UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

In the Matter of: BRADEN'S BALLOONS ALOFT, INC.
FAA Order No. 2004-6

Docket No. CP02SW0002
DMS No. FAA-2002-11520[1]

Served: September 22, 2004

DECISION AND ORDER

On March 27, 2002, Administrative Law Judge Burton S. Kolko issued a written initial decision[2] holding that Respondent Braden's Balloons Aloft, Inc., performed faulty repairs on a Cameron balloon and, as a result, violated Sections 43.13(a)[3] and (b)[4] and 145.57(a)[5] of the Federal Aviation Regulations (FAR), 14 C.F.R. §§ 43.13(a), 43.13(b),

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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). Access may be obtained through the following Internet address: http://dms.dot.gov.

[2] A copy of the initial decision is attached.

[3] Section 43.13(a) of the FAR provides in pertinent part:

> Each person performing maintenance, alteration, or preventive maintenance on an aircraft, engine, propeller, or appliance shall use the 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, except as noted in § 43.16.

14 C.F.R. § 43.13(a).

[4] Section 43.13(b) of the FAR 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 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).

14 C.F.R. § 43.13(b).

[5] Section 145.57(a) of the FAR provides in pertinent part:

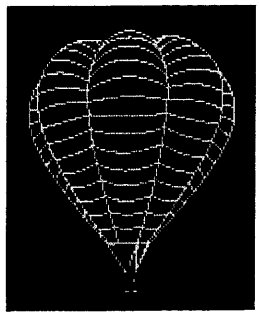
> [E]ach certificated domestic repair station shall perform its maintenance and alteration operations in accordance with the standards in part 43 of this chapter[.]

and 145.57(a). Respondent has appealed from the initial decision. After due consideration of the arguments raised by Respondent, Respondent's appeal is denied.

The Evidence

Introduction. David Hankins is the owner of a Cameron sports model V-90 hot air balloon, registration number N3982Y. (Tr. 43, 73, 78, 107- 108, Complainant's Exhibit 2 at 1.) During an annual inspection of this balloon, in September 2000, at SuperiAire Technologies in Albuquerque, New Mexico, Matt Guthrie[6] discovered certain discrepancies – missing stitching on two vertical load tapes and on horizontal seams. Respondent had replaced two panels and patched two other panels of the balloon's envelope about one year earlier, and no other maintenance had been performed in between that repair and the inspection. Respondent admits that it performed those repairs but denies responsibility for the discrepancies found by Guthrie. Respondent's affirmative defense is that the portion of the balloon that it repaired is above and to the right of the area where the discrepancies were found.

Balloon Structure. A hot air balloon's envelope consists of vertical load tapes, sewn onto the fabric between the load tapes. *See* below.



The load tapes are structural members of the balloon. When the vertical load tapes reach

[6] Guthrie is the holder of a repairman certificate, which authorizes him to return balloons to service after an annual inspection and after maintenance. (Tr. 15.) He started SuperiAire Technologies in 1998. (Tr. 16.)

the bottom of the balloon, they turn back up inside the balloon, forming a loop at the mouth of the envelope. The area where the load tape goes around the mouth of the balloon is called the turnback. (Tr. 19.) Suspension cables for the basket are attached to these loops in the turnback areas.

The fabric between two parallel vertical load tapes extending from the top to the bottom of the balloon envelope is called a gore. (Tr. 18.) Each gore is composed of several panels of fabric. The panels are sewn together.

Cameron Balloons. The Cameron standard model balloon has 8 vertical load tapes and 8 gores. (Tr. 18, 30.) The bottom panel of each gore is made of a nonflammable fabric known as Nomex. The other panels are made from Duraflight, a nylon fabric.

Hankins owns a Cameron sports model balloon. The sports model also has 8 vertical load tapes and 8 gores. The sports model differs from the standard model in that the Nomex panel on a sports model is narrower than on a standard model balloon. (Tr. 108.)

