

UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

In the Matter of:

ALPHIN AIRCRAFT, INC.

FAA Order No. 97-9

Served: February 20, 1997

Docket No. CP93EA0334

DECISION AND ORDER

This case arises from an aircraft repair station's installation of spar reinforcement kits on a charter airline operator's Beechcraft Baron airplane. After a hearing, Administrative Law Judge Ronnie A. Yoder imposed a \$6,000 civil penalty for 12 violations of the Federal Aviation Regulations.¹

The repair station, Alphin Aircraft, Inc. (Alphin Aircraft) has appealed from the law judge's decision.² On appeal, Alphin Aircraft argues, among other things, that it was forced to defend itself without counsel, that airworthiness was "never a

¹ The law judge found six violations of 14 C.F.R. § 43.13(a) and six violations of 14 C.F.R. § 43.13(b).

Section 43.13(a) provides, in relevant part, that "[e]ach person performing maintenance . . . on an aircraft . . . shall use the methods, techniques, and practices prescribed in the current manufacturer's maintenance manual or Instructions for Continued Airworthiness prepared by the manufacturer, or other methods, techniques, and practices acceptable to the Administrator"

Section 43.13(b) provides, in relevant part, that "[e]ach person maintaining [an aircraft]. . . shall do that work in such a manner and use materials of such a quality, that the condition of the aircraft . . . will be at least equal to its original or properly altered condition (with regard to aerodynamic function, structural strength, resistance to vibrations and deterioration, and other qualities affecting airworthiness)."

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

problem,” and that one of Complainant’s witnesses should have been disqualified due to bias. This decision denies the appeal and affirms the law judge’s decision.

The facts of this case are as follows. After the Federal Aviation Administration (FAA) received reports that the Beechcraft Baron frame was susceptible to cracking at the wing attach points, the agency issued an Airworthiness Directive (AD)³ requiring inspection of the Baron wing attach point area for cracks. (Tr. 17.) The purpose of the AD was “[t]o prevent cracks in the forward spar carry-through web structure from propagating to lengths that could compromise the integrity of the wing attachment to the fuselage.” (Complainant’s Exhibit 14 at 1.)

The AD required installation of a kit to reinforce the spar carry-through structure if there was a crack in the bend radius⁴ greater than 2.25 inches or if there were multiple cracks on the same side of the aircraft. (Complainant’s Exhibit 14 at 1-2.) If, however, there was only one crack in the bend radius per side, and any such crack was less than 2.25 inches long, the AD permitted stop drilling of the crack, and reduced the inspection interval from 500 hours to 200 hours. (*Id.*; Complainant’s Exhibit 4-1.)⁵

As for cracks in the web face, in the area of the huckbolt fasteners, the AD prohibited stop drilling because of the danger of damaging the structure behind the

³ AD 90-08-14.

⁴ When Fare Share’s Director of Maintenance, David Genn, was asked, “What is the web radius?” he explained: “The carrythrough is essentially a block to fit the lower end of the fuselage. It’s got a radius to fit the shape of the lower part of the aircraft.” (Tr. 17.)

⁵ Stop drilling, which involves drilling a hole in the end of the crack to alleviate stress on the crack, is a special procedure to keep cracks from propagating. (Tr. 30.)

web face. (Complainant's Exhibit 14 at 2.) For cracks in the web face, the AD required installation of the reinforcement kit if a crack exceeded 1 inch, if there was more than one crack on the same side of the aircraft, or if a crack connected two fastener holes. (*Id.*) For a single crack in the web face less than 1 inch long, the AD required reinspection every 100 hours, but did not require installation of the kit. (*Id.*)

Fare Share, Limited (Fare Share) owns a Beechcraft Baron aircraft that it uses in its charter airline operations. (Tr. 10-11.) When Fare Share's Director of Maintenance, David Genn, performed the inspection required by the AD, he found a crack in the right forward bend radius that was .75 inches long, which he stop drilled, per the AD. (Tr. 29; Complainant's Exhibit 4-1.) Then, when he reinspected the entire area at the 200-hour interval, he found two more cracks in the web face, in the area of the huckbolt fasteners. (Complainant's Exhibit 4-1.) At this point, according to Mr. Genn, the AD required installation of the forward spar reinforcement kit. (*Id.*) Although technically, the AD did not yet require installation of the rear spar reinforcement kit, Fare Share elected to have a repair station install the rear kit at the same time to reduce aircraft "down time." (Tr. 31.)

