (2 Tr. 315-316.) H & H introduced documentary evidence, including its tax returns for 2003-2007, regarding its financial situation. The ALJ held the record open for H & H to submit additional financial information. Subsequently, H & H submitted its tax returns for 2000-2002, as well as additional financial information.

The FAA also initiated an enforcement action against Jupe for his actions related to this incident. After a hearing before a National Transportation Safety Board (NTSB) administrative law judge, the parties settled the case with Jupe agreeing to a 150-day suspension of his airman certificate.¹¹ The FAA issued an amended order of suspension of Jupe's airman certificate on July 24, 2008, for violations of 14 C.F.R. §§ 43.3(a), 43.13(a), 43.13(b), 91.7(a), 91.9(a), 91.13(a), 135.227(a), and 135.227(c)(1). (Exhibits A-10 and A-12 at 168-169.)¹²

II. The Initial Decision

The ALJ found that H & H violated the regulations as alleged in the complaint. (Initial Decision at 4.) He rejected H & H's arguments, as follows.

¹¹ The ALJ also held the record open for the agency attorney to submit a complete copy of the transcript of the NTSB hearing in Jupe's suspension action.

¹² Agency counsel argued at the civil penalty hearing, that as Jupe's employer, H & H was liable for Jupe's violations. She argued that she should not have to "relitigate" the case, although as explained above, the NTSB did not issue a decision in Jupe's case. The ALJ rejected this argument and required the agency to put on a case to demonstrate that H & H violated the regulations alleged in the complaint.

1. The ALJ held that it was immaterial whether the application of the tape constituted preventive maintenance, rather than maintenance,¹³ because 14 C.F.R. § 43.3(g) prohibits pilots from performing preventive maintenance on aircraft used in Part 135 operations (except in circumstances not involved in this case.) (Initial Decision at 4-5.)

2. The ALJ held that H & H failed to prove that Jupe had been supervised by a mechanic when he applied the tape. (Initial Decision at 5.)

3. The ALJ rejected H & H's argument that it should not be held responsible for Jupe's actions. The ALJ based his decision on this issue on the legal principle that employers are vicariously liable for the actions of their employees acting within the scope of their employment. The ALJ found that Jupe acted within the scope of his employment while piloting the aircraft on the flights in question because he was "operating in the capacity for which he was hired, and in furtherance of Respondent's business." (Initial Decision at 5.)

4. The ALJ held that the aircraft was unairworthy when Jupe operated the aircraft on the five flights on January 31, 2007. He found that the aircraft was in an unsafe condition for flight because the "prospect of fire and possibility of oil depletion" were "too great to be consistent with minimum levels of aircraft safety." (Initial Decision at 6.) In addition, he found, the aircraft was in an unsafe condition for flight because "the risk of moisture penetrating the nose cone and compromising the systems inside ... violated minimum safety standards." He noted that "[t]aping the radome ... was an

¹³ "Maintenance" is defined as "inspection, overhaul, repair, preservation and the replacement of parts, but excludes preventive maintenance. 14 C.F.R. § 1.1. "Preventive maintenance" is defined as "simple or minor preservation operations and the replacement of small standard parts not involving complex assembly operations." 14 C.F.R. § 1.1.

unaccepted and unapproved solution.” Consequently, he held, the aircraft was not in a condition for safe operation, and therefore, was unairworthy. (Initial Decision at 6.)

5. The ALJ held that H & H violated the FAR, as alleged, because no record of the maintenance – the application of tape to the nose cone – had been made. (Initial Decision at 6.)

6. The ALJ assessed a \$7,500 civil penalty, finding that it “is commensurate with the nature and extent of the violations, while accounting in suitable measure for Respondent’s financial circumstances.” (Initial Decision at 9.)

III. Appeal

H & H argues on appeal that the ALJ’s initial decision should be reversed or modified because:

- the oil leak and the condition of the radome did not cause the aircraft to be in an unsafe condition during the five flights on January 31, 2007;
- application of tape does not constitute maintenance;
- Jupe acted outside his scope of employment *as a pilot* when he applied the tape to the radome, and as a result, H & H should not be held liable for his actions;
- H&H cannot afford to pay the civil penalty assessed by the ALJ.

By making these arguments, H &H, which is *pro se* in this matter, appeals the ALJ’s findings that it violated Section 135.413(a), by failing to repair defects between required maintenance under Part 43 of the FAR, and Section 91.7(a), by operating an unairworthy aircraft. H & H has not challenged the ALJ’s findings regarding the recordkeeping violations, 14 C.F.R. §§ 91.405(b) and 135.65(c), and as a result, the recordkeeping violations are not reviewed in this decision.

A. 14 C.F.R. § 135.413(a)

The ALJ correctly held that H & H violated 14 C.F.R. § 135.413(a), which provides:

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

14 C.F.R. § 135.413(a). H & H did not properly repair the deteriorated radome in accordance with the regulations pertaining to maintenance (1 Tr. 108), and as a result, it violated Section 135.413(a).

