UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

In the Matter of: HIGH EXPOSURE, INC.
FAA Order No. 2003-7

Docket No. CP00EA0037
DMS No. FAA-2000-7873[1]

Served: September 12, 2003

DECISION AND ORDER[2]

High Exposure appeals from the written initial decision of Administrative Law Judge Burton S. Kolko,[3] finding that High Exposure operated its Piper PA-18A aircraft beyond the time limitations for compliance with two airworthiness directives (ADs) in violation of 14 C.F.R. §§ 39.3[4] and 91.7(a)[5]. This decision denies High Exposure's appeal.

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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] The Administrator's civil penalty decisions, as well as indexes of the decisions, the Rules of Practice in civil penalty actions, and other information, are available 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. Additional information is available on the website.

[3] A copy of the initial decision, assessing a $2000 civil penalty, is attached.

[4] Section 39.3 of the Federal Aviation Regulations provides as follows:

> No person may operate a product to which an airworthiness directive applies except in accordance with the requirements of that airworthiness directive.

14 C.F.R. § 39.3

[5] Section 91.7(a) of the Federal Aviation Regulations provides that "No person may operate a civil aircraft unless it is in an airworthy condition." 14 C.F.R. § 91.7(a).

The Facts.

High Exposure[6] owned and operated a two-seat Piper PA-18A aircraft, registration number N6894B.[7] On May 2, 1999, N6894B was involved in an accident after getting caught in a wind shear while landing at Cross Keys Airport in Williamstown, New Jersey. Although the aircraft's occupants only sustained minor injuries, the aircraft was destroyed. (Tr. 14, 75.)

FAA Aviation Safety Inspectors Eric Bubny and Thomas Martin investigated this accident. (Tr. 13, 64.) Bubny requested High Exposure's maintenance records for N6894B, and about 2 or 3 weeks after the accident, David E. Dempsey, High Exposure's president, submitted the maintenance records to Bubny. (Tr. 16, 76, 84-85.) After reviewing the records, Bubny questioned whether prior to February 1999, High Exposure had complied with AD 60-10-08 and AD 68-05-01 in a timely fashion.[8]

AD 60-10-08 required fuel selector valve inspections on all PA-18 airplanes equipped with two wing tanks.[9] (Agency's Exhibit 4.) The FAA issued AD 60-10-08 in May 1960 after the occurrence of "several accidents ... involving engine fuel starvation attributed to a lack of detent action in the fuel selector valve ..., causing the pilot to

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The Administrator has 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 Kilrain, FAA Order No. 96-18 (May 3, 1996), *petition for reconsideration denied*, FAA Order No. 96-23 (August 13, 1996), *petition for review denied,* Kilrain v. FAA, No. 3587 (3rd Cir. May 1, 1997).

[6] High Exposure is a non-commercial operator under Part 91 of the Federal Aviation Regulations, 14 C.F.R. Part 91 *et. seq*. High Exposure has a waiver for banner towing. (Tr. 60.)

[7] The aircraft was manufactured in 1956.

[8] Complainant did not allege that the accident in May 1999, was caused by any non-compliance with AD 60-10-08 or AD 68-05-01, or that on the day of the accident, the aircraft was not in compliance with the ADs or was unairworthy for any other reason.

[9] N6894B had one fuel tank on each wing. (Tr. 14, 16, 60, Agency's Exhibit 1.)

position the selector improperly." (*Id.*) AD-60-10-08 provided that prior to July 15, 1960, and every 100 hours of time in service afterwards, the fuel selector valve shall be "thoroughly cycled to determine whether or not detent engagement is positive." (*Id.*) The AD required that "[i]f detent engagement is not positive, the valve must be replaced prior to further flight." (*Id.*) The AD also required the inspection of the fuel valve to determine whether "the position of the fuel valve handle at detent engagement coincides with the proper markings on the indicator plate." If the fuel valve handle does not coincide with those markings, the plate must be repositioned properly. (*Id.*)

AD 68-05-01 required periodic inspections of the engine exhaust muffler and shroud assembly, carburetor heat shroud and air duct, support braces, clamps and brackets, exhaust stacks and manifolds in various models of Piper aircraft, including the PA-18. (Agency's Exhibit 5.) Under this AD, for PA-18 aircraft with mufflers having fewer than 950 hours time in service as of March 31, 1968, an inspection was required within the next 50 hours of time in service and then at least every 100 hours time in service afterwards. (*Id.*, ¶ b.)

On October 25, 1997, an A&P mechanic certified that he performed an annual inspection on N6894B and that it was in airworthy condition. (Agency's Exhibit 7.) The mechanic noted that N6894B's tachometer indicated that the aircraft had 799 hours time in service on that date. (*Id.*) In a separate entry on the same date on another page, the mechanic wrote that he inspected the muffler in compliance with AD 68-05-01 and that he complied with AD 60-10-08. (Agency's Exhibit 6.)

Bubny testified that under these ADs, recurrent inspections were required within the next 100 hours time in service, or by 899 hours as measured by tachometer. (Tr. 32.)

Bubny testified, however, that he did not find any records reflecting compliance with these ADs[10] prior to N6894B's next annual inspection on February 15, 1999,[11] when tach time was 1033 hours. (Tr. 26-28, 122; Administrator's Exhibits 7, 8 and 9.) High Exposure, in Bubny's opinion, operated the aircraft between 899 and 1033 hours in an unairworthy condition. He explained that the aircraft was unairworthy during that period because High Exposure did not perform the maintenance required under AD 60-10-08 and AD 68-05-01. (Tr. 33.)[12] After completing his review, he testified, he returned the records to Dempsey, keeping copies of those that led him to believe that the AD inspections had not been conducted in a timely fashion between October 1997 and February 1999. (Tr. 19, 50.)