Identification of Gores. The witnesses at the hearing differed regarding how they identify gores. Matt Guthrie claimed that he follows the industry practice, which is to refer to the gore to the *left* of a numbered vertical load tape by the number of that load tape. (Tr. 51.) Hence, the gore to the left of load tape #1 would be gore #1, and the gore to the left of tape #2 (between tapes #1 and #2) would be gore #2.[7]

In contrast, R. Morgan Braden, Respondent's owner, stated that it is his practice when making logbook entries to identify a gore to the *right* of a numbered load tape by

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[7] Applying Guthrie's practice, gores would be marked as follows:
Gore #1 Tape #1 Gore #2 Tape #2 Gore #3 Tape #3, etc.

that tape's number. He testified that, for example, gore #2 would be to the right of load tape #2, or in other words, between load tapes #2 and #3. (Tr. 146.)[8]

Identification of Panels. Guthrie testified that for both standard and sports model balloons, he identifies the Nomex panel as "NX." He identifies the nylon panel adjacent to the Nomex as panel A, and the subsequent nylon panels with consecutive alphabetical letters. (Tr. 64, 69, 70.)

The Cameron Balloons Inspection Checklist, found in Appendix B of the Cameron Balloons Manual, identifies the lowest panel as NX, and the panel immediately above the NX panel as the A panel. The panel above the A panel is the B panel. (Respondent's Exhibit 1 at 3.)

The Cameron Balloons Manual also includes a diagram entitled "Typical V-Series Patterns Drawing." This diagram depicts the panels in a gore in a standard model V-90 balloon. The panels are labeled from bottom to top as NX, A, B, C, etc. (Respondent's Exhibit 1 at 1.)

There is an insert in the "Typical V Series Patterns Drawing" regarding the sports model envelopes. The insert states as follows: "Note: For "Sport" version replace "NX" with (1) NXA cut from Nomex and (1) NXB cut from Duraflight." (Respondent's Exhibit 1 at 1-2.) Applying this system of identifying sports model balloon panels, the panels would be marked from bottom to top as NXA, NXB, A, B, etc. (Respondent's Exhibit 1 at 1-2.) Guthrie testified that despite this insert, most repairmen identify the nylon panel immediately above the Nomex panel as panel A, not NXB. (Tr. 69-70.)

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[8] Thus, applying Braden's practice, gores would be marked as follows:
Tape #1 Gore #1 Tape #2 Gore #2 Tape #3 Gore #3, etc.

The Damage to the Balloon and the Repair at Braden's. On October 3, 1999, Hankins participated in a night show at the Albuquerque Balloon Fiesta. While the balloon was fully inflated, it encountered a wind shift, along with 20 to 25 other balloons. Hankins' balloon, as well as others, caught fire. (Complainant's Exhibit 2 at 2; Tr. 74.) According to Hankins, it was only a "quick flash fire." (Tr. 76) He explained that the fire resistant Nomex panels (at the mouth of the balloon) did not burn, but the nylon panels immediately above the Nomex and adjacent to load tapes #1 and #2 were damaged. (Tr. 74-76; Complainant's Exhibit 4 at 2 and 4.) Hankins took the balloon to Respondent for repair.

Braden testified that the Albuquerque Balloon Fiesta is his busiest season. (Tr. 141.) He recalled looking at the burned section of the balloon when Hankins brought it in, and he prepared the work order. He wrote on the work order dated October 4, 1999, that Gore 2, Panel A, and Gore 3, Panel A needed to be replaced and that Gore 2, Panel B, and Gore 3, Panel B needed to be patched. (Complainant's Exhibit 2 at 5.)

