UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

In the Matter of: ALASKA AIRLINES, INC.
FAA Order No. 2004-8

Docket Nos. CP02NM0001, CP02NM0002, CP02NM0003
DMS Nos. FAA-2002-11411, FAA-2002-11412, FAA-2000-11413[1]

Served: October 4, 2004

DECISION AND ORDER[2]

Complainant FAA (Complainant) has appealed the attached decision of Administrative Law Judge (ALJ) Burton S. Kolko, which dismissed Complainant's three complaints alleging that Alaska Airlines, Inc. (Alaska) violated the following regulations:

- 14 C.F.R. § 43.13(a), providing that "[e]ach person performing maintenance ... or preventive maintenance on an aircraft ... shall use the methods, techniques, and practices prescribed in the current manufacturer's maintenance manual ... or other methods, techniques, and practices acceptable to the Administrator";

- 14 C.F.R. § 119.5(g), providing that "[n]o person may operate as a direct air carrier ... in violation of ... appropriate operations specifications";

- 14 C.F.R. § 119.5(l), providing that "[n]o person may operate an aircraft under ... part 121 of this chapter ... in violation of ... appropriate operations specifications"; and

- 14 C.F.R. § 121.153(a)(2), providing that "no certificate holder may operate an aircraft unless that aircraft ... [i]s in an airworthy condition."

---

[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.

The ALJ held that Alaska was not liable for improper maintenance that was performed by its independent contractors. On review, the Administrator grants Complainant's appeal, reverses the ALJ's decision, and assesses a civil penalty of 33,000. The Administrator finds that Alaska is responsible for the maintenance deficiencies of its independent contractors because: (1) 14 C.F.R. § 121.363 provides that carriers are *primarily* responsible for maintenance; (2) the FAA has issued guidance emphasizing that carriers have *unrestricted* and *unconditional* responsibility for their independent maintenance contractors; and (3) one of Alaska's operations specifications required it to ensure that its contractors performed all substantial maintenance *without deviation* according to its maintenance program.

I.

A. Docket No. CP02NM0001

On or about October 22, 2000, B.F. Goodrich Aerospace (B.F. Goodrich), one of Alaska's independent contractors, completed substantial maintenance, including a service check, on Alaska's N797AS, a Boeing 737-400 aircraft. Alaska does not dispute that while performing the maintenance, B.F. Goodrich improperly wired the "smoke/fire bell cutout relay" in the lower cargo compartment's smoke detection and fire suppression system.

Alaska operated the aircraft in revenue service from October 23, 2000, through October 27, 2000. On or about October 27, 2000, the flight crew noted in the aircraft log that a warning bell for the smoke detection and fire suppression system was malfunctioning. Alaska repaired the aircraft on the same day by re-wiring two reversed wires.

In the complaint, as amended, Complainant alleged that Alaska violated 14 C.F.R. §§ 119.5(g) and (l) by operating as an air carrier while out of compliance with its operations specifications. According to Complainant, Alaska failed to comply with the following operations specifications:

1. Section D072, which required Alaska to maintain its aircraft according to its Continuous Airworthiness Maintenance Program, including the provisions of Alaska's B737-400 maintenance manual; and

2. Section D091, which required Alaska to ensure that its contractors performed all substantial maintenance, without deviation, according to the air carrier's Continuous Airworthiness Maintenance Program.

Complainant also alleged that Alaska violated 14 C.F.R. § 121.153(a)(2) by operating an aircraft that was not airworthy. Complainant requested a civil penalty of $11,000.

B. Docket No. CP02NM0002

On or about February 12, 2001, another of Alaska's independent contractors, Aviation Management Systems, Inc. (Aviation Management), performed a "D" check on Alaska's N742AS, a Boeing 737-290C. While performing the "D" check, Aviation Management used an unapproved chemical stripper to strip the aircraft. Alaska's operations specifications required it to follow the aircraft maintenance manual, which stated that a "D" check includes the completion of Paint and Prep Task Card #1801100. This task card required stripping the aircraft chemically according to Boeing Process Specification BAC 5725. Aviation Management used a chemical stripper that Boeing Process Specification BAC 5725 did not list as an approved chemical stripper.

Complainant issued a complaint alleging that Alaska violated 14 C.F.R. § 43.13(a) by performing maintenance without using methods, techniques, and practices in the current manufacturer's maintenance manual or ones that were otherwise acceptable

to the Administrator. Complainant also alleged that Alaska violated 14 C.F.R. §§ 119.5(g) and (l) by operating as an air carrier while out of compliance with its operations specifications. According to Complainant, Alaska failed to comply with Section D091(A) of its operations specifications, which, as discussed above, required Alaska to ensure that Aviation Management performed, without deviation, all substantial maintenance according to Alaska's Continuous Airworthiness Maintenance Program. Complainant requested an $11,000 civil penalty.