High Exposure's only witness during its case-in-chief was its president and owner, David Dempsey. He testified about an earlier occasion when he had provided N6894B's records to a different FAA inspector, David Grasso,[13] who was investigating N6894B's loss of power while flying over Veteran's Stadium in Philadelphia in September 1998. As a result of the loss of power, N6894B made a forced landing in an Acme parking lot.[14] Dempsey testified that Grasso did not mention any problems revealed by the maintenance review. (Tr. 72.) Dempsey stated that while he did not

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[10] Bubny testified that he thought that Dempsey had provided him with all of the maintenance records in his possession. (Tr. 49.)

[11] According to Dempsey, there was no annual inspection between October 1997 and February 1999, because the aircraft was grounded in 1998. (Tr. 95.)

[12] *See* n.8.

[13] Dempsey testified that he provided Grasso with logbooks, copies of 337s, and records of annual inspections and AD compliance, as well as stickers or invoices reflecting maintenance performed while N6894B was away from its home base. (Tr. 71, 74.)

[14] Despite damage to the aircraft, no one was injured.

check to ensure that Grasso returned *all* the records, he had no reason to think that any were not given back to him. (Tr. 75, 88.)

According to Dempsey, High Exposure's pilots do not carry the logbooks in the aircraft. As a result, mechanics record maintenance performed when the aircraft is away from High Exposure's home base on stickers or pieces of paper, or as addenda to maintenance invoices.[15] (Tr. 74; *see also* Agency's Exhibit 10.)

Dempsey opined that the aircraft must have accrued 100 hours of flight time some time between Memorial Day in May 1998, and the forced landing in September 1998.[16] He thought that the muffler was replaced in June 1998, and the exhaust stacks were replaced later. This work, he claimed, was recorded on stickers, but not in the logbooks. (Tr. 80-81, 87.)[17] The sticker for the muffler repair, he believed, was in the logbook at some point but it was not affixed to any logbook page. (Tr. 87.) He did not know what had happened to the sticker. He explained that he did not know if he had lost the sticker or whether someone else – perhaps Grasso, Bubny or an insurance company employee – had lost it. (*See* Tr. 88.)[18]

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[15] High Exposure used to fly that aircraft along the beaches in New York and New Jersey during the summer. (Tr. 73.) Dempsey explained that maintenance was performed at various facilities depending upon where the aircraft was located when maintenance was needed. (Tr. 73-74.)

[16] He based this assumption on the fact that the logbook indicated that as of May 12, 1998, N6894B had been in service for 64 hours since its last AD inspections in October 1997. Dempsey stated that High Exposure does most of its flying in the summer. Their banner towing season, he explained, starts after Memorial Day. (Tr. 80.)

[17] Stickers are generally about 4 inches by 6 inches. Dempsey testified that they usually do not adhere the stickers onto any pages of the logbook but instead insert them in a sleeve in a binder. (Tr. 92.) Bubny, however, testified that he did not see logbook entries as described by Dempsey on stickers that were either loose or affixed to a logbook page. (Tr. 122.)

[18] Dempsey acknowledged that he did not provide the invoice regarding the 1998 muffler replacement to Bubny in 1999 although he thinks that that record was in one of his offices when Bubny requested the records. (Tr. 90.)

High Exposure also introduced Carter Aviation's invoice for replacing a PA-18's exhaust stacks and spark plugs. Dempsey explained that he found this invoice while preparing for the hearing and did not think that he had provided it to the FAA previously.[19]

Dempsey testified that Flight Line Aero in Woodbine, New Jersey, performed the required AD inspections at some point between the AD inspections that were conducted on October 25, 1997, and February 15, 1999. (Tr. 82-83, 96.) He said that when he checked with Flight Line Aero prior to the hearing, they explained that while they had no record of the AD inspections, they did recall doing the work. (Tr. 93.)

Dempsey explained that after N6894B crashed at Cross Keys Airport in May 1999, both the FAA and the insurance company requested the aircraft's maintenance records. (Tr. 76.) He said that he provided the "large majority" of the records to Bubny and some of the information to the insurance company. (Tr. 84)[20] He said that he had provided sufficient records to Bubny to establish that the aircraft was airworthy at the time of the accident. (Tr. 108.)[21] He testified further that he offered to provide Bubny with any additional records if needed, but he did not hear from the FAA until he received the letter of investigation dated May 27, 1999. (Tr. 77, 113.) He testified that he

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[19] Respondent's Exhibit 4 is a typed invoice billing High Exposure for replacing a PA-18's exhaust stacks and spark plugs. Someone wrote by hand "what plane" on the bottom of the invoice and "6894B" next to the typed entries regarding the exhaust stacks and spark plugs. *Id.* There is no mention of either AD 60-10-08 (pertaining to fuel selector valves) or AD 68-05-01 (pertaining to exhaust mufflers, exhaust stacks, etc.)

[20] He also stated that he provided Bubny with all of the records that he had or reasonably could get his hands on (Tr. 104), including a binder containing some logbooks. (Tr. 77.)

[21] The central issue in this case, it should be noted, however, is not whether the aircraft was airworthy immediately prior to its crash in May 1999, but whether it was airworthy between 899 hours time in service and February 15, 1999, when it had 1033 hours time in service.

provided all the records that he could find to the insurance company after June 25, 1999. (Tr. 106.)

The ALJ's Initial Decision.

In the initial decision, the ALJ held that the preponderance of the evidence demonstrated that High Exposure flew N6894B without inspection 134 hours beyond the limits set by AD 60-10-08 and AD 68-05-01 between 899 and 1033 time in service. He found that High Exposure operated N6894B in an unairworthy condition during those 134 hours. He inferred that High Exposure had overflown the ADs based upon his finding that High Exposure failed to provide any records to the FAA that established that the required inspections were performed on time, that is, by 899 hours time in service. (Initial Decision at 4.) The ALJ found that Bubny had no reason to believe that Dempsey had given him "anything less than all relevant records." (Initial Decision at 5.)