Braden did not perform the work himself. (Tr. 140). Instead, he assigned this job to Donna Ecclestone, an experienced balloon repairman from Canada, who was on a working vacation, and helping him out in the shop. (Tr. 140-141.)[9]

After Ecclestone finished the job, Braden inspected the balloon and signed off on her work, approving the balloon for return to service. (Tr. 150, 154.)[10] Braden signed the

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[9] Braden testified that Ecclestone had "exceptional credentials." He stated that she had worked for a company in Calgary repairing balloons, including Cameron balloons, for over 10 years. (Tr. 141.) He stated further that he had no problems with her work during that week. (Tr. 141.)

[10] When Braden signed the approval for return to service after the repairs were made, he was indicating that the particular work performed was done satisfactorily. *See* 14 C.F.R. § 43.13(9)(a)(4) which provides:

If the work performed on the aircraft, airframe, aircraft engine, propeller, appliance, or

maintenance release, dated October 6, 1999, indicating that the balloon had been repaired and inspected in accordance with the manufacturer's specifications and approved for return to service. The maintenance release indicated that the following work had been done: "Replace Pannel (sic) A, Gore 2 & 3, Patch [Panel] B, Gore, 2 & 3." (Complainant's Exhibit 2, page 3.) Braden included a similar maintenance release on the bill. (Complainant's Exhibit 2, page 6.)

Time Period between October 1999 Repair and September 2000 Annual Inspection. According to Hankins, only his wife and he had access to the balloon between the repair by Respondent in October 1999 and the annual inspection conducted by Guthrie in September 2000. He testified that no maintenance was performed on the balloon during this time period. (Tr. 83.)

Annual Inspection. On September 6, 2000, Guthrie, accompanied by Hankins, conducted an annual inspection of the balloon. (Tr. 17.) As part of the inspection, they found that stitching was missing on some of the panels and tapes. (Tr. 19-20.) Guthrie contacted the FAA (Tr. 35) and FAA Aviation Safety Inspector Walter Tidmore, the principal maintenance inspector (PMI) for Braden's Balloons, came to examine the balloon. On September 7, 2000, Tidmore took photographs of the discrepancies. Seven of these photographs were introduced into evidence as Complainant's Exhibit 4. Guthrie testified that these photographs, introduced as Complainant's Exhibit 4, represent what he saw during his inspection of the balloon on September 6, 2000. (Tr. 21.)

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component part has been performed satisfactorily, the signature, ... by the person approving the work [shall be entered in the maintenance record]. The signature constitutes the approval for return to service only for the work performed.

Load Tape #1. The photograph in Complainant's Exhibit 4, on page 2, depicts two yellow Nomex panels as well as the bright blue nylon panels directly above the Nomex panels on the right and left of load tape #1. This photograph shows that load tape #1 had only 2 rows of stitches, instead of the 14 rows of parallel stitches required by the Cameron Balloons Manual. (Tr. 22.) According to the Cameron Balloons Manual, "1 inch tubular nylon or polyester load tape must be sewn with 14 parallel rows of stitching." (Complainant's Exhibit 3 at 51.)[11]

The top photograph in Complainant's Exhibit 4, on page 3, depicts the end of the turnback of load tape #1 inside the balloon between blue nylon panels. This photograph shows that at the end of the turnback of load tape #1, there were only two rows of vertical stitching holding the tape to the balloon envelope instead of 14 rows of parallel vertical stitching. (Tr. 22-23.) This photograph also shows some fragments of stitches that had been removed, but not replaced. (Tr. 22-23.) Moreover, the two vertical rows of stitches on the load tape did not extend to the end of the load tape, as they should. (Tr. 23.) Finally, there should have been a double row of three rows of stitches across the tape perpendicular to the 14 rows of vertical stitching, but there were no horizontal rows of stitches across the end of load tape #1. (Tr. 23.)

