UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

In the Matter of:	FAA Order No. 2000-13
EMPIRE AIRLINES, INC.	Served: June 8, 2000
	Docket No. CP98NM0011

DECISION AND ORDER[1]

Respondent Empire Airlines is appealing from Administrative Law Judge Burton S. Kolko's written initial decision[2] issued on September 3, 1999. The law judge held that Empire violated 14 C.F.R. §§ 43.13(a)[3] and 121.379(b)[4] when the left engine

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[1] 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).

[2] A copy of the law judge's written initial decision is attached.

[3] Section 43.13(a) of the Federal Aviation Regulations provides in pertinent part:

> Each person performing maintenance, alteration, or preventive maintenance on an aircraft, engine, propeller or appliance shall use the methods, techniques, and practices prescribed in the current manufacturer's maintenance manual or Instructions for Continued Airworthiness prepared by its manufacturer, or other methods, techniques, and practices acceptable to the Administrator except as noted in § 43.16.

14 C.F.R. § 43.13(a).

[4] Section 121.379(b) of the Federal Aviation Regulations provides:

> A certificate holder may approve an aircraft, airframe, aircraft engine propeller or appliance for return to service after maintenance, preventive maintenance, or alterations that are performed under paragraph (a) of this section. However, in the case of a major repair or major alteration, the work must have been done in accordance with technical data approved by the Administrator.

mount[5] of Empire's Fairchild F-27F aircraft was repaired in a manner not specified by either the Fairchild Structural Repair Manual (SRM) or Overhaul Manual (OM). The law judge determined that a $5000 civil penalty for those violations was appropriate. For the reasons set forth below, Empire's appeal is denied.[6]

During the summer of 1997, Empire Airlines requested that the FAA extend the time before overhaul for the engine mounts for its Fairchild F-27F aircraft, N222DG. (Tr. 8, 26; Complainant's Exhibit 5.) Larry Richards, the FAA principal maintenance

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14 C.F.R. § 121.379(b). Section 121.379(a) provides in pertinent part that "A certificate holder may perform or it may make arrangements with other persons to perform maintenance, preventive maintenance, and alterations as provided in its continuous airworthiness maintenance program and its maintenance manual." 14 C.F.R. § 121.379(a).

[5] The Fairchild F-27 Series Overhaul Manual describes the engine mount assembly as follows:

> The engine mount assembly consists of six steel tubes welded to seven fittings to form a W-shaped structure capable of supporting the power plant. The assembly is also utilized to support the engine control linkage, fire detector cable, electrical harnesses, fuel heater, and various hose and heat shield assemblies.

Fairchild F-27 Series Overhaul Manual, Engine Mount, Part Number 27-510001-1, -31, and –51, at 71-1, page 1 (Sep 1, 1967.)

[6] Conair Aerospace, located in Abbottsford, Canada, was performing a C check on the F-27 when the corrosion on the left engine mount was discovered. (Tr. 66.) Conair Aerospace is authorized to perform heavy checks and overhauls, and to accomplish airworthiness directives under Empire's operations specifications. (Tr. 102; *see also* Tr. 68.)

Conair employees had discovered pitting corrosion when they removed a placard that had been affixed to the motor mount. According to Empire Airlines' Terry D. Robinson, most of the pits were within the negligible range, having less than 5% penetration through the base material, but there were a couple places where it was difficult to determine whether the pitting was more extensive than that. (Tr. 68.) The defect and the repair were described as follows in the repair report dated August 15, 1997:

> Defect: Inboard and outboard support tubes found corroded where igniter warning stickers attached. ...
>
> Rectification: corrosion removed, and tubes measured and found below limits.
>
> Engine mount separated from the engine and tubes reinforced with welded repairs in accordance with AC 43.13-1A, para. 71.

inspector (PMI) assigned to Empire, requested that Empire provide him with the maintenance records for that aircraft's engine mounts. (Tr. 9) While reviewing one of the records documenting maintenance performed by Conair Aerospace in 1996, he noticed an entry regarding an engine mount repair indicating that the mount had corrosion beyond limits, and that it was repaired in accordance with Advisory Circular (AC) 43.13-1A, paragraph 71. (Tr. 9; Complainant's Exhibit C.) Paragraph 71 describes how to perform a welded sleeve repair.[7] He questioned the appropriateness of this reference to AC-43.13-1A.[8] (Tr. 9.) Consequently, he requested that Empire provide him with any data substantiating the repair. (Tr. 9.)