The ALJ rejected High Exposure's contention that N6894B was airworthy despite the absence of records showing timely AD compliance. The ALJ held: "Responsibility for the failure of relevant documents to show that Respondent complied with the ADs – and the consequences therefrom – is its [High Exposure's] own." (Initial Decision at 3.) The ALJ also rejected High Exposure's position that the FAA should have, as part of its investigation, contacted all of the facilities that performed maintenance on N6894B to determine whether High Exposure had complied with the two ADs. (Initial Decision at 5.)[22] He concluded that the invoices from Carter Aviation did not establish that it had

[22] The ALJ wrote:

> It was not up to the FAA to contact every concern which did or could have performed maintenance for the company or might otherwise hold records in order to determine whether High Exposure was in compliance. That was manifestly High Exposure's responsibility. As the recipient of the maintenance services, it was in the best position to know where pertinent records might be located and what they contained.

performed the necessary AD inspections on N6894B. (Initial Decision at 6.) Finally, he assessed a $2,000 civil penalty against High Exposure.

High Exposure's Appeal.

1. The complaint was not stale.

High Exposure argues on appeal that the ALJ should have dismissed the complaint as stale because the alleged failure to comply with the ADs occurred more than 2 years prior to the issuance of the Final Notice of Proposed Civil Penalty (FNPCP) on September 5, 2000. High Exposure, however, misunderstands the stale complaint rule, which provides that a complaint is stale if the alleged violations occurred more than 2 years before the issuance of the Notice of Proposed Civil Penalty (NPCP). 14 C.F.R. § 13.208.[23] In this case, the complaint was not stale because Complainant issued the NPCP on October 6, 1999, less than 2 years after the last AD inspection on October 25, 1997. Necessarily then, the agency attorney issued the NPCP less that 2 years after the time when the AD required inspections should have occurred.

> Additionally, to require the agency to undertake such a search would place a burden on it plainly unreasonable under the circumstances – and one not contemplated by the FARs. ... Finally, the fact that Respondent may have had to turn over certain records to its insurance company simply does not excuse its failure to supply the pertinent records to the agency. Respondent does not contend that copier machines were unavailable to it.
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> * * *
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> The aircraft would have been airworthy, of course, if AD compliance had been shown (Tr. 35.) But it was not. Respondent's failure to produce records showing periodic, 100-hour inspections under AD requirements when it had the obligation to do so demonstrated that the FARs in question had been violated.

(Initial Decision at 5.)

[23] The agency attorney issues a NPCP to a person for alleged violations of the regulations. That person may submit written comments, request an informal conference, or pay the penalty. If the person fails to submit a timely response to the NPCP or if, after an informal conference, the agency attorney does not agree to withdraw the allegations, the agency attorney will issue the FNPCP. 14 C.F.R. §§ 13.16(d) & (e).

2. The complaint was sufficient.

High Exposure argues that the "Notice was so defective that is (sic) should be stricken." (Appeal Brief at 12.) High Exposure noted that Complainant misidentified the aircraft's registration number in both the notice and the complaint. While Complainant did give the wrong registration number in the original complaint in some paragraphs, it correctly identified the aircraft as N6894B in others. Complainant subsequently amended the complaint, correcting those errors. High Exposure never argued that it was confused by these mistakes.

High Exposure also argues that the notice was inadequate because Complainant alleged violations occurring between October 25, 1997, and February 15, 1999, failing to specify the exact dates on which the violations occurred. Complainant was not required to allege specific dates because compliance with these two ADs is based upon hours of operation rather than calendar dates.

3. High Exposure was not prejudiced by Complainant's post-hearing submission.

High Exposure argues that the ALJ should have dismissed this civil penalty action because Complainant filed a "prejudicial and inflammatory" supplementary submission after the conclusion of the hearing. At the end of the hearing, the ALJ held the record open until July 13 to allow the parties to submit additional evidence or motions. (Tr. 152.) Complainant filed a supplemental pleading, with an attached declaration by an FAA inspector. The ALJ denied High Exposure's motion to strike Complainant's post-hearing pleading, but he did strike the attached declaration and any argument based on

it.[24] There is no evidence in the initial decision that the ALJ was influenced by the supplemental pleading.[25]

4. The ALJ's decision is supported by the preponderance of the evidence.

High Exposure argues that the ALJ's decision is not supported by the preponderance of the reliable, probative and substantial evidence. That argument is rejected.

It is undisputed that the aircraft underwent AD inspections on October 25, 1997, (tach time: 799 hours) and on February 15, 1999, (tach time: 1033). As inspections were due under these ADs every 100 hours, inspections should have been repeated when the aircraft had no more than 899 hours time in service. Bubny found no documentation indicating that N6894B had been inspected under these ADs between 799 and 1033 hours time in service.

The FAA's prima facie case would have been stronger if the regulations required High Exposure to retain records of *all* recurrent AD inspections, even after they are repeated. The FAA, however only requires owners or operators to retain records revealing current AD status. Section 91.417(a)(2)(v) requires that each registered owner or operator shall retain records of "[t]he *current* status of applicable airworthiness directives (AD) including for each, the method of compliance, the AD number, and revision date." 14 C.F.R. § 91.417(a)(2)(v) (emphasis added.) Records reflecting the current status of compliance with an AD, furthermore, "shall be retained and transferred

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[24] The ALJ struck the declaration, finding that it contained "rank hearsay untested by cross-examination." (Initial Decision at 6.)

