

**UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC**

In the Matter of:

**HORIZON AIR INDUSTRIES,
INC.**

FAA Order No. 96-24

Served: August 13, 1996

Docket No. CP94NM0228

DECISION AND ORDER

Respondent Horizon Air Industries, Inc. (Horizon) has appealed from the initial decision of Administrative Law Judge Ann Z. Cook¹ granting Complainant's motion for decision and assessing a \$10,000 civil penalty against Horizon for operating an unairworthy aircraft in violation of 14 C.F.R. § 121.153(a)(2) (1994).²

On March 1, 1994, Horizon Flight No. 2336, an SA-227AC model aircraft, took off from the airport at Missoula, Montana, on a routine passenger-carrying flight. Three passengers were aboard the plane. Shortly after takeoff, the pilot reported erroneous airspeed and altimeter readings and returned to the airport at Missoula. Upon landing, the pilot and co-pilot discovered that the aircraft's static

¹ Copies of the following documents are attached: (1) the law judge's order granting Complainant's motion for decision, served on August 8, 1995, and (2) the law judge's later order setting the sanction amount, served on September 26, 1995.

² Section 121.153(a)(2) provides as follows:

(a) Except as provided in paragraph (c) of this section, no certificate holder may operate an aircraft unless that aircraft--

...

(2) Is in an airworthy condition and meets the applicable airworthiness requirements of this chapter, including those relating to identification and equipment.

ports were covered with tape, placed there by maintenance personnel who washed the aircraft before the flight.

Complainant filed a complaint alleging that Horizon violated Section 121.153(a)(2) by operating a passenger-carrying aircraft that was not in airworthy condition. In its answer, Horizon admitted all the factual allegations of the complaint, including the allegation that the aircraft was not in airworthy condition during the flight, but denied that it violated Section 121.153(a)(2). As an affirmative defense, Horizon asserted as follows:

. . . the facts admitted in paragraph II, 3, 4, and 5 of this answer were caused solely by the failure of the members of the flight crew of the aircraft to perform duties which they had been properly trained and instructed to perform by respondent and which failure was impossible for respondent to prevent.

(Answer, ¶ 4.)

Once Horizon had admitted all of the factual allegations of the complaint, Complainant filed a motion for decision asking that the law judge find that Horizon had violated Section 121.153(a)(2). Complainant contended that it was well-established that an air carrier is responsible for the actions of its employees acting within the scope of their employment. (Motion for Decision at 2.)

In response to Complainant's motion, Horizon countered that pilots who act in complete and willful "disobeyance" of their employer's instructions are not acting within the scope of their employment. (Answer to Motion for Decision at 2.)

Horizon asserted that:

[w]hether Horizon should be held responsible for the failure of its pilot to perform his assigned duty is an issue of fact that can only be established after a hearing to determine whether Horizon failed in any way in its duty to exert the highest possible degree of care to ensure that the check was performed.

(*Id.*) Horizon also argued that aviation safety was better promoted by penalizing the pilot in such a situation rather than the air carrier. (*Id.*)

The law judge disagreed. On August 4, 1995, the law judge granted Complainant's motion for decision, finding that Horizon was responsible for its pilot's actions. (Order Granting Motion for Summary Judgment at 3.) According to the law judge, if the pilot violated the regulations during the performance of respondent's business, then the pilot's actions were within the scope of employment, and the respondent was responsible for them. Only an employee's intentional and deliberate acts fall outside the scope of employment, the law judge held--not acts, like those in the instant case, that are merely negligent. (*Id.* at 4.) The law judge noted further that "[n]otwithstanding [Horizon's] attempt to blame this incident entirely on the pilots, it appears that Horizon's maintenance procedures *may also have* contributed to the failure to remove the tape from the static ports." (*Id.*; emphasis added.) The law judge did not determine the amount of the civil penalty in the order granting the motion for decision, but instead gave the parties an opportunity to brief the issue and to express their views on the need for a hearing regarding sanction. The parties were given until September 11, 1995, to file their briefs.

Complainant filed a brief concerning sanction, but Horizon did not do so, and on September 26, 1995, the law judge assessed a sanction of \$10,000, reasoning that Horizon had not asserted any justification for mitigating the sanction. Horizon then filed the instant appeal.

In its appeal brief, Horizon argues that the law judge improperly disregarded an issue of fact in granting Complainant's motion for decision. According to

Horizon, there was an issue of fact as to whether the pilot caused the problem by disregarding his training and instructions, and therefore, the law judge should have allowed a hearing.