C. FAA Docket No. CP02NM0003

On or about November 3, 2000, independent contractor B.F. Goodrich performed a "C" check on Alaska's N775AS, a Boeing 737-4Q8. Among other things, the "C" check required the mechanic to complete Alaska's Task Card 440000001, Step 15 of which required downgrading the aircraft from Category III to Category I status.

On or about November 13, 2000, after replacing and inspecting N775AS's #1 Navigation Receiver, two B.F. Goodrich mechanics, who were unqualified to perform this low weather minima maintenance, failed to downgrade the aircraft from Category III to Category I and to perform the required functional tests. Further, on or about November 21, 2000, after replacing and inspecting N775AS's #2 Navigation Receiver, two other B.F. Goodrich mechanics, who were also unqualified to perform lower weather minima maintenance, failed both to downgrade the aircraft from Category III to Category I status and to perform the required functional tests.

B.F. Goodrich returned the aircraft to service on November 30, 2000, and on December 1 and 2, 2000, Alaska operated the aircraft in Category III status on seven revenue flights.

Complainant issued a complaint alleging that Alaska violated 14 C.F.R. §§ 119.5(g) and (l) by operating as an air carrier while out of compliance with its operations specifications. According to the complaint, Alaska failed to comply with Section D091(A) of its operations specifications, which, as stated above, required the airline to ensure that B.F. Goodrich performed, without deviation, all substantial maintenance according to Alaska's Continuous Airworthiness Maintenance Program. As in the other two cases, Complainant requested a civil penalty of $11,000 in this case, for a total civil penalty in the three cases of $33,000.

II.

Each party filed a motion for decision under 14 C.F.R. § 13.218(f)(5), arguing that there was no genuine issue of material fact and that it was entitled to decision as a matter of law. Section 13.218(f)(5) provides that:

> A party may make a motion for decision, regarding all or any part of the proceedings, at any time before the administrative law judge has issued an initial decision in the proceedings. The administrative law judge shall grant a party's motion for decision if the pleadings, depositions, answers to interrogatories, admissions, matters that the administrative law judge has officially noticed, or evidence introduced during the hearing show that there is no genuine issue of material fact and that the party making the motion is entitled to a decision as a matter of law. The party making the motion for decision has the burden of showing that there is no genuine issue of material fact disputed by the parties.

Initially, the ALJ denied both parties' motions for decision. In his order, he stated that the issue was whether Alaska knew or should have known of its contractors' violations, and he could not resolve this issue on the pleadings.

Subsequently, both the parties asked the ALJ to decide the case on the existing record, without a hearing. Complainant argued that the ALJ was wrong in determining that a "knew or should have known" standard applied. Complainant stated that if the case

went to hearing, it would not contend that Alaska knew of the violations at the time they were committed, nor would it contend that reasonable diligence by Alaska would have revealed them at the time they occurred. Instead, Complainant said, it would argue that Alaska was responsible for failing to prevent the violations, due to Alaska's "overriding responsibility to effectively oversee the facilities, organization, training, record keeping, auditing, and personnel of its maintenance contractors." Complainant's Request to Submit Cases on Existing Record at 3 (June 4, 2002).

III.

The ALJ granted the parties' requests to decide the three consolidated cases without a hearing. He went on to grant Alaska's motion for decision and dismiss the three complaints. The ALJ reasoned as follows.

In each case, Alaska used an FAA-certified repair station, and the FAA filed charges against each repair station. In the ALJ's view, the FAA's pursuit of enforcement action against the repair stations fulfilled the public's interest in safety.

The ALJ held that Alaska exercised reasonable diligence and did not know about the discrepancies until after it operated its aircraft. Further, he said, no law or policy makes air carriers liable for every mistake. He also stated that air carriers have not been found liable for contractor actions of which they were unaware and could not have known in the exercise of reasonable diligence.

The ALJ said that while Section 121.363(a) makes air carriers "primarily" responsible for maintenance, "primarily" does not mean "always," and he said that if Congress or the FAA intended strict liability, they would have provided for it expressly. In his view, strict liability would be questionable policy because it would require air

carriers to tear down repair stations' work to ensure proper maintenance, which would be duplicative.

According to the ALJ, although Alaska's operations specifications required it to "ensure" that its contractors perform all substantial maintenance according to its maintenance program, this only restated Alaska's existing responsibilities, and he said that the law required Alaska to "ensure" only to the extent of what was reasonable under the circumstances.

The ALJ said that the USAir case, FAA Order No. 1992-70, 1992 FAA LEXIS 352 (December 21, 1992), in which the Administrator held USAir liable for the actions of its independent contractor pushback operator, was distinguishable because the independent contractor was under USAir's immediate control, USAir acknowledged responsibility for the pushback operator's actions, and USAir should have suspected that the aircraft was not airworthy.