[25] Consequently, there is no need to determine whether High Exposure correctly described the declaration as "inflammatory."

with the aircraft at the time the aircraft is sold." 14 C.F.R. § 91.417(b)(2). Consequently, once High Exposure repeated the inspections under AD 60-10-08 and AD 68-05-01 on February 15, 1999, it was not required to keep records of previous inspections under those ADs.

Nonetheless, the preponderance of the evidence supports the conclusion that the inspections under these ADs did not occur in a timely fashion between October 1997 and February 1999. The evidence does not indicate that it was High Exposure's practice to destroy records of superceded AD inspections[26] or more specifically, that it discarded the records of prior inspections under these ADs once the inspections were repeated in February 1999. On the contrary, Dempsey testified that High Exposure keeps all maintenance records, regardless of whether the FAA requires it to keep them. (Tr. 88).

High Exposure's explanations for the absence of records indicating that the required AD inspections were performed by 899 hours time in service were not compelling. Dempsey's vague, uncorroborated testimony that Flight Line Aero in Woodbine, New Jersey, performed the inspections under these ADs deserves little weight. There was no evidence that he had any first-hand knowledge about these inspections. Dempsey's hearsay testimony that someone at Flight Line Aero informed him prior to the hearing that he recalled performing the inspections (Tr. 93) – in the absence of corroborating documentation -- constitutes, as the ALJ found, uncompelling and unsubstantiated hearsay.

High Exposure argues that under 14 C.F.R. § 91.417, it properly transferred N6894B's maintenance records to its insurance company following the accident on

[26] High Exposure provided records of superceded inspections under these ADs when the tach time was 582.61 hours.

May 2, 1999, and as a result, it could not provide them to the FAA during the investigation. However, Dempsey did not know when he gave the maintenance records to the insurance company. He testified vaguely that the insurance company had all the records "within a few weeks [after the accident], I imagine." (Tr. 76.) When asked on cross-examination where the maintenance records were when Bubny requested them, Dempsey replied that while he could not recall where all the records were at that point, he gave Bubny the "large majority" of the records and he gave all the maintenance records eventually to the insurance company. (Tr. 84.) Also, on re-direct examination, he testified that Bubny requested the records before High Exposure surrendered materials to the insurance company. (Tr. 106-107.)

High Exposure contends that the ALJ should have found that it gave all of its maintenance records to Grasso for a conformity inspection in September 1998. (Appeal Brief at 8.) The issue, however, is whether High Exposure gave Grasso records of any AD inspections that were performed by the time that the aircraft had accumulated 899 hours of operation. Dempsey did not know whether Grasso failed to return any of the records. (Tr. 88.)[27] Moreover, Dempsey's testimony that he picked up records from Hortman Aviation, which performed most of High Exposure's maintenance, and

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[27] The question remains, however, why Grasso did not notice that AD compliance was overdue. It seems likely that if the aircraft had 863 hours of operation on May 12, 1998, and recurrent inspections were due by 899 hours, that AD compliance was overdue by September, 1998, after a summer of banner towing. Bubny's testimony that Grasso stated that he did not review the records is hearsay and deserves little weight. On the one hand, perhaps Dempsey provided Grasso with records of timely recurrent inspections. This would explain why Grasso did not alert Dempsey that the aircraft was overdue for these AD inspections. On the other hand, perhaps Grasso performed a cursory review of the records – or no review at all – and did not realize that the recurrent AD inspections were overdue.

delivered them to Grasso, is irrelevant in light of his claim that Flight Line Aero performed the AD compliance inspections. (Tr. 70-71.)

High Exposure raised the possibility that records of AD compliance might be in the possession of one of the several shops that performed maintenance on this aircraft, and that Complainant should have contacted those shops as part of its investigation. Complainant was not obligated to represent at the hearing that it had contacted each maintenance shop but found no records. Likewise, Complainant was not obligated to interview the witnesses listed on High Exposure's witness list. Under 14 C.F.R. § 13.224(a), Complainant had to prove its case by the preponderance of the evidence, not beyond a reasonable doubt. In the Matter of Terry and Menne, FAA Order No. 1991-12 at 6 (April 12, 1991), *petition for reconsideration denied*, FAA Order No. 1991-31 (August 2, 1991), *petition for review denied*, Terry & Menne v. FAA, *reported as table case at* 976 F.2d. 1445, *full text slip opinion reported at* 1992 U.S. App. LEXIS 27483 (D.C. Cir. October 21, 1992.)[28]

High Exposure also argues that Complainant should have interviewed the authors of the invoice for the new muffler (Respondent's Exhibit 4.) Complainant was unaware of the invoice until the hearing. (Tr. 114-119.) Moreover, the invoice did not even mention the fuel selector valve, the subject of AD 60-10-08.

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[28] Also, High Exposure may be confusing what the FAA inspectors should have done during their investigation before the issuance of the NPCP, and what Complainant had to do to prevail at the hearing. For example, High Exposure argues that the FAA's failure to do any investigation to search for exculpatory materials was inexcusable. (Appeal Brief at 9.) Complainant was required to prove its case by the preponderance of the evidence at the hearing. It is irrelevant whether Complainant could have conducted a more thorough investigation prior to initiating this action. *See* In the Matter of High Exposure, FAA Order No. 2001-2 (May 16, 2001) (finding that regardless of what additional actions the FAA inspectors could have taken during the investigation to ascertain whether High Exposure operated the aircraft in question, Complainant presented sufficient evidence to sustain its burden of proof at the hearing.)

High Exposure challenged the reliability of Bubny's testimony in light of the inconsistency between his testimony during Complainant's case-in-chief on cross-examination in the morning, and his rebuttal testimony in the afternoon. Bubny testified on cross-examination during the morning session:

> Q (High Exposure's attorney): The aircraft, though, was involved in an accident in 1998, isn't that correct?
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> A (Bubny): I am unaware of that.
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> Q (High Exposure's attorney): Are you aware at any time in 1998 that the aircraft records were surrendered to the FAA at your office in 1998 to David J. Grasso?
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> A (Bubny): I'm not aware of that.