The lower photograph on page 3 of Complainant's Exhibit 4 depicts another part of load tape #1 in the turnback area inside the envelope between blue nylon panels. This

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[11] Braden testified that he did not recall the inspection but that ordinarily as part of an inspection, he would check the stitching involved in the repair to ensure that it had been done properly. (Tr. 156-157.) He testified that if he had seen only two rows – instead of 14 rows -- of stitching on the load tapes in the area that had been repaired, he would have had it corrected. (Tr. 156.) He testified further that did not think that he had inspected stitching in the turnback area [where Guthrie found the discrepancies] because he did not believe that his shop had repaired that section of the balloon. (Tr. 157-58.)

photograph of load tape #1 shows only two rows of vertical stitches on load tape #1. (Tr. 23.) In one area, the vertical stitches had failed altogether. To show how the stitching had failed, Tidmore slid a tag underneath the tape. (Tr. 103.) Had the stitches been intact, he would not have been able to insert the tag underneath this tape.

Load Tape #2. The photograph on page 4 of Complainant's Exhibit 4 of the outside of the envelope shows load tape #2 with only 2 rows of stitching running vertically between the shiny blue nylon panels above the Nomex panels. Another photograph of the inside of the balloon in the turnback area where load tape #2 runs between the nylon panels above the Nomex panels shows an area where the two rows of vertical stitches run off the tape. Where the vertical stitching ran off the tape, only one vertical row of stitching remained. (Complainant's Exhibit 4 at 5, Tr. 27, 28.)

Horizontal Seam Between the Nomex Panel and the Nylon Panel to the Left of Load Tape #2. Guthrie found another deficiency involving the horizontal seam between the Nomex panel and the nylon fabric panel above it in gore #2 (to the left of load tape #2.) This seam – a double row of stitching -- should have extended all the way to load tape #2. However, as the photographs on pages 4 and 5 of Complainant's Exhibit 4 show, the double row of stitching stops runs upward off the Nomex and ends short of the intersection of the panels and load tape #2.

Significance of the Deficiencies. Guthrie testified that the missing stitches on two of the eight vertical load tapes constituted a "major structural deficiency," involving 25% of the load tape, while the incomplete horizontal seam near load tape #2 was a less severe deficiency. (Tr. 27.) When asked about the significance of the deficiencies regarding load tape #2, Guthre explained that the structural strength of that load tape had been

jeopardized because it lacked enough stitches to hold the turnback. He testified:

> If you're flying the balloon and you lose 25 percent of your cables, it's going to be a drastic shift and the basket is going to be – it's going to alter the flying characteristics a little bit, and it has the potential of creating other hazards through flying. If there is other damage in the balloon, it could throw enough stress into that area to where the balloon would possibly come apart.

(Tr. 37.)

The Initial Decision

The ALJ held that the preponderance of the credible and probative evidence shows that Respondent performed the work which led to the deficiencies found by Guthrie during the annual inspection. (Initial Decision at 3-4.) The ALJ wrote:

> The work order and maintenance release signed by Mr. Braden on behalf of Braden's … speak for themselves; and the testimony that the balloon had not been flown or repaired prior to the examinations of Messrs. Guthrie and Tidmore was credible. The evidence demonstrates that Braden's returned the balloon to service when it was in an unairworthy condition (Tr. 135).

(Initial Decision at 4.) The ALJ rejected the defense that the missing rows of stitches on the load tapes and the gap in the horizontal seam could not be attributed to Respondent's repair. (Initial Decision at 4-5.) The ALJ assessed a civil penalty of $2,247.

Appeal

I. Did Complainant prove its case by the preponderance of the evidence?

Respondent argues that Complainant did not prove by the preponderance of the evidence that Respondent repaired the portions of the balloon shown in the photographs. According to Respondent, Complainant should be held to what it alleged in the complaint – that Respondent repaired gores #2 and #3, panels A and B which, Respondent contends, are not the same areas depicted in the photographs. Respondent insists that the defects were not found in the areas that it repaired.