Because Fare Share did not have the necessary tools, it chose to have an airframe repair shop perform the work, and Mr. Genn contacted Thurman S. Alphin (Tr. 33), the president of Alphin Aircraft (Tr. 3). Mr. Alphin told Mr. Genn that he had installed the kits on at least four to six other aircraft, which led Mr. Genn to have sufficient confidence in Mr. Alphin to have him install the kits. (Tr. 33.)⁶ Fare

⁶ Only one of the two Alphin mechanics who installed the spar reinforcement kits, Gregory Harne, testified at the hearing. Interestingly, Mr. Harne testified that the kits he installed on the Fare Share aircraft were the first such kits he had ever installed. (Tr. 212.) (Continued on next page.)

Share ferried the aircraft to the Alphin Aircraft facility in Hagerstown, Maryland for installation of the front and rear spar reinforcement kits. (Tr. 33-34; Complainant's Exhibit 2-2.) Alphin Aircraft installed the kits in July 1992 and returned the aircraft to service on July 14, 1992. (Complainant's Exhibit 2-2.)

At the next 100-hour inspection of the aircraft, on September 24, 1992, Mr. Genn found problems with the installation of the kits. (Tr. 38.) Mr. Genn did not discover the problems earlier because the work was located under the floor compartment where it was not readily accessible.⁷ According to Mr. Genn, he found the following problems with the installation of the reinforcement kits during the 100-hour inspection:

- air gaps around the flange areas,
- tipped rivets,
- rivets not properly locked,
- rivets of improper grip lengths,
- holes drilled into the radius area,
- rivets installed in the radius area,
- missing rivets, and
- a spliced stringer with short rivets that pulled apart by hand.

(Complainant's Exhibit 4-1.)

After Mr. Genn contacted Alphin Aircraft, the mechanics who installed the kits flew to Fare Share's facility to review the problems with him. (*Id.*) On September 25, 1992, Fare Share ferried the aircraft to Alphin Aircraft for correction

The mechanic who helped Mr. Harne install the kits, Les Kerns (Tr. 214), did not testify for Alphin Aircraft at the hearing, and it is unclear from the record whether Mr. Kerns had any prior experience in installing the kits.

⁷ To inspect the area, the carpeting, floor boards, and front seat must be removed. (Tr. 39, 41.) Mr. Genn's employer, the owner of the aircraft, did not expressly ask Mr. Genn to pull the interior apart to inspect the work; as a result, Mr. Genn did what he normally does, which is to rely on the repair station's certification. (Tr. 39-40.)

of the problems. (*Id.*) There Mr. Genn met with Alphin Aircraft's mechanics and reviewed his drawings of the problems with them, after which the Alphin Aircraft mechanics performed various repairs. When Mr. Alphin returned the aircraft to service on September 30, 1992, he entered in the logbook, "Replaced defective rivets. And reworked stringer reinforcements. Reinforcement complies with drawings for reinforcement kt. per AD-90-8-14." (Complainant's Exhibit 2-6.)

On February 24, 1993, Morgan Brown, an FAA safety inspector, inspected the aircraft as part of a routine investigation of the Alphin Aircraft repair station. (Tr. 138.) Inspector Brown found air gaps and problems with the installation of the rivets, which, he testified, could result in the aircraft breaking up in flight during severe turbulence because the kits are installed in high-stress areas. (Tr. 169.)

Inspector Brown took photographs of the aircraft and photocopied relevant documents (Complainant's Exhibit 1), but apparently he did not immediately report his findings to Alphin Aircraft. He was concerned about a possible appearance of impropriety because Mr. Alphin had sued him regarding a prior investigation.⁸ As a result, Inspector Brown asked his supervisor, Airworthiness Unit Supervisor Michael Hanson, to corroborate his findings in this case. (Tr. 198.) Mr. Hanson

⁸ As the law judge explained in his initial decision:

In 1980, [Inspector] Brown inspected the engines of two aircraft that had been overhauled by Thurman Alphin. Brown concluded that the engines had low cylinder compression and had not been properly overhauled. Tr. 194-195. The engines became the subject of an enforcement action initiated by Complainant against T. Alphin. See Administrator v. Thurman S. Alphin, NTSB Order No. EA-2008 (May 31, 1984), which reversed an administrative law judge's finding that T. Alphin violated the regulations by improperly overhauling two aircraft engines. T. Alphin subsequently sued Inspector Brown over statements he made concerning the engines. Tr. 195.