The application of tape to repair the radome was not a proper repair under 14 C.F.R. § 43.13, which requires that each person who performs maintenance or preventive maintenance on an aircraft use “methods, techniques and practices prescribed in the current manufacturer’s maintenance manual or Instructions for Continued Airworthiness prepared by its manufacturer, or other methods, techniques, and practices acceptable to the Administrator.” 14 C.F.R. § 43.13(a). As the inspector testified, the application of tape to defects in a radome is not prescribed in the manufacturer’s maintenance manual or in AC No. 43-13. For that matter, the advisory circular pertaining to the maintenance of weather radar radomes, AC No. 43-14, specifically states that the use of tape is an improper repair. Jupe did not testify that he relied upon any document describing an approved or acceptable method for the maintenance of the radome. Instead, he testified that he did it on his own and did not consult anyone. (1 Tr. 194.) Jupe also failed to comply with 14 C.F.R. § 43.13(b)¹⁴ when he applied the tape to

¹⁴ Section 43.13(b) provides:

Each person maintaining or altering, or performing preventive maintenance shall do that work in such a manner and use materials of such a quality, that the condition of the

the deteriorated radome because, as the inspector testified, that work did not return the airframe to its original or properly altered condition. (1 Tr. 89-90.) H & H did not introduce any data to support Jupe's use of tape to repair the radome.

Further, as the holder of a pilot, but not a mechanic, certificate, Jupe was not qualified under Part 43 to perform maintenance on N6751C, rendering the repair an improper repair. Even if the application of tape constituted "preventive maintenance," it nonetheless would have been improper because Jupe was not authorized under the FAR to perform preventive maintenance on this aircraft. Under 14 C.F.R. § 43.3(g), a pilot may perform preventive maintenance on any aircraft owned or operated by that pilot as long as that aircraft is not operated under 14 C.F.R. Parts 121, 129 or 135. In this case, the aircraft was operated under Part 135. Consequently, as the ALJ found, Jupe was not qualified to perform this work, whether it was considered maintenance or preventive maintenance.

H & H argues that it was error for the ALJ to find it liable for a violation of Section 135.413 because it did not hire Jupe to act as a mechanic and, therefore, he acted outside of the scope of his employment when he attached the tape to the radome. H & H's argument misses the mark. The question in this case is not whether Jupe was acting within the scope of his employment but whether H & H was responsible under Section 135.413 for the failure to repair its aircraft properly between required inspections. Section 135.413 makes the holder of the air carrier certificate primarily responsible for the airworthiness of the aircraft and requires the certificate holder to have defects

aircraft, airframe, aircraft engine, propeller, or appliance worked on will be at least equal to its original or properly altered condition (with regard to aerodynamic function, structural strength, resistance to vibration and deterioration, and other qualities affecting airworthiness).

repaired between required maintenance. As the certificate holder, H & H was responsible under Section 135.413 for the improper repair of its aircraft.

B. 14 C.F.R. § 91.7(a)

The ALJ found that the aircraft was in an unsafe condition due to the oil leak and the improper repair of the radome, and consequently, that N6751C was unairworthy during the five flights on January 31, 2007. The Administrator has held that an aircraft is airworthy when it both (1) conforms to its type design approved under a type certificate or supplemental type certificate and to applicable Airworthiness Directives; and (2) is in a condition for safe operation. *E.g.*, Kilrain, FAA Order No. 1996-18 (May 3, 1996), *petition for reconsideration denied*, FAA Order No. 1996-23 (August 13, 1996), *petition for review denied*, Kilrain v. FAA, No. 96-3587 (3rd Cir. May 1, 1997). Airworthiness is not synonymous with “flyability.” USAir, FAA Order No. 96-25 at 13 (August 13, 1996). If the aircraft does not meet its type design or supplemental type design – and therefore does not meet the first prong of the test for unairworthiness – then the aircraft is unairworthy. Emery, FAA Order No. 1997-30 (October 8, 1997).

The preponderance of the evidence demonstrated that Jupe operated the aircraft¹⁵ when it did not meet its type design, and therefore, did not satisfy the first prong of the test for airworthiness. Jupe tried to repair the aircraft using a method that was neither approved nor accepted by the Administrator. Further, as Bartels testified, the tape did not return the radome to its original or properly altered or repaired condition. (1 Tr. 89-90.) He testified that the aircraft was not airworthy because the use of tape was not an approved or acceptable method of repair and because Jupe was not a certificated

¹⁵ Jupe, as the ALJ held, was acting within the scope of his employment when he flew the aircraft, and therefore, H & H was vicariously liable for Jupe’s actions in violation of Section 91.7(a).

mechanic. (1 Tr. 84, 100, 104.) Thus, the aircraft did not conform to its type design, and consequently, was flown in an unairworthy condition on January 31, 2007. America West Airlines, FAA Order No. 1996-3 at 30-31 (February 13, 1996) (aircraft delamination repaired with speed tape; aircraft did not meet the first prong of the test for airworthiness because use of speed tape was not an approved or accepted method.)

The aircraft was also unairworthy because it was not in a safe condition for flight, and therefore, did not meet the second prong of the test of airworthiness.¹⁶ Regarding the condition of the nose cone, Bartels testified that there was tape on the center of the nose cone and that paint, primer and base material had eroded in the area beyond the tape. (1 Tr. 77-78; Exhibit A-2.) When asked on cross-examination whether the two pieces of tape could cause an adverse effect on N6751C's operation, Bartels responded:

The condition of the nose cone, the radome, and the application of the tape could adversely affect the operation of the radar and given that there is raised areas, bows, and lifted areas, this airplane, flown in moisture or rain, the potential for rain, moisture to migrate under the tape and into the dome or even possibly through the dome into where the radar is located could affect the proper operation of the radar.

