UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

In the Matter of: DELAWARE SKYWAYS, LLC
FAA Order No. 2005-6

Docket No. CP02EA0043
DMS No. FAA-2002-14060[1]

Served: March 18, 2005

DECISION AND ORDER[2]

Respondent Delaware Skyways, LLC (Delaware), has appealed the decision of Administrative Law Judge (ALJ) Burton S. Kolko.[3] The ALJ found that Delaware failed to repair an aircraft, in violation of 14 C.F.R. § 91.405(a),[4] and operated it when it was not airworthy, in violation of 14 C.F.R. § 91.7(a).[5] The ALJ assessed Delaware an $8,000 civil penalty.

Delaware's main arguments on appeal are that: (1) the aircraft was in fact airworthy; (2) Delaware reasonably relied on a promise by the inspector not to take enforcement action; and (3) the ALJ should have granted its motion for more definite statement. Delaware has not challenged the amount of the civil penalty, but only the finding of violations.

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[1] Materials filed in the FAA Hearing Docket (except for materials filed in security cases) are also available for viewing through the Department of Transportation's Docket Management System (DMS) at the following Internet address: http://dms.dot.gov.

[2] The Administrator's civil penalty decisions, along with indexes of the decisions, the rules of practice, and other information, are on the Internet at the following address: http://www.faa.gov/agc/cpwebsite. In addition, there are two reporters of the decisions: Hawkins' Civil Penalty Cases Digest Service and Clark Boardman Callaghan's Federal Aviation Decisions. Finally, the decisions are available through LEXIS and WestLaw. For additional information, see the website.

[3] A copy of the ALJ's written decision is attached. (The ALJ's decision is not attached to the electronic versions of this decision nor is it included on the FAA website.)

[4] 14 C.F.R. § 91.405 provides: "Each owner or operator of an aircraft — (a) Shall have that aircraft inspected as prescribed in subpart E of this part and shall between required inspections, except as provided in paragraph (c) of this section, have discrepancies repaired as prescribed in part 43 of this chapter …."

[5] 14 C.F.R. § 91.7(a) provides: "No person may operate a civil aircraft unless it is in an airworthy condition."

I. Facts

Delaware operates a flight school, and owns a Cessna 152, registration number N703DF, which it rents and uses in its flight training program. On July 9, 2001, two FAA safety inspectors from the Philadelphia Flight Standards District Office went to New Castle County Airport to inspect Delaware's operation. (Tr. 11.) When they inspected N703DF, they found a number of items that they considered airworthiness discrepancies. (Tr. 12-13.) One of the inspectors listed the items on a sheet of paper because the inspectors did not have any aircraft condition notices with them. The inspector gave the list to the president of Delaware and told him that Delaware needed to repair the items. (Tr. 13.)

A little over a month later, on August 13, 2001, one of the FAA inspectors returned to Delaware for a follow-up inspection. (Tr. 14.) He reviewed Delaware's records to determine if Delaware had corrected the items, but the records did not reflect any maintenance or repair of the discrepancies. (Tr. 15.) The inspector then looked at the aircraft and saw that while Delaware had corrected some of the items, the following remained:

(1) loose cockpit rugs;
(2) an undocumented antenna mounted behind the nose gear;
(3) a missing rivet; and
(4) a loose window on the co-pilot door.

The inspector listed the items on an aircraft condition notice and gave it to a Delaware maintenance employee. (Tr. 15-16). After the inspector issued the aircraft condition notice, Delaware corrected the items. Between the July 9 inspection and the date when Delaware finally corrected all the deficiencies, Delaware had operated the aircraft with the uncorrected items on 12 separate days.[6]

II. Case History

The complaint alleged that Delaware violated 14 C.F.R. § 91.405(a), which requires operators to repair discrepancies on their aircraft, as well as 14 C.F.R. § 91.7(a), which prohibits the operation of a civil aircraft that is not airworthy. The complaint further alleged that Delaware was subject to a maximum civil penalty of $1,100 for each violation under 49 U.S.C. § 46301(a)(1), and that under the facts and circumstances of the case,

[6] July 12-14, 2001; July 17, 2001; July 20-22, 2001, July 27-28, 2001; August 1, 2001; August 3, 2001; and August 5, 2001.

a $12,000 civil penalty was appropriate.