Complainant had the burden of proof in this matter under 14 C.F.R. § 13.224.[12] According to records filled out by Braden himself, in October 1999, Respondent repaired the A and B panels associated with load tapes #2 and #3, replacing the A panels and patching the B panels. [*See* Complainant's Exhibit 2 at 3 (inspection and maintenance record dated 10/6/99) and 5 (work order dated 10/4/99)]. Hankins testified that the burned panels were directly above the Nomex. (Tr. 76.)[13] It follows, therefore, that the replaced "A" panels must have been the nylon panels directly above the Nomex, and the patched nylon "B" panels must have been immediately above the "A" panels.

Using Appendix B's inspection checklist[14] to show the repairs to load tapes #2 and #3, panels A and B, and using Guthrie's method of identifying panels to the left of a load tape with that tape's number, then the damage would be indicated as follows:

Chart I.

B	**patched**	**patched**	
A	**replaced**	**replaced**	
NX			
	1	2	3 4

Indeed, that is where Guthrie found the deficiencies during the annual inspection. Guthrie found missing rows of stitches on load tapes #1 and #2 where these load tapes

[12] Section 13.224(a) provides: "Except in the case of an affirmative defense, the burden of proof is on the agency." 14 C.F.R. § 13.224(a).

[13] Hankins is the only witness who recalled with any certainty where the damage was. Braden, who did not recall the repair, did not testify about the location of the burned area of the envelope.

[14] The Cameron Balloons Manual, Appendix B, contains an inspection checklist that a person inspecting a balloon envelope could use to indicate the location of damage on a standard "O", "A", and "V" series envelope. Guthrie acknowledged that this inspection checklist is for standard envelopes, and does not represent the sport model V series envelope. (Tr. 70.) Guthrie testified, however, that using the Cameron inspection checklist in Appendix B to identify damage to a sports balloon, the nylon panel above the Nomex would be noted as panel A. (Tr. 69.)

cross the Nomex panels and the nylon panels directly above the Nomex panels. (Complainant's Exhibit 4.) Guthrie found an improperly stitched seam to the left of load tape #2 (when viewed from the outside of the envelope) between the Nomex panel and the nylon panel directly above it. (Complainant's Exhibit 4 at page 4.) As Chart I illustrates, load tapes #1, #2, and #3[15] would have been involved in the replacement of panels 2A and 3A (assuming that the gore to the left of a load tape is identified by that tape's number). Guthrie testified that he did not find any problems with load tape #3, but, he explained, there had been no need to open that tape because the panel to the right of tape #2 was not replaced with a full panel. (Tr. 64.) Furthermore, between the date of repair and the annual inspection, no other maintenance was performed.

Moreover, Guthrie testified that the nylon panels that he would call "A" panels[16] directly above the Nomex on either side of load tape #2 had been replaced. (Tr. 66.) He said that these were made of new fabric. (Tr. 66.) His observations of new fabric on either side of load tape #2 confirm that the replaced panels were between load tapes #1 and #3 (on either side of load tape #2) and thus, as Complainant sought to prove, that the discrepancies found on load tapes #1 and #2 resulted from Respondent's repairs.

Hence, Complainant made out a prima facie case that Respondent did faulty repairs resulting in the discrepancies found during the annual inspection approximately one year later. As discussed below, Respondent failed to rebut that prima facie case.

Respondent's affirmative defense is based primarily upon Guthrie's testimony on cross-examination. Respondent's representative used a chart that he had modified to

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[15] Guthrie testified that a minimum of 3 load tapes would have to be opened to replace two adjacent panels. (Tr. 59-60.)

[16] He explained that using the Cameron diagram insert, these panels would be designated as NXB panels.

depict the damage to the balloon and the repairs to cross-examine Guthrie. Respondent's representative modified the chart to include NXA (Nomex) and NXB (nylon) panels. Respondent's representative requested that Guthrie assume that the panels described in the work order were the A and B panels to the *right* of tapes #2 and #3. Chart II below shows the modifications[17] made by Respondent's representative and the location of the replaced and patched panels according to the assumptions that he presented to Guthrie:

Chart II.