(1 Tr. 139.) He explained further that anomalies, such as holes, pinholes, improperly performed repairs on the radome, or moisture on the antenna could cause the radar to present erroneous weather information to the pilot.

It may say something is out there that isn't there. It may cloak something that's out there and not tell you it's there and in the doing of that, when the pilot relies on the radar to avoid certain areas of weather, if the reliability of the radar is degraded by the things I've mentioned already, then he may – and he could find

¹⁶ In light of the finding that the aircraft did not meet its type design due to its improper repairs, the aircraft was unairworthy and it was flown in violation of 14 C.F.R. § 91.7(a) on that basis alone. The finding of a violation of Section 91.7(a) does not require a finding that the aircraft also was in an unsafe condition during its operation. However, for the sake of completeness, this decision also considers whether the aircraft satisfied the second prong of the test for airworthiness.

himself in a place flying into ... adverse weather, such as a thunderstorm, convective activity and such that could compromise the safety of the flight.

(1 Tr. 141.)

H & H acknowledges in its appeal brief that if there had been thunderstorms in the area during the flights, moisture could have leaked into the nose cone and caused false radar readings. (Appeal Brief at 3.) H & H argues, however, that the flights were conducted in cold and icing conditions. When considering the airworthiness of an aircraft, the Administrator will evaluate whether the aircraft is in a safe condition to fly in any of the types of weather for which the aircraft was certificated by the FAA. The focus is on whether there is the *potential* for harm to the aircraft or injury to the pilot and passengers due to the degraded condition of the radome that was improperly repaired. Warbelow's Air Ventures, Inc., FAA Order No. 2000-3 at 8 (February 3, 2000), *petition for reconsideration denied*, FAA Order No. 2000-14 (June 8, 2000), [*second*] *petition for reconsideration dismissed*, FAA Order No. 2000-16 (August 8, 2000). Such potential existed on January 31, 2007.

Moreover, failure to repair the damaged radome could have led to further, more extensive damage. As explained in the FAA advisory circular pertaining to maintenance of weather radomes:

Any hole, regardless of size, can cause major damage to a radome since moisture can enter the radome wall and cause internal delamination. If the moisture freezes, more serious damage may occur.

AC No. 43-14 at ¶ 5 (Exhibit A-4 at 2.)

In light of the foregoing, the Administrator finds that due to the condition of the radome, the aircraft was unairworthy under both prongs of the test for airworthiness, *i.e.*, did not conform to its type design and was in an unsafe condition for flight. Hence,

H & H violated 14 C.F.R. § 91.7 on January 31, 2007.¹⁷

C. Civil Penalty

On appeal, H & H argues that it does not have the operating capital to pay the \$7,500 civil penalty assessed by the ALJ. In support of this argument, H & H attached to its appeal brief the following documents: (1) copies of its ledgers for 2008; (2) the 2008 year-end statement that it submitted to its accountant; and (3) its Bank of America statement for the period ending April 6, 2009, showing its line of credit. H & H argues that if the ALJ had accepted the company's August 2008 ledgers, as well as the January-July 2008 ledgers, the ALJ would have gotten a different impression of the company's finances because the ledger documents the expenses incurred in July and paid in August.

Preliminarily, the Administrator will not consider the documents attached to H & H's appeal brief. These documents were not authenticated or subject to cross-examination.

Financial hardship may constitute grounds for reduction of an otherwise appropriate civil penalty when proven by the respondent by the preponderance of the evidence. Scenic Mountain Air, Inc., FAA Order No. 2001-5 at 13-14 (May 16, 2001). The Administrator has held that unsworn and unsubstantiated statements by alleged violators are insufficient evidence of inability to pay,¹⁸ but the testimony of a credible,

¹⁷ Having already found a violation of this section, resolution of this appeal does not require a review of the ALJ's finding that the oil leak rendered the aircraft unairworthy. Accordingly, the Administrator will not decide that issue in this appeal. No adjustment of the sanction is necessary.

¹⁸ Conquest Airlines, FAA Order No. 1994-20 at 3 (June 22, 1994); Giuffrida, FAA Order No. 1992-72 at 4 (December 21, 1992).

independent witness may suffice to prove financial hardship, even in the absence of supporting documentary evidence.¹⁹

Regarding financial hardship, the ALJ wrote:

Respondent showed that its financial condition is somewhat precarious. While generally healthy, it has suffered significant reverses. It did not show taxable income in three of the last five years for which full-year tax returns had been prepared (Exh. R-4.) Even in better years, the company's financial picture compelled its principal, Mr. Husted, to take out only modest amounts as salary. Due consideration of the effect of the civil penalty on a respondent's ability to continue in business, while accounting for the extent and gravity of the violations, warrants a lesser levy than the amount proposed by Complainant.

The assessment determined, \$7,500, nonetheless, is substantial, as well as appropriate. It remains within the Sanction Guidance Table's "maximum" range of suggested penalty amounts. I find also that the penalty has sufficient "bite," or deterrent effect (*see Toyota Motor Sales, Inc.*, FAA Order No. 94-28 (September 30, 1994), (p. 11).

(Initial Decision at 9.)