Delaware filed a motion for more definite statement, which the ALJ denied, finding that Delaware could use discovery to fill in any gaps in its understanding of the complaint. Delaware then filed an answer denying that the items affected the airworthiness of the aircraft. Delaware admitted that it took no action regarding three of the four items, but alleged that it corrected the loose cockpit rug immediately, by repositioning it. Delaware also pointed out that the inspector did not issue an aircraft condition notice at the time of the first inspection, but only after his follow-up inspection.

In its answer, Delaware claimed as an affirmative defense that when it repaired the aircraft, it had reasonably relied upon the inspector's purported promise that if Delaware corrected the items listed in the aircraft condition notice, then the FAA would not take any enforcement action.

Complainant filed a motion for decision in which it claimed that Delaware did not file its answer in a timely manner. The ALJ denied Complainant's motion for decision, stating that "we all seem to be having problems with our mail," apparently due to the anthrax scare at the time.

After a hearing, the ALJ issued a written initial decision finding that Delaware "knowingly operated the aircraft with open discrepancies between July 9 and August 13, 2001," and in so doing, violated 14 C.F.R. §§ 91.405(a) and 91.7(a). The ALJ assessed an $8,000 civil penalty.

III. Airworthiness

Delaware argues that the aircraft was airworthy despite the alleged discrepancies. (Appeal Brief at 5.) Past cases have held that: "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 safe operation." In the Matter of California Helitech, FAA Order No. 2000-18 at 3 n.7 (Aug. 11, 2000) (quoting other cases).

A. Antenna

Delaware argues that the aircraft's previous owner, Dawn Aviation, installed the antenna, that the FAA inspected and approved it at the time, and that Delaware gave the inspector documentation about the antenna. (Appeal Brief at 8.)

The problem with this argument is that when the inspector conducted both his first investigation on July 9, 2001, and his follow-up investigation on August 13, 2001, Delaware's maintenance records failed to indicate in any way whether the antenna was FAA-approved and how it came to be on the aircraft. (Tr. 16.)

Even after the inspector informed Delaware of the problem on July 9, 2001, Delaware continued to fly the plane without taking any action, as the inspector discovered when he returned to Delaware for his follow-up investigation on August 13, 2001. Although Delaware reinstalled the antenna and provided documentation concerning the reinstallation to the inspector on August 31, 2001 (Respondent's Exhibit 2), Delaware's corrective action did not occur until after it had committed the violations.

As the ALJ correctly held:

> The agency proved its charges respecting the antenna. Equipment that is not part of a design that is approved under a type or supplemental type certificate and is not otherwise accounted for in appropriate records constitutes a discrepancy. The FAA inspectors were entitled to assume that the antenna was not lawful equipment and, thus, amounted to a discrepancy. A discrepancy unaddressed renders an aircraft unairworthy.

(Initial Decision at 4.)[7] FAA inspectors may rely on maintenance records to determine whether maintenance has been done properly. In the Matter of California Helitech, FAA Order No. 2000-18 at 8, 10-11 (August 11, 2000); *see generally* In the Matter of High Exposure, FAA Order No. 2003-7 (September 12, 2003) (FAA could rely on records of inspections required by airworthiness directives, even if regulations did not require operators to retain such records).

B. Aircraft Condition Notice

Delaware argues that all the flights at issue were airworthy as a matter of law because they took place before the inspector issued the aircraft condition notice (FAA Form 8620-1).[8] According to the case law quoted

[7] When an aircraft has unresolved discrepancies, it is not airworthy. In the Matter of General Aviation, FAA Order No. 1998-18 at 13 (October 9, 1998).

