

UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

In the Matter of: RONALD L. GATEWOOD

FAA Order No. 2001-1

Docket No. CP97EA0071
DMS No. FAA-1997-3292¹

Served: May 16, 2001

PETITION FOR RECONSIDERATION DENIED²

Ronald L. Gatewood has filed a petition requesting that the Administrator reconsider FAA Order No. 2000-1. In that decision, the Administrator held that Mr. Gatewood was the operator of an unairworthy aircraft that had been maintained improperly and flown by one of his employees. The Administrator held in that order that Mr. Gatewood violated 14 C.F.R. §§ 91.405(a),³ 91.405(b),⁴ 91.407(a)(2),⁵ and 91.7.⁶

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 are available on LEXIS, Westlaw, and other computer databases. They also can be found in Hawkins's Civil Penalty Cases Digest Service and Clark Boardman Callaghan's Federal Aviation Decisions. For additional information, see 66 Fed. Reg. 7532, 7549 (January 23, 2001).

³ It is provided in Section 91.405(a) of the Federal Aviation Regulations (FAR) as follows:

Each owner or operator of an aircraft

- (a) Shall have that aircraft inspected as prescribed in subpart E of this part and shall between required inspections, except as provided in paragraph (c) of this section, have discrepancies repaired as prescribed in part 43 of this chapter.

14 C.F.R. § 91.405(a).

After consideration of all the arguments presented by the parties and of the record in this case, Mr. Gatewood's petition for reconsideration is denied.

I. Facts

Mr. Gatewood is the owner and chief flight instructor of the Warrenton-Fauquier Flight Center, a general aviation business in Northern Virginia. (Tr. 44.) Mr. Gatewood has extensive pilot experience and has held a mechanic's certificate with A&P ratings⁷ since 1975 and an inspection authorization.⁸ (Tr. 61, 98-99.) He also owns Sky World Aviation, a maintenance and general aviation company that he started in 1991. (Tr. 99.)

⁴ Section 91.405(b) of the FAR provides as follows:

Each owner or operator of an aircraft

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

14 C.F.R. § 91.405(b).

⁵ It is provided in 91.407(a)(2) as follows:

(a) No person may operate any aircraft that has undergone maintenance, preventive maintenance, rebuilding or alteration unless –

(2) The maintenance record entry required by § 43.9 or § 43.11, as applicable, of this chapter has been made.

14 C.F.R. § 91.407(a)(2).

⁶ It is provided in Section 91.7(a) of the FAR as follows:

(a) No person may operate a civil aircraft unless it is in an airworthy condition.

14 C.F.R. § 91.7(a).

⁷ The privileges of a mechanic with airframe and powerplant (A&P) ratings are set forth in 14 C.F.R. §§ 65.85 and 65.87.

⁸ See 14 C.F.R. §§ 65.91-65.95. Under Section 65.95(a), an inspection authorization holder may inspect and approve for return to service aircraft that have undergone major repairs and alterations.

On the evening of June 19, 1997, the propeller of a Cessna 172M, registration number N852DA, owned by the Warrenton-Fauquier Flight Center, struck a landing light during a landing at Richmond International Airport. Brian Rosenstein, a flight instructor who observed the landing, informed Mr. Gatewood about the propeller strike.⁹

Mr. Gatewood sent Jim Willess, a part-time flight instructor at the center,¹⁰ to Richmond to assess the damage to the aircraft.¹¹ Mr. Willess holds a mechanic's certificate with A&P ratings (Tr. 8),¹² but his only employment experience as a mechanic was from April to June, 1995, when he worked for Sky World Aviation. (Tr. 8-9, 99.) Mr. Gatewood testified that the aircraft was a "vital part" of the business, and he was anxious to get a damage assessment so that he could determine what repairs would be necessary, i.e., "get a prop on order, get an engine change...." (Tr. 101-102.)

Mr. Gatewood authorized Mr. Willess to fly the aircraft back to Warrenton if he

⁹ Brian Rosenstein, who was employed as a flight instructor by Warrenton-Fauquier Flight Center, called Mr. Gatewood and informed him about the propeller strike. (*E.g.*, Tr. 30-31, 100.) One of Mr. Rosenstein's former students had been flying N852DA when its propeller struck a taxiway landing light. (Tr. 26-28.) Mr. Rosenstein, who landed his aircraft soon afterwards, observed the damaged aircraft.