(Initial Decision at 14, n.16.)

denied Inspector Brown's request to be removed from the investigation, because FAA guidelines suggested removal only if less than 3 years had passed since a lawsuit. (Tr. 204.) Mr. Hanson testified that "well in excess of 3 years" had passed. (*Id.*)

Mr. Hanson flew to Fare Share on March 8, 1993, to look at the aircraft. Later the same day, Mr. Hanson sent Alphin Aircraft a letter of investigation. (Complainant's Exhibit 9.) When asked whether he was able to confirm all of the findings of Mr. Genn and Inspector Brown, Mr. Hanson replied,

. . . I confirmed the majority of them. There may be one or two that I was unable to gain access to. I'm not as flexible as some of these young guys, like Mr. Genn is I did confirm a lot of bad rivets and a couple of air gaps, and the rivets in the radius.

(Tr. 201.)

When Mr. Genn conducted another 100-hour inspection of the aircraft between March 18 and March 22, 1993, he found problems with the repairs Alphin Aircraft performed in September 1992. (Tr. 78, 83-85.) Mr. Genn prepared a second set of drawings detailing the problems with the repairs to the installations. Although the Alphin Aircraft mechanics had reworked portions of the installation, many of the same problems remained: air gaps; tipped, defective, and missing rivets; and rivets installed in the radius. (Tr. 113, 114, 118; Complainant's Exhibits 5-2, 17.)

Later in March 1993, Fare Share ferried the aircraft for a third time to Alphin Aircraft's facility in Hagerstown. At this point, Alphin Aircraft replaced the entire front and rear reinforcement kits. (Tr. 91, 118.)

Subsequently, Complainant initiated the instant civil penalty action, alleging that Alphin Aircraft violated Sections 43.13(a),⁹ 43.13(b),¹⁰ and 145.57(a)¹¹ of the Federal Aviation Regulations when, on three separate occasions (July 14, 1992, September 30, 1992, and March 26, 1993), it performed repairs on Fare Share's Beechcraft Baron. After a hearing, the law judge found six violations of Section 43.13(a) and six violations of Section 43.13(b) relating to the work Alphin Aircraft performed on the aircraft in July 1992 and September 1992.¹²

The law judge declined to find any violations concerning the March 1993 reinstallation because Complainant had not offered any evidence regarding the reinstallation. (Initial Decision at 18.) The law judge also declined to find a violation of Section 145.57(a), which requires each certified domestic repair station to perform maintenance and alteration according to the standards in Part 43. According to the law judge, there was nothing in Section 145.57(a) that defined a

⁹ For the text of this regulation, *see supra* note 1.

¹⁰ *Id.*

¹¹ Section 145.57(a) provides, in relevant part, that "each certified domestic repair station shall perform its maintenance and alteration operations in accordance with the standards in part 43 of this chapter." 14 C.F.R. § 145.57(a).

¹² Specifically, the law judge found that air gaps and improperly installed rivets in three portions of the installation (right rear, left rear, and left front) constituted three violations of Section 43.13(a). After multiplication by two occasions (the first installation of the kits in July 1992, and the repair of the kits in September 1992), the law judge concluded that there were six violations of Section 43.13(a). (Initial Decision at 22-23.)

Likewise, the law judge found that air gaps and tipped rivets in three portions of the installations performed by Alphin Aircraft in July 1992 and September 1992 resulted in six violations of Section 43.13(b).

violation apart from the violations in Part 43, and consequently, Section 145.57(a) could not support an independent violation.¹³

Regarding the penalty, the law judge noted that Complainant had requested \$6,000. Given his finding that Complainant had established 12 violations, the law judge calculated that the requested penalty was \$500 per violation. The law judge stated that the Sanction Guidance Table used by agency attorneys¹⁴ recommended a \$750 to \$1,000 civil penalty for each maintenance violation committed by a repair station.¹⁵ The law judge observed that at \$500 per violation, the requested civil penalty was significantly below the amount provided in the FAA guidelines.

The law judge found, as aggravating factors, that Alphin Aircraft supplanted the applicable FAA standards with its own standards of quality, demonstrating an inappropriate compliance attitude and suggesting an element of deliberateness in its behavior. (Initial Decision at 30.) The law judge noted that the air gaps and improperly installed rivets impaired the structural integrity of the installations and

¹³ Complainant argues in its reply brief that the law judge erred in failing to find a violation of Section 145.57(a). Complainant, however, did not file a cross-appeal from the law judge's decision. As a result, this argument is not properly before the Administrator and will not be considered. Also, finding a violation of Section 145.57(a) would have no effect on the sanction amount, because the law judge assessed, and this decision affirms, the amount requested by Complainant.

