UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

In the Matter of: **AMERICA WEST AIRLINES**	FAA Order No. 96-3 Served: February 13, 1996 Docket Nos. CP93WP0172, CP93WP1073, CP93WP0174

DECISION AND ORDER

On July 13, 1994, Administrative Law Judge Burton S. Kolko issued a written initial decision[1] in these consolidated cases, holding that Respondent America West Airlines (hereinafter referred to as America West) violated 14 C.F.R. §§ 43.13(a), 43.13(b), and 121.153.[2] The law judge affirmed the full $44,750 in civil

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

[2] The pertinent text of 14 C.F.R. § 43.13(a) and (b) is as follows:

> (a) Each 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 its manufacturer, or other methods, techniques, and practices acceptable to the Administrator, except as noted in § 43.16. He shall use the tools, equipment, and test apparatus necessary to assure completion of the work in accordance with accepted industry practices. If special equipment or test apparatus is recommended by the manufacturer involved, he must use that equipment or apparatus or its equivalent acceptable to the Administrator.
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> (b) Each person maintaining . . . shall do that work in such a manner and use materials of such a quality, that the condition of the aircraft . . . worked on will be at least equal to its original or properly altered condition (with regard to aerodynamic function, structural strength, resistance to vibration and deterioration, and other qualities affecting airworthiness).

In pertinent part, 14 C.F.R. § 121.153 provides as follows:

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

penalties sought by Complainant as follows: (1) $19,000 in Docket No. CP93WP0172 ("the fan cowl case"); (2) $15,000 in Docket No. CP93WP0173 ("the Denver flap case") and (3) $10,750 ("the St. Louis flap case"). America West has appealed from the law judge's initial decision. As will be explained further in this decision, after careful consideration of the record and the briefs submitted by the parties, America West's appeal is denied.

The America West General Maintenance Manual (GMM), in effect at the time of the incidents giving rise to this case, provided:

> 1. General
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> Station charts and external patch examples are provided to identify damage location and accepted repairs. *In all cases the Structural Repair Manual must be followed for repair of damage.*

(Complainant's Exhibit 1)(emphasis added.) The structural repair manuals (SRM) are maintenance manuals developed by the aircraft manufacturers. In these three cases, America West failed to comply with the pertinent instructions as set forth in the applicable Boeing SRMs.

As FAA Airworthiness Inspector William Sebring testified at the hearing, the Federal Aviation Regulations do not limit carriers to using the SRM issued by the manufacturer. (*See* 14 C.F.R. 43.13(a) and 43.13(c)).[3] America West chose, when

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

[3] Section 43.13(a) requires that persons performing aircraft maintenance use the methods, techniques and practices set forth in the current manufacturer's maintenance manual (such as the Boeing SRMs) "*or other methods, techniques, and practices acceptable to the Administrator . . . .*" 14 C.F.R. § 43.13(a)(emphasis added.) Thus, Section 43.13(a) does not require that the manufacturer's maintenance manual be followed in all cases.

What other methods, techniques, and practices are acceptable to the Administrator? Section 43.13(c) provides in pertinent part:

> Special provisions for holders of air carrier operating certificates and operating certificates issued under the provisions of Part 121, . . .

drafting its GMM, to restrict its maintenance personnel to using the manufacturer's SRMs for all structural repairs. In this sense, America West's GMM at the time of these incidents was more restrictive than the general maintenance manuals of other carriers with whom Mr. Sebring had worked. (1 Tr. 25.)

America West submits its GMM, and each of its revisions, to the FAA for acceptance.[4] In contrast, the Boeing SRM is an FAA-approved manual. (1 Tr. 62.)

> *Unless otherwise notified by the administrator*, the methods, techniques, and practices contained in the maintenance manual or the maintenance part of the manual of the holder of an air carrier operating certificate . . . constitute acceptable means of of compliance with this section.

14 C.F.R. § 43.13(c)(Emphasis added.)

[4] As explained by FAA Airworthiness Inspector William Sebring, America West submits the revisions to its GMM to his office (FAA Certificate Management Office in Phoenix, Arizona), where the manual revision is reviewed. If the FAA office finds no problem with the revision, then the revision is tacitly accepted and the office sends no response to the carrier. However, if the FAA office has concerns about the revision, then the FAA will contact the airline and try to work out an acceptable solution. (1 Tr. 63.)

The process of FAA approval and acceptance of manuals is described in the Air Transportation Operations Inspector's Handbook, FAA Order No. 8400.10 (June 30, 1991). As defined in FAA Order No. 8400.10, "approved" means the following:

> "Approved:" When "approved" is used to describe a document, manual, or checklist, it means that a regulation requires FAA approval and that the FAA has evaluated and specifically approved the document, manual or checklist.

(Page 3-2057.)

The term "accepted" as defined in that order means:

> "Accepted:" "Accepted" is used to describe a document, manual, or checklist which does not have, or is not required to have, FAA approval. Only a portion of an operator's manuals are required to have FAA approval. The remaining portions are "accepted" by the FAA. Operators are required to submit the entire general manual to the FAA for review. If the FAA concludes that an accepted section of the general manual is not in compliance, the FAA must formally notify the operator of the deficiency. Upon notification, the operator must take action to resolve the deficiency.

(Page 3-2057.)

As explained in that Order: "Approval is granted by letter, a stamp of approval, the issuance of operations specifications, or some other official means of conveying approval." (Page 1-142.) In contrast, "[a]cceptance of an operator's proposal may be accomplished by various means, including a letter, verbal acceptance or by taking no action which indicates there is no FAA objection to the proposal." *(Id.)*

America West and Complainant entered into the following stipulations:

> 1. As to each of the aircraft involved in the three cases at bar, the subject temporary repairs did not render the aircraft in a condition unsafe for operation at the time of the incidents.
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> 2. As to each of the subject temporary repairs, said repairs were not "major repairs" as defined in Part 1 and Part 43 of the Federal Aviation Regulations.[5]

(Joint Exhibit 1.) In addition, the parties agreed that Complainant's allegations of violations of Section 121.153(a)(2) are based on claims that the repairs at issue rendered the aircraft unairworthy because the aircraft no longer conformed to their type designs or supplemental type designs. (*Id.*)

A description of each of the incidents giving rise to these cases, and a summary of the pertinent testimony related to each incident follows.

1. Docket No. CP93WP0172 ("The Fan Cowl Case")

On June 17, 1992, America West performed maintenance on civil aircraft N158AW, a Boeing 737-300, in St. Louis, Missouri, by applying aluminum speed tape to damage on the fan cowl of the right engine nacelle. The fan cowl had been damaged when the aircraft hit a belt loader while parking. The damaged area was 3.5 inches by 3 inches. The application of speed tape was accomplished in

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[5] (*See also* 1 Tr. 53-54.) A "major repair" is defined in 14 C.F.R. § 1.1, as a repair:

> (1) That, if improperly done, might appreciably affect weight, balance, structural strength, performance, powerplant operation, flight characteristics, or other qualities affecting airworthiness; or
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> (2) That is not done according to accepted practices or cannot be done by elementary operations.

A "minor repair" is defined in 14 C.F.R. § 1.1 as a "repair other than a major repair." As Inspector Sebring testified, a major repair requires FAA-*approved* data, whereas a minor repair only requires that the data is *acceptable* to the Administrator. (1 Tr. 54.) Inspector Sebring testified that there "could be any number of sources" of data acceptable to the Administrator. (1 Tr. 55.)

accordance with an Engineering Repair, which is a document prepared by America West engineers, authorizing a particular repair and explaining to the maintenance personnel how to accomplish that repair. Subsequently, the aircraft was returned to service and operated as Flight 1589 from St. Louis, Missouri, to Phoenix, Arizona. The next day, the fan cowl was removed and replaced. This damage and the application of speed tape came to FAA Airworthiness Inspector William Sebring's attention while he was performing routine surveillance reviewing America West's aircraft records. (1 Tr. 45.)

The Boeing 737-300 SRM sets forth allowable damage limits. According to the SRM, "hole and puncture damage is permitted if it is 1.0 inch or less in length/diameter." (Complainant's Exhibit 9 at 2 (Note G).) Since the damage in this case exceeded that limit, an interim repair was necessary. The SRM provided directions for a flush plug patch as an appropriate interim repair. (1 Tr. 50-51; Complainant's Exhibit 9 at 6 (Note 3N).) The SRM does not provide for the use of speed tape to repair fan cowl damage that is greater than 1 inch in diameter. (1 Tr. 48.)[6] For this reason, Inspector Sebring concluded that the Engineering Repair was inconsistent with the applicable SRM. (1 Tr. 48.)

Inspector Sebring testified that in his opinion when the aircraft was operated after the speed tape was applied, the aircraft did not meet all of its airworthiness requirements because the aircraft was not in its original or properly altered condition. (1 Tr. 52-53.)[7] He testified that the repair was not accomplished using

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[6] According to the Boeing SRM, when the damage is one inch or less in length/diameter, the damage can be protected with aluminum foil tape. (Complainant's Exhibit 9 at 1-2.) In this case, the damage exceeded those dimensions.

[7] One of Complainant's rebuttal witnesses, Thomas Rodriguez, testified that the puncture of the outer skin of the fan cowl had a minor effect on the load-bearing characteristics, but no

methods acceptable to the Administrator. (1 Tr. 53.) Inspector Sebring questioned whether the application of speed tape constituted a repair, because speed tape only seals damage and does not restore strength. (1 Tr. 53 and 60.)

The Engineering Repair used in this case was prepared by Paul Jackson, who was America West's Chief Structures Engineer from June 1991 to July 1992. Mr. Jackson testified that when he prepared the Engineering Repair, he consulted the Boeing SRM and Boeing drawings on file at America West, and examined an actual structure. He concluded that the damage was minor, that a minor repair could be incorporated in an Engineering Repair and that the damage could be protected until the aircraft returned to Phoenix for a permanent repair. (1 Tr. 152.) He testified that because this Engineeering Repair called for a minor repair, it did not require FAA approval or acceptance prior to implementation, but only had to be consistent with acceptable practices under 14 C.F.R. § 43.13. (1 Tr. 153.) In his opinion, the use of speed tape in this instance was consistent with industry practice and Section 43.13. (1 Tr. 153.) He claimed that the aircraft was airworthy when it was returned to service because "by definition, the classification of a minor repair means that it has no effect on airworthiness." (1 Tr. 154.)

2. Docket No. CP93WP0173 ("The Denver Flap Case")

On May 20, 1992, during a ramp inspection at Stapleton International Airport in Denver, Colorado, Ron Norton, an FAA inspector, noticed delamination[8]

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safety of flight implications. Likewise, he testified, the application of the speed tape had no adverse effect upon the remaining load-bearing characteristics of the structure. (2 Tr. 113-114.)

[8] Inspector Sebring explained that the airplane flap in question has upper and lower skins covering a honeycomb composite. The skins are bonded to the composite. As the skins progress toward the trailing edge, they are bonded together with no composite between them. When there is trailing edge delamination, there is a separation of the skins. (1 Tr. 29.)

at the No. 3 trailing edge aft flap on civil aircraft N183AW, a Boeing 737-200. The inspector notified America West personnel about this delamination. America West contacted the Continental (CAL) maintenance personnel who provided maintenance services for America West aircraft in Denver. When Inspector Norton later returned to see how the repair was progressing, he found that the aircraft had departed. Because Inspector Norton thought that the repair should have taken longer to complete, he alerted the FAA's Phoenix, Arizona, Certificate Management Office to the possibility that the aircraft had departed without proper repairs. (1 Tr. 26-27.)

The delamination was described in the maintenance log, as "2 inches diameter delamination on trailing edge of the right inboard trailing edge flap." (Complainant's Exhibit 3.) The maintenance technician was able to insert a credit card between the skins, at a maximum penetration of 3/8 inch. (Complainant's Exhibit 4.)

As temporary corrective action, Continental maintenance had applied speed tape over the area. No Engineering Repair was prepared with regard to this damage and temporary repair. (2 Tr. 18.) After the speed tape was applied, the aircraft was returned to service.

On May 23, 1992, the flap was removed and replaced. (Complainant's Exhibit 3.) It was noted in the log that when the maintenance personnel removed the flap, they found water under the skin. (*Id.*)[9]

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[9] Based upon that entry, Inspector Sebring opined that the speed tape had not served as a sealant. (1 Tr. 70-71.)

The SRM for the Boeing 737-100, 200 aircraft series provided that no trailing edge delamination is allowed without repair. (Complainant's Exhibit 2.) The SRM provided that as an interim measure in instances of this type of delamination, a sealant should be injected into the delaminated area, and then the skins should be clamped or riveted together.[10] (1 Tr. 29-32.)

America West maintained that the interim repair procedures set forth in the SRM for this type of damage were *"overlooked"* because that manual was ambiguous.[11] America West personnel claimed that they had viewed the delamination as surface (rather than trailing edge) delamination contained within a 3-inch diameter circle, and according to the SRM then in effect, no repair is necessary for surface delamination in a critical area that is contained within a 3-inch diameter circle. (Complainant's Exhibit 2.) Yancy Black, an America West maintenance controller, instructed the Continental Airlines maintenance technician

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[10] It is noted in the SRM that the above method does not constitute a permanent repair and that the corroded skin and core must be removed at the earliest opportunity. (Complainant's Exhibit 2.)

[11] *See* the letter written by Oscar Culp, Director, Quality Assurance at America West. (Complainant's Exhibit 5, page 2.)

Inspector Sebring explained the distinction between surface and trailing edge delamination as follows:

> [T]he trailing edge . . . is where the top and bottom pieces of metal come together. It's where . . . they're sealed and terminated. If you have delamination in that area it opens and leaves a void. Surface delamination does not touch an edge. It is . . . limited to the surface of the skin, either an upper or a lower surface, . . . so no void and no method that . . . moisture contamination or other contamination could enter the surface.

(1 Tr. 40.) Thomas Rodriguez, an aerospace engineer in the FAA Seattle Aircraft Certification Office, testified that there is a clear difference between a surface and a trailing edge, (2 Tr. 90) and that the distinction is important, because the trailing edge is a more critical part of the structure. He explained that there are forces on a trailing edge that could cause faster spreading of delamination than would occur in cases of surface delamination. (2 Tr. 90-91.)

simply to place aluminum speed tape over the delaminated area for protection. (Complainant's Exhibit 4 at 2.)[12]

Inspector Sebring testified that in his opinion N183AW did not meet its airworthiness requirements when it was operated out of Denver because the aircraft was no longer in its original or properly altered condition due to the damage and the application of speed tape. (1 Tr. 44, 69, 74.) He added that because America West's GMM at the time required that its mechanics follow the SRM for structural repairs, America West was limited to the procedure set forth in the SRM to repair this aircraft. (1 Tr. 45.)

Paul Jackson, America West's Chief Structures Engineer, testified that in his opinion, N183AW was airworthy when it departed from Denver. He based his opinion on his belief that the application of speed tape for this minor damage was consistent with accepted industry practice. (1 Tr. 160, 183, 185.)

Don Lee Jensen, who was employed by Boeing at the time of the hearing, but who had been a structural and airframe engineer for America West from July 1990 to July 1992, testified as an expert for America West. Mr. Jensen testified that the application of speed tape to flaps is included in the current SRM for Boeing 737s. (2 Tr. 11.) On cross-examination, he narrowed his testimony, explaining that the application of speed tape to repair flaps is in the current 737-*300* SRM, but not in the current 737-*200* SRM. (1 Tr. 19.) Also, he recalled, the current 737-300 SRM

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[12] Mr. Black noted in a memorandum describing this incident that Continental maintenance had "advised that if it was their a/c [aircraft] they would go ahead and make the interim repair by injecting resin and placing rivets in [the] panel to provide clamping action and obtain their Engineer's approval. . . . CAL MX suggested this type of repair for aircraft N183AW." (Complainant's Exhibit 4 at 2.) However, because Mr. Black regarded this as surface delamination, he decided that the injection of resin followed by clamping was not necessary. (*Id.*)

limits the use of speed tape to delamination that is 1-inch by 1-inch in size, and the damage to the trailing edge flap of N183AW, a 737-200, exceeded those dimensions. (2 Tr. 22, 25.)

3. Docket No. CP93WP0174 ("St. Louis Flap Case)

On June 8, 1992, America West applied speed tape to a delaminated area on on the right inboard trailing edge flap of civil aircraft N509DC, a Boeing 737-300. The delamination was about 3.5 inches long along the trailing edge and one-eighth inch deep. (1 Tr. 155.) Paul Jackson, America West's Chief Structures Engineer, prepared an Engineering Repair directing the maintenance personnel to seal the trailing edge with aluminum tape and to make a permanent repair at the next RON (remain over night.) (Complainant's Exhibit 10 at 1 and 3.) After speed tape was applied to the trailing edge, as per the Engineering Repair, the aircraft was released and flown as Flight 1589 from St. Louis, Missouri, to Phoenix, Arizona. On June 9, 1992, a permanent flap repair was made. (Complainant's Exhibit 10 at 2.)

The Boeing 737-300 SRM Allowable Damage for Honeycomb Panels chart provided that no trailing edge delamination was permitted. (Complainant's Exhibit 11 at 1.) The SRM instructed that trailing edge delamination should be cleaned up (cut out). (1 Tr. 85; Complainant's Exhibit 11 at 1-2.)

Mr. Jackson testified that in determining to apply speed tape to the delamination, he consulted SRMs for the Boeing 737-200, 737-300 and 757, as well as Boeing drawings of the flap. (1 Tr. 156.) He asserted that the Boeing 757 SRM approves the use of speed tape in cases of trailing edge delamination. (1 Tr. 173.)[13]

[13] *See also* testimony of William Huey, (1 Tr. 116-117), and Respondent's Exhibit 13 (excerpt from the Boeing 757-200 SRM.)

He claimed that he chose to apply speed tape as an interim measure, rather than sealing the damage site by injecting 595 sealant, because it would be easier to remove the tape rather than sealant when permanently repairing the flap. (1 Tr. 156, 173.) However, on cross-examination, Mr. Jackson acknowledged that the Boeing SRM does not call for the injection of a sealant, but instead provides that no delamination is permitted, and that the delaminated structure must be cut away. (1 Tr. 175.) Mr. Jackson testified, nevertheless, that the application of speed tape for this minor damage was an accepted industry practice. (1 Tr. 156.)

FAA Airworthiness Inspector Kenneth Kensche testified that in his opinion, the aircraft was unairworthy when it was operated from St. Louis after the speed tape was applied. (1 Tr. 89-90.) He testified that the aircraft was not built with that delamination, and the proper repairs to eliminate the delamination were not made. Consequently, he stated, the aircraft was unairworthy because it was not in its original or properly altered condition, and it was not consistent with its type design. (*Id.*) He testified that in his opinion America West was required to follow the minor repair in the SRM because America West's GMM stated that the SRM must be followed when making all structural repairs.[14] (1 Tr. 87, 92.)

Inspector Kensche testified that because the Boeing 737 and 757 flaps are made from different composite materials, a carrier should not use a flap repair method set forth in a Boeing 757 SRM to repair a Boeing 737 flap. (1 Tr. 104.) Thomas Rodriguez, an FAA aerospace engineer, testified that he too did not

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[14] Inspector Kensche explained that there are ways of handling minor repairs other than the minor repair methods described in the SRMs. Other airlines have procedures "in their book called standard practices." However, he testified, America West was limited, in his opinion, to following the SRM because of the instruction in America West's GMM that the SRM was to be used for all structural repairs. (1 Tr. 92.)

recommend using a Boeing 757 manual to determine appropriate repairs for a Boeing 737 flap because of the structural differences of the flaps on the two aircraft. (2 Tr. 87.)[15]

Additional Evidence

As Inspector Sebring explained, major repairs require FAA-approved data, while minor repairs require only data that is acceptable to the Administrator, and there is no one particular source of acceptable data. (1 Tr. 54, 55.) Inspector Kensche testified that a minor repair scheme not included in the SRM must be accepted by the FAA before a carrier can implement it. (1 Tr. 95-96.) He explained that he would expect to see data to review because he cannot accept data without looking at it first. (1 Tr. 95.)

America West took the position that despite the language of its GMM, it was not required to follow the applicable procedures set forth in the FAA-approved Boeing SRMs. Paul Jackson testified that it was not his understanding that he was required to adhere strictly to the SRM regarding minor damage repairs. Mr. Jackson testified that:

> My understanding at the time was that . . . in general, the general maintenance manual prescribes the practices of the A&P mechanics and they should follow the structural repair manual. However we also had provisions at America West Airlines to issue engineering repairs that could expound on structural repair manual procedures or design a specific repair for particular damage on the aircraft . . . .

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[15] For example, the upper skin of a Boeing 757 consists of a number of graphite panels, while the Boeing 737 upper skin is one sheet. (2 Tr. 86-87.) As a result, "in the case of delamination, . . . it would propagate to the edge of that particular panel [on a 757]; whereas, with regard to the 737, . . . it could grow all the way to the edges of the surface." (2 Tr. 87.)

(1 Tr. 163; *see also* 1 Tr. 154.) Mr. Jackson testified, nonetheless, that any type of work on an aircraft must be done in accordance with accepted procedures under Section 43.13. (1 Tr. 157, 171-172.)

Raymond Borowski, Vice President, Technical Services for Chromolloy Compressor Technologies, testified as an expert witness for America West. Mr. Borowski testified that the specification of allowable dimensions for delaminations or holes in the Boeing SRMs were not limitations, but simply repair data subject to the usual amendment process. (2 Tr. 40.) He testified that a limitation is only that information included in a clearly defined separate limitations section, such as the limitations section in a flight manual, a data sheet, or a maintenance manual. (2 Tr. 39.) He emphasized that Boeing's responsibility for the airworthiness of its aircraft ceases once the aircraft leave the factory, and that the owner/operator then becomes responsible for continuing airworthiness. (2 Tr. 41-42.) He testified, "Anything that Boeing publishes in the way of repair manuals, other information, service bulletins, et cetera, are properly considered advice, recommendations, good things to know, good things to follow . . . ." (2 Tr. 42.)

Mr. Borowski testified that, in his opinion, when speed tape was applied to these three aircraft, the aircraft were airworthy under 14 C.F.R. § 121.153, and America West was in compliance with 14 C.F.R. § 43.13. (2 Tr. 43-44.) He explained that "[i]f America West declares it to be a minor deviation from previously issued, previously approved, previously accepted advice like the repair manual, then America West may proceed immediately with that minor repair . . . . That authority comes with the operating certificate." (2 Tr. 44.) Mr. Borowski testified that

regardless of the statement in America West's GMM that all structural repairs must be made in accordance with the SRM, America West could always use any data approved by the Administrator. (2 Tr. 45, 48.)[16]

Mr. Borowski testified that a minor repair requires no approval and no documentation, such as drawings, test reports, prototypes or test data. (2 Tr. 48, 50.) For that matter, he stated, "if an applicant submits to the District Office the data relating to a minor repair, . . . the inspector is to send it back to the applicant, explaining that such action is not required." (2 Tr. 48-49.) He explained that by virtue of holding an operating certificate, America West can determine whether a repair is major or minor, and if the repair is minor, then America West does not have to develop formal substantiating data or documentation regarding that repair. (2 Tr. 60-61.) Consequently, according to Mr. Borowski, America West was not required to seek FAA approval before returning these aircraft to service. (2 Tr. 49.)

Finally, according to Mr. Borowski, the application of the speed tape returned the aircraft to their *original* condition. (2 Tr. 66-67.) Consequently, in his opinion, the aircraft were airworthy.

Shortly after these incidents, America West sent a series of telexes to Boeing requesting *general* guidance pertaining to the use of speed tape. In none of these telexes did America West specifically describe its use of speed tape in these cases. In reply to one telex sent to Boeing by America West, Boeing stated that it does not recommend the use of speed tape as a temporary structural repair for trailing edge flap delamination in Boeing 737-300 aircraft. (Complainant's Exhibit 13, page 3.)

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[16] On cross-examination, he testified that use of other data *acceptable* to the Administrator is always an option. (2 Tr. 64.)

Boeing stated further in this telex, dated June 22, 1992: "Although we do not recommend speed tape for trailing edge flap delamination, speed tape can be used as a temporary repair for certain types of damage noted in the SRM. However, each type of damage should be reviewed on a case by case basis." (Complainant's Exhibit 13, page 3.)

America West introduced a portion of its Policies and Procedures Manual pertaining to major and minor structural repairs. The Major/Minor Structural Repair Logic Diagram is a flow chart illustrating what type of repair to make depending upon whether a major or minor structural repair is involved. According to this diagram, if there is structural damage to a non-primary structure, then it must be determined whether the repair can be accomplished under standard SRM guidelines and/or replacement. If so, the diagram indicates the repair is a minor one and should be accomplished per the SRM, and the diagram references note 7. Further, according to the diagram, if the repair cannot be accomplished using SRM guidelines and/or replacement, and there is no FAA-approved specific repair, then it should be asked whether the repair affects "systems, structural performance, weight and balance, aerodynamics or aircraft performance." If the repair will not affect any of these, then according to the diagram, a minor repair should be accomplished per data acceptable to the Administrator. Again there is a reference to note 7. It is stated in note 7 that "[r]epair may be accomplished based on the non-criticality of the component[17] using accepted procedures, i.e., vendor-supplied

[17] FAA's aerospace engineer, Thomas Rodriguez, testified that the flaps are non-critical portions of the wing on Boeing 737s. (2 Tr. 117.)

information, Advisory circular 43.13, and/or industry standard practices." (Respondent's Exhibit 16.)

Oscar Culp, America West's Senior Director of Quality Assurance and Engineering at the time of the hearing, testified that under Section 43.13(c), the Administrator allows the airlines to develop data and that when the airline puts the procedure in its manual, the procedure becomes acceptable. (2 Tr. 76-77.)

Thomas Rodriguez, an FAA aerospace engineer, testified that in his opinion the aircraft were not restored to their original or properly altered condition after the application of speed tape. He explained that the repairs for delamination were set forth in Boeing documents, but those repair methods were not followed. Consequently, the methods used were not acceptable. (2 Tr. 89.) He testified that the repairs and interim actions in the Boeing SRMs are designed to return the aircraft to their original or properly altered conditions. (2 Tr. 93.) He also disagreed with Mr. Borowski's testimony regarding limitations. He explained that there are limits with regard to when a repair or an interim action provided in an SRM can be used because those actions are designed to ensure that the structure remains capable of carrying its required loads. (2 Tr. 92.)

Mr. Rodriguez also testified that because minor repairs were involved in these cases, the repairs had to be made in a manner acceptable to the Administrator. (2 Tr. 104, 109.) When asked whether the use of speed tape on Boeing 737 damage such as was involved in these cases is industry practice, Mr. Rodriguez replied "Not that I've seen approved or accepted." (2 Tr. 109.) With regard to note 7 to America West's Policies and Procedures Manual, Mr. Rodriguez testified "[t]hat America West maintenance can use industry standard practices in

performing minor repairs . . . if the industry standard practice has been found acceptable to the Administrator." (2 Tr. 117-118.) He explained, in essence, that a repair scheme (both major and minor) is "acceptable to the Administrator" if the repair scheme has been submitted to, and reviewed and accepted by the Administrator or his delegate. (2 Tr. 117-118, 120.) He stated that it is not implicit that minor damage repair done by the owner is acceptable to the Administrator. (2 Tr. 118.)

Lonnie Giles, the supervisor of the airworthiness unit of the FAA Phoenix Certificate Management Office, testified on rebuttal for Complainant. (2 Tr. 125.) Mr. Giles testified that minor repairs have to be done in accordance with data acceptable to the Administrator under Section 43.13(a). (2 Tr. 129-130.) Section 43.13(a) requires that all maintenance be performed in accordance with methods, techniques and practices acceptable to the Administrator, and "maintenance" includes minor repairs. (2 Tr. 130.)

Mr. Giles acknowledged that America West did not have to submit data to the FAA prior to making the flights concerned, and was not required to obtain approval from the FAA prior to the flights. (2 Tr. 130.) He testified that this case arose when the FAA inspectors subsequently asked to see the data that had been used to make these repairs to ensure that that data was acceptable to the Administrator. (2 Tr. 131.) According to Mr. Giles, it is the FAA's "responsibility to conduct surveillance, and to ask questions when we see something that's outside of what has been the norm." (2 Tr. 138.)

Mr. Giles interpreted the GMM excerpt at issue in this case (Complainant's Exhibit 1) as follows: ". . . if the Structural Repair Manual gives you an option, then

you must take it." (2 Tr. 136-137.) He testified that if the SRM provides a specific repair, America West was not free to substitute industry standard practices for that repair. (2 Tr. 147.)

He acknowledged that in general "[t]here are many, many [minor] repairs done to aircraft every day that are not contained in the Structural Repair Manual." (2 Tr. 137.) Minor repairs can be done "in accordance with other kinds of documentation, maintenance manuals, the manufacturer's published manuals, plus manuals that are published by the carrier." (2 Tr. 137.) He agreed that there are occasions when industry standard practices can be used, but the standard practice must be applicable to the particular damage. (2 Tr. 137-138.)

On cross-examination, Mr. Giles testified that America West maintenance personnel could satisfy themselves that they are using minor repair schemes acceptable to the Administrator by using the maintenance manuals provided to them. He testