

UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

In the Matter of:

RONALD L. GATEWOOD

FAA Order No. 2000-1

Served: February 3, 2000

Docket No. CP97EA0071

DMS No. FAA-1997-3292¹

DECISION AND ORDER²

Complainant and Respondent Ronald L. Gatewood have filed cross-appeals from the oral initial decision³ of Administrative Law Judge Burton S. Kolko rendered on January 20, 1999. Complainant alleged that Mr. Gatewood violated Sections 91.405(a),⁴

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 use of the following Internet address: <http://dms.dot.gov>. For additional information, *see* 65 Fed. Reg. 1654, 1671 (January 11, 2000).

² The Administrator's civil penalty decisions are available on LEXIS, Westlaw, and other computer databases. They are also available on CD-ROM through Aeroflight Publications. Finally, they can be found in Hawkins's Civil Penalty Cases Digest Service and Clark Boardman Callaghan's Federal Aviation Decisions. For additional information, *see* 65 Fed. Reg. 1654, 1671 (January 11, 2000).

³ Excerpts of the transcript containing the law judge's ruling on the motion to dismiss and his decision following the conclusion of the hearing are attached to this decision.

⁴ It is provided in Section 91.405(a) 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.

91.405(b),⁵ 91.407(a)(2),⁶ and 91.7(a),⁷ 14 C.F.R. §§ 91.405(a) and (b), 91.407(a)(2) and 91.7(a). At the conclusion of Complainant's case-in-chief, the law judge dismissed the allegations that Mr. Gatewood had violated Sections 91.405(a), 91.405(b) and 91.7(a), although he probably intended to dismiss Section 91.407(a)(2), rather than Section 91.405(b).⁸ In the initial decision, the law judge sustained the dismissal of the alleged violations of Sections 91.405(a), 91.407(a)(2), and 91.7(a). He held that Complainant proved that Mr. Gatewood had violated Section 91.405(b), finding that Mr. Gatewood failed to ensure that the appropriate maintenance entries had been made, and assessed a \$750 civil penalty for that violation.

After consideration of the briefs and the records, Complainant's appeal is granted, and Respondent's appeal is denied. A \$2,750 civil penalty is assessed.

⁵ It is provided in Section 91.405(b) of the FAR 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).

⁶ 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).

⁷ 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).

⁸ See summary of the law judge's ruling on the motion to dismiss, and the summary of the law judge's oral initial decision, *infra*.

The Hearing

1. Introduction

Mr. Gatewood is the owner of the Warrenton-Fauquier Flight Center, which is a general aviation business in Northern Virginia. (Tr. 99.) He is a pilot as well as the holder of a mechanic certificate with an airframe and powerplant (A & P) rating.⁹

2. Complainant's Case in Chief

During the evening of June 19, 1997, one of the Flight Center's aircraft, a Cessna 172M, identification number N852DA, was damaged during landing when its propeller struck a runway light at the Richmond International Airport. Brian Rosenstein, a flight instructor employed by the Warrenton-Fauquier Flight Center, had landed another aircraft at Richmond a few minutes earlier. Mr. Rosenstein examined N852DA and observed some damage to the propeller tips and some minor cosmetic damage to the wheel fairings.

Mr. Rosenstein testified that "[a]pproximately the last four inches or so of the propeller had nicks and cuts in it and ... one of the tips looked like it had been cut by a knife or some sharp object." (Tr. 28.) He said further, "[t]here were some nicks and pieces out of the leading edge of the propeller at various points, but the tips were the parts of the propeller that had the most damage to them." (Tr. 28.) Mr. Rosenstein concluded that the airplane was unsafe for flight based upon the damage to the propeller and his

⁹ Mr. Gatewood has held his A&P rating since 1975. He is also the owner of Sky World Aviation, an aircraft maintenance facility that he started in 1991. (Tr. 99.)

knowledge about propeller strikes.¹⁰ (Tr. 29.) He asked the fixed base operator to place a sign on the propeller indicating that the propeller should not be moved. (Tr. 29.)

