UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

In the Matter of: HIGH EXPOSURE, INC.

FAA Order No. 2001-2

Docket No. CP98EA0066
DMS No. FAA-1999-5569[1]

Served: May 16, 2001

DECISION AND ORDER[2]

Respondent High Exposure, Inc., has appealed the law judge's initial decision,[3] which found that High Exposure operated a banner-towing flight in violation of FAA safety regulations.[4] The law judge assessed High Exposure a civil penalty of $1,100, and

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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 are available on LEXIS and WestLaw. They can also 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] A copy of the law judge's written initial decision is attached.

[4] The specific regulations are 14 C.F.R. §§ 91.119(a) & (b) and 14 C.F.R. § 91.13(a). These regulations provide as follows:

> **§ 91.119. Minimum safe altitudes: General.**
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> Except when necessary for takeoff or landing, no person may operate an aircraft below the following altitudes:
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> (a) *Anywhere.* An altitude allowing, if a power unit fails, an emergency landing without undue hazard to persons or property on the surface.
>
> (b) *Over congested areas.* Over any congested area of a city, town, or settlement, or over any open air assembly of persons, an altitude of 1,000 feet above the highest obstacle within a horizontal radius of 2,000 feet of the aircraft.
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> **§ 91.13. Careless or reckless operation.**
>
> (a) *Aircraft operations for the purpose of air navigation.* No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

High Exposure has appealed. This decision denies High Exposure's appeal and affirms the law judge's initial decision.

I. Facts

Briefly, two FAA inspectors from the local Flight Standards District Office were at the Nazareth Speedway in Nazareth, Pennsylvania to monitor an air show. (Tr. 25, 105.) Shortly before the air show began, the FAA inspectors noticed an aircraft towing a banner reading "Autobahn Motor Cars, Devon, PA." (Tr. 29, 30.) The FAA inspectors noticed that the aircraft was flying too low over congested areas, creating a safety problem. (Tr. 32, 106.) The operator of the banner-towing aircraft had not obtained a waiver to fly over the racetrack. (Tr. 42.) The FAA inspectors could not see the aircraft's registration number, and they were unsure of the aircraft's make and model number. (Tr. 49-50, 110-11.) Ultimately, the air show performer flew his aircraft alongside the banner-towing aircraft and signaled for the aircraft to leave the area, which it did. (Tr. 33, 34, 127.)

An FAA inspector testified at the hearing that when he called the President of High Exposure after the incident, the latter acknowledged that the banner-towing flight occurred. (Tr. 35-36.) In the answer to the amended complaint, however, High Exposure denied operating the aircraft. When the FAA inspectors sent High Exposure a letter requesting the name of the pilot who operated the aircraft, High Exposure did not provide it. (Tr. 41-42; Complainant's Exhibits 7 & 8.) Complainant subsequently filed the instant civil penalty action against High Exposure.

II. The Law Judge's Decision

After a hearing, the law judge issued a written initial decision in which he found that a preponderance of the reliable and probative evidence showed that High Exposure operated the aircraft in question. (Initial Decision at 2.) The law judge also concluded that High Exposure operated the aircraft contrary to the safety regulations because the aircraft operated at an altitude of only 600 to 800 feet around the racetrack stadium and over a shopping mall, a highway, and a parking area. (Initial Decision at 3, 4.)

The law judge rejected High Exposure's argument that the agency witnesses were not credible due to discrepancies in their accounts of the timing of the flight. The law judge found that the discrepancies were minor and that the witnesses' accounts were trustworthy. (Initial Decision at 3, 4.)

As for the civil penalty, the law judge found that the banner-towing operation created an unreasonable risk to public safety. In making this finding, the law judge relied on an FAA inspector's testimony that if the engine failed, the pilot might not have had room enough for a safe landing. (Initial Decision at 4, 5.) The law judge assessed High Exposure a $1,100 civil penalty.