B		patched	patched	
A		replaced	replaced	
NXB				
NXA				
	1	2	3	4

Also, Respondent's counsel highlighted in red a 3/8th inch portion of the horizontal line between panels NXA and NXB, immediately to the left of tape #2, to represent the area where the seam did not extend all the way to the tape.

Based on these assumptions and modifications, Guthrie agreed on cross-examination that to replace the adjacent A panels, there would have been no reason for Respondent to have opened the seam between the NXA and NXB panels. (Tr. 59.) Again, using this modified chart and the assumptions regarding marking gores, Guthrie agreed that Respondent would have had to open load tapes #2, #3, and #4 and not tape #1. He acknowledged, however, that he had found no deficiencies on load tapes #3 and #4 but found missing stitching on tape #1. (Tr. 61.) Respondent relies upon this testimony by Guthrie on cross-examination to support its defense that it repaired a different portion of the balloon than the section found with improperly stitched load tapes and seams depicted in the photographs.

[17] Respondent's representative made the NXA panels thinner than the wider NXB panels.

The evidence does not support the position that the replaced A panels were separated from the Nomex panels by one nylon NXB panel. As mentioned previously, Hankins testified that the burned portion of the balloon was directly above the Nomex. There is no compelling evidence to contradict Hankins' memory of where the damage was. Braden did not remember where the damage was or where the repairs were made.

The ALJ rejected Braden's contention that Guthrie's practice of referencing gores – to the left of the tape -- was "simply incorrect." Cameron did not mandate a particular method for identifying the panels (from left to right or from right to left), and Respondent's representative even acknowledged that fact. (Tr. 151.)

Respondent claims that the checklist in Appendix B is evidence that the manufacturer recommends that, for example, gore #1 should be to the right of load tape #1. Respondent's representative had Guthrie mark an X in the box that represented panel C, gore 1 on a blown up portion of the checklist (with 6 load tapes). Guthrie placed the X in the box for panel C to the left of load tape #1 as depicted in Chart III below.

Chart III.

C	X					
B						
A						
NX						
		1	2	3	4	5	6

According to Respondent, placing the mark to the left of load tape #1 was "comical" because the mark was in a margin of the diagram. (Appeal Brief at 10.) What Respondent fails to take into account, however, is that this diagram is to a balloon what a map is to a globe. In other words, he fails to take into account that the areas to the

extreme right and left on this diagram are in reality contiguous because an inflated balloon is a sphere. Hence, the gore to the left of tape #1 is also, on a balloon with 8 gores, the gore to the right of tape #8. Thus, there is nothing inherently comical about putting the X in the box to the left of tape #1.[18]

Braden's contends that it had no reason to open load tape #1. Respondent's defense fails because whether you refer to gores to the left or the right of the load tapes, Respondent was required to open load tape #2 to replace panels 2A and 3A because load tape #2 is sandwiched between panels 2A and 3A. It seems highly unlikely that Respondent would have sewn only 2 of 14 veritical rows of stitching on load tape #2 but someone else sewed only 2 of 14 rows on load tape #1. Also, if we compare where the parties contend that the work was done, keeping in mind that Guthrie stated that he would identify the panel above the Nomex as A and Respondent would identify that same layer as NXB, then we can see that they would agree that Respondent worked on the panel to the right of load tape #2 that is separated from the bottom Nomex layer by one nylon panel. Guthrie would call that panel 3B and according to Respondent, that would be identified as the panel 2A – both of which were included as panels that were repaired by Braden's according to the maintenance records. *See* Chart IV.