Subsequently, Empire's Frank James contacted the flight standards district office. Mr. James informed Inspector Richards that Empire had taken N222DG out of service and was preparing to remove and replace its left engine mount.[9]

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[7] Paragraph 71 of Advisory Circular 43.13-1A provides as follows:

> This repair is outlined in figure 2.5. Select a length of steel tube sleeve having an inside diameter approximately equal to the outside diameter of the damaged tube and of the same material, and at least the same wall thickness. Diagonally cut the sleeve reinforcement at a 30 degree angle on both ends so that the minimum distance of the sleeve from the edge of the crack or dent is not less than 1 ½ times the diameter of the damaged tube. Cut through the entire length of the reinforcement sleeve, and separate the half-sections of the sleeve. Clamp the two sleeve sections to the proper positions on the affected areas of the original tube. Weld the reinforcement sleeve along the length of the two sides and weld both ends of the sleeve to the damaged tube as shown in the figure. The filling of dents or cracks with welding rod in lieu of reinforcing the member is not acceptable.

[8] The inspector was surprised to find this reference to AC 43.13-1A for a repair to an air carrier aircraft. (Tr. 9.) He stated further that "43.13-1A is primarily used for the general aviation community and it's used as acceptable data for minor repairs. ... [R]epairs to an engine mount as per FAR Part 43(a)[14 C.F.R. § 43.13(a)] is classified as a major repair and, although AC 43.13-1A can be used as a basis for approval, stand[ing] alone it is not normally approved data for a major repair." (Tr. 10.)

[9] The aircraft operated for about 1 ½ years with the sleeve repair without any problems. (Tr. 75.)

Inspector Richards flew to Midland, Texas, and observed and photographed the repaired mount that had been removed from N222DG, as well as the replacement mount. (Tr. 15-17; Complainant's Exhibit 2.) He observed that the corroded areas of the removed left engine mount had been repaired with a "sleeve" weld. (Tr. 20, 21, 37.)

According to the Fairchild F-27 Series Overhaul Manual, when rust or corrosion is found on the engine mount, the rust should be cleaned off down to the bare metal and the surface should be inspected. "Isolated pitting less than 1/20 of tube diameter and not located in the middle third of the tube may be considered negligible." Fairchild F-27 Series Overhaul Manual, IX-15 (Nov. 15, 1986), page 3.

Regarding repairs to the engine mount, the Fairchild Overhaul Manual provides as follows:

> B. Damage Repairable By Patching.
>
> Repairs by patching to the engine mount for damage exceeding that considered to be negligible are given in the applicable sections of Civil Aeronautics Manual 18.[10]
>
> C. Damage Repairable By Insertion.
>
> Damage to the engine mount, exceeding that repairable by patching, is repaired according to the limits given in the applicable sections of Civil Aeronautics Manual 18.
>
> D. Damage Necessitating Return of Mount to Manufacturer.
>
> Any damage in excess of negligible, which cannot be repaired by patching or insertion, ... necessitates return of mount to manufacturer for correction or repair.

Fairchild Overhaul Manual, F-27 Series, IX-15, (Nov. 15, 1986), at page 4.

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[10] The Civil Aeronautical Manual (CAM) was superceded by Advisory Circular 43.13-1, later amended as Advisory Circular 43.13-1A. (Tr. 80.)

The Fairchild F-27 Series Structural Repair Manual, similarly, provides the following instructions for repair of the engine mounts:

> B. Damage Repairable By Patching.
>
> Patch repairs in middle third of tube are not permissible. For damage exceeding that considered to be negligible repairs are accomplished as given in the applicable section of Federal Aviation Agency publication AC 43.13-1.
>
> C. Damage Repairable By Insertion.
>
> ... Damage to the engine mount exceeding that considered to be negligible or repairable by patching is repaired according to the limits given in the applicable section of Federal Aviation Agency publication AC 43.13-1.
>
> D. Damage Necessitating Replacement.
>
> Any damage in excess of negligible, but in such a position that it cannot be repaired by patching or insertion indicates that engine mount replacement is necessary. The engine mount must also be replaced if any damage exists which is beyond the limits or repair by patching or insertion ....

Complainant's Exhibit 4, Fairchild F-27 Series, Structural Repair Manual, IX-4 (Oct. 15, 1978), at page 17.

Thus, neither the Fairchild Overhaul Manual nor the Structural Repair Manual specify that a "sleeve" weld is an allowable repair for the engine mount.