The ALJ correctly found that Respondent's financial condition was "somewhat precarious." The corporation's taxable income in 2007 was less than \$5,000, its taxable income in 2006 was less than \$3,000, and it had negative taxable income in 2005. As the ALJ found, the corporation paid Husted only a modest salary during those years and only \$800 in salary during the first half of 2008. Husted testified that the business fell off during the second quarter of 2008. This evidence alone demonstrates that the corporation lacks the financial resources to pay the \$7,500 civil penalty assessed by the ALJ. A \$4,000 civil penalty is adequate in light of the company's financial circumstances.

¹⁹ Blue Ridge Airlines, FAA Order No. 1999-15 (December 22, 1999).

IV. Conclusion

In light of the foregoing, H & H's appeal is granted in part to the extent explained in this decision. A \$4,000 civil penalty is assessed.²⁰

[Original signed by J.R. Babbitt]

J. RANDOLPH BABBITT
ADMINISTRATOR
Federal Aviation Administration

²⁰ This order shall be considered an order assessing civil penalty unless Respondent files a petition for review within 60 days of service of this decision with the U.S. Court of Appeals for the District of Columbia Circuit or the U.S. court of appeals for the circuit in which the respondent resides or has its principal place of business. 14 C.F.R. §§ 13.16(d)(4), 13.233(j)(2), 13.235 (2009). *See* 71 Fed. Reg. 70460 (December 5, 2006) (regarding petitions for review of final agency decisions in civil penalty cases).

RECEIVED FEBRUARY 24, 2009

UNITED STATES DEPARTMENT OF TRANSPORTATION
OFFICE OF HEARINGS
WASHINGTON, D.C.

RECEIVED

FEB 25 2009

HEARING DOCKET

FEDERAL AVIATION ADMINISTRATION,)	
Complainant,)	FAA DOCKET NO. CP08CE0001
v.)	(Civil Penalty Action)
HUSTED AND HUSTED AIR CHARTER, INC.))	
Respondent.)	DMS No. FAA-2007-0361

**INITIAL DECISION
OF ADMINISTRATIVE LAW JUDGE RICHARD C. GOODWIN**

Found: 1) Respondent violated 14 CFR §§91.7(a), 91.405(b), 135.65(c), and 135.413(a) as charged; and
2) Respondent is hereby assessed a civil penalty of \$7,500.

I. Background

Respondent Husted and Husted Air Charter, Inc. ("Respondent" or "Husted"), is a corporation located in Olathe, KS. It holds an air carrier certificate permitting it to operate under Part 135 of the Federal Aviation Regulations ("FARs"). It carries both cargo and passengers (2 Tr. 277).

The parties agree that on January 31, 2007, a pilot in Respondent's employ, James H. Jupe, operated five Part 135 flights in a Beechcraft Baron 58 aircraft, N6751C, between and among points in Kansas and neighboring states.¹ Following the last flight, an inspector of the Federal Aviation Administration ("FAA," "agency," or "Complainant") conducted a ramp inspection over two days. The inspection revealed oil deposits in several places on the left side of the left engine. Additionally, Jupe had placed tape on the nosecone, or radome (Exh. A-11; 1 Tr. 10-11, 27-29, 40, 48).

The contested portion of the Complaint charges that Mr. Jupe, by applying the tape to the nosecone, had performed maintenance. Jupe is not qualified to accomplish that task, the Complaint charges. Nor had he acted under the

¹ Exh. A-11; 1 Tr. 8-9. The flights, in sequence, were between: 1) Kansas City, MO and Wichita, KS; 2) Wichita, KS and Oklahoma City, OK; 3) Oklahoma City, OK and Wichita, KS; 4) Wichita, KS and Independence, KS; and 5) Independence, KS and Kansas City, MO. *Ibid.*

supervision of an authorized mechanic. The taping was not a permissible repair or alteration and, as such, rendered the aircraft unairworthy. Additionally, no record of the action could be located (Exh. A-11; 1 Tr. 27-28).

Thus, Complainant charges, Respondent violated the following FARs (all in 14 CFR): section 135.65(c), which requires each person who takes a maintenance action to record it; section 91.405(b), which obligates aircraft operators to ensure that maintenance personnel make appropriate entries in maintenance records following maintenance; section 135.413(a), stating that each certificate holder is "primarily responsible" for the airworthiness of its aircraft, and must have defects repaired between required maintenance actions; and section 91.7(a), which prohibits the operation of a civil aircraft unless it is airworthy. The agency seeks a civil penalty of \$11,000 (Exh. A-11).

Respondent, which appeared through its President, John Husted ("Mr. Husted"), denied liability (1 Tr. 17, 27-29, 206; 2 Tr. 319-320).

A hearing was held on September 4 and 5, 2008, in Kansas City, MO. I determined that a written decision was reasonable and appropriate under the circumstances (2 Tr. 326). The parties filed post-hearing exhibits and briefs and the matter now is ready for decision.

I hold that the facts and circumstances of this case justify findings of violations on all counts and, allowing for mitigating factors, warrant an assessment against Respondent of \$7,500.