Mr. Rosenstein called Mr. Gatewood by telephone at about 12:30 or 1:00 AM on June 20, 1997, and informed him about what had happened to N852DA. Mr. Rosenstein testified that during the telephone conversation he explained to Mr. Gatewood the extent of the damage to the propeller tips. When asked on direct examination: "Is that the same type of description that you've testified to before?" he replied, "For the most part. I don't remember my exact words but I believe I explained it the best that I could at that time." (Tr. 31.) He testified that he explained to Mr. Gatewood that the pilot and he did not bring the airplane back because Mr. Rosenstein thought it would not be safe to do so. Later he testified that he did not recall whether he actually said that the airplane was unsafe. (Tr. 31.)

Mr. Gatewood dispatched Jim Willess, a retired United Airlines pilot, to evaluate the damage to N852DA. Mr. Willess held several FAA certificates and ratings, including an airline transport pilot certificate and a mechanic certificate with an A&P rating.¹¹ (Tr. 8.) Mr. Willess was a part-time flight instructor at the Warrenton-Fauquier Flight Center. (Tr. 9.)

Regarding his instructions from Mr. Gatewood, Mr. Willess testified:

He advised me that Delta Alpha had sustained some unknown damage to the aircraft at Richmond the night before and that he wished for me to proceed to

¹⁰ Mr. Rosenstein testified that there were lights mounted on the top of the hangar shining down on the ramp of the FBO.

¹¹ Mr. Willess received his A&P certificate in 1994. (Tr. 18.) He had been briefly employed as an A&P mechanic in the spring of 1995 by Mr. Gatewood's maintenance operation, Sky World. (Tr. 22, 99.) That was his only employment experience as a mechanic. (Tr. 8-9.)

Richmond and assess the severity of the damage and to recover the airplane if I thought it was safe to do so."

(Tr. 15.)¹² Mr. Willess testified that Mr. Gatewood did not ask him to repair the airplane.

(Tr. 17.) He said that he understood that if the airplane was unairworthy, he should return to Warrenton without it. (Tr. 17.)

Mr. Willess examined the aircraft and determined that it was airworthy.

(Tr. 19-21.) He testified:

I found nothing out of the ordinary. In fact, the airplane looked pristine except for the prop tip and a small piece of plastic that covers the brake housing on the right landing gear faring. (sic.) That piece I thought probably would fall off, so I removed it. It didn't require tools or anything to do that because it was hanging by a small sliver of fiberglass. Just pulled it off. It probably would have fallen off anyway.

(Tr. 21.) Mr. Willess also removed a portion to the propeller tip. (Answer at 2.)

After examining the aircraft, Mr. Willess flew it back to Warrenton. (Tr. 10, 17.) He did not get a ferry permit, he testified, because he did not think that a ferry permit was necessary. (Tr. 21.) At the hearing, he acknowledged that he realized now that the aircraft was not airworthy. (Tr. 22.)¹³ Mr. Willess failed to enter a description of the

¹² In the answer, Mr. Gatewood admitted as follows:

...Respondent admits that on June 19, 1997, aircraft N852DA was involved in a landing mishap at Richmond, Virginia, during a student pilot training flight. Upon being notified that N852DA had been involved in a landing incident, the Respondent asked Mr. Willess, the holder of an A & P mechanic certificate as well as an ATP certificate, to travel to Richmond, assess any damage the aircraft may have suffered, and to take appropriate action for the aircraft's repair and/or return to Warrenton.

(Answer at 1-2.)

¹³ Mr. Willess was the subject of a FAA enforcement action for operating an unairworthy aircraft. (Tr. 22.)

work performed and an approval for return to service in the aircraft maintenance record.

(Answer at 2; Tr. 61-62.)¹⁴

FAA Flight Safety Inspector Edward Hall, who works at the Richmond Flight Standards District Office, testified as an expert in aviation maintenance generally. (Tr. 41-43.) He testified that a standard airworthiness certificate is issued when an aircraft meets its type certificate design and is in a condition for safe flight. (Tr. 45.) He explained that the FAA issues a ferry permit when an airplane does not meet its type design but is safe for flight so that it may be flown to a maintenance facility. (Tr. 45.)

Inspector Hall explained that only a FAA-certificated repair station may make major repairs to a propeller. Individual mechanics may not make such repairs.¹⁵ (Tr. 49.) Major repairs for propellers are defined specifically in Part 43, Appendix A of the Federal Aviation Regulations.¹⁶

¹⁴ His only entry in the aircraft logbook noted his flight to Whiskey 66 and his mechanic certificate number. (Tr. 107.)