¹⁰ Mr. Willess is a retired United Airlines pilot, holding several pilot certificates, including an ATP pilot certificate. At the time of this incident, he was employed at the Warrenton-Fauquier Flight Center in Virginia as a part-time flight instructor. (Tr. 8 & 9.)

¹¹ Mr. Gatewood testified that Mr. Rosenstein's description of the damage had been "inconclusive" as to the nature and extent of the damage. (Tr. 100, 118.) As a result, Mr. Gatewood explained, he sent Mr. Willess to Richmond to assess the extent of the damage. (Tr. 100-102, 112, 116, 118.)

Mr. Willess, testifying on Complainant's behalf, testified on direct examination that he had been asked to go to Richmond to "assess the severity of the damage and to recover the airplane if I thought it was safe to do so." (Tr. 15; *see also* Tr. 17.) He testified that "[t]he authority was mine to determine whether it was flyable." (Tr. 15.) On cross-examination, he testified that Mr. Gatewood sent him to Richmond to determine the airworthiness of N852DA. (Tr. 18.)

¹² He received his A&P ratings in 1994.

determined that N852DA was airworthy. (Tr. 24, 112.)¹³ Mr. Gatewood told Mr. Willess to take the aircraft's logbooks with him in case it was necessary to obtain a ferry permit.¹⁴ (Tr. 16, 103.)

Mr. Willess performed some improper maintenance on the aircraft¹⁵ (Tr. 50) and flew it back to Warrenton. It was uncontested that the aircraft was unairworthy during this flight to Warrenton. (Tr. 50.) Mr. Willess wrote in the logbook that he was ferrying the aircraft to Warrenton, although he neither applied for nor obtained a ferry permit from the FAA. (Complainant's Exhibit 2, Tr. 13-14, 21.) He did not enter in the logbook the nature of the maintenance that he had performed or that the aircraft was approved for return to service. (Complainant's Exhibit 2.)

FAA Aviation Safety Inspector Edward Hall testified about the nature of the repairs that N852DA required based upon the description of the damage by Brian Rosenstein and the relevant service manual and bulletins. Inspector Hall testified that the damage was so significant that the propeller should have been removed, scrapped, and replaced. (Tr. 58-60.)

¹³ Mr. Willess testified that he understood that he was to return to Warrenton without N852DA if it was unairworthy. (Tr. 17.) Mr. Gatewood testified that he instructed Mr. Willess not to fly an unairworthy aircraft. (Tr. 112.)

¹⁴ The FAA may issue a special flight permit for a ferry flight of a damaged aircraft to a place where it can obtain necessary maintenance when the aircraft does not meet its type design but is nonetheless safe for flight. (Tr. 45.) See 14 C.F.R. §§ 21.197-21.199.

¹⁵ Mr. Willess broke off a piece of the propeller blade and a small piece of plastic that covers the brake housing on the right landing gear faring. He testified that he removed that piece of plastic because he thought it would fall off anyway. (Tr. 21.)

It was undisputed that Mr. Willess was not qualified to perform major repairs on a damaged propeller. (Tr. 120.)¹⁶ Mr. Gatewood testified that he implicitly authorized Mr. Willess to perform minor repairs only on the aircraft. (Tr. 111.)

II. The Law Judge's Initial Decision

After the presentation of Complainant's case, the law judge dismissed the allegations that Mr. Gatewood had violated Sections 91.405(a), 91.407(a),¹⁷ and 91.7(a). The law judge concluded that Mr. Willess had exceeded the scope of his authority when he went beyond assessing the extent of the aircraft damage. (Tr. 94-95.)

Although he had dismissed three of the four alleged violations, the law judge weighed all of the evidence at the conclusion of the hearing to determine whether a preponderance of the evidence would support a finding that Mr. Gatewood had violated any of the four alleged regulations. The law judge concluded again that Mr. Gatewood should not be held responsible for Mr. Willess' flight of the unairworthy aircraft. The law judge held that the preponderance of the evidence showed that Mr. Gatewood "could not reasonably have anticipated that Mr. Willis (sic) would exceed the mandate that he was given before he went down to Richmond and therefore cannot be held [responsible] for ... the frolic and detour that his agent took in flying ... an unairworthy aircraft...."

¹⁶ Only a certificated repair station may make major repairs to a propeller. (Tr. 49.)