II. Findings and Conclusions

A. The Agency's Testimony

Inspector Thomas Bartels of FAA's Kansas City (MO) Flight Standards District Office was one of the agency officials conducting the inspection. He testified that, having learned of possible problems with the aircraft, he met it as it landed at the Charles B. Wheeler Downtown Airport in Kansas City on January 31, 2007 (1 Tr. 60-63; *see also* Exh. A-15). Mr. Jupe, an employee of Respondent, was the pilot. Inspectors Bartels performed a ramp inspection. He observed, among other things, engine oil leakage and tape on the nosecone. He then issued a document known as an Aircraft Condition Notice, in which he noted that his "limited inspection" did not suggest that continued operation of the aircraft would be contrary to pertinent FARs, or that a ferry permit, known as a Special Flight Permit, would be needed to enable the aircraft to be flown to a site for repairs (Exh. R-1; 1 Tr. 131-32, 145, 185, 193-94; Exh. A-15). He had not found FAR violations to that point. Inspector Bartels told Mr. Jupe that he would return the next day to conduct additional examination (1 Tr. 75, 175; Exh. A-15).

The next day, February 1, 2007, inspector Bartels returned as promised. He brought a second inspector, Greg Shutterlee, and together they performed a more detailed inspection. Bartels testified that the inspectors found oil on the left-hand engine nacelle flaps in significant amounts. They observed dark streaks on the nacelle, cowling, and the main gear door. The amount of oil showing and the form of its presence – streaking and running down -- indicated to them oil leaks which were excessive. The circumstances were a concern, inspector Bartels said, for two reasons. The first was that they presented a fire hazard. Material oil leaks can result in engine compartment fires. The second reason was that the circumstances suggested an abnormality in the engine compartment. Oil leaks can lead to depletion substantial enough to cause the engine to run out of oil.²

Inspector Bartels also scrutinized the placement of tape on the aircraft's nosecone (1 Tr. 64-65, 75-79, 128, 160; Exhs. A-1(A), and A-1(C) through A-1(H); Exhs. A-2(B) and (C)). Jupe, the pilot, told Bartels that the taping, performed with a material known as abrasion tape, was an attempt to prevent moisture from getting through pinholes in the aircraft skin. Moisture penetration could damage the radar inside (1 Tr. 66-68, 182).

Inspector Bartels testified that the taping constituted maintenance. Such maintenance was not an authorized method of repair, he continued. The agency neither approves nor accepts it (1 Tr. 94-97). The pertinent Advisory Circular in fact states that the use of tape is an improper method of repair (1 Tr. 87-89, 92; Exh. A-4). This aircraft in any case had been operating under Part 135, and Mr. Jupe was not authorized to perform a Part 135 aircraft repair. He lacked the certification required (1 Tr. 66, 74-75, 83-85, 98-99). The character of the maintenance itself constituted a further problem. Bartels observed that the tape was wrinkling and coming undone. The repair, such as it was, would not have prevented moisture from getting into the radome, he said. And once inside, Bartels added, moisture could adversely affect flight safety. It potentially would compromise the function of the radar equipment and avionics within. Inspector Bartels concluded that, on account of an unauthorized and improper repair which did not cure a potentially unsafe condition, the aircraft during the five named flights had been unairworthy.³

² 1 Tr. 65, 70-74. Inspector Bartels testified that engine leaks occasionally occur. They sometimes are minor and do not necessarily render an aircraft unairworthy. He stressed, however, that in this case the streaking and other evidence of leaking that the inspectors observed suggested leaks which were "excessive and a cause for concern." 1 Tr. 160-61.

³ 1 Tr. 79, 99-100, 104, 128, 139-41, 160, 175-76, 182; Exhs. A-2(B) and (C). While inspector Bartels never retracted the Aircraft Condition Notice statement that a ferry permit would not be needed to move the aircraft for repairs, he stated that he regretted his inaction. 1 Tr. 178. Bartels' failure to retract does not in any way undermine the findings the inspectors jointly made following the second day of inspection.

B. Husted's Response

Respondent raised several objections to Complainant's evidence and conclusions.

Husted's pilot, Jupe, was a witness for Respondent. He contended that the tape application was not maintenance, but preventive maintenance (see 1 Tr. 133). The FARs define "maintenance" and "preventive maintenance" in a mutually exclusive fashion; "maintenance" excludes "preventive maintenance" (14 CFR §1.1). Pilots operating aircraft are permitted to perform preventive maintenance, which is defined in pertinent part as "simple or minor preservation operations." *General Aviation, Inc.*, FAA Order No. 98-18 (October 9, 1998). Respondent seemed to take the position that Jupe's action was that type of preventive maintenance. It referred to the taping as "putting a piece of tape that weighed 1 gram on the aircraft" (Resp. Post Hearings Br., p. 3).

Respondent also asserted that, even if Mr. Jupe's actions were in fact "maintenance" as defined, he had been supervised by a properly certificated mechanic, thus legitimating the repair under the FARs (1 Tr. 133; Resp. Post Hearings Br., p. 2). In support of this contention, Jupe testified that he had performed the repair on the recommendation of and instructions from a certificated mechanic. This mechanic had been standing nearby when Jupe applied the tape (1 Tr. 182-83, 194-95).

Mr. Husted also contended that Respondent should not be liable for any violation because Jupe had performed the taping without Mr. Husted's knowledge (1 Tr. 195). Mr. Husted added that he had no knowledge of any of the violations with which his company was charged (1 Tr. 198). He contended that Jupe had been acting outside the scope of his employment when he performed the acts complained of (Resp. Post Hearings Br., p. 2).