¹⁵ See 14 C.F.R. § 65.81(a), which 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....) It is provided in 14 C.F.R. § 43.3(e), "The holder of a repair station certificate may perform maintenance, preventive maintenance, and alterations as provided in Part 145 of this chapter." Under 14 C.F.R. § 145.51, "[a] certificated domestic repair station may (a) maintain or alter any ... propeller ... for which it is rated." See 14 C.F.R. §§ 145.71 and 145.73 (regarding authority of foreign repair stations to maintain propellers on U.S. registered aircraft.)

¹⁶ In pertinent part, section 3 of Appendix A provides as follows:

(3) Propeller major repairs:

(iii) shortening of blades;
(xiii) repairs to deep dents, cuts, scars, nicks, etc. and straightening of aluminum blades.

N852DA had a fixed pitch aluminum propeller blade manufactured by McCauley. (Tr. 51.) The McCauley Service Manual for this type of propeller provided, in pertinent part, as follows:

Surface Defects.

To avoid dressing off an excessive amount of metal, inspect defect per paragraph 2.14 during process of removing cuts or scratches. Use suitable fine-cut files and emery cloth to remove defects. Then smoothly finish surface with No. 320 grit emery cloth. Repair surface defects as follows:

Dents, cuts, scars, scratches and nicks shall be removed or otherwise treated as explained below, provided their removal or treatment does not materially weaken the blade, materially reduce its weight or materially impair its performance. Remove metal around longitudinal surface cracks, narrow cuts, and shallow scratches to form shallow saucer-shaped depressions ... Blades shall be considered unserviceable if they require the removal of metal forming a finished depression more than 1/16th inch deep, 3/8ths inch wide (overall) and 1 inch deep.

(Exhibit C-5; Tr. 52-53). Inspector Hall testified that very minor stone nicks in the leading edge and in the propeller face could be filed out with a round cutter, flat file, a probe cloth and a magnifying glass. (Tr. 54.) The damage in this case, he testified, was not minor. (Tr. 54.)¹⁷ He testified that damage that is more extensive than such minor nicks, but not extensive enough to render a propeller blade unserviceable would require a major repair. (See Tr. 53-54.)

McCauley Service Bulletin 176C provided in pertinent part:

Blade strike ... is defined as any impact or suspected impact of the rotating propeller upon such items as ... landing lights.... Caution: Internal damage can occur without evidence of gross external damage. Procedures for following blade strike of a rotating propeller: *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.*

(Exhibit C-6; Tr. 56)(emphasis added.)

¹⁷ He based this opinion on Mr. Rosenstein's testimony. Inspector Hall did not see the damage to N852DA's propeller himself. (Tr. 54, 83.)

Inspector Hall testified that assuming that Mr. Rosenstein's testimony with respect to the extent of the propeller damage was true, then at a minimum, the propeller required a major repair by a certificated repair station. It would have been necessary to remove the propeller to accomplish the major repair. Inspector Hall asserted his opinion that the propeller was unserviceable and should have been scrapped and replaced. (Tr. 58.) He opined further that the airplane, in the condition described by Mr. Rosenstein, was flown in an unsafe condition. (Tr. 59.)¹⁸ He testified that if Mr. Gatewood had applied for a ferry permit for the airplane, the FAA would have denied that application because the propeller had to be replaced and the aircraft required further investigation. (Tr. 59.)

When asked what action Mr. Gatewood should have taken if Mr. Rosenstein's description of the damage during the telephone conversation had been as detailed as his testimony had been at the hearing, Inspector Hall replied:

Mr. Gatewood should have, at the very least, replaced the propeller and had a mechanic with the appropriate maintenance manuals and tools remove that propeller, replace the propeller, do extensive inspections to the crankshaft, the engine crankshaft, and the engine mounts, of course, and under those circumstances we would have issued a special flight permit.