(Tr. 36.) In the afternoon, the agency attorney asked Bubny on direct during Complainant's rebuttal case: "In doing your review of the maintenance for November 6894 Bravo, were you aware that Inspector David Grasso had also reviewed those maintenance records back in September of 1998?" (Tr. 122-123.) Bubny responded he had asked Grasso whether he had reviewed the records, and that he recalled Grasso saying that he had had the records but had not reviewed them. (Tr. 123.) Bubny later explained that he recalled questions in the morning regarding an accident in 1998 but he considered N6894B's forced landing in the Acme parking lot in 1998 as an *incident*, not an *accident*.[29] (Tr. 123-125.) He also claimed that he had misunderstood the question in the morning because he thought that he had been asked if Grasso had reviewed – rather than obtained -- the logbooks. (Tr. 124-125.) Bubny's explanation of these discrepancies

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[29] Unlike an incident, an accident is defined as an occurrence involving an aircraft in which a person suffers a serious injury or dies, or an aircraft sustains substantial damage. *Aircraft Accident and Incident Notification, Investigation, and Reporting*, FAA Order No. 8020.11B, p.2 & 4 (August 16, 2000).

is plausible, and in any event, the discrepancies do not render his testimony, as a whole, unreliable.

5. The ALJ properly rejected High Exposure's reasonable reliance argument.

High Exposure's attorney argues that his client relied reasonably upon the assessments of the aircraft as airworthy by Aviation Safety Inspectors John Penzone and David Grasso. (Tr. 138-139; Appeal Brief at 13-14.) High Exposure did not prove any detrimental reliance, and as a result, the ALJ properly rejected this argument.[30]

Penzone issued a special airworthiness certificate for N6894B in May 1998. According to a logbook entry dated May 12, 1998, Penzone found that N6894B met the requirements for amending its special purpose agricultural airworthiness certificate to permit the aircraft to be used for aerial photography. When Penzone wrote that entry, N6894B had only 863 hours time in service,[31] and recurrent inspections were not due until 899 hours time in service. Hence, when the special airworthiness certificate was issued, High Exposure had not operated N6894B past the due date for recurrent AD inspections.

High Exposure's argument that it relied to its detriment upon any finding of airworthiness by Grasso must also be rejected. It is undisputed that Dempsey provided maintenance records to Grasso in September 1998. There is no evidence that High Exposure delayed recurrent AD inspections until February 15, 1999, based upon any advice regarding recurrent inspections given by Grasso or any other FAA official. High

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[30] The ALJ did not specifically address High Exposure's reasonable reliance argument, but instead rejected it without comment. (Initial Decision at 6.)

[31] The logbook indicates that N6894B had 3533 total time in service and 863 hours tach time on May 11, 1998. (Agency's Exhibit 7, p.2). Penzone's logbook entry, dated May 12, 1998, indicates that the aircraft had 3533 total time in service on that date. (Agency's Exhibit 7, p.3.)

Exposure asserts in its appeal brief that it relied upon Grasso's conformity inspection on February 2, 1999, but there is no evidence that Grasso had any involvement with N6894B after October 1, 1998, when he was supposed to return the maintenance records to High Exposure.

6. High Exposure's other arguments.

High Exposure states in its appeal brief that, with the Administrator's permission, it will present additional arguments after it receives the hearing transcript. It mentions that it requested a copy under 14 C.F.R. § 13.230(b) but did not receive it.[32]

The transcript is available on-line through the Department of Transportation's Docket Management Services (DMS) at http://dms.dot.gov. Due to the peculiar circumstances, compounded by the difficulties with the delivery of the U.S. Mail in the fall, 2001, High Exposure may raise new arguments based upon a review of the transcript in a petition of reconsideration.

Conclusion.

High Exposure's appeal of the ALJ's initial decision is denied. A $2,000 civil penalty is assessed.[33]

Marion C. Blakey

MARION C. BLAKEY, ADMINISTRATOR
Federal Aviation Administration

Issued this 10th day of September, 2003.

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[32] The Hearing Docket file does not have any request from High Exposure for a copy of the transcript. High Exposure's attorney did not mention that he had requested a copy of the transcript in his request for an extension of time in which to file the appeal brief.

[33] 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).

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UNITED STATES DEPARTMENT OF TRANSPORTATION
OFFICE OF HEARINGS
WASHINGTON, D. C.
SERVED October 31, 2001 by Facsimile as the DOT Mailroom is Closed
(Any Appeal Filing Should Be By Facsimile or Express Carrier Other Than USPS)

FEDERAL AVIATION ADMINISTRATION, Complainant, v. HIGH EXPOSURE, Respondent.	FAA DOCKET NO. CP00EA0037 (Civil Penalty Action) DMS FAA-2000-7873-12

INITIAL DECISION
OF ADMINISTRATIVE LAW JUDGE BURTON S. KOLKO

Found: 1) That Respondent violated 14 C.F.R. §§39.3 and §91.7(a) as charged; and
2) That Respondent is liable to and is hereby assessed a civil penalty of $2,000.

BACKGROUND

FAA's amended complaint asserts that Respondent High Exposure, Inc. of Springfield, PA operated a Piper PA-18A aircraft beyond the time periodic inspection had been required under airworthiness directives (ADs) applicable to the aircraft. High Exposure thus violated §39.3 of the Federal Aviation Regulations (FARs), 14 C.F.R. §39.3, according to the agency. That section states: "No person may operate a product to which an airworthiness directive applies except in accordance with the requirements of that airworthiness directive." The agency also charges High Exposure with violating §91.7(a), 14 C.F.R. §91.7(a): "No person may operate a civil aircraft unless it is in an airworthy condition." Under authority of 49 U.S.C. §46301(a)(1), Complainant has proposed a civil penalty of $2,000.

Respondent denied the charges.

An oral evidentiary hearing was held in Philadelphia, PA on June 13, 2001. At the conclusion of the hearing, I determined to make a written decision, and left the record open to consider certain matters (Tr. 152-53). The parties made closing statements (Tr. 132-52). In a subsequent pleading the agency proffered additional evidence and argument. Respondent moved to strike the pleading and attachment and moved to dismiss the complaint as well. The agency replied to Respondent. These matters are considered below (*see* p. 6).

DISCUSSION AND FINDINGS

The preponderance of the evidence demonstrates that High Exposure operated its Piper PA-18A aircraft, registration number N6894B, without inspection beyond AD limits (*see* Tr. 90-91). I conclude, as such, that it violated §§39.3 and 91.7(a) of the FARs as charged.

The agency's investigation began after Respondent's Piper PA-18A aircraft sustained an accident on May 2, 1999 at Cross Keys Airport in Williamstown, N.J. (Tr. 13, 36, 40, 75, 100). The aircraft, known as a Supercub, was a two-seater manufactured in 1956, registration number N6894B (Tr. 14, 69; *see also* Exhs. AX-1, AX-2). Pertinent to this case is the fact that it contained two fuel tanks, one in each wing (Tr. 14).

In furtherance of its inquiry, the agency requested from High Exposure maintenance records pertaining to this aircraft. The company's owner, David Dempsey, personally handed to FAA aviation inspector Eric Bubny those records in his possession or which he could get his hands on (Tr. 104). The agency drew its conclusions and pursued this action as a result of its examination of those records.

The two airworthiness directives at issue are AD 60-10-08 and AD 68-05-01.

AD 60-10-08. AD 60-10-08 requires inspection of the detent action in the fuel selector valve every 100 hours' time in service for every PA-18 aircraft equipped with two wing tanks (Exh. AX-4). The periodic inspection is designed to assure that detent engagement is positive. Without proper engagement, the pilot could position the selector improperly and fail to recognize which fuel tank had been selected. Fuel starvation could result (Exh. AX-4; Tr. 20-21, 51, 82). Inspector Bubny testified that High Exposure complied with the directive by way of a maintenance entry dated March 17, 1995. At that point the aircraft's time in use (equivalent to time in service), as measured by a tachometer, was 582.61 hours (Exh. AX-3; Tr. 21). The entry noted that the next inspection of the fuel selector valve was due under the AD at 682 hours' time in service (Exh. AX-3; *see also* Exh. AX-9, p. 3). The next entry Complainant located, dated October 25, 1997 – when the aircraft underwent its annual inspection -- showed that Respondent checked the fuel valve at a tachometer, or tach, time of 799 hours (Exhs. AX-6, AX-7; Tr. 94).

No maintenance records made available to inspector Bubny referenced AD 60-10-08 again until the aircraft's next annual inspection of February 15, 1999.[1] Respondent's log shows that it inspected the aircraft under the AD at that time (Exh. AX-8; Exh. AX-9, p. 2; Tr. 30-31, 94). The tach time was recorded as 1033 hours (Exh. AX-9, p. 2; Tr. 31, 33). Since the prior inspection had taken place at 799 hours (Exh. AX-6), the next inspection had been due at 899 hours (Tr. 32). The records suggested, then, that Respondent "overflew" the AD by a total of

[1] Tr. 26-28; Exh. AX-7. This inspection originally was to take place no later than October 25, 1998 (AX-7, p. 3). It was not performed until the following February, however, because the aircraft had sustained an accident a month prior to the scheduled annual and had been grounded for repairs during much of the intervening period. Tr. 95; *see* discussion on p. 4.

134 hours (1033 minus 899).[2] Complainant concluded that the aircraft had been operated for that period in an unairworthy condition (Tr. 33, 63).

AD 68-05-01. AD 68-05-01 requires PA-18 aircraft which have exhaust mufflers with less than 950 hours' time in service to undergo an inspection every 100 hours' time in service (Exh. AX-5; Tr. 22-24, 32, 51). The inspection involves checking the muffler and associated equipment for cracks, corrosion, burn-through, and similar wear (Exh. AX-5; Tr. 24, 82). Respondent made a maintenance entry for this AD under the same date, March 17, 1995, as the maintenance entry respecting AD 60-10-08. The tach time, of course, was identical, 582.61 hours. The entry noted that a new muffler had been installed, meaning that under the AD the next check was due at a tach time of 682.61 hours (Exh. AX-3; Tr. 18). The next maintenance entry Complainant located, at the annual inspection of October 25, 1997, shows that Respondent complied with AD 68-05-01 at a tach time of 799 hours (Exhs. AX-6, AX-7; Tr. 25-26, 94).

No maintenance records made available to inspector Bubny referenced AD 68-05-01 again until the aircraft's next annual inspection, February 15, 1999 (Tr. 26-28; Exh. AX-7; *see* n. 1). The log shows that High Exposure inspected the muffler under AD 68-05-01 at that time (Exh. AX-8; Exh. AX-9, p. 2; Tr. 30-31, 94). It recorded the aircraft's tach time as 1033 hours (Exh. AX-9, p. 2; Tr. 31, 33). Since the prior inspection had taken place at a tach time of 799 hours (Exh. AX-6), the next inspection had been due at 899 hours (Tr. 32). Respondent overflew the AD by a total of 134 hours (1033 minus 899), the agency charged (Tr. 33; *see* n. 2). The aircraft, it concluded, had been operated during that period in an unairworthy condition (Tr. 33, 63).

Respondent's Defenses. Respondent asserts that it complied with the airworthiness directives (Tr. 82). It had undertaken the periodic inspections as required (Tr. 96). Maintenance records so demonstrating were extant, it says (Tr. 84). High Exposure acknowledges that it may not have supplied all pertinent records to the agency inspector in charge of the investigation. But the thrust of its arguments is that responsibility for any failure in the agency's probe to demonstrate High Exposure's AD compliance must lie with the agency.

Respondent's arguments are rejected. Responsibility for the failure of relevant documents to show that Respondent complied with the ADs – and the consequences therefrom -- is its own.

High Exposure's owner, David Dempsey, stated unequivocally that his company had complied with the ADs between the annuals of October 1997 and February 1999 (Tr. 82). More specifically, he claimed, maintenance had been

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[2] Tr. 33; *see* Tr. 90-91. The October 25, 1997 inspection also had showed that the aircraft had overflown the AD at that juncture by 116.39 hours (799 minus 682.61 (the latter number obtained by adding 100 to the March 17, 1995 reading of 582.61 hours)). The agency did not plead this apparent violation in its complaint, however -- perhaps because Respondent averred that it did not own or operate the aircraft until June, 1997. Answer, pp. 1, 5; *see* Tr. 122, 137.

performed on the aircraft between October 1997 and May 1998 which was not reflected in the maintenance records in evidence (Tr. 73, 83-84; *see* Exh. AX-7).

In response to inspector Bubny's request for High Exposure's maintenance records following the May 2, 1999 accident, Dempsey had personally given Bubny "what we have," he said (Tr. 85, 86-87, 104). Respondent had already turned over maintenance records for the Supercub to FAA inspector David Grasso several months earlier. In September 1998, inspector Grasso had undertaken an investigation of an accident sustained by the aircraft earlier that month in Philadelphia (Tr. 69-71, 74-75; Exh. R-1). Inspector Grasso had returned the records, Dempsey thought, but he was not positive (Tr. 75). In any event, the following May Dempsey had given inspector Bubny "a large majority" of those records (Tr. 84) in "a binder that had some logbooks in it" (Tr. 77). Dempsey at this juncture explained to the FAA, he said, that High Exposure's maintenance had been accomplished at different places (Tr. 77).

Dempsey elaborated that Respondent's maintenance is performed by various entities in New Jersey, Pennsylvania, and Delaware (Tr. 73-74). He mentioned particularly Flight Line Aero of Woodbine, N.J. (Tr. 83). And High Exposure uses different formats for keeping maintenance records. They are memorialized on "a combination of things" (Tr. 111): stickers, copies of invoices, pieces of paper (Tr. 74). Respondent intimated that it was the agency's responsibility to contact these entities – indeed, every entity that did or might have accomplished maintenance for it (*see* Tr. 128). And the agency should have combed through every conceivable High Exposure record in order to determine its compliance properly, Respondent suggests (*see* Tr. 35-36).

Mr. Dempsey also stated that he would have been happy to give inspector Bubny anything else the agency wanted (Tr. 85). He said that he had asked Bubny to let him know if the agency needed anything else (Tr. 77). But the FAA never contacted the company (Tr. 113), and the next time Dempsey heard from the agency was when he received a letter of investigation (LOI) dated May 27, 1999 (Tr. 46, 77, 79, 105, 128-29).

Dempsey also excused his failure to produce all pertinent records he claimed were in existence by noting that he had forwarded maintenance records to his insurance company shortly after the May 2, 1999 accident (Tr. 75-76). By the end of June 1999, the insurance company had taken possession of the aircraft (Tr. 78-79, 106; Exh. R-3).

High Exposure's arguments are unavailing. It simply was ultimately responsible for creating, keeping and turning over to the FAA records demonstrating its continuing compliance with the ADs (*see* Tr. 148). It did not. An inference that the required maintenance had never been performed may be drawn from the failure of Respondent to establish otherwise, and I conclude that the evidence so shows. The preponderance of the reliable and probative evidence, I conclude, demonstrates

that Respondent overflew the ADs in violation of §39.3 of the FARs and, as such, operated the Piper PA-18A in an unairworthy condition in violation of §91.7(a).

It was not up to the FAA to contact every concern which did or could have performed maintenance for the company or might otherwise hold records in order to determine whether High Exposure was in compliance. That was manifestly High Exposure's responsibility. As the recipient of the maintenance services, it was in the best position to know where pertinent records might be located and what they contained. Additionally, to require the agency to undertake such a search would place a burden on it plainly unreasonable under the circumstances – and one not contemplated by the FARs. Nor was it inspector Bubny's responsibility to ask inspector Grasso if he had reviewed and/or had retained some or all of the records. Inspector Bubny was undertaking a separate investigation into a separate episode (Tr. 36). Had High Exposure alerted inspector Bubny to the possibility that his fellow inspector was holding pertinent records, then responsibility for collecting them may have devolved upon Bubny. But there is no evidence of that; in fact, the evidence tends to suggest that inspector Grasso returned the records he had obtained to High Exposure just two days after he had received them (Exh. R-1; Tr. 88). Finally, the fact that Respondent may have had to turn over certain records to its insurance company simply does not excuse its failure to supply the pertinent records to the agency. Respondent does not contend that copier machines were unavailable to it (*see* Tr. 134).

The overriding point is that the initiative and follow-through for locating and supplying pertinent records to the agency had to come from Respondent. And the agency would be justified in inferring that it had received all available records unless it had reason to suspect that others were extant. In this case it could so infer. Inspector Bubny credibly testified that he had no reason to imagine that High Exposure kept or was aware of additional pertinent records after receipt of Mr. Dempsey's binder. He was never so advised (Tr. 40-41). Dempsey had never indicated that he was handing over anything less than all relevant records (Tr. 121). No basis existed for suspecting that pertinent records were in existence but not included in Dempsey's material (Tr. 49-50). Bubny reasonably concluded that he had received every pertinent record (Tr. 127).