Mr. Husted also suggested that the oil leak was not a cause for concern. He knew about it, stressed that the aircraft was being operated for freight only, and stated that the "dirty" aircraft needed only to be "cleaned up" (2 Tr. 320).

Finally, Mr. Husted objected to Complainant's assertion that the aircraft was unairworthy (1 Tr. 17, 206).

C. Conclusions

Complainant's contentions essentially are adopted. Respondent's arguments uniformly are rejected. I find each of the violations alleged.

Firstly, Respondent's contention that Mr. Jupe had performed simple, lightweight "preventive maintenance" is rejected as irrelevant. The argument assumes that the pilot was permitted to perform such a task. He was not. The

FARs did not allow Mr. Jupe to perform preventive maintenance. The regulations state that (other than in situations inapplicable here) pilots may not perform preventive maintenance on Part 135 aircraft (14 CFR §43(g); Exh. A-7; 1 Tr. 98-99). Since the aircraft at issue was flown under Part 135, Jupe was not permitted to perform preventive maintenance because he lacked the requisite pilot status. So whether the type of task Mr. Jupe performed can properly be considered as falling within the definition of "preventive maintenance" is beside the point.

Respondent's conclusion that Mr. Jupe's repair was sufficiently supervised to immunize it from violation also does not withstand examination. Jupe's unsupported statements, even if taken as true, fail to demonstrate supervision. That the mechanic initiated instructions and was in the immediate area fails to demonstrate either active guidance or control of the outcome -- both critical components of supervision. Jupe, moreover, himself undermined Respondent's contention. He testified, "I didn't consult anybody else before I did it. I did it on my own" (1 Tr. 194). Respondent simply failed to show supervision.

Respondent's additional contention that it cannot, or should not, be held liable for actions of its pilot because it had no knowledge of them also is rejected. Respondent is legally obligated to answer for the conduct of its pilot. Mr. Jupe was an employee of Husted and Husted Air Charter. Employers are vicariously liable for the actions of their employees acting within the scope of their employment (*See, e.g., Warbelow's Air Ventures, Inc.*, FAA Order No. 2000-3 (February 3, 2000), p. 5, *reconsid. den.*, FAA Order No. 2000-14, June 8, 2000, *pet. den.* 19 Fed.Appx. 606 (unpublished opn., September 20, 2001)). In piloting the aircraft, Jupe, a company pilot, plainly was acting within the scope of his employment. He was operating in the capacity for which he was hired, and in furtherance of Respondent's business. Respondent thus is responsible for Jupe's actions.⁴

The principle of vicarious liability is integral to aviation law and policy. Air carriers owe the flying public a duty of performance at the highest standard of care (*WestAir Commuter Airlines*, FAA Order No. 1996-16 (May 13, 1996), pp. 6-7). Holding air carriers responsible for employee violations assures the public that the carriers will attempt to conform to this standard. Who better to pressure their employees to perform at the highest level than the air carriers themselves? *See Warbelow's*, pp. 5-6.

Respondent's contention that the aircraft was airworthy during the flights in question also must be rejected. To be airworthy, an aircraft must: (1) conform to a type design approved under a type certificate or supplemental type certificate and to applicable Airworthiness Directives, and (2) be in a condition for

⁴ Mr. Jupe, as a result of this incident, was the subject of a disciplinary proceeding brought by the FAA before the National Transportation Safety Board (NTSB). The parties settled the matter by Jupe's agreement to a suspension of his airman certificate for a period of 150 days beginning July 17, 2008. Exh. JN-1; Exh. A-13, pp. 4-5.

safe operation. *Delaware Skyways LLC*, FAA Order No. 2005-6 (March 8, 2005), p. 2; *California Helitech*, FAA Order No. 2000-18 (August 11, 2000), p. 3 n. 7. Inspector Bartels concluded that the aircraft was not airworthy because the maintenance shortfalls he discovered compelled him to find that the aircraft had not been in a condition for safe operation. I agree. Inspector Bartels' testimony demonstrated that the oil leaks were more than evidence of a "dirty" aircraft (as Respondent would have it); they were significant enough to compromise safe operation to an unacceptable degree. The prospect of fire and the possibility of oil depletion were too great to be consistent with minimum levels of aircraft safety. Additionally, the risk of moisture penetrating the nosecone and compromising the systems inside also violated minimum safety standards. Taping the radome, while well-intentioned, was an unaccepted and unapproved solution. In sum, the matters uncovered by the inspectors – the oil leakage and the prospect of moisture penetrating interior systems -- each demonstrated an impermissible level of potential for hazard. Each independently showed that the aircraft had not been in a condition for safe operation.⁵ Each situation, then, violated the second prong of the airworthiness test. These matters require a finding that the aircraft was not airworthy when operated on the five flights listed in the Complaint.⁶

Finally, inspector Bartels testified that the maintenance performed had not been recorded in any aircraft record (1 Tr. 101, 107). This contention was not met by Respondent. I find the testimony credible. The regulations require that maintenance actions be set down in writing. Entries are the responsibility of a properly certificated person (§135.65(c)) as well as of the certificate holder (§91.405(b); 1 Tr. 102, 106-07). Failure to make a record of the maintenance accomplished, then, violated the stated FARs.

Against this background, I find and conclude that Respondent violated FAR §§ 91.7(a), 91.405(b), 135.65(c), and 135.413(a), as set out in the Complaint.