Terry Robinson, Empire's customer coordinator in 1996,[11] testified that he had seen the damage before the repair and that the damage was in the middle third of the tube. (Tr. 65, 75, 81.)[12] Mr. Robinson testified further that Conair used the sleeve repair

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[11] In that position, Mr. Robinson served as a liaison between Conair Abbottsford and Empire Airlines. At the time of the hearing, he was Empire's Director of Maintenance.

[12] Inspector Richards explained that the documentation for this repair did not specify where the damage was. However, he did observe that the repair extended into the middle third of the tube. (Tr. 58, 59.)

because the damage was in the middle third of the tube, where patching was prohibited. (Tr. 75.)

The parties introduced evidence on the issue of whether a sleeve repair is a type of patch repair, or whether sleeve and patch repairs[13] are separate procedures. Inspector Richards testified that there is a significant difference between a welded patch repair and a welded sleeve repair. He explained that the welded patch repair is a much less aggressive repair than the welded sleeve repair. (Tr. 21.) He testified that there were too many variables involved for him to be able to give an opinion regarding whether a welded sleeve repair is stronger than a patch repair. (Tr. 53-54.)

Terry Robinson, in contrast, testified that a sleeve repair is stronger than a patch repair because a sleeve repair encapsulates the tube, while a patch merely reinforces the side of the tube on which the patch is welded. (Tr. 73-75.) Harold Martin, an engineer who worked for Fairchild from 1947 to 1971 and then again from 1978 until his retirement in 1984, testified that a sleeve repair is a patch repair and that a sleeve repair is stronger than a patch repair as described in AC 43.13. (Tr. 93.) Mr. Martin testified further that he believes that Fairchild intended to categorize both patch and sleeve repairs as patches. (Tr. 94.)

While the Fairchild F-27 Series Overhaul and Structural Repair Manuals do not specify that a sleeve repair is an appropriate repair for the engine mount, the manufacturer's manuals for the Fairchild FH-227, in contrast, do provide for engine

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[13] The directions for performing a sleeve repair are contained in AC 43.13-1A, paragraph 71, while directions for the performance of a welded-patch repair are set forth in AC 43.13-1A, paragraph 73. (*See* Complainant's Exhibit 3.)

mount sleeve repairs. (Tr. 44, 45, Respondent's Exhibit 1.)[14] One type of engine mount may be used on both the Fairchild F-27F (N222DG is a Fairchild F-27F) and the Fairchild FH-227. (Complainant's Exhibit 8; Tr. 44.) Empire argued at the hearing that if the sleeve repair is approved for the Fairchild FH-227, then it must also be approved for the Fairchild F-27F because the two aircraft may use the same engine mount.

The law judge held that Empire violated Sections 43.13(a) and 121.379(b) of the Federal Aviation Regulations. He concluded that the overhaul and structural repair manuals permitted only two methods of repair – patching and insertion -- for non-negligible damage to the engine mount on a Fairchild F-27 series aircraft. He held that if there is any damage beyond the criteria for patching or insertion repairs then engine mount replacement is required under the manufacturer's manuals. (Initial Decision at 3.) He held further that these manuals do not provide for sleeve repairs, and sleeve and patch repairs are "materially different." (Initial Decision at 4.) The law judge also rejected Empire's argument that the Fairchild F-27 series overhaul and structural repair manuals' silence regarding sleeve repairs can be regarded as tacit approval. (Initial Decision at 4.)

Empire argued at the hearing that reliance upon AC 43.13-1A was proper under the FAA Inspector's Handbook, FAA Order No. 8300.10. The Inspector's Handbook provides this guidance to FAA inspectors:

> NOTE: AC 43.13-1, as amended, may be used as approved data, only if the following three prerequisites are met:
>
> - The user has determined that it is appropriate to the product being repaired/altered;
> - The user has determined that it is directly applicable to the repair/alteration being made;

[14] Inspector Richards testified also that another manufacturer, Fokker, permits sleeve repairs on the engine mounts for the Fokker F-27. (Tr. 44-45.)

- The user has determined that it is not contrary to manufacturer's data.

(Tr. 105; Respondent's Exhibit 3.) The law judge rejected this argument. He wrote:

> Respondent's further contention that the FAA Inspector's Handbook allows AC 43.13-1 to be used as approved data if appropriate, applicable, and not contrary to manufacturer's data ... merely begs the question, since whether the sleeve repair performed by Respondent's contract repair station meets these conditions is a central issue in this case.

(Initial Decision at 4.)