¹⁷ As explained in the Administrator's decision, the law judge stated preliminarily at the conclusion of Complainant's case-in-chief that he was dismissing the *second* paragraph of the complaint regarding Section 91.405(b). However, at the conclusion of the hearing, he affirmed his earlier ruling and stated that he was dismissing the *third* paragraph regarding Section 91.407(a)(2). From the law judge's reasoning, it appears most likely that he intended to dismiss the third paragraph pertaining to Section 91.407(a)(2) and to find that Mr. Gatewood violated Section 91.405(b). See discussion in In the Matter of Gatewood, FAA Order No. 2000-1 at 10-11, n.20, and 13 (February 3, 2000).

(Tr. 143-44.) He held that Mr. Gatewood reasonably expected Mr. Willess to report back to him about the condition of the aircraft, rather than flying an unairworthy aircraft.

(Tr. 144.)

The law judge held that the dispute regarding the degree of detail that Mr. Gatewood was provided during the night concerning the damaged aircraft was a "tempest in a teapot." (Tr. 144.) The law judge explained:

In any event it occurred in the middle of the night and it's hard to be sure at that time what exactly Mr. Rosenstein was observing, admittedly lit up by the lights on the ramp. But ... he was not an A&P mechanic and was not going to be able to report fully on the damage that he saw.

(Tr. 144.) The law judge concluded that "Mr. Rosenstein conveyed or certainly Mr. Gatewood received an impression that something of some indeterminate nature was wrong with this aircraft due to a propeller strike; he had better get some eyes and ears down there to take a look at it and to report back to him." (Tr. 145.)

Regarding Mr. Gatewood, the law judge stated:

Mr. Gatewood impressed me on the stand as a man of experience and wisdom and prudence. He knows what he's doing. He's been around the block in the aviation industry and I find it incredible to assume that had he been armed with Mr. Rosenstein's very specific knowledge or detailing of extensive damage that he would have even offered an option to Mr. Willis (sic) to fly that aircraft back.

(Tr. 145.)

The law judge stated that he would not hold Mr. Gatewood responsible for Mr. Willess' actions beyond the scope of his authority because to do so would be to impose strict liability. (Tr. 145.) As a result, the law judge affirmed his earlier ruling, finding that Mr. Gatewood had not violated Sections 91.405(a), 91.407(a), and 91.7(a).

The law judge also affirmed his preliminary ruling that Mr. Gatewood *did* violate Section 91.405(b), because as the owner or operator, Mr. Gatewood had failed to ensure

that personnel made appropriate entries in the aircraft's maintenance records. He held that it would have been an appropriate exercise of supervisory authority for Mr. Gatewood to instruct Mr. Willess, after the latter's return to Warrenton, to record whatever maintenance he had performed in the logbook. (Tr. 145-46.) The law judge assessed a \$750 civil penalty against Mr. Gatewood for this violation. (Tr. 146.)

III. The Administrator's Decision, FAA Order No. 2000-1

Both parties appealed from the law judge's initial decision. The Administrator affirmed the law judge's finding that Mr. Gatewood had violated Section 91.405(b), and reversed the law judge's finding that Mr. Gatewood had not violated Sections 91.405(a), 91.407(a), and 91.7(a). The Administrator assessed a \$2,750 civil penalty against Mr. Gatewood, as sought by Complainant.

A. Sections 91.405(a), 91.407(a) and 91.7(a)

The Administrator granted Complainant's appeal, and relying upon In the Matter of Fenner,¹⁸ concluded that Mr. Gatewood was N852DA's operator. The Administrator noted that Mr. Gatewood had authorized Mr. Willess to fly N852DA if he determined that the aircraft was airworthy, and that is what Mr. Willess did, although he incorrectly concluded that the aircraft was airworthy. (FAA Order No. 2000-1 at 17.)

The Administrator rejected the law judge's conclusion that Mr. Gatewood had done all that a reasonable and prudent owner could be expected to do and that

¹⁸ In Fenner, the Administrator wrote that "[w]hile aircraft owners may not be liable for all infractions committed in their aircraft, they can be held liable for infractions committed by a pilot who had permission to use their aircraft." In the Matter of Fenner, FAA Order No. 96-17 at 6 (May 3, 1996), *aff'd* Fenner v. FAA, 113 F.3d 1251 (11th Cir. 1997).