The aircraft would have been airworthy, of course, if AD compliance had been shown (Tr. 35). But it was not. Respondent's failure to produce records showing periodic, 100-hour inspections under AD requirements when it had the obligation to do so demonstrated that the FARs in question had been violated.[3]

High Exposure also attempted to bolster its case by submitting two invoices showing that Carter Aviation & Aero Service of Williamstown, N.J. (Carter Aviation)

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[3] *See* Tr. 33. Mr. Dempsey stated that he did not check with Flight Line Aero – the company which he had specifically named as having performed maintenance for Respondent (*see* I.D., p. 4) – to see if it had work orders or other evidence of High Exposure's AD compliance until after he had received the agency's LOI and had begun preparing for this hearing. Tr. 93-94. Flight Line Aero told Dempsey that it had no such documentation, but Dempsey claimed that it had recalled doing the work. Tr. 94. This hearsay, unsubstantiated remark clearly fails to prove its assertion.

had performed work on the Supercub's muffler on July 1 and August 30, 1998 (Exh. R-4; Tr. 80). The maintenance accomplished is not reflected in any logbook entry, Mr. Dempsey explained; it was recorded on a sticker (Tr. 81). High Exposure usually files these stickers – which record the date and type of work done and contain authorized signatures (Tr. 92) – in a sleeve in a binder, Dempsey said (Tr. 92). But the binder he had given to inspector Bubny contained no stickers. Nor were stickers given to Bubny in some other form; nor were they elsewhere in evidence (Tr. 91-93, 122). And there are additional reasons for questioning the probative value of the invoices. They fail to show that any AD inspection had in fact taken place. The invoices show only that Carter Aviation had performed services – the exact nature of which is not specified – involving the muffler, points, mag gaskets, exhaust stacks, and spark plugs. AD 68-05-01 is specific and requires more than that: compliance involves "remov[ing] muffler assembly, disconnect[ing] air ducts, stacks, and shrouds as necessary, and visually inspect[ing] exterior and interior surfaces . . . " (Exh. AX-5, ¶(f); Tr. 80). Neither invoice suggests that this work was accomplished. Further, the invoices do not record the aircraft's tach time, so there is no way to know whether the 100-hour limit had been satisfied. The required notations and signatures of the mechanics performing the inspections also are absent. Manifestly the invoices do not satisfy AD requirements.

Respondent also argued that the complaint should be dismissed because it was brought outside the two-year statute of limitations set out by 14 C.F.R. §13.208(d) of the FARs (Tr. 144-45). Section 13.208(d) permits a respondent to move to dismiss a complaint which alleges a violation occurring more than two years prior to the issuance of a notice of proposed civil penalty. The notice of proposed civil penalty in this matter was served under date of October 6, 1999, and so may cite events occurring after October 6, 1997 (*see* Tr. 146-47). Since the first annual inspection referenced in the complaint occurred on October 25, 1997, the statute of limitations does not bar the action.

In other matters, I deny Respondent's motion to strike Complainant's post-hearing pleading, with the exception of Complainant's attached Declaration and any argument in either of its post-hearing pleadings relying on the Declaration, which I grant. The Declaration is rank hearsay untested by cross-examination. I also deny Respondent's motion to dismiss the complaint.

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

PENALTY

I have determined to assess a civil penalty of $2,000.

Airworthiness directives, which are issued by the FAA, prescribe corrective action when an unsafe condition exists or is likely to develop (Tr. 13; *Scenic Mountain Air, Inc.,* FAA Order No. 2001-5 (May 16, 2001), p. 1). As such, permitting Respondent's Supercub to overfly ADs 60-10-08 and 68-05-01 compromised the aircraft's safety. Additionally, of course, it undermined the agency's overall goal of

safe skies (*see* Tr. 134). The assessment, I find, will promote adherence to the FARs and act as an appropriate deterrent to others.

The penalty, as Complainant suggested, is also designed to encourage High Exposure to better organize its records (*see* Tr. 151). The record shows that Respondent's record retention was spotty and marked by disorder and confusion.

Mr. Dempsey simply did not know where all of High Exposure's records were (Tr. 84). The evidence suggested that they were everywhere and nowhere. At one point Dempsey noted that pertinent records had been "somewhere in my office; however, it took me some time to find them – with three different offices and the paperwork is kept in either one of them in one of many files" (Tr. 90). Gathering the records from the many shops which performed repairs for High Exposure, Dempsey added, would have been "impossible" (Tr. 86). And he was not even sure what materials he had handed over to the agency (Tr. 81). As late as the hearing – by which time Respondent might have understood that its recordkeeping policies needed substantial revision – the situation was apparently little improved. Dempsey rather casually noted that the maintenance records now were "with the airplane, somewhere, I would imagine" (Tr. 78).

The FARs do not mandate a particular method of recordkeeping (*see* Tr. 91). But Respondent's current system plainly is unacceptable. High Exposure risks further violations if it persists in its indifferent, slapdash manner of creating and maintaining records. FAA inspectors must be able to determine from a review of records whether required maintenance has been performed on a timely basis. *Watts Agricultural Aviation,* FAA Order No. 91-8 (July 5, 1991), pp. 15-16. It is hoped that the civil penalty will help spur Respondent to adopt procedures which would enable it both to observe FAR requirements and to show that it has done so.

Respondent High Exposure is hereby assessed a civil penalty of $2,000 for violations of 14 C.F.R. §39.3 and 14 C.F.R. §91.7(a).[4]

Burton S. Kolko

Burton S. Kolko
Administrative Law Judge

[4] Any appeal from this order 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 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, Washington, DC 20591, and to agency counsel. Service upon the presiding judge is optional.

FAA Docket No. CP00EA0037
(Civil Penalty Action)

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