Horizon's argument lacks merit. There was no issue of fact concerning whether the pilot caused the problem. As the law judge found, the pilot was negligent in failing to conduct an adequate pre-flight inspection of the aircraft. The law judge stated, "The pilot's acknowledged failure to conduct a pre-operation check on the aircraft was . . . an act of negligence" (Initial Decision at 4.) Horizon admitted in its answer that the pilot had failed to perform an assigned duty. Nevertheless, the law judge held, as a matter of law, that Horizon violated Section 121.153(a)(2), because Horizon was responsible for the actions of its pilot that were performed within the scope of his employment.

Horizon also argues that the law judge based her ruling on facts not in the record. Horizon states:

[t]he law judge improperly considered documents attached to the FAA's Preliminary Witness and Exhibit List. Since a hearing was not held, the documents were neither offered nor admitted into evidence. The rules provide that the "exclusive record" in a proceeding such as this shall consist of "all exhibits *admitted into evidence*" 14 C.F.R. § 13.230(a) [emphasis added].

(Appeal Brief at 2-3.) Horizon's argument appears to be based on the following portion of the law judge's decision:

Notwithstanding Respondent's attempt to blame this incident entirely on the pilot, it appears that Horizon's maintenance procedures may also have contributed to the failure to remove the tape from the static ports. In its initial response to the FAA's letter of investigation, Horizon did not attribute the incident to the pilot's failure to conduct a pre-flight inspection. Rather, Horizon's director of quality control stated that "an improper procedure was used in covering the aircraft static ports to prevent washing solution from directly contaminating the system" Complainant's Exhibit F-1. Moreover, the letter states that Horizon reviewed its manual instructions in the wake of the

incident and made revisions to prevent reoccurrence of such incidents. The revisions now "provide clear instructions and cautions for personnel assigned to wash aircraft." Complainant's Exhibit F-1, F-2-5. Specifically, the manual instructs maintenance personnel to use red tape to cover static ports and requires that all tape be removed after washing procedures are completed. Complainant's Exhibit F-4. Thus, this incident might have been avoided if Respondent's service manual initially contained these instructions.

(Order Granting Motion for Decision at 5.) Complainant's counter-argument is that the portion of the law judge's decision set forth above was merely dicta. (Reply Brief at 4.) Complainant asserts that it was not necessary for the law judge to consider which actions by Horizon or its servants caused the unairworthy condition, because Horizon admitted that it operated an unairworthy aircraft.

Complainant further argues that the law judge's consideration of its exhibits was not erroneous. (Reply Brief at 4, n.3.) Complainant argues that Section 13.218(f)(5), "Motion for Decision," permits the administrative law judge to consider a variety of documents, not just "exhibits received into evidence," in ruling on a motion for decision. This rule, according to Complainant, which is more liberal than Section 13.230(a), "Record," enables the judge to go beyond the record to determine whether a genuine issue of material fact has been raised. (*Id.*)

Contrary to Complainant's argument, it was improper for the law judge to consider the unauthenticated exhibits attached to Complainant's Preliminary Witness and Exhibit List in ruling on Complainant's motion for decision.

Section 13.218(f)(5), which governs motions for decision, indicates the documents that may be considered by the law judge in ruling on a party's motion for decision.

It provides as follows:

The administrative law judge shall grant a party's motion for decision if the pleadings, depositions, answers to interrogatories, admissions, matters that the administrative law judge has officially noticed, or evidence introduced during the hearing show that there is no genuine

issue of material fact and that the party making the motion is entitled to a decision as a matter of law.

14 C.F.R. § 13.218(f)(5) (emphasis added). Nowhere does Section 13.218(f)(5) refer to unauthenticated exhibits as a type of document that may be considered by the law judge. Unauthenticated exhibits do not fall within any of the listed categories. Thus, Complainant's contention that the law judge properly considered the unauthenticated exhibits is incorrect.³

The other problem with the law judge's consideration of the unauthenticated exhibits, as Horizon points out in its appeal brief, is that it appears that the law judge considered the subsequent remedial measures referred to in the unauthenticated exhibits as evidence of fault or negligence. Citing the unauthenticated exhibits, the law judge stated that Horizon reviewed its maintenance manual instructions in the wake of the incident and, to prevent recurrence of such incidents, added specific instructions to maintenance personnel to use red tape to cover static ports and to be sure to remove all tape after washing an aircraft. The law judge concluded, "this incident might have been avoided if Respondent's service manual initially contained these instructions." (Order Granting Motion for Decision at 5.)