Mr. Gatewood should not be responsible for Mr. Willess' actions. (FAA Order No. 2000-1 at 17.) The Administrator wrote:

Mr. Gatewood did not do all that could reasonably and prudently be expected of an owner of an aircraft. Mr. Gatewood acted imprudently when he sent Mr. Willess to examine the aircraft. Yes, Mr. Willess was a mechanic with an A&P rating. However, Mr. Willess was not qualified to work on propellers. He had very little experience as a mechanic. More importantly, he was not in a position to evaluate the condition of the propeller because he did not have the necessary tools or the appropriate manuals or service bulletins. If Mr. Gatewood wanted Mr. Willess to examine the aircraft because he wanted to have one of his own personnel on the scene in Richmond, he should have instructed Mr. Willess to arrange for a local repair station to assess the propeller damage. Mr. Gatewood, who was an experienced mechanic, testified that Mr. Rosenstein had told him that N852DA had sustained a propeller strike (Tr. 118). According to the service bulletin, the propeller had to be removed. By putting the inexperienced and unprepared Mr. Willess into a position to determine whether the aircraft was airworthy, and if so, to fly it back from Richmond, Mr. Gatewood was responsible if this employee made a faulty determination. In the future, he should be more careful about whom he sends and with what authority if one of his aircraft is damaged away from Warrenton.

(FAA Order No. 2000-1 at 17-18.)

The Administrator also rejected the law judge's determination that Mr. Gatewood should not be responsible for Mr. Willess' actions because he was acting outside the scope of his authority. Relying upon In the Matter of Trans World Airlines,¹⁹ the Administrator held that Mr. Gatewood should be held responsible because Mr. Willess, a part-time flight instructor for the flight school, was acting within the scope of his employment when he flew the aircraft. (FAA Order No. 2000-1 at 19.)

The Administrator rejected Mr. Gatewood's argument regarding a 1974 decision issued by the National Transportation Safety Board (NTSB). In Administrator v.

¹⁹ In the Matter of Trans World Airlines, FAA Order 98-11 (June 16, 1998). In this case, the flight attendants violated company policy by serving alcoholic beverages to a visibly intoxicated passenger. The Administrator held that nonetheless, the company was responsible for the actions of the flight attendants because serving beverages to passengers is within the scope of their employment.

Bischoff, 2 NTSB 1013 (1974), the NTSB stated that a person who technically meets the definition of the term “operator” should not be held responsible for a violation unless he was “involved in the flight in such a manner that it can reasonably be inferred that, in the absence of any evidence to the contrary, he participated in, authorized, or permitted the violations.” Bischoff, 2 NTSB at 1015. In rejecting Mr. Gatewood’s argument, the Administrator noted that she was not bound by NTSB case law, and that the Bischoff case, involving co-owners and co-occupants of the aircraft, was distinguishable. The Administrator wrote further that even under Bischoff, Mr. Gatewood had participated in the violation by sending Mr. Willess to assess the airworthiness of the aircraft. (FAA Order No. 2000-1 at 19-20.)

B. Section 91.405(b).

The Administrator denied Mr. Gatewood’s appeal and affirmed the law judge’s finding that Mr. Gatewood violated Section 91.405(b). The Administrator held that Mr. Gatewood was responsible for Mr. Willess’ failure to make a logbook entry describing the maintenance that he had performed and approving the aircraft for return to service. The Administrator noted “[t]he aircraft’s unairworthiness does not change the fact that by flying the aircraft after it sustained propeller damage and after Mr. Willess performed maintenance on it, he was returning the aircraft to service.” (FAA Order No. 2000-1 at 15.)

IV. Analysis of Petition for Reconsideration

1. Mr. Gatewood argues in his petition for reconsideration that the Administrator’s determination that Mr. Gatewood should be held responsible as an operator for violations of Sections 91.405(a), 91.407(b) and 91.7(a) should be reversed.

Mr. Gatewood argues that the Administrator's decision is contrary to: 1) the undisputed facts of this case, 2) the regulations pertaining to the certification and privileges of A&P mechanics, and 3) NTSB precedent "establishing that the FARs [Federal Aviation Regulations] are not strict liability regulations." (Petition for Reconsideration at 10.)²⁰

Preliminarily, it should be noted that the law judge went beyond the statutory and regulatory definitions of the term "operate" in determining that Mr. Gatewood should not be held responsible as an operator because Mr. Gatewood could not have anticipated that Mr. Willess would fly an unairworthy aircraft. The FAA's authorizing statute defines the term "operate aircraft" as "using aircraft for the purposes of air navigation, including ... causing or authorizing the operation of aircraft with or without the right of legal control of the aircraft." 49 U.S.C. 40102(32). The term "operate" is defined in the regulations as follows:

Operate, with respect to aircraft means use, cause to use or authorize to use aircraft, for the purpose (except as provided in § 91.13 of this chapter) of air navigation including the piloting of aircraft, with or without the right of legal control (as owner, lessee, or otherwise.)