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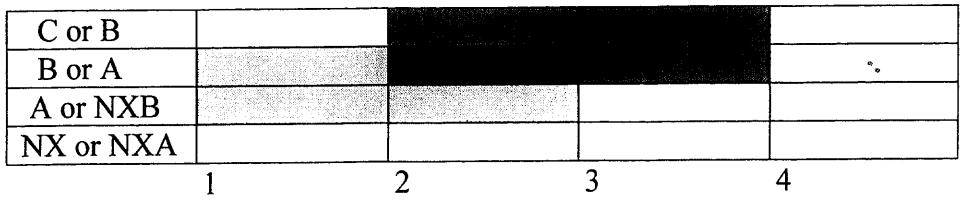
[18] That this is so was made clear by Guthrie's marking on page 3 of Respondent's Exhibit 1 of where he considered panel 1C to be. Page 3 of the Respondent's Exhibit 1 is a full view of the Cameron Balloons Manual's Appendix B, the inspection checklist. The inspection checklist depicted on that page has 20 columns. Guthrie testified that the X that he had made on page 4 of the exhibit – in the C panel to the left of load tape #1 -- correlated to the panel to the right of tape #20. (Tr. 49.)

Chart IV.



Respondent argues that Complainant might have "laid to rest the issue of panel orientation [if it had introduced] photographs of the patched B panels or at least some testimony concerning their position relative to everything else being debated." (Appeal Brief at 12.) Respondent may be correct on this point, but such cumulative evidence regarding orientation was not necessary. Moreover, this argument cuts both ways, because Respondent also did not introduce any photographs or present any evidence regarding the patches to rebut Complainant's *prima facie* case.

On appeal, Respondent attacks Hankins' credibility, arguing that Hankins' testimony was "unreliable, unconvincing, obviously but poorly rehearsed, insufficient, contradicting, totally unelaborated and simply parroted for the benefit of the complaint." (Appeal Brief at 14.) Respondent argues that the ALJ should not have credited Hankins' testimony in part because Hankins and Guthrie disagreed about whether Hankins had left the balloon overnight at Guthrie's shop. Whether the balloon was at Guthrie's shop overnight is not a material fact in this case and cannot be resolved on this record. This inconsistency is insignificant and does not justify disturbing the ALJ's apparent finding that Hankins was a credible witness.[19] In the Matter of Werle, FAA Order No. 1997-20

[19] The ALJ did not state specifically in his decision whether he considered Hankins to have been a credible witness. He did, however, accept Hankins' testimony and found that "SuperiAire Technologies' examination began directly after Hankins brought it in (Tr. 90)." (Initial Decision at 2.) It is well established that an ALJ's credibility decisions will be given deference because the ALJ is in the best position to evaluate the demeanor of the witness. *E.g.*, In the Matter of

at 11 (May 23, 1997); In the Matter of Park, FAA Order No. 1992-3 at 9 (1992).

Respondent argues further that "[t]he fact remains that Mr. Hankins brought his balloon to Mr. Guthrie on the 5th and left it there overnight during which time Mr. Guthrie (Braden's hostile competitor) had plenty of time to tamper with the envelope in order to create the condition described in the complaint." (Appeal Brief at 23.) Under 14 C.F.R. § 13.233, the ALJ "shall issue an initial decision or rule in a party's favor only if the decision or ruling is supported by, and in accordance with, the reliable, probative, and substantial evidence contained in the record." Respondent's suggestion of tampering and his characterization of Guthrie as a hostile competitor do not constitute substantial evidence.

Respondent takes issue with the ALJ's inference that Respondent was overwhelmed during Fiesta week due to increased business volume. Fiesta week is Respondent's busiest time of the year. Whether Respondent was "overwhelmed" and unable to cope with the increased work that week was not a material fact in the ALJ's decision. At most it was an explanation of why Respondent failed to repair the balloon properly and suggests that the discrepancies were inadvertent.

II. Should Respondent be allowed to supplement the record at this juncture in the proceedings with a certification by Donna Ecclestone?