³ Note that in cases involving motions for summary judgment under Rule 56 of the Federal Rules of Civil Procedure, which are analogous to motions for decision under 14 C.F.R. § 13.218, the courts have held that unauthenticated documents may not be considered. *See, e.g., Burnett v. Stagner Hotel Courts*, 821 F. Supp. 678, 683 (N.D. Ga. 1993) ("in order for a document to be considered in support of or in opposition to a motion for summary judgment, it must be authenticated by and attached to an affidavit that meets the requirements of Rule 56(e) and the affiant must be a person through whom the exhibits could be admitted into evidence"); *Maryland Casualty Co. v. W.R. Grace & Co.*, 794 F. Supp. 1206, 1233 (S.D.N.Y. 1991) (unauthenticated documents showing dates of coverage in insurance case could not form basis for summary judgment); *Gutenkauf v. Mills-Jennings Co.*, 784 F. Supp. 1520, 1528 (D. Mont. 1990) (unauthenticated excerpt from bank file was not proper evidence for consideration by the court in ruling on motion for summary judgment), *aff'd* 953 F.2d 1387 (9th Cir. 1992).

The Rules of Practice governing these civil penalty proceedings, which are found in Subpart G of Title 14 of the Code of Federal Regulations, 14 C.F.R. §§ 13.201-13.235, are silent on the admissibility of subsequent remedial measures. However, the policy behind Federal Rule of Evidence 407, which provides that evidence of subsequent remedial measures is inadmissible to prove culpability, will be followed in civil penalty cases over which the Administrator has jurisdiction. Adopting such a policy is appropriate because it avoids discouraging individuals from taking actions that may improve safety.⁴ Thus, subsequent remedial measures are inadmissible in civil penalty proceedings to prove a violation, though they may be admitted for other purposes (*e.g.*, to show ownership or control, existence of duty, and feasibility of precautionary measures, if controverted, and impeachment).⁵

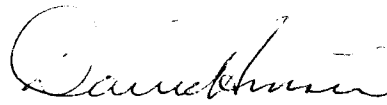
The law judge's error in considering unauthenticated exhibits, particularly as evidence of subsequent remedial measures to prove a violation, does not affect the outcome of this case, however. As Complainant points out, the law judge relied on the unauthenticated exhibits in dicta. Furthermore, even without the unauthenticated exhibits, Complainant was entitled to the granting of its motion for decision, because Horizon's answer, which admitted all the factual allegations in the complaint, showed that there was no genuine issue of fact and that Complainant was entitled to judgment as a matter of law. As the law judge correctly held, Horizon is responsible for the actions and omissions of its employees.⁶ In the Matter of USAir, FAA Order No. 92-70 at 5-6 (December 21, 1992).

⁴ FED. R. EVID. 407 advisory committee's note.

⁵ *Id.*

⁶ This includes both Horizon's pilots, who failed to conduct an adequate pre-flight inspection, as well as Horizon's maintenance personnel, who failed to remove the tape they had affixed

For the foregoing reasons, Horizon's appeal is denied and the law judge's order assessing a \$10,000 civil penalty is affirmed.⁷



DAVID R. HINSON, ADMINISTRATOR
Federal Aviation Administration

Issued this 12th day of August, 1996.

to the static ports after washing the aircraft. (Horizon admitted ¶ II, § 4 of the complaint, which stated that "upon returning to the gate, it was discovered that the aircraft's static ports were covered with tape, placed there prior to the aircraft being washed." Horizon did not claim, as an affirmative defense, that someone other than its maintenance personnel--*e.g.*, a *saboteur*--had affixed the tape to its aircraft.) Note that the National Transportation Safety Board has recognized a duty on the part of maintenance personnel to discover and remove tape affixed to static ports before releasing an aircraft for service. Administrator v. Negron, NTSB Order No. EA-4344, 1995 NTSB LEXIS 31, at *7 (March 29, 1995). Hence, even without the unauthenticated exhibits, the negligence of Horizon's maintenance personnel was established.

⁷ 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 (1995)), this decision shall be considered an order assessing civil penalty. See 14 C.F.R. §§ 13.16(b)(4) and 13.233(j)(2) (1995).