14 C.F.R. § 1.1 (operate). Mr. Gatewood authorized and caused Mr. Willess to fly N852DA. Hence, under these definitions, Mr. Gatewood was the operator.²¹

The law judge also exceeded the Administrator's case law interpreting the term "operator." In In the Matter of Fenner, Mr. Fenner, the owner of the aircraft, was out of

²⁰ Mr. Gatewood also argues that the Administrator should have deferred to the law judge's credibility findings. However, he failed to indicate which factual findings the Administrator reversed without justification. (Petition for Reconsideration at 13.)

²¹ The law judge held that Mr. Gatewood could not reasonably have anticipated that Mr. Willess would exceed the mandate that he was given before he went down to Richmond. The Administrator in essence held that that ruling was irrelevant as long as Mr. Willess was authorized to fly the aircraft.

town when another pilot, who was authorized to fly the aircraft, flew in a reckless manner.²² The Administrator held Mr. Fenner responsible as the operator of the aircraft because he had authorized the pilot to fly the aircraft. There was no evidence in that case that Mr. Fenner could have anticipated that the pilot would fly the aircraft in such a reckless manner.²³

The regulatory scheme makes the owner or operator of an aircraft primarily responsible for the aircraft's airworthiness. In the Matter of Pacific Aviation International, Inc., FAA Order No. 97-8 at 5 and n.14 (February 20, 1997) (referencing 14 C.F.R. § 91.403(a), which provides: "The owner or operator of an aircraft is primarily responsible for maintaining that aircraft in airworthy condition") Inspector Hall testified that Mr. Gatewood was "ultimately responsible" for the airworthiness of his aircraft because he was actively involved, as the owner, in maintenance of that aircraft. (Tr. 85.) Thus, Mr. Gatewood was responsible for the operation of the aircraft in an unairworthy condition, in addition to Mr. Willess' responsibility for improper maintenance and for flying an unairworthy aircraft.

²² In Fenner, an unidentified pilot flew an aircraft dangerously close to a National Guard helicopter. The owner had given the pilot permission to fly the aircraft, although there was no evidence that the owner had authorized such reckless flying.

²³ Cf., In the Matter of Westair Commuter Airlines, FAA Order No. 96-16 (May 3, 1995). In Westair, the Administrator held Westair responsible for the failure of its contractor (United Airlines) to provide a ground security coordinator despite WestAir's reasonable expectation that the contractor would honor its contractual obligations. In this case, the Administrator held that WestAir violated 14 C.F.R. §§ 108.5 and 108.10(a)(1), which impose certain responsibilities for safety upon the holders of air carrier operating certificates. 14 C.F.R. § 108.1(a). The Administrator wrote: "While it may be true that West Air had every reasonable expectation that United would honor its contractual obligations, and that it had no knowledge of the failure to have a ground security coordinator present, WestAir remains responsible for the security violations at issue." In the Matter of WestAir, FAA Order No. 96-16 at 6.

Mr. Gatewood argues in his petition for reconsideration that the Administrator's finding that Mr. Willess acted within the scope of his employment is not supported by the record or by logic.²⁴ (Petition for Reconsideration at 12.) This argument is not compelling. As the Administrator explained in FAA Order No. 2000-1, Mr. Gatewood authorized Mr. Willess to evaluate the airworthiness of the aircraft, and if he found that it was airworthy, he could fly it back to Warrenton. Mr. Willess did just that. Mr. Willess examined the aircraft and, believing that it was airworthy, he flew it back to Warrenton.

Moreover, the question is not whether Mr. Gatewood actually authorized Mr. Willess to violate the Federal Aviation Regulations by flying an unairworthy aircraft. Very few operators would ever be found to have violated the Federal Aviation Regulations based on the actions of their employees, if violations were dependent upon an actual authorization by the employer to violate the rules.²⁵ As explained in FAA Order No. 2000-1:

²⁴ Mr. Gatewood notes that even Inspector Hall testified that by flying the unairworthy aircraft, Mr. Willess acted beyond the scope of authority given to him by Mr. Gatewood. Respondent's counsel questioned Inspector Hall on cross-examination regarding whether Mr. Willess acted beyond the scope of authority given to him by Mr. Gatewood by flying the aircraft when it was in an unairworthy condition. (Tr. 78.) Agency counsel objected that this question called for a legal conclusion, but the law judge overruled the objection. (*Id.*) Inspector Hall replied that Mr. Willess had acted beyond the scope of authority given to him by Mr. Gatewood. However, the question did call for a legal conclusion, one that Inspector Hall was not qualified to give.