(Tr. 60.) He stated further that he did not think that it was appropriate for Mr. Gatewood to send Mr. Willess to Richmond because Mr. Willess "was not prepared to do anything other than fly the aircraft back to Warrenton." (Tr. 60.) On cross-examination, he testified, however, that Mr. Gatewood was prudent to send a mechanic to evaluate the

¹⁸ The aircraft was not flown in the condition seen by Mr. Rosenstein, because Mr. Willess performed some maintenance, albeit inappropriate, before flying the aircraft to Warrenton.

condition of the aircraft prior to conducting maintenance. (Tr. 69, 72.)¹⁹ Inspector Hall testified that Mr. Willess was not an appropriate choice of a mechanic to examine the aircraft, despite the fact that Mr. Willess was an A & P mechanic. (Tr. 69.) He stated that it was not established that Mr. Willess was qualified to perform major repairs on propellers or to remove and install propellers. (Tr. 71, 73.) He agreed that it was prudent of Mr. Gatewood to instruct Mr. Willess that if the aircraft was unairworthy, he should return to Warrenton without it. (Tr. 73.)

3. Mr. Gatewood's Answer

Mr. Gatewood conceded that the determination made by Mr. Willess that the aircraft was airworthy was in error. (Answer, paragraphs 4 and 5.) He also conceded that Mr. Willess did not make appropriate repairs to the aircraft, and that he failed to make the appropriate entries in the maintenance records. (Answer, paragraphs 4 and 5.) Mr. Gatewood contended that he did not participate in the determination that the aircraft was airworthy, and that he did not authorize the maintenance performed, the failure to make required maintenance entries, or the particular maintenance that was performed by Mr. Willess. (Answer, paragraphs 4 and 5.) He contended that he did not authorize the flight of N852DA in an unairworthy condition (Answer, paragraph 7.)

4. The Law Judge's Ruling on Mr. Gatewood's Motion to Dismiss

At the conclusion of Complainant's case-in-chief, Mr. Gatewood's attorney made a motion to dismiss the allegations that his client violated Sections 91.7(a) and 91.407(a)(2). (Tr. 88-89, 90.) Mr. Gatewood contended that he should not be held

¹⁹ Later in cross-examination, Inspector Hall testified that "[i]t 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.)

responsible as the operator for these violations because he had not authorized these violations by Mr. Willess. (Tr. 89.)

The law judge dismissed the allegation of the complaint that Mr. Gatewood had operated the aircraft in an unairworthy condition in violation of Section 91.7(a). The law judge found that Complainant had only shown that Mr. Rosenstein, who lacked expertise in evaluating aircraft damage, had informed Mr. Gatewood in the middle of the night that the aircraft had experienced a propeller strike. He found that the record at the close of Complainant's case "does not indicate that Mr. Gatewood did anything other than to instruct Mr. Willis (sic), a licensed A&P mechanic, to go down and take a look at the aircraft, [and] if the aircraft were in an unairworthy state, to so report it back"

(Tr. 92.) He stated further, in pertinent part:

The point is that in terms of actually erroneously flying an aircraft that was in unairworthy condition, the onus at that point was on Mr. Willis (sic). At that particular point, based upon what the Agency has proven in its case to date, Mr. Gatewood did all that reasonably and prudently he could be expected to do as an owner. He sent somebody to be his eyes and his ears and not necessarily his hands, because although Mr. Willis (sic) took his tools with him, he was also told by Mr. Gatewood to take the maintenance records and I infer from that ... that if the aircraft had to stay for maintenance repairs, those maintenance records would be necessary for a repair station to deal with that.

(Tr. 94.) The law judge held that to the extent that Mr. Willess did more than simply evaluate the airworthiness of the aircraft, he exceeded his instructions from Mr. Gatewood. The law judge determined that Mr. Gatewood should not be held responsible for any violations due to Mr. Willess' exceeding his scope of authority.

(Tr. 94-95.) He stated that for these reasons he was dismissing the allegations contained in Part II, paragraphs 1, 2, and 4 of the complaint (pertaining to Sections 91.405(a), 91.405(b), and 91.7(a) of the FAR.) (Tr. 95.) He stated further that he would not dismiss

paragraph 3 of the complaint (pertaining to Section 91.407(a)(2)) because Complainant had proven that Mr. Willess had performed maintenance but had not made an appropriate notation in the records.²⁰

5. Respondent's Case

Mr. Gatewood testified that Mr. Rosenstein was "inconclusive" about the nature and extent of the damage to the aircraft. (Tr. 100-101.) Mr. Gatewood testified:

He [Mr. Rosenstein] told me that the airplane had a prop strike. He did not say that there was X number of inches. He said there was damage to the tip. There was a little sliver off the back. How big's a little?