The law judge also rejected Empire's argument that it should have been able to use a sleeve repair for the F-27F because sleeve repairs are permissible for the FH-227, which uses the same motor mount as the F-27F. The judge explained that the "apparent interchangeability" of the engine mounts on the F-27 and the FH-227 does not change the fact that the Fairchild F-27 series overhaul and structural repair manuals do not allow for sleeve repairs to the engine mount for repair of corrosion. (Initial Decision at 4.)[15] The judge stated that he had to presume that there was a logical reason why the F-27 series manuals did not provide for sleeve repairs and why the FH-227 manuals did permit such repairs. He wrote:

> Respondent was obligated to follow the terms of governing manuals. If dissatisfied or unclear about the terms its remedy was to attempt to amend the manuals or gain permission from an FAA designated engineering representative ("DER")[16] to make the desired repair. (Tr. 10-11), not to follow the procedures set out in a manual expressly applicable to a different aircraft.

(Initial Decision at 4.)

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[15] The law judge mistakenly referred to the FH-227 as the Fokker FH-227. However, the FH-227 is manufactured by Fairchild, not Fokker. *See* Respondent's Exhibit 1.

[16] A DER is a FAA-designee with the authority to approve data on behalf of the Administrator. (Tr. 10-11.) There was no evidence in this case that a DER had approved any data that would permit the use of a sleeve repair for Empire's N222DG.

The law judge assessed a $5000 civil penalty against Empire for these violations.

On appeal, Empire argues that it was entitled to rely upon AC 43.13-1A as approved data for the sleeve repair of the engine mount of its Fairchild F-27F. This argument is rejected.

Under Section 121.379, a certificate holder may approve an aircraft for return to service after maintenance performed by another person as provided in the certificate holder's continuous airworthiness maintenance program and in its maintenance manual. However, "in the case of a major repair or major alteration, the work must have been done in accordance with technical data approved by the Administrator." 14 C.F.R. § 121.379(b). There is no dispute in this matter that the left engine mount repair constituted a major repair (Tr. 63), and thus, Empire was obligated to use approved data when repairing the corroded engine mount.

It is uncontested in this case that the Fairchild F-27 series overhaul and structural repair manuals contained approved data for a major repair of a Fairchild F-27F aircraft, such as Empire's N222DG. As Inspector Richards explained, AC 43.13-1A is not normally considered to be approved data for a major repair, but may be used as a basis for approval.[17] (Tr. 10.) The patch and insertion repairs set forth in AC 43.13-1A were approved data for a major repair of this aircraft because both were referenced in the Fairchild F-27 series overhaul and structural repair manuals. In contrast, neither the Fairchild F-27 series overhaul nor the structural repair manual referenced the description of the sleeve repair set forth in AC 43.13-1A. Also, neither Empire nor Conair sought the approval of a DER for a sleeve repair of N222DG's left engine mount. Hence, the sleeve

[17] Likewise, it is stated in the FAA Inspector's Handbook that AC 43.13-1, as amended, may be used on an individual basis to obtain approval. (Respondent's Exhibit 3, paragraph 1.D(2)).

repair set forth in AC 43.13-1A cannot be considered "approved data" for a major repair of the Fairchild F-27F aircraft in this case.

The fact that a sleeve repair may be approved data for the repair of one model aircraft (*i.e.*, the Fairchild FH-227) does not mean necessarily that a sleeve repair is approved for the same type of damage to another aircraft (*i.e.*, the Fairchild F-27F). The Fairchild F-27 and the Fairchild FH-227 may be similar aircraft, and they may use the same motor mount. However, there may be subtle differences that would make a welded sleeve repair appropriate for the FH-227 and not for the F-27F. That might be the reason that the Fairchild FH-227 manuals permit welded sleeve repairs of the motor mount, but the Fairchild F-27 series manuals do not. Whether there are indeed differences between the aircraft that would explain why a welded sleeve repair is approved data for the FH-227, but not the F-27F, cannot be determined on this record and is not a question that needs to be addressed on this appeal. Regardless of the similarity between the aircraft, aviation safety demands that maintenance personnel not assume that approved data for the repair of one specific aircraft can be used as approved data for a major repair on a different aircraft.[18]

According to the FAA Inspector's Handbook, FAA Order No. 8300.10 chg. 10, repair data may not be considered as "approved" unless the user has determined first that the data is not contrary to the manufacturer's data. Referring to a dictionary definition of "contrary," Empire argues that "the term 'contrary' does not simply imply absence from the manual" but instead, "means that the repair must be opposite or all together different