²⁵ As the Administrator explained:

The fact that the servant's act is expressly forbidden by the master, or is done in a manner which he has prohibited, is to be considered in determining what the servant has been hired to do, but it is usually not conclusive, and does not in itself prevent the act from being within the scope of employment. A master cannot escape liability merely by ordering his servant to act carefully. If he could, no doubt few employers would ever be held liable. Thus, instructions to a sales clerk never to load a gun while exhibiting it will not prevent liability when the clerk does so, in an effort to sell the gun.

FAA Order No. 2000-1 at page 19, n.23, *quoting* Prosser and Keaton on the Law of Torts, § 70, at 502-503 (5th ed. 1984).

The Administrator has held that employers are responsible for the acts or omissions of their employees committed while acting in the scope of their employment. *See e.g., In the Matter of Trans World Airlines*, FAA Order No. 98-11 (June 16, 1998); *In the Matter of USAir, Inc.*, FAA Order No. 92-48 (July 22, 1992), *petition for reconsideration denied*, FAA Order No. 92-70 (December 21, 1992)(air carrier held responsible for the acts and omissions of its ground crew and captain during pushback operations). The Administrator has rejected arguments that an employer should not be held responsible for the unauthorized actions – acts that are violative of the Federal Aviation Regulations or company policy – of its employees that are within their scope of employment. Thus, in *In the Matter of TWA*, FAA Order No. 98-11 (June 16, 1998), the Administrator held that TWA was responsible for the actions of its employees who served alcoholic beverages to a passenger who appeared intoxicated despite company policy and Federal regulations prohibiting such service. These employees may have engaged in prohibited acts, but they were within the scope of their employment in that serving beverages to passengers is in the scope of employment of flight attendants. *Id.*

FAA Order No. 2000-1 at 18-19. As the Administrator held in FAA Order No. 2000-1, flying the aircraft was within Mr. Willess' scope of employment as a flight instructor for the flight center.

In light of the foregoing discussion, it was not necessary for the Administrator to evaluate the law judge's determination that Mr. Gatewood had acted prudently in sending Mr. Willess to Warrenton. Nonetheless, the Administrator reviewed the evidence and held that Mr. Gatewood did not act prudently. In his petition for reconsideration, Mr. Gatewood attacks some of the Administrator's findings and reasoning regarding Mr. Gatewood's lack of prudence. On reconsideration, the Administrator stands by her previous determination, as modified, and as explained in the following discussion.

In finding that Mr. Gatewood acted imprudently when he sent Mr. Willess to assess the damage to N852DA, the Administrator wrote that Mr. Willess was not qualified "to work" on propellers (FAA Order No. 2000-1 at 17 and 20.) This was an

overstatement. As Mr. Gatewood points out in his petition, under 14 C.F.R. § 65.81(a),²⁶ Mr. Willess, as an A&P mechanic, was not qualified to perform *major* repairs on the aircraft's propeller but was qualified to perform *minor* repairs. However, this overstatement does not affect the outcome of the Administrator's decision.²⁷

Mr. Gatewood argues that in her decision the Administrator held that Mr. Gatewood should have relied upon the assessment of Mr. Rosenstein (who was not the holder of an A&P mechanic certificate). (Petition for Reconsideration at 9-10.) Mr. Gatewood, however, is wrong. The Administrator stated that Mr. Gatewood's actions were imprudent in light of the fact that Mr. Rosenstein had informed him that

²⁶ Section 65.81(a) provides:

A certificated mechanic may perform or supervise the maintenance, preventive maintenance or alteration of an aircraft or appliance, or a part thereof, for which he is rated (but excluding major repairs to, and major alterations of, propellers ...), and may perform additional duties in accordance with §§ 65.85, 65.87, and 65.95. However, he may not supervise the maintenance, preventive maintenance, or alteration of, or approve and return to service, any aircraft or appliance or part thereof, for which he is rated unless he has satisfactorily performed the work concerned at an earlier date. If he has not so performed that work at an earlier date, he may show his ability to do it by performing it to the satisfaction of the Administrator or under the direct supervision of a certificated and appropriately rated mechanic, or a certificated repairman, who has had previous experience in the specific operation concerned.