(Tr. 118.) Mr. Gatewood testified that Mr. Rosenstein said that he did not know if there was damage to the nose wheel, the firewall, or the engine mount. (Tr. 100.)

Mr. Gatewood testified that the next morning he was anxious to get an assessment of the damage to N852DA because he needed to know what steps he should take to repair the aircraft, *i.e.*, order a new prop, get an engine change. (Tr. 101.) This aircraft, he explained, is and was a vital part of his business. (Tr. 101-102, 103.) Neither Mr. Gatewood nor any of his mechanics, he testified, were available to go to Richmond to observe the aircraft that morning. (Tr. 101, 104.) Consequently, he decided to send Mr. Willess to Richmond to assess the damage. (Tr. 102.)

Regarding his instructions to Mr. Willess, Mr. Gatewood testified:

²⁰ It appears likely that the law judge meant to dismiss the third paragraph (regarding Section 91.407(a)(2)), and *not* to dismiss the second paragraph (regarding Section 91.405(b)). Section 91.405(b) would be violated by a failure to ensure that the appropriate entries were made in the maintenance records. Section 91.407(b), on the other hand, involved the additional element that Mr. Gatewood, as the operator, would be held responsible for the *operation* of the aircraft when the appropriate entries had not been made. The law judge held that Mr. Gatewood was not responsible for the operation of the aircraft, but he was responsible for failing to ensure that appropriate entries were made. *See* the initial decision in which the law judge dismissed the third paragraph and found a violation of the second paragraph at Tr. 143.

I said, "Go down and take a look. Be sure to take the logbooks because if it can be ferried, you'll have to have the logbooks to get a special flight permit." I specifically said, "Do not fly an unairworthy airplane."

(Tr. 102-103.) He testified that he did not authorize Mr. Willess to make any major repairs on the aircraft, but that he implicitly authorized Mr. Willess to make minor repairs. (Tr. 111, 112.)

Mr. Gatewood testified that he did not expect Mr. Willess to do any repairs. (Tr. 113.) He explained that Mr. Willess was qualified to make major and minor repairs, but not propeller repairs. (Tr. 120.) Mr. Gatewood testified that he did not know that Mr. Willess was flying the aircraft back to Warrenton until he overheard an air traffic controller questioning Mr. Willess.²¹ (Tr. 104.) Mr. Gatewood testified that when he observed the aircraft, he was surprised that Mr. Willess had flown the aircraft in the condition that it was in. (Tr. 105.)

The Law Judge's Oral Initial Decision

The law judge regarded the disagreement over the degree of detail in Mr. Rosenstein's description of the damage to Mr. Gatewood as a "tempest in a teapot." According to the law judge, regardless of how Mr. Rosenstein described the damage, he was not qualified to provide a complete evaluation of the damage that he had viewed in the middle of the night because he was not a mechanic. (Tr. 144.) The law judge found that Mr. Rosenstein indicated that something was wrong with that aircraft and that somebody more knowledgeable had better take a look at it. (Tr. 44.)

Regarding Mr. Gatewood, the law judge stated:

²¹ Mr. Gatewood had been monitoring the approach control frequency as he was flying another aircraft in the Richmond area as Mr. Willess was flying back to Warrenton.

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 just 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 held that Mr. Willess acted beyond the scope of his authority in flying the aircraft to Warrenton in an unairworthy condition, and that Mr. Gatewood could not reasonably have expected him to do so. (Tr. 143-144.) The law judge found that it was improper to impose strict liability against Mr. Gatewood for Mr. Willess' actions in flying the aircraft under those circumstances.

The law judge ruled: "[T]he shoe's on the other foot when it comes to paragraph 2 of the complaint with regard to ensuring that personnel make appropriate entries in the aircraft maintenance records." (Tr. 145.) According to the law judge, it would have been an appropriate exercise of supervisory authority for Mr. Gatewood to instruct Mr. Willess to record whatever maintenance was performed in the logbook after Mr. Gatewood had observed the aircraft. (Tr. 146.) Hence, the law judge found a violation of Part II, paragraph 2 of the complaint (pertaining to a violation of Section 91.405(b)) and assessed a \$750 civil penalty for that violation. (Tr. 146.)