III. Penalty

The agency has asked for a total civil penalty of \$11,000 (Agency's Post-Hearing Brief, p. 9). Mr. Husted takes exception, calling that amount "excessive" (Resp. Post Hearings Br., p. 4). He believes that, in view of Respondent's financial condition, it could not bear a civil penalty without a severe adverse effect on its business. Mr. Husted has submitted financial documents in support of his contention. Financial hardship, when proven, may constitute grounds for

⁵ Complainant was not required to show that the described conditions were unsafe in fact. It was enough to demonstrate that each carried the potential for harm. *Polynesian Airways*, FAA Order No. 1994-40 (December 9, 1994); *David H. Mayer*, FAA Order No. 1997-12 (February 20, 1997).

⁶ See also *Delaware Skyways LLC*, FAA Order No. 2005-6 (March 18, 2005), n. 7 ("When an aircraft has unresolved discrepancies, it is not airworthy.")

I have considered all other arguments advanced by Respondent and reject them without comment.

reduction of an otherwise appropriate civil penalty. See, e.g., *Blue Ridge Airlines*, FAA Order No. 1999-15 (December 22, 1999), p. 10.

Complainant bears the burden of justifying the amount of the civil penalty it seeks. *Phyllis Jones Luxemburg*, FAA Order No. 1994-18 (June 22, 1994), p. 6. However, it is Respondent's burden to plead and prove financial hardship sufficient to warrant mitigation of the civil penalty amount. *Conquest Helicopters*, FAA Order No. 1994-20 (June 20, 1994), p. 3; *Salvatore Giuffrida*, FAA Order No. 92-72 (December 21, 1992), p. 2.

I conclude that a civil penalty in the amount of \$7,500 is warranted and is appropriate to the circumstances.

Complainant is obligated to consider the following factors when determining the civil penalty amount: (1) the nature and circumstances of the violation; (2) the extent and gravity of the violation; (3) the respondent's degree of culpability; (4) the respondent's history of prior violations, if any; (5) the respondent's ability to pay the civil penalty; (6) the effect on the entity's ability to stay in business; and (7) other matters as justice may require. See, e.g., *Folsom's Air Service, Inc.*, FAA Order No. 2008-11 (November 6, 2008), p. 11. The determination weighs whether the violation was inadvertent or deliberate, the private or public character of the violation, and the attitude of the violator. The agency also considers the respondent's size, particularly in determining the offender's ability to absorb the sanction. An appropriate civil penalty must reflect the totality of the circumstances surrounding the violations (Tr. 110-11, 117; *Folsom's Air Service, Inc.*, FAA Order No. 2008-11 (November 6, 2008), p. 12; *Eastern Air Center, Inc.*, FAA Order No. 2008-3 (January 28, 2008). Finally, the civil penalty should provide sufficient incentive to deter the respondent and similarly-situated entities from future violations. *Folsom's Air Service, Inc., Id.*, p. 20.

The agency has issued enforcement guidelines, FAA Order No. 2150.3A (judicially noticed as Exhibit A-8, and also found at www.airweb.faa.gov), for its employees to respect in determining appropriate sanctions. The guidelines also advise the public of the sanction policy that the Administrator intends to follow through the adjudication of individual cases. *Folsom's Air Service, Inc.*, FAA Order No. 2008-11 (November 6, 2008), p. 13. The Sanction Guidance Table, contained in Appendix 4 of Order No. 2150.3A, and as amended by Compliance/Enforcement Bulletin No. 92-1 (included in Appendix 1), sets out penalty recommendations within three ranges of amounts – designated minimum, moderate, and maximum – to best reflect the nature and circumstances of each violation. Mitigating and/or aggravating factors are part of the calculus. For air carriers, the Sanction Guidance Table sets out the civil penalty ranges per

violation as follows: minimum, \$1,000 to \$3,999; moderate, \$4,000 to \$7,499; and maximum, \$7,500 to \$11,000.⁷

Complainant states that it followed the guidelines in its civil penalty determination (1 Tr. 117). A Part 135 air carrier's unauthorized maintenance, and improper maintenance, each are violations warranting a civil penalty in the maximum range (Exh. A-8, pp. 7, 9; 1 Tr. 113-16). For failure to make a required entry in an aircraft log, the guidelines advise a civil penalty in the moderate to maximum range. An unairworthy aircraft having an actual or potential adverse effect on safe operation warrants a civil penalty in the maximum range (Exh. A-8, p. 8; 1 Tr. 116-17). Complainant concluded that, in view of the tables and all the pertinent factors in this case, an appropriate civil penalty was \$11,000. It points out that, had it followed the guidelines strictly, it could have requested a civil penalty in an amount as high as \$83,000 (1 Tr. 117-18; Compl. Post-Hearing Br., pp. 8-9).

The record shows that Respondent operated aircraft in derogation of safety. The Beechcraft was flown both with clear signs of an oil leak significant enough to require further investigation and the prospect of moisture penetration of vital aircraft systems. The latter situation continued following a slapdash repair performed by an individual lacking the qualifications to accomplish it. The aircraft was operated in this condition five times. The maintenance, moreover, went unrecorded. These circumstances warrant a substantial penalty.