[18] It is possible, considering that the Fairchild F-27F and the FH-227 may use the same motor mount, that a DER might have approved a welded sleeve repair on behalf of the Administrator for a Fairchild F-27F engine mount if Empire had sought such approval. However, there is no way to resolve that question on this record.

from the repair described in the manual." (Appeal Brief at 6.) Using a sleeve repair was indeed contrary to the structural and overhaul manuals. Under these manuals, if the damage exceeded the negligible level and could not be repaired by patching or insertion, then it would be necessary to return the mount to the manufacturer. *See* Fairchild F-27 Series Overhaul Manual, 71-1, Paragraph 5D (Nov. 15, 1986); Fairchild F-27 Series Structural Repair Manual, 54-2, Paragraph 13D (October 15, 1978) *included in* Complainant's Exhibit 4; (Tr. 49.) Patching was not an option because the damage extended into the middle third of the tube.[19] Performing a welded sleeve repair is distinguishable from an insertion[20] or returning the mount to the manufacturer for replacement.

Empire argues that it was not precluded from using a sleeve repair because the manual did not specifically prohibit the use of sleeve repairs. The law judge correctly found that this argument was not compelling. The manufacturer's manuals stated which repairs were appropriate. It is unreasonable to expect the manufacturer to have listed all of the repairs that would not be appropriate for any given damage.

Empire argues that Complainant failed to prove its case because Complainant did not call an expert witness. Empire points to the case of In the Matter of Florida Propeller and Accessories to support its argument. In that case, the Administrator held that Complainant failed to introduce expert testimony on the critical issue of whether a propeller could wear down a certain amount in a certain length of time. FAA Order No. 97-32 at 9 (October 8, 1997). The issues involved in the case at hand do not require such

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[19] Mr. Robinson testified that the damage was in the middle third of the engine mount. (Tr. 75.)

[20] Inspector Richards testified that a repair by insertion requires the use of a jig fixture. (Tr. 36.)

expert testimony. The question here was whether Conair used the approved repairs in the manuals, and the evidence indicated that it did not.

Empire argues that the law judge's initial decision in In the Matter of Lockheed Aeromod Center, FAA Case No. CP 94WP0028, supports its position in this case. In that case, the law judge held that Complainant had failed to prove by the preponderance of the evidence that the respondent repair station had not used the methods, techniques and practices acceptable to the Administrator because the respondent had not followed its procedures manual. The law judge noted that Complainant had been unable to cite any section of the procedures manual that respondent had failed to use, but instead pointed to an inapposite requirement. 1995 FAA LEXIS 308 at *22-24 (March 3, 1995). As already explained, Complainant did prove in the case at hand that Empire Airlines used a procedure not permitted by the manufacturer's overhaul and structural repair manuals. Moreover, it should be noted that initial decisions of the law judges, while useful, have no precedential value unless appealed to, and affirmed by, the Administrator, and are not binding in other cases. 14 C.F.R. § 13.233(j)(3).[21]

Empire also argues that it was entitled to rely on the services performed by Conair. In support of this proposition, Empire cites to the law judge's decision in In the Matter of Empire Airlines, FAA Case No. CP94NM0064, 1995 LEXIS 399 (March 3, 1995), *appeal withdrawn,* FAA Order No. 95-7, 1995 FAA LEXIS 362 (May 5, 1995).

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[21] This regulation provides:

> A final decision and order of the Administrator after appeal is precedent in any other civil penalty action. Any issue, finding or conclusion, order, ruling or initial decision of an administrative law judge that has not been appealed to the FAA decisionmaker is not precedent in any other civil penalty action.

In that decision, the law judge held that the evidence failed to prove that either the wheel in question was improperly greased when installed by a repair station after an overhaul, or that improper greasing caused the wheel bearing to fail on takeoff and separate from the aircraft. The law judge held further that even if Complainant had proven that the wheel bearing had been improperly greased or that the improper greasing had caused the incident, Empire was not liable. The law judge explained that Empire should not be held responsible for the separation because Empire reasonably relied upon a FAA-certificated repair station to do the repair, and Empire had no reason to suspect that the repair station had not accomplished the task properly.