¹⁴ The Sanction Guidance Table is found in Appendix 4 to FAA Order No. 2150.3A.

¹⁵ Actually, the sanction per violation listed in the Sanction Guidance Table for a repair station's "failure to perform or properly perform maintenance, repairs, alterations, and required inspections" is a moderate civil penalty to a 30-day suspension of the repair station certificate. (See Appendix 4 to FAA Order No. 2150.3A, p. 13.) The Sanction Guidance Table lists the following as penalties in the normal range for repair stations: a minimum penalty is \$400-\$549, a moderate penalty is \$550-\$749, and a maximum penalty is \$750-\$1,000. (*Id.*, at 3.) In this case, however, the law judge found aggravating circumstances. According to the Sanction Guidance Table, aggravating circumstances may justify a sanction outside of the normal range. (*Id.*, at 2.)

undermined the safety of the aircraft. (Initial Decision at 29; Tr. 62, 120, 169.) He further noted that Alphin Aircraft is a large operation, has been in business for many years, and repairs aircraft used in public and commercial operations. As a result, the work that it performs impacts the safety of a significant number of people. (Initial Decision at 30.) The law judge also pointed out that Alphin Aircraft did not claim or offer any evidence of financial hardship. A \$6,000 penalty was the maximum civil penalty that he could assess, the law judge explained, because that was the amount requested in the complaint.¹⁶ Based on the entire record, including the aggravating factors he had noted, the law judge imposed a \$6,000 civil penalty.

In its appeal brief, Alphin Aircraft asks the Administrator to order a new hearing or to dismiss the case. (Appeal Brief at 1.) According to Alphin Aircraft, "financial conditions at the time" forced it to defend itself without counsel. (*Id.*) Alphin Aircraft's president, Thurman Alphin, represented Alphin Aircraft at the hearing. Mr. Alphin, who is representing Alphin Aircraft again on appeal, argues that he was unable properly to bring out several underlying factors at the hearing without the aid of counsel.

In response, Complainant notes that Alphin Aircraft raises this issue for the first time on appeal. (Reply Brief at 12.) Complainant argues that the proceeding was not criminal, and that "a right to counsel . . . does not attach in an administrative proceeding." (*Id.*)

Although the due process right to assigned counsel may apply to certain types of administrative proceedings (*e.g.*, revocation of probation, revocation of

¹⁶ See 14 C.F.R. § 13.16(h), providing that "the FAA decisionmaker . . . shall not assess a civil penalty in an amount greater than that sought in the complaint."

parole, and deportation),¹⁷ it does not apply here. Alphin Aircraft cites no authority supporting a due process right to assigned counsel in FAA civil penalty proceedings, nor is the Administrator aware of any such authority.

Alphin Aircraft's second argument is that "airworthiness was never a problem" because "there were no cracks in rear bulkhead and the crack in forward bulkhead was 3/4 inch long and stop drilled." (Appeal Brief at 1.) According to Alphin Aircraft, "the airworthiness directive allows 2.25 inches before it is mandatory to install a kit." (*Id.*) However, work must still be done properly, even if it is not required by an AD.¹⁸ Moreover, as for Alphin Aircraft's suggestion that the alleged discrepancies were of no consequence because the installation of the kits constituted an FAA minor change (Appeal Brief at 1), this argument too must fail. As the law judge found, the air gaps and improperly driven rivets affected the structural integrity of the aircraft, creating the possibility of an in-flight break-up. (Initial Decision at 24, 29; Tr. 62, 120, 169.) The law judge properly found that the operative question was whether Alphin Aircraft performed the repairs according to the repair standards established by the FAA. (Initial Decision at 21.)

¹⁷ 3 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 14.17, at 76 (2nd ed. 1980).

¹⁸ Contrary to Alphin Aircraft's claim, the record suggests that the Airworthiness Directive did require installation of the forward kit, if not the rear kit. (Mr. Genn testified that to reduce aircraft down time, Fare Share elected to have the rear kit installed at the same time as the forward kit, even though the rear kit was not yet technically necessary. (Tr. 31.)) The 3/4 inch long crack in the bend radius was not the only crack Mr. Genn found. Mr. Genn also found several cracks in the web face near the huckbolt area. (Complainant's Exhibit 4-1; see also Complainant's Exhibit 14 at 2.) It was at this point, as Mr. Genn indicated in his written statement (Complainant's Exhibit 4-1), that the Airworthiness Directive required installation of the forward reinforcement kit. See the discussion *supra* at p. 2, indicating that if there was more than one crack on the same side of the aircraft in the area of the huckbolt fasteners, then the Airworthiness Directive required installation of the reinforcement kit.