Respondent in its case for mitigation submitted tax returns for the years 2003-2007, supplemented by revenue and expense account ledgers for the period January-July 2008.⁸ The documents indicate that the company has suffered some financial reverses recently. Mr. Husted emphasized that the company's gross sales for the four months immediately preceding the hearing, May-August 2008, were just one-third of its gross sales for the next preceding four-month period, the first four months of 2008 (2 Tr. 275-76, 292-93). Mr. Husted takes only a small salary. In 2007, that amount was \$4,200. In 2008, he testified, it was just \$800 (to the point of the September hearing), on account of the company's straitened circumstances (Exh. R-4, p. 1, line 12; Exh. A-16(c); 2 Tr. 280-83, 316-17). Mr. Husted claimed that Respondent "can't pay the bills" (2

⁷ The guidelines' tables show the maximum range as \$7,500 to \$10,000. See Exh. A-8, p. 5. The upper limit, however, was adjusted to \$11,000 by regulation effective January 21, 1997. See 14 CFR §305(d); 62 Fed.Reg. 4134 (January 29, 1997); Exh. A-8, p. 9; 1 Tr. 113-14.

FAA Order No. 2150.3B updated the guidelines effective October 1, 2007 for violations occurring on or after that date. Since the instant violations occurred no later than January 31, 2007, Order No. 2150.3B does not apply. See 72 Fed.Reg. 55853 (October 1, 2007); *Folsom's Air Service*, *Ibid.* p. 12, n. 26.

⁸ Exhs. R-4 (tax returns) and A-16(a) through (l) (ledgers). The Post Hearing Order of September 10, 2008, as amended by the Amended Post Hearing Order of September 25, 2008, had held the record open until October 10, 2008, for the purpose of enabling Respondent to supply financial records up to July 31, 2008. The ledgers were among the documents submitted in response. Respondent also filed tax returns for the years 2000 through 2002 (Exhs. A-17 through A-19) and supplements to its 2003-07 tax returns (Exhs. A-20 through A-24). The post-hearing exhibits, A-16 through A-24, are all hereby admitted into evidence.

Tr. 315) and “[t]here’s a good possibility that I’ll have to shut the door.” (2 Tr. 316).

Complainant countered that Respondent failed to prove financial hardship. In support, it noted that Husted and Husted Air Charter, as Mr. Husted himself testified, has always been able to meet its financial obligations (see 2 Tr. 309). The company’s tax returns also demonstrate that, in spite of a zero or negative taxable income for three of the five years submitted, Respondent was able to recover and continue as a viable, healthy concern (Exh. R-4; Compl. Post Hearing Br., p. 10). Additionally, the 2008 ledgers show that the company has a more positive financial picture than Mr. Husted suggested in his testimony, having a net revenue of over \$17,000 during the first seven months of that year (Exh. A-16; Compl. Post Hearing Br., p. 10).

In weighing all the facts and circumstances, I find and conclude that a civil penalty assessment of \$7,500 is appropriate. It is commensurate with the nature and extent of the violations, while accounting in suitable measure for Respondent’s financial circumstances.

Respondent showed that its financial condition is somewhat precarious. While generally healthy, it has suffered significant reverses. It did not show taxable income in three of the last five years for which full-year tax returns had been prepared (Exh. R-4). Even in better years, the company’s financial picture compelled its principal, Mr. Husted, to take out only modest amounts as salary. Due consideration of the effect of the civil penalty on a respondent’s ability to continue in business, while accounting for the extent and gravity of the violations, warrants a lesser levy than the amount proposed by Complainant.

The assessment determined, \$7,500, nonetheless is substantial, as well as appropriate. It remains within the Sanction Guidance Tables’ “maximum” range of suggested penalty amounts. I find also that the penalty has sufficient “bite,” or deterrent effect (see *Toyota Motor Sales, Inc.*, FAA Order No. 94-28 (September 30, 1994), p. 11).

In sum, I find and conclude that a sanction amount of \$7,500 suitably accounts for the totality of the circumstances of this case.⁹

⁹ Respondent’s brief, filed January 11, 2009, adds that “the last few months of business has been a disaster” (Post Hearings Br., pp. 3-4). This statement is insufficient evidence of inability to pay, however, as unsworn and unsubstantiated. *Conquest Airlines*, FAA Order No. 1994-20 (June 22, 1994), p. 3.

All other arguments Respondent has offered respecting penalty have been considered and rejected. In particular, its plea in mitigation to consider its “lost revenue” resulting from engine repairs undertaken at the behest of the FAA (see, e.g., Exh. R-5; 2 Tr. 311-14) is discounted as irrelevant.

Husted and Husted Air Charter, Inc. is hereby assessed a civil penalty of \$7,500 for violations of FAR §§91.7(a), 91.405(b), 135.65(c), and 135.413(a).¹⁰



Richard C. Goodwin
Administrative Law Judge

Attachment – Service List

¹⁰Any appeal from the Initial Decision to the Administrator must be in accordance with section 13.233 of the Rules of Practice, which requires 1) that a notice of appeal be filed no later than 10 days (plus an additional 5 for mailing) from the date of this order and 2) that the appeal be perfected with a written brief or memorandum not later than 50 days (plus 5 for mailing) from the date of this order. Each is to be sent to the Appellate Docket Clerk, Room 924-A, Federal Aviation Administration, 800 Independence Avenue, S.W., Washington, DC 20591, and to agency counsel. Service upon the presiding judge is optional.