[8] According to Delaware, the General Aviation Operations Inspector's Handbook, FAA Order No. 8700-1, required the inspector to issue an aircraft condition notice when he first noted the alleged discrepancies during his July 2001 inspection. Delaware points to a flow chart in FAA Order No. 8700-1 that indicates that if an operations inspector finds an unsatisfactory condition, the next step is to issue an aircraft condition notice. (Respondent's Exhibit 1 at 11.)

As the inspector pointed out at the hearing, FAA Order 8700.1 is an operations inspector's handbook, and he is an airworthiness inspector rather than an operations inspector. (Tr. 27-28.) Nonetheless, the inspector did testify that he would ordinarily issue an aircraft condition notice to advise an operator of discrepancies. He did not have any such forms with him during the July 2001 inspection, however, so he both advised Delaware's president of the discrepancies orally,

above, if an aircraft fails to meet its type design or is unsafe for operation, it is not airworthy. This is true even if the FAA has not had the opportunity to provide any notice at all to an operator. Delaware has pointed to no legal authority indicating that an aircraft is airworthy as a matter of law if the FAA did not use an aircraft condition notice to notify an operator of discrepancies.

C. Loose Cockpit Rugs

Regarding the loose cockpit rugs, Delaware argues that the ALJ erred in concluding that it had to secure the rugs in the cockpit to the floor, because Complainant failed to provide any evidence that this was necessary. This is incorrect. Complainant provided testimony of an FAA inspector, qualified as an expert in evaluating the airworthiness of aircraft, who testified that the loose rugs near the rudder pedals created an unsafe and therefore unairworthy condition because they could interfere with the controls in flight. (Tr. 21, 68.)

Delaware provided its own witness, the president of Delaware, who in contrast, was not qualified as an expert. Delaware's president testified without corroboration that Cessna did not permit the rug to be secured to the floor, because doing so would eliminate access to critical aircraft components. (Appeal Brief at 8.)[9] The ALJ weighed the conflicting testimony and credited the expert testimony over that of Delaware's owner. Delaware has provided no reason to disturb the ALJ's decision to accord greater weight to the expert testimony.

D. Passenger Window Latch

Delaware argues that it inspected the passenger window latch after the inspector's July 9, 2001, visit, found it within tolerance, and that the inspector could not testify otherwise. In addition, Delaware argues, the inspector could not testify that the aircraft manual did not permit the window to be opened in flight. (Appeal Brief at 8.) Even if the manual permitted a person to open the window during flight, Delaware has provided no reason to overturn the ALJ's finding that the latch was defective and posed a risk to safety, given that it could open unexpectedly during flight and distract the pilots. The ALJ, who found that the loose window latch "caused the entire window to be loose" (Initial Decision at 2), determined that the testimony of Delaware's

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and also provided him with a written list of the discrepancies. (Tr. 22.) Delaware has not explained how, if at all, it was prejudiced by receiving notice of the discrepancies other than in the form of an aircraft condition notice.

[9] He testified to this effect even though, as is commonly known, there are materials for securing rugs that would not eliminate access – *e.g.*, Velcro.

president – that the latch continued to work and posed no risk to safety – was self-serving and lacking in credibility (*id.* at 5). The ALJ's credibility determinations are entitled to deference on appeal, given that he had the opportunity to observe the witnesses' demeanor. In the Matter of Bengry, FAA Order No. 2003-9 at 3 (September 12, 2003).