III. High Exposure's Arguments on Appeal

On appeal, High Exposure argues that the law judge erred by concluding that High Exposure operated the flight. Under 49 U.S.C. § 40102(a)(32), "'operate aircraft' and 'operation of aircraft' mean using aircraft for the purposes of air navigation, including — (A) the navigation of aircraft; and (B) causing or authorizing the operation of aircraft with or without the right of legal control of the aircraft." Similarly, under 14 C.F.R. § 1.1, "*Operate*, with respect to aircraft means use, cause to use or authorize to

use aircraft, for the purpose ... of air navigation including the piloting of aircraft, with or without the right of legal control (as owner, lessee, or otherwise)."

Complainant established a *prima facie* case that High Exposure "operated" the flight within the meaning of 49 U.S.C. § 40102(a)(32) and 14 C.F.R. § 1.1. Complainant's *prima facie* case included the following:

- testimony from an advertising agency executive that High Exposure agreed to tow the banner advertising Autobahn Motor Cars on the day and at the place in question (Tr. 11-12);
- the "flight order" in which High Exposure agreed to produce and tow the banner on the weekend in question for several thousand dollars (Complainant's Exhibit 1); and
- testimony that High Exposure's President admitted in essence during the investigation that his company operated the flight (Tr. 35-36).[5]

Once Complainant established a *prima facie* case, it became High Exposure's burden to prove that someone else operated the flight.[6] High Exposure failed to introduce any evidence to rebut Complainant's *prima facie* case. Therefore, the law judge correctly determined that High Exposure was the operator.

High Exposure argues that a decision of the NTSB, Administrator v. Bischoff, 2 NTSB 1013 (September 13, 1974), supports its appeal. Bischoff, a co-owner of an airplane involved in a low-flight incident, told an FAA inspector that both he and his co-

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[5] High Exposure argues that the law judge erroneously stated in his decision that the President of High Exposure admitted that he personally piloted the aircraft. The law judge stated, however, that the President of High Exposure admitted that *his company*, High Exposure, operated the aircraft. The record supports the law judge's statement. (Tr. 36, 65-66; Respondent's Exhibit 2.)

[6] Note that the National Transportation Safety Board (NTSB) also shifts the burden of proof to the respondent in pilot or operator identity cases when the FAA establishes a *prima facie* case against the respondent. *See, e.g.*, Administrator v. Baehr, NTSB Order EA-4075, 1994 NTSB LEXIS 26 at *7 (February 1, 1994). Although NTSB decisions are not binding precedent, they may be persuasive. In the Matter of WestAir Commuter Airlines, d/b/a United Express, FAA Order No. 1993-18 at 6 (June 10, 1993).

owner were in the aircraft during the low flight, but he could not remember who was the pilot. Both Mr. Bischoff and his co-owner declined to testify at the hearing. Bischoff, 2 NTSB at 1015. The NTSB concluded that both men could be considered operators of the aircraft and could be held responsible for the regulatory violations. Significantly, the NTSB stated:

> To hold otherwise in this case would be to place beyond the reach of enforcement action two airmen, who were co-owners and co-occupants of an aircraft on a flight during which regulatory violations were committed, because each chose to remain silent regarding the identity of the pilot who was in command or operating the controls.

Bischoff, 2 NTSB at 1015, n.7. The NTSB indicated that an aircraft operator should not be held responsible for violations unless, absent any evidence to the contrary, one can reasonably infer that the operator participated in, authorized, or permitted the violations. Bischoff, 2 NTSB at 1015. The NTSB suspended Bischoff's commercial pilot certificate for 30 days.

The instant case is like Bischoff in that one reasonably can infer from the evidence that High Exposure participated in, authorized, or permitted the violations. It is also like Bischoff in that the alleged violator failed to present any evidence at the hearing to rebut the agency's case. For example, the President of High Exposure declined to take the stand to rebut the testimony that he had admitted during the investigation that High Exposure operated the flight. Indeed, High Exposure did not call a single witness to the stand.