Mr. Gatewood's Appeal

Mr. Gatewood argues on appeal that it was error for the law judge to hold that he had violated Section 91.405(b). According to Mr. Gatewood's argument, Section 91.405(b) requires the owner to ensure that the approval for return to service is in the

maintenance records and it does not have any requirement that the preceding maintenance be recorded. Mr. Gatewood argues further that:

We submit that no alteration to Willess' entry could have rendered it an "appropriate entr[y] ... indicating the aircraft has been approved for return to service." Indeed, in view of the fact that the aircraft was unairworthy, any such alteration to Willess' entry would have been fraudulent.

(Respondent's Appeal Brief at 10.) Consequently, Mr. Gatewood argues, he did not ask Mr. Willess to make any after-the-fact entries, but instead he ordered that the aircraft undergo a complete inspection and have an overhauled propeller installed. Once that work was performed, he argues, he ensured that the maintenance personnel made the appropriate entries in the aircraft maintenance records indicating that the aircraft had been approved for return to service. (Respondent's Appeal Brief at 10-11.) Complainant disagrees with Mr. Gatewood's interpretation of the requirements of Section 91.405(b).

To resolve this issue, the place to begin is with a review of Section 91.405(b) itself. Section 91.405(b) provides:

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).

What should the approval for return to service entry include? Section 43.9(a)(4), provides as follows:

(a) Maintenance record entries: Except as provided in paragraphs (b) and (c) of this section, each person who maintains, performs preventive maintenance, rebuilds, or alters an aircraft, airframe, aircraft engine, propeller, appliance, or component part shall make an entry in the maintenance record of that equipment containing the following information:

(4) If the work performed on the aircraft, airframe, aircraft engine, propeller, appliance or component part has been performed satisfactorily,

the signature, certificate number, and kind of certificate held by the person approving the work. *The signature constitutes the approval for return to service only for the work performed.*

14 C.F.R. § 43.9(a)(4)(emphasis added.) In light of the fact that under this regulation, the approval for return to service is only for the particular maintenance that was performed, it should be obvious that the approval must include a description of what that maintenance was. Hence, to the extent that Mr. Willess performed any maintenance on this aircraft – and the parties agree that Mr. Willess did perform maintenance, albeit improper – that maintenance should have been described in the records as part of the approval for return to service. The aircraft's unairworthiness does not change the fact that by flying that aircraft after it sustained propeller damage and after Mr. Willess performed maintenance on it, he was returning it to service.

Certainly, Mr. Gatewood acted properly, once the aircraft was back in Warrenton, by having the aircraft inspected and an overhauled propeller installed. However, that maintenance does not relieve him of the responsibility of ensuring that accurate records of maintenance (including improper maintenance and all approvals for return to service) were kept. Based upon the foregoing, Mr. Gatewood's appeal is denied.

Complainant's Appeal

Complainant argues that the law judge should have held Mr. Gatewood responsible under Section 91.405(a) for failing to have the discrepancies repaired in accordance with Part 43. Complainant also argues that the law judge should have held Mr. Gatewood responsible for violating Section 91.407(a)(2) for operating an aircraft that underwent maintenance when no entry reflecting that entry had been made. Finally,

Complainant argues that the law judge should have found Mr. Gatewood responsible for having violated Section 91.7(a) by operating a civil aircraft that was unairworthy.

Complainant's appeal is granted, and the law judge's findings are reversed regarding these allegations.

The first question to address is whether the law judge should have found that Mr. Gatewood was the operator. The term "operate aircraft" is defined in the FAA's authorizing statute as follows:

"operate aircraft" and "operation of aircraft" mean using aircraft for the purpose 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.

49 U.S.C. § 40102(a)(32). In addition, the Federal Aviation Regulations provide that:

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.

In In the Matter of Fenner, FAA Order No. 96-17 (May 3, 1996), *aff'd*, Fenner v. FAA, 113 F.3d 1251 (11th Cir. 1997), the Administrator held that the owner of the aircraft was the operator of the aircraft and therefore responsible for violations committed by another pilot who had permission to fly the aircraft. In that case, the pilot had flown the aircraft dangerously close to a National Guard helicopter. The pilot had been given the authority to fly the aircraft, although there was no evidence that he had been authorized to fly it in such a reckless manner. The Administrator, interpreting the above-quoted regulation and statute stated, "[n]either the statutory nor the regulatory definition of the

term operate contains any language indicating that in order to have ‘operated’ an aircraft, a person must have authorized the pilot’s *particular use or manner of use* of the aircraft.” Regarding the argument that the Administrator was imposing strict liability on the owner of the aircraft, the Administrator held further, “[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.” *Id.*, at 6.