E. In-Service Wear Rates

Delaware argues, without any support, that to prove that parts like the cockpit rugs or the passenger window latch are not airworthy, the FAA must establish the aircraft in-service wear rates for the parts. (Appeal Brief at 5.) The rate of wear on the cockpit rugs and window latch, however, was not at issue in this case. The problem with the rugs was that they were loose and could interfere with the controls. As for the window latch, the ALJ found that it was actually defective and posed a risk to safety.[10]

IV. Reasonable Reliance

Delaware argues as an affirmative defense that it reasonably relied on an alleged promise made by the inspector not to take enforcement action against it. (Appeal Brief at 5.) Delaware bears the burden of proving any affirmative defenses. 14 C.F.R. § 13.224(c). Delaware's president, its sole witness, did not testify that the inspector promised not to take enforcement action, nor did Delaware introduce any other evidence to that effect. Arguments by counsel do not constitute evidence. In the Matter of Watts Agricultural Aviation, Inc., FAA Order No. 1991-8 at 13 (April 11, 1991), *petition for review denied*, Watts Agricultural Aviation, Inc. v. Busey, 977 F.2d 594 (1992).

Further, even if there was evidence of the alleged promise, this argument would fail anyway. The argument is essentially one of estoppel – it is an argument that the alleged promise by the inspector estops the government from bringing enforcement action.[11] To estop the government, one must prove affirmative misconduct, which is more than just negligence. Siu de Puerto Rico, Caribe Y Latino America v. Virgin Islands Port Authority, 42 F.3d 801, 803 (3rd Cir. 1994); In the Matter of Offshore Air, FAA Order No. 2001-4 n.34

[10] With a defective part that poses a risk to safety, an aircraft cannot be considered airworthy, regardless of the manufacturer's in-service wear rates.

[11] *See* In the Matter of Delaware Skyways, CP02EA0042, DMS No. FAA-2002-14059, in which the decision on appeal discusses estoppel in greater detail.

(May 16, 2001). Nothing in the record indicates that any alleged promise by the inspector not to take enforcement action would have been anything other than an act of negligence.

V. Motion for More Definite Statement

The Rules of Practice for FAA Civil Penalty Proceedings provide in 14 C.F.R. § 13.218(f)(3) that "[a] party may file a motion for more definite statement of any pleading which requires a response under this subpart." Delaware argues that the ALJ erred in denying its motion for a more definite statement because some of the allegations in the complaint were too vague and ambiguous – *e.g.*, "rugs loose in cockpit," "antenna mounted behind nose gear," "missing rivet by small door on left side of nose cowl," and "copilot door window loose." (Appeal Brief at 5.) This frivolous argument fails because the complaint was clear enough for Delaware to frame a responsive pleading.[12] Thus, the ALJ did not err in denying Delaware's motion for more definite statement. He correctly noted that Delaware could use discovery to obtain further detail.[13]

VI. Conclusion

For the foregoing reasons, this decision denies Delaware's appeal and, absent any challenge from Delaware to the amount of the civil penalty, affirms the ALJ's assessment of an $8,000 civil penalty.[14]

MARION C. BLAKEY, ADMINISTRATOR
Federal Aviation Administration

Issued this 8th day of March, 2005.

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[12] Although the Federal Rules of Civil Procedure are not binding in this forum, the Administrator may refer to them for guidance. In the Matter of Toyota Air Cargo, USA, FAA Order No. 2004-7 at 5 (September 22, 2004). Rule 12(e) of the Federal Rule of Civil Procedure provides: "If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party may move for a more definite statement …."

The courts grant motions for a more definite statement under Rule 12(e) only rarely. Schaedler v. Reading Eagle Publication, 370 F.2d 795, 798 (3rd Cir. 1967). The courts do not favor them, and grant them when the complaint is unintelligible, rather than when there is merely a lack of detail. In Re APF Co., 274 B.R. 408, 425 (D.C. Del. 2001). If there is only a lack of detail, then the moving party should use discovery to obtain more information. Redel's, Inc. v. General Electric Co., 54 F.R.D. 443 (D.C. Fla. 1972).

[13] Any arguments not discussed have been considered and rejected.

[14] Under the rules of practice, unless Respondent files a petition for review with a Court of Appeals of the United States under 49 U.S.C. § 46110 within 60 days of service of this decision, this decision is an order assessing civil penalty. 14 C.F.R. §§ 13.16(d)(4) and 13.233(j)(2).