Although High Exposure attempts to cast doubt on the credibility of Complainant's witnesses, the law judge found the agency's witnesses credible and their accounts trustworthy. The law judge's credibility determinations are entitled to deference

because the law judge observed the witnesses' demeanor as they testified. In the Matter of Gotbetter, FAA Order No. 2000-17 at 9 (August 11, 2000), citing In the Matter of Warbelow's Air Ventures, FAA Order No. 2000-3 at 12 (February 3, 2000). A careful review of the entire record has revealed nothing that would justify reversing the law judge's credibility determinations. The law judge correctly found that the variations in the testimony were minor and reasonable, given the passage of time. Further, it is immaterial whether the FAA inspectors interviewed the air show performer at 1 p.m. or 2:30 p.m., or whether they worked until 1 p.m. or 4 p.m.

High Exposure's other arguments are equally unavailing. High Exposure asserts that one of the agency witnesses was unreliable because he participated in the air traffic control strike of 1981. However, High Exposure established no connection between participation in a strike and veracity.

High Exposure argues that the FAA inspectors should have investigated the location and status of each of High Exposure's aircraft. However, regardless of what further steps the inspectors could have taken during the investigation, Complainant presented sufficient evidence to sustain its burden of proof.

High Exposure argues that even if it did operate the banner-towing flight, Complainant failed to prove any safety violations because Complainant took no enforcement action against the air show performer, who was operating at the same altitude as the banner-towing flight. The air show performer, however, had a valid waiver for his operation over the racetrack (Tr. 26-27, 42), while High Exposure did not.[7]

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[7] The Manager of the local FAA Flight Standards District Office issued the air show performer a certificate of waiver for his performance at the Nazareth Speedway under authority of 14 C.F.R. § 91.903. (Complainant's Exhibit 3.) While High Exposure had a general waiver to operate banner-towing flights (Tr. 42-43; Complainant's Exhibit 9), it failed to effectuate the waiver by

Further, whether a safety rule is enforced against someone else is irrelevant. In the Matter of Costello, FAA Order No. 1993-10 at 6 (March 25, 1993). An agency's decision not to prosecute is a matter of prosecutorial discretion and is presumptively immune from review. *Id.*

High Exposure also argues that Complainant unfairly conducted discovery after the deadline contained in Complainant's proposed discovery schedule, failed to send High Exposure a copy of a *subpoena duces tecum* served on a non-party, and failed to supplement its discovery answers in a timely fashion.[8] High Exposure argues that as a result, the law judge should have granted its motion to strike the material obtained via the *subpoena duces tecum.*

The law judge correctly denied High Exposure's motion to strike. The parties did not file a joint procedural schedule. Rather, they filed two separate schedules, both of which were only proposals. The law judge never made either proposed schedule binding on the parties. Further, High Exposure has failed to show any prejudice. Complainant served a request for admissions and the material it obtained via the *subpoena duces tecum* on High Exposure on June 1, 1999, and the hearing did not take place until August 5, 1999. Thus, High Exposure was not surprised at the hearing by the material Complainant obtained via the *subpoena duces tecum.* Rather, High Exposure became aware that Complainant had obtained the material about two months before the hearing. Finally, High Exposure itself created the documents obtained via the *subpoena*

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coordinating with the local Flight Standards District Office in Allentown, Pennsylvania. (Tr. 44-45.) Further, High Exposure's general waiver did not allow it to fly below the altitudes set forth in 14 C.F.R. § 91.119. (Tr. 44-45.)

[8] Under 14 C.F.R. § 13.220(i), a party who has responded to a discovery request has a duty to supplement or amend the response as soon as the information is known in certain situations.

duces tecum. These documents included the order form in which High Exposure agreed to produce and tow the banner in question, as well as High Exposure's invoice, marked paid. (Exhibits A-1 through A-4 attached to Complainant's Request for Admissions.) Because High Exposure created the documents, their existence should have come as no surprise. No prejudice has been shown.

All other arguments raised by High Exposure have been considered and rejected. For the foregoing reasons, the law judge's initial decision is affirmed and a civil penalty of $1,100 is assessed.[9]

JANE F. GARVEY, ADMINISTRATOR
Federal Aviation Administration

Issued this 15th day of May, 2001.

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[9] 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. *See* 14 C.F.R. §§ 13.16(b)(4) and 13.233(j)(2) (2000.)