The ALJ also remarked upon the Alaska Airlines v. Sweat case, 568 P.2d 916 (Alaska 1977), a case in which Alaska was sued by a passenger injured in a plane crash operated by one of Alaska's independent contractors. The State of Alaska's Supreme Court rejected Alaska's argument that it was not responsible for its independent contractor's negligence. According to the ALJ, this case was distinguishable because imposing responsibility on Alaska in the instant civil penalty case was unreasonable, and therefore responsibility never attached to Alaska in the first place.

For these reasons, the ALJ granted Alaska's motion for decision in the three cases and dismissed the complaints.

IV.

On appeal, Complainant argues that the ALJ erred in ruling that Alaska was only responsible for its contractors' maintenance violations if Alaska knew or could have known contemporaneously about the violations through reasonable diligence.

Section 121.363 of the Federal Aviation Regulations addresses the responsibility of air carriers for airworthiness and maintenance. It provides:

> § **121.363** Responsibility for airworthiness.
>
> (a) Each certificate holder is primarily responsible for--
> (1) The airworthiness of its aircraft ...; and
> (2) The performance of the maintenance ...in accordance with its manual and the regulations of this chapter.
> (b) A certificate holder may make arrangements with another person for the performance of any maintenance .... However, this does not relieve the certificate holder of the responsibility specified in paragraph (a) of this section.

14 C.F.R. § 121.363.

Section 121.363 provides in paragraph (a) that the *air carrier*, of all possible persons, is the one that is *primarily* responsible for airworthiness and maintenance. WEBSTER'S DICTIONARY defines "primarily" as "[i]n a primary manner." The definition of "primary" includes "being or standing first in a list, series, or sequence" and "first in importance; chief; principal; main." *Id.* Alaska concedes that it was "first in line for liability," though it still argues that it was not liable for the violations. (Reply Brief at 5.) By using the term "primarily" to describe the air carrier's responsibility, the regulation indicates that the air carrier's responsibility is first and foremost, and that others, such as the repair station and the mechanic, may be responsible as well. "Primarily," "secondarily," and so on, ordinarily are used in an additive fashion, to mean "both/and" rather than "either/or." Consistent with this interpretation, Complainant brought

enforcement action against not just Alaska as the air carrier, but also against the repair stations that improperly performed the maintenance for Alaska.

In paragraph (b), Section 121.363 emphasizes that arranging for maintenance with someone else does *not* relieve the air carrier of its primary responsibility for airworthiness and maintenance. Thus, the regulation does not allow air carriers to evade their primary responsibilities by delegating their maintenance obligations to third parties.

Well before the maintenance improprieties in this case occurred, the FAA issued guidance emphasizing that air carriers are responsible for maintenance by their independent contractors. In this guidance, the FAA specifically noted with disapproval "a recent trend among some air carriers not to take into account their responsibility to control and oversee maintenance performed by contractors." Flight Standards Handbook Bulletin for Airworthiness HBAW-1996-05B at 2 (1996) (attached to Complainant's Motion for Decision dated June 6, 2002). As a result, the FAA rearticulated and reemphasized what it called "the air carrier's ***unrestricted* and *unconditional responsibility*** for the airworthiness of its aircraft, along with the associated requirement to be ***responsible for the performance of all elements of its continuous airworthiness maintenance program***." (*Id.*; emphasis added.)

To drive home this point, the bulletin required air carriers, including Alaska, to add Section D091 to their operations specifications, which Alaska did. Section D091 contained strong language. It expressly stated that Alaska must ***"ensure,"*** which according to WEBSTER'S DICTIONARY means "to make ***certain***," that its contractors performed maintenance, "***without deviation***," according to Alaska's maintenance program (emphasis added). Given that the FAA used such unconditional language in the

bulletin and the operations specification, the ALJ's reasonableness test is unjustifiable and Alaska should have understood that it was responsible for the proper performance of the maintenance by the independent contractors in this case.

There are no cases that are on all fours with the instant case. The courts and the Administrator, however, have indicated repeatedly in past cases that an air carrier's duties, which include a statutory duty to exercise the highest possible degree of care,[3] are non-delegable.[4] The rationale is one of public policy – it is that the duties of common carriers are too important to permit them to transfer them to someone else.

The Administrator has indicated that the fact that another entity performed the maintenance for the air carrier does not mean that responsibility for any improper maintenance shifts from the air carrier to the other entity. In the Matter of Empire Airlines, FAA Order No. 2000-13 at 12-15 (June 8, 2000) (holding the air carrier responsible for the violations of its independent contractor).

---

[3] In several places, the FAA's governing statute refers to the duty of an air carrier to provide service with the highest possible degree of safety in the public interest. For example, the statute provides: "When issuing a certificate under this chapter, the Administrator shall – (1) consider – (A) the duty of an air carrier to provide service with *the highest possible degree of safety in the public interest*." 49 U.S.C. § 44702; emphasis added. The statute also provides: "When prescribing a regulation or standard ..., the Administrator shall – (1) consider – (A) the duty of an air carrier to provide service with *the highest possible degree of safety in the public interest* ...." 49 U.S.C. § 44701(d)(1)(A); emphasis added.

[4] Kelley v. United Airlines, 986 F. Supp. 684, 686 (D. Mass. 1997) (passenger sued United after she fell while contractor was helping her from wheelchair into seat; court said that state courts would likely find that common carriers can be liable for negligence of contractor, because duties of common carrier are non-delegable); Alaska v. Sweat, 568 P.2d 916, 925 (Alaska 1977) (passenger injured in plane crash sued Alaska and independent contractor that actually operated aircraft; court rejected argument that Alaska was not responsible); In the Matter of Empire Airlines, FAA Order No. 2000-13 (June 8, 2000) (Administrator held air carrier responsible for improper repair performed by repair station); In the Matter of WestAir Commuter Airlines, FAA Order No. 1996-16 (May 3, 1996) (Administrator held that WestAir was responsible for its contractor's violations of WestAir's security program); In the Matter of USAir, FAA Order No. 1992-70 (December 21, 1992) (Administrator held USAir liable for its pushback operator's airworthiness violations).

Contrary to the ALJ's decision, the case law indicates that it does not matter if the FAA has certificated the independent contractor who committed the maintenance violations. (As discussed above, the ALJ found it significant that the independent contractors in this case held FAA-issued certificates of their own. To him, this militated in favor of not holding Alaska responsible, because the enforcement actions against the repair stations already fulfilled the public interest in safety.) According to the WestAir Commuter Airlines case, however, air carriers do not lose responsibility for their independent contractors' regulatory violations simply because the independent contractor is independently certificated by the FAA. In the Matter of WestAir Commuter Airlines, FAA Order No. 1996-16 at 7 (May 3, 1996). WestAir Commuter Airlines had contracted with United Airlines for United to provide a ground security coordinator for certain WestAir flights. WestAir argued that it was not responsible for the security coordinator's absence at some flights in part because United held its own FAA-issued certificate. The Administrator stated in WestAir that an air carrier's duties are too critical to permit it to transfer them to another, and "it makes no difference that WestAir's reliance was on another air carrier." Likewise, in Empire, the Administrator held the air carrier responsible for the maintenance performed by a certificated repair station. FAA Order No. 2000-13 at 12-15. [5] Additionally, Section 121.363 does not provide that air carriers

---

[5] While the Administrator left open the possibility in the Empire Airlines case that "there may be certain limited circumstances under which an air carrier might not be liable" for an independent contractor's violations, this statement was *dicta*, as the Administrator held the air carrier liable for the improper repairs. Empire Airlines, FAA Order No. 2000-13 at 15. Further, the Empire Airlines case is distinguishable because Operations Specification Section D091, with its strong language indicating that the air carrier must *ensure*, *without deviation*, proper performance by its independent maintenance contractors, was not at issue as it is here.

Also, concerning the ALJ's statement that lawmakers did not provide for strict liability, although tort principles may have been used as guidance in past regulatory cases, this is not a tort

are primarily responsible for maintenance *except* when they hire an entity independently certificated by the FAA to perform their maintenance.

There are strong public policy reasons supporting holding air carriers responsible for the performance of maintenance by their independent contractors. A holding that lack of knowledge alone exempts air carriers from responsibility could provide air carriers with incentive to look the other way and avoid all knowledge of maintenance improprieties. As stated repeatedly in the past, the FAA must not permit air carriers to transfer away their critical statutory duty to provide service with the highest possible degree of safety in the public interest.

V.

The Enforcement Sanction Guidance Table, FAA Order No. 2150.3A, App. 4 (Dec. 14, 1988), provides that a civil penalty in the maximum range – *i.e.*, $7,500 to $11,000 – is appropriate for cases like this involving air carriers that have operated aircraft that are out of compliance with their operations specifications and not airworthy. Especially in light of the pattern of violations shown here by the three separate instances of violations, the sanction Complainant requests of $11,000 per case is reasonable and appropriate. As a result, this decision assesses a total civil penalty of $33,000.

---

case in which tort principles like strict liability apply. The regulations and operations specifications control the outcome of this case, not tort law.

Conclusion

For the foregoing reasons, this decision reverses the ALJ's decision granting Alaska's motion for decision and denying Complainant's motion for decision. Further, this decision assesses a civil penalty of $11,000 per case for a total of $33,000.[6]

Marion C. Blakey

MARION C. BLAKEY, ADMINISTRATOR
Federal Aviation Administration

Issued this 30th day of September, 2004.

[6] 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(b)(4) and 13.233(j)(2).