14 C.F.R. § 65.81(a).

²⁷ Mr. Gatewood argues in his petition that under Section 65.81(a), Mr. Willess, as the holder of a mechanic certificate with an A&P rating, was qualified to inspect N852DA, and that "the record establishes that Willess 'at the time and currently' had met the currency requirement to perform such maintenance." (Petition for Reconsideration at 11.)

Actually, the record was unclear on this point. Mr. Gatewood testified that "to the best of my knowledge, at the time and currently, he [Mr. Willess] met the currency requirements as an active A&P." (Tr. 100.) However, Mr. Gatewood did not explain the basis of that conclusion or how he would be familiar with the qualifications and current experience of a mechanic whom he had not employed (as a mechanic) for over 2 years. As a result, Mr. Gatewood's opinion carries little, if any weight.

Inspector Hall's testimony expressing his concern that Mr. Willess may not have been qualified under Part 65 to inspect the aircraft also was inconclusive. (Tr. 69-72; 84-85.)

there had been a propeller strike.²⁸ The Administrator accepted the law judge's determination that Mr. Rosenstein's description of the damage, rather than of the nature of the mishap (propeller strike), was inconclusive.²⁹

Under McCauley Service Bulletin 176C, "Any McCauley propeller experiencing a blade strike must be removed from the aircraft and completely overhauled by an FAA-approved repair station in accordance with the applicable overhaul manual."

Complainant's Exhibit 6 at 2 (emphasis added.) In light of Mr. Gatewood's extensive experience as a mechanic with A&P ratings and an inspection authorization, he should have realized that the aircraft could not be airworthy unless the propeller was removed and overhauled in compliance with the service bulletin.³⁰ The Administrator has held that an aircraft cannot be considered airworthy³¹ if maintenance required by the

²⁸ Mr. Gatewood argues that the Administrator ignored the testimony of Complainant's witnesses to the effect that Mr. Gatewood acted prudently by sending a mechanic with an A&P rating to determine the airworthiness of N852DA. (Petition for Reconsideration at 10.) This argument lacks merit. Mr. Rosenstein, the flight instructor who saw the damaged aircraft and informed Mr. Gatewood about the propeller strike, agreed on cross-examination that Mr. Gatewood was prudent in sending an A&P to inspect the airplane. (Tr. 36.) However, he gave no opinion whether it was prudent to send Mr. Willess. Inspector Hall testified that while it was prudent of Mr. Gatewood to send a mechanic to evaluate the condition of the aircraft, Mr. Willess was not an appropriate choice. (Tr. 69-72.) Inspector Hall testified, "It would be prudent to send a mechanic experienced with this type of damage, with the appropriate maintenance manuals to make a proper evaluation." (Tr. 76.)

²⁹ The Administrator deferred to the law judge's credibility finding that Mr. Gatewood did not receive a full description of the actual extent of the damage from Mr. Rosenstein.

³⁰ Some damaged propellers cannot be overhauled. If a propeller sustains damage requiring the removal of metal forming a finished depression more than 1/16th inch deep, 3/8th inch wide (overall) and 1 inch long, the propeller would be unserviceable and have to be scrapped. Complainant's Exhibit 5 (McCauley Service Manual).

³¹ Airworthiness is not synonymous with "flyability." Copsey v. National Trans. Safety Board, 993 F.2d 736, 739 (10th Cir. 1993); In the Matter of USAir, FAA Order No. 96-25 at 13 (August 13, 1996). 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),

manufacturer's maintenance manual has not been performed.³² In the Matter of USAir, FAA Order No. 96-25 at 12-13 (aircraft was unairworthy where inspection required by maintenance manual had not been performed). Nonetheless, Mr. Gatewood sent a flight instructor with only limited employment experience as a mechanic more than 2 years earlier, to assess the airworthiness of an aircraft that could not possibly have been airworthy. Mr. Gatewood even authorized Mr. Willess to fly the aircraft back if he believed that it to be airworthy. He did not ensure that Mr. Willess had the appropriate tools or that he had familiarized himself with the appropriate manuals or service bulletins before doing the inspection.