Respondent seeks to supplement the record by attaching a certification by Donna Ecclestone to its appeal brief. (Appeal Brief at 29.) Respondent argues that the ALJ proposed to keep the record open to allow both parties to supplement the record. The ALJ did suggest to the parties that he could hold the record open at the end of the hearing for further proceedings involving Donna Ecclestone. (Tr. 143.) Later, after an off-the

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Warbelows Air Ventures, FAA Order No. 2000-14 at 3 (June 8, 2000).

record discussion following the conclusion of Complainant's rebuttal case, the ALJ explained that the record was closed. He stated that the parties considered the closing of the record as acceptable, and that "[t]here is no reason to keep it open." (Tr. 164.) Respondent's representative did not object.

III. Was the ALJ's denial of Respondent's request for a continuance of the hearing reversible error?

Respondent argues that the ALJ erred when he denied its request for a continuance of the hearing because the ALJ disregarded the provisions of 14 C.F.R. § 13.221. Section 13.221 provides in pertinent part:

> (a) *Notice.* The administrative law judge shall give each party at least 60 days notice of the date, time, and location of the hearing.
>
> (b) *Date, time, and location of the hearing.* The administrative law judge ... shall set a reasonable date, time, and location for the hearing. The administrative law judge shall consider the need for discovery and any joint procedural or discovery schedule submitted by the parties when determining the hearing date.

14 C.F.R. §§ 13.221(a) and (b).

The complaint in this case was issued on February 21, 2002. On May 2, 2002, the ALJ sent out a notice announcing that the hearing would be held on August 27, 2002, thereby informing the parties 117 days in advance of the hearing date. Respondent did not mail its First Set of Interrogatories to the agency attorney until July 31, 2002. On August 22, 2002 -- five days before the scheduled hearing date -- Respondent's representative requested a postponement of the hearing "based on the fact that I have just today received the first answers to my first set of interrogatories from the agency attorney." Respondent's representative's only additional justification for the requested postponement was that Respondent intended "to file a motion for summary judgment

based on the evidence presented by the agency attorney and two certifications being finalized at this point." Letter by Ronald DiGiovanni to Hon. Burton S. Kolko, dated August 22, 2002.[20] The agency attorney opposed the motion.

The ALJ denied the motion for postponement, writing as follows:

> The complaint goes back to February 21, 2002, from which date discovery could have been initiated. Parties are always desirous of more time to prepare for trial, which is why they were given almost twice the sixty days' notice required by the Rules of Practice. There appear to be material issues of fact to be heard, and the time has come to hear them.

Order Denying Motion for Continuance dated August 23, 2002.

Respondent's argument that Section 13.221 does not impose a 60-day limit on discovery is correct. Section 13.221 sets the minimum number of days of notice that the ALJ must provide the parties of the hearing date. The ALJ provided nearly twice that amount of notice to the parties. Respondent must accept responsibility for delaying its initiation of discovery until there was less than a month remaining before the scheduled hearing date and for not having obtained the certifications in time for the hearing.

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[20] Respondent represents in its appeal brief that one of those certifications was from Donna Ecclestone, and that it would have established her credentials as a repairwoman. The ALJ wrote in the initial decision that Ecclestone's credentials had not been established at the hearing. That is true. If the certification had been prepared prior to the hearing and introduced at the hearing, the ALJ would have had to decide how much weight to attach to it. In the Matter of Emery Worldwide Airlines, FAA Order No. 1997-30 at 11 (October 8, 1997); *see* 14 C.F.R. § 13.222(c) which provides that "[t]he fact that evidence submitted by a party is hearsay goes only to the weight of the evidence and does not affect its admissibility." Moreover, regardless of her credentials, the preponderance of the evidence established that the discrepancies are attributable to the repairs made by Braden's.

Conclusion

Based upon the foregoing, Respondent's appeal is denied, and the ALJ's initial decision, assessing a $2,247 civil penalty against Respondent is affirmed.[21]

Marion C. Blakey

MARION C. BLAKEY, ADMINISTRATOR
Federal Aviation Administration

Issued this 21st day of September, 2004.

[21] 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 shall be considered an order assessing civil penalty. 14 C.F.R. §§ 13.16(b)(4) and 13.233(j)(2).