In the case at bar, Mr. Gatewood had authorized Mr. Willess to fly the aircraft if Mr. Willess determined that the aircraft was airworthy. Mr. Willess determined that the aircraft was airworthy, albeit mistakenly, and he flew it.²² Hence, Mr. Gatewood was the operator, as well as the owner, of N852DA.

The law judge held that Mr. Gatewood should not be held responsible as the owner and operator because he had done “all that reasonably and prudently he could be expected to do as an owner” and he should not be held responsible for Mr. Willess’ actions beyond the latter’s scope of responsibility. (Tr. 94, 143-144.) The law judge was wrong in this regard. 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

²² Mr. Gatewood argues that Complainant’s reliance on the Fenner case is misplaced because the law judge in this case held that the actions taken by Mr. Willess were not reasonably foreseeable by Mr. Gatewood. Respondent’s Reply Brief at 8, n. 7. Gatewood’s argument is not persuasive. In Fenner, there was no reason for Mr. Fenner to have suspected that the pilot would fly the aircraft in such a reckless manner. If anything, in the case at bar, Mr. Gatewood should have realized that Mr. Willess, an inexperienced A&P mechanic, without access to manuals, service bulletins, etc., pertaining to this propeller and who was not qualified to repair propellers, might

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.

Moreover, the law judge erred when he held that Mr. Gatewood should not be held responsible for Mr. Willess' actions because they were beyond the latter's scope of authority. 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

make an erroneous determination of airworthiness and then fly an unairworthy aircraft back to Warrenton.

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.* Similarly, in the case at bar, Mr. Willess, who was a part-time pilot for the flight school, was acting within the scope of his authority when he flew the aircraft, despite the fact it was unairworthy and he had been instructed not to fly the aircraft unless it was airworthy.²³

Gatewood cites a 1974 decision issued by the National Transportation Safety Board (NTSB), In the Matter of Bischoff, arguing that an operator who technically meets the definition of operator in 14 C.F.R. § 1.1 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

²³ It has been explained that:

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.

W. Page Prosser *et al.*, Prosser and Keeton on the Law of Torts, § 70, at 502-503 (5th ed. 1984), quoted in In the Matter of TWA, at 18.

permitted the violations.” Respondent’s Appeal Brief at 7, (quoting Administrator v. Bischoff, 2 NTSB 1013, 1015 (1974)).

Preliminarily, it should be noted that the Administrator is not bound by the precedent of the NTSB. In the Matter of Westair Commuter Airlines, Inc., FAA Order No. 93-18 (June 10, 1993). Also, the Bischoff case did not involve an employer and employee, but instead co-owners of an aircraft. In Bischoff, the NTSB held that the co-owner of the aircraft could be charged with careless or reckless operation because he participated in, authorized, or permitted the violations as a co-occupant of the aircraft. Moreover, even applying the test in Bischoff to this case, it should be found that Mr. Gatewood participated in the violation by sending Mr. Willess, a part-time employee with limited experience as an A&P mechanic, who was not qualified to work on propellers, and lacked the necessary tools and manuals, to decide whether the aircraft was airworthy.

Turning now to the individual violations, it is found that Mr. Gatewood violated Section 91.405(a) because he was the owner and operator of N852DA and he did not have the aircraft repaired as prescribed in Part 43. It is found further that Mr. Gatewood operated the aircraft and did not ensure that appropriate entries were made in the logbook. As a result, he violated Section 91.407(a)(2). Finally, it is found that Mr. Gatewood violated Section 91.7(a)(2) because he operated it in an unairworthy condition.

Complainant argues that Mr. Gatewood should be assessed a civil penalty of \$2,750 for violating Sections 91.405(a), 91.405(b), 91.407(a)(2) and 91.7(a).