As noted above, an initial decision that has not been affirmed on appeal to the Administrator lacks precedential value. Moreover, unlike the cited initial decision, in the case at bar Empire had reason to know of the improper repair by Conair. While no Empire employees worked on the C-check, Empire employees Terry Robinson, the customer coordinator, and David Hartson, the director of quality assurance, were at the Conair facility while the C-check and repair were accomplished. (Tr. 55-56, 65, 99, 100.) Mr. Robinson acknowledged seeing the damage prior to the repair and the repair itself. (Tr. 81.)[22] Moreover, Conair's Mohammed Aslam, who signed the airworthiness release for this aircraft, was acting on Empire's behalf.[23] Empire specifically authorized

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[22] While not entirely clear, it appears that Empire's employees participated in the decision to use a sleeve repair. Mr. Robinson, who saw the damage prior to the repair, testified comparing the patch to a sleeve repair:

> [W]hen we look at the engine mount and the torsional loads and all of the things that it has to go through in supporting that engine solely in flight, in turbulence, and all of the other things that it goes through, it was our decision that a – that we would err on the side of what is the most safe, in our opinion what was the most safe, what was the most structurally sound repair that we could put on that.

Mr. Aslam to release aircraft for flight after certain required inspections, such as the one involved in this incident.

It is also noteworthy that in Empire Airlines' Airworthiness Release/Inspection Authorization Form (Complainant's Exhibit 10), authorizing Mr. Aslam to perform inspector and airworthiness release duties, *provides* that: "All authorized personnel are responsible to the Director of Quality Assurance when performing inspections." Thus, when Empire authorized Mr. Aslam to approve the aircraft for return to service, it retained the ultimate responsibility for proper approval. In any event, the repair performed by Conair was described accurately in the maintenance records. If Mr. Robinson or Mr. Hartson had reviewed the paperwork and the manuals, they could have determined that a major repair based upon unapproved data had been made. Hence, it is reasonable to hold Empire accountable for the return to service of this aircraft that had undergone a major repair not based upon approved data.

Air carriers have the duty to perform their services with the highest possible degree of safety in the public interest. 49 U.S.C. § 44702(b)(1)(A); In the Matter of

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(Tr. 75.)

He also testified:

> When we added up all the information and looked at that, if we would have used strictly a patch repair it would have tailed into the center third of that motor mount and upon our reasoning is that if the manufacturer said he didn't want it there then it tailed into there then that would have, you know, created problems that he didn't want us to do and that's why we chose to use the sleeve repair.

(Tr. 75-76.) Certainly, if Empire's employees participated in the decisionmaking process that resulted in the use of the sleeve repair, then Empire should be held responsible for the failure to use approved data for this major repair contrary to 14 C.F.R. § 121.379(b).

[23] As Inspector Richards explained, when Mr. Aslam approved the aircraft for return to service after the repair, he was acting for Empire Airlines. (Tr. 39.)

USAIR, FAA Order No. 92-70 at 4 (December 21, 1992).[24] While under the regulations, an air carrier can arrange with other persons to perform maintenance on its aircraft, the carrier cannot delegate away its primary responsibility for the airworthiness of its aircraft. 14 C.F.R. §§ 121.363(a)(1) and (b),[25] 121.379(a). Allowing an air carrier to delegate its primary responsibility for the safety of its aircraft would not serve the public interest.[26] While there may be certain limited circumstances in which an air carrier might not be held responsible for maintenance and inspections performed by a contractor or vendor, no such reasons exist in this case.

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[24] In that case, the Administrator held that regardless of whether the pushback operator was USAir's agent or an independent contractor, the Part 121 carrier was still responsible for the pushback operator's acts or omissions because the duty of care to protect others or their property is non-delegable. FAA Order No. 92-70 at 4.

[25] Section 121.363 provides in pertinent part:

> (a) Each certificate holder is primarily responsible for the
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> (1) The airworthiness of its aircraft, including airframes, aircraft engines, propellers, appliances and parts thereof; ...
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> (b) A certificate holder may make arrangements with another person for the performance of any maintenance, preventive maintenance, or alterations. However, this does not relieve the certificate holder of the responsibility specified in paragraph (a) of this section.

14 C.F.R. § 121.363(a)(1) and (b).

[26] *See also* FAA Order No. 92-70 at 4, *citing* W. Prosser and W. Keeton, The Law of Torts § 71 (5th ed. 1984) (the non-delegable character of a duty is based on a finding by a court that the duty is so important to the community that it should not be transferred to another.) Although this is not a case in tort, the Administrator may look to tort principles for guidance.

Based upon the foregoing, Empire's appeal is denied, and the law judge's initial decision assessing a $5,000 civil penalty against Empire is affirmed.[27]

Jane Garvey

JANE F. GARVEY, ADMINISTRATOR
Federal Aviation Administration

Issued this 8th day of June, 2000.

[27] 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.)