Alphin Aircraft also argues that Mr. Genn's drawings were exaggerated and misleading. According to Alphin Aircraft, Mr. Genn was excessively technical in calling the rivets tipped if the head was not completely flat and parallel with the surface, even though the rivets were acceptable and "100% full strength."¹⁹ (Appeal Brief at 1.) Similarly, Alphin Aircraft argues that it was false and misleading to say that there were gaps in the installation because the so-called gaps were actually overhang. (*Id.*, at 2.)

Alphin Aircraft also points out that Mr. James Alphin, the president of one of Alphin Aircraft's competitors, testified that when he and two of his employees inspected the installation, they could not find any air gaps or tipped rivets. However, the law judge found James Alphin's testimony "inherently less persuasive" than that of other witnesses because he is Thurman Alphin's son. (Initial Decision at 11, n.15.)

In addition, Alphin Aircraft argues that Inspector Brown should not have served as a witness due to his previous involvement with Mr. Thurman Alphin. The law judge found no basis for concluding that Inspector Brown's testimony in this case, which was corroborated by his supervisor, was biased because of his participation in previous cases involving Alphin Aircraft.²⁰ (Initial Decision at 22.)

¹⁹ Mr. Genn's drawings were hardly the sole basis for the law judge's finding of violations. For example, Mr. Harne, one of Alphin Aircraft's own witnesses, admitted that the tipped rivets and air gaps should not have been there.

The law judge did not err in admitting or considering the drawings. Two other mechanics signed the drawings to indicate that they accurately reflected the condition of the installations. The two FAA inspectors corroborated the drawings. Moreover, as the law judge noted, Alphin Aircraft did not dispute the existence of these discrepancies at the time that it received the drawings from Mr. Genn. (Initial Decision at 18.)

²⁰ Inspector Brown's testimony was also consistent with that of Mr. Genn, Fare Share's Director of Maintenance.

The law judge noted that Alphin Aircraft's own witnesses generally corroborated the findings of Inspector Brown and his supervisor, contesting only the significance of their findings. (*Id.*)

Logic, depth, and persuasiveness are the criteria for evaluating expert testimony. In the Matter of Valley Air Services, Inc., FAA Order No. 96-15, at 7 (May 3, 1996). Alphin Aircraft has offered no persuasive reason to disturb the law judge's assessment of the testimony of the expert witnesses in this case. A preponderance of the reliable, probative, and substantial evidence supports the law judge's findings of violations.

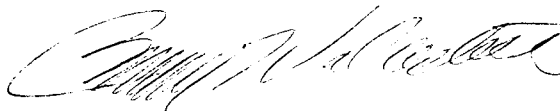
Alphin Aircraft's last argument is that the Double Jeopardy Clause of the United States Constitution²¹ prohibits the law judge's finding of multiple violations in this case. (Appeal Brief at 2.) Alphin Aircraft apparently relies on case law holding that the Double Jeopardy Clause prohibits finding multiple violations for the same act or transaction absent proof of an additional required fact for each offense.²² Assuming, for the sake of argument, that the Double Jeopardy Clause applies in FAA civil penalty proceedings,²³ there was an additional required fact for each violation the law judge found.²⁴

²¹ The Double Jeopardy Clause of the United States Constitution provides: "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. Amend. V.

²² See p. 26 of the law judge's initial decision, citing Blockburger v. United States, 284 U.S. 299, 304 (1932) and subsequent decisions.

²³ Neither the Federal courts nor the Administrator have decided this issue yet. See In the Matter of Midtown Neon Sign Corp., FAA Order No. 96-26 at 5-6, nn.10, 11 (August 13, 1996), discussing why it has not been established that the Double Jeopardy Clause applies in civil penalty cases arising under the Federal hazardous material statute. Much of the discussion in Midtown also applies to civil penalty proceedings like those in the instant case, arising under the statute formerly known as the Federal Aviation Act of 1958. (Congress (Continued on next page.)

Alphin Aircraft's appeal is denied and the law judge's decision assessing a \$6,000 civil penalty is affirmed.²⁵



BARRY L. VALENTINE
Acting Administrator
Federal Aviation Administration

Issued this 19th day of February, 1997.

repealed the Federal Aviation Act and recodified it without substantive change at 49 U.S.C. §§ 40101-46507.)

²⁴ See *supra* note 12, for a discussion of how the law judge determined that there were 12 violations in this case.

²⁵ 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) (1996).