Complainant argues that under the Sanction Guidance Table set forth in the FAA Order

No. 2150.3A, Compliance and Enforcement Program, appropriate penalties for

Mr. Gatewood's individual violations would be:

<u>Regulation</u>	<u>Sanction Guidance Table Recommended Penalty range</u>	<u>Appropriate Penalty according to Complainant</u>
§ 91.405(a) ²⁴	\$550 to \$1,100 ²⁵ (moderate to maximum penalty)	\$1,100
§ 91.7 ²⁶	\$550 to \$1,100 (moderate to maximum penalty)	\$1,100
§ 91.405(b) ²⁷	\$500 to 749 (minimum to moderate penalty)	\$ 749 ²⁸
§ 91.407(a)(2)	none	\$ 500

²⁴ Section 91.405(a) requires, in pertinent part, that each owner or operator of an aircraft shall have discrepancies repaired as prescribed in 14 C.F.R. Part 43 in between required inspections. The Sanction Guidance Table recommends a moderate to maximum civil penalty for "failure to perform or improper performance of maintenance, including required maintenance." Sanction Guidance Table, included in FAA Order 2150.3A, Appendix 4, III.A.2.

²⁵ The Sanction Guidance Table prescribes the following penalty ranges for violations committed by general aviation owners:

Maximum: \$750 to \$1,000*

Moderate: \$550 to 749

Minimum: \$500 to \$549

Sanction Guidance Table, included in FAA Order No. 2150.3A, Appendix 4, at 3.

*Note: As explained in 14 C.F.R. Part 13, Subpart H, entitled Civil Monetary Penalty Adjustment, the FAA's maximum civil penalty authority against an individual under 49 U.S.C. § 46301(a)(1) as adjusted for inflation is \$1,100. 14 C.F.R. § 13.305(d).

²⁶ The Sanction Guidance Table recommends a moderate to maximum civil penalty for operation of an unairworthy aircraft. Sanction Guidance Table, included in FAA Order No. 2150.3A, Appendix 4, III.A.5.

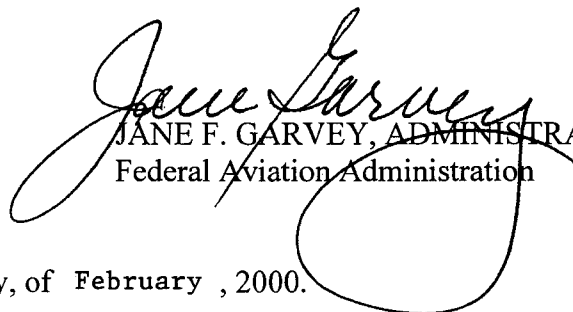
²⁷ Section 91.405(b) provides, in pertinent part, that each owner or operator of an aircraft shall ensure that maintenance personnel make appropriate entries in the aircraft maintenance records indicating that the aircraft has been approved for return to service. The Sanction Guidance Table recommends a minimum to moderate civil penalty against owners and operators in general aviation for failure to make proper entries in aircraft logs. Sanction Guidance Table, included in FAA Order 2150.3A, Appendix 4, III.A.3.

²⁸ The law judge assessed a \$750 civil penalty for this violation.

Regarding the appropriate sanction for a violation of Section 91.407(a)(2), Complainant notes that there is no specific recommendation in the Sanction Guidance Table that covers this violation. Complainant states, "Giving Respondent the benefit of the doubt, the recommended sanction would be the bare minimum of \$500." Complainant's Appeal Brief at 43-44. If these penalties are added together, the sum is \$3,449. Complainant notes that the \$2,750 civil penalty that it is seeking is therefore appropriate. Complainant's Appeal Brief at 44.

As Inspector Hall explained, "the propeller blade is a highly stressed rotational piece of equipment essential for [the aircraft's] safe operation." (Tr. 54-55.) Mr. Gatewood's employee flew N852DA with a propeller that required a major repair as it had been involved in a propeller strike about which Mr. Gatewood was informed. A \$2,750 civil penalty is reasonable under these circumstances.

In light of the foregoing, the law judge's initial decision is reversed, Respondent's appeal is denied, and Complainant's appeal is granted. A \$2,750 civil penalty is assessed.²⁹


JANE F. GARVEY, ADMINISTRATOR
Federal Aviation Administration

Issued this 2nd day, of February , 2000.

²⁹ Unless Respondent files a petition for review with a Court of Appeals of the United States within 60 days of service of this decision (under 49 U.S.C. § 46110, this decision shall be considered an order assessing civil penalty. See 14 C.F.R. §§ 13.16(b)(4) and 13.233(j)(2)(1999).)