Mr. Gatewood argues in his petition that the Administrator imposed strict liability by finding him responsible for the unreasonable actions of Mr. Willess and arguing further that such a finding of strict liability is contrary to the case law of the NTSB. Mr. Gatewood urged the Administrator to follow the precedent of the NTSB. First, as stated in FAA Order No. 2000-1, the Administrator is not bound by NTSB case law.³³ *E.g., In the Matter of Richardson & Shimp*, FAA Order No. 92-49 at 9 n.13 (July 22, 1992) ("The Administrator may decide to follow persuasive NTSB precedent but is not required to do so.") Second, most of the cases cited by Mr. Gatewood are not on point, as they involve a pilot's responsibility for the negligent acts of others. Third, to the extent that the NTSB has held that a person will not be held responsible as an operator for the

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

³² A service bulletin is a means of revising an FAA-approved manufacturer's service manual, and is considered to be a part of the manual. (Tr. 55-56.)

³³ FAA Order No. 2000-1 at 20.

violations caused by others unless the operator actually authorized the violation, that case law is inconsistent with the Administrator's decision in the Fenner case.³⁴

As a result of the foregoing discussion, Mr. Gatewood's petition that the Administrator reverse her decision that Mr. Gatewood had violated Sections 91.405(a), 91.407(a)(2) and 91.7(a) is denied.

2. Mr. Gatewood also argues in his petition for reconsideration that the Administrator erred when she held that Mr. Gatewood violated Section 91.405(b). Mr. Gatewood argues that because the aircraft was unairworthy, Mr. Gatewood could not change Mr. Willess' entry to indicate that the aircraft had been returned to service. (Petition for Reconsideration at 16.) Mr. Gatewood's argument in this regard is identical to the argument that he presented in his appeal brief, arguing that the law judge had also decided this issue in error. (Compare Mr. Gatewood's Appeal Brief at 8-11, with his

³⁴ In Administrator v. Bischoff, the NTSB noted that the term "operate" has a broader meaning under 14 C.F.R. § 1.1 than either actually operating the controls of an aircraft or serving as the pilot in command. Administrator v. Bischoff, 2 NTSB 1013, 1014 (1974). In that case, the NTSB held that the respondent and another pilot, as co-owners and co-occupants of an aircraft, operated that aircraft below minimum safe altitudes in violation of 14 C.F.R. §§ 91.79(c) and 91.9. There was no testimony establishing which of the pilots was operating the controls or was serving as pilot in command. The NTSB wrote:

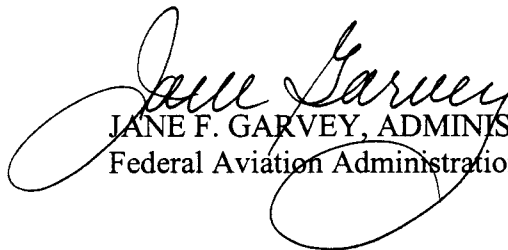
Considering respondent's role in the flight (*i.e.*, as co-owner and co-occupant) in light of the above definition [14 C.F.R. § 1.1], it is the Board's conclusion that both respondents ... "operated" the aircraft, such that they can be held responsible under the applicable regulations. We hasten to add that not every "operator" who technically comes within the definition quoted above could be held responsible in an enforcement action under regulations such as Sections 91.79(c) and 91.9. Rather, the operator must be shown to have been involved in the flight in such a manner that it can reasonably be inferred that, in the absence of any evidence to the contrary, he participated in, authorized, or permitted the violations.

Id., at 1015. As explained in FAA Order No. 2000-1, Mr. Gatewood did participate in the violation to the extent that he sent Mr. Willess (*see* discussion in FAA Order No. 2000-1, and in this decision at 15-16 *supra*.)

Petition for Reconsideration at 16-18.) The Administrator will not consider repetitious petitions. 14 C.F.R. § 13.234(d).

V. Conclusion

THEREFORE, Mr. Gatewood's petition for reconsideration of FAA Order No. 2000-1 is denied except for those modifications noted herein.³⁵


JANE F. GARVEY, ADMINISTRATOR
Federal Aviation Administration

Issued this 15th day of May, 2001.

³⁵ A person may file a petition for review in the United States Court of Appeals for the District of Columbia Circuit or in the court of appeals of the United States for the circuit in which the person resides or has its principal place of business not later than 60 days from the issuance of a final order of the Administrator. 49 U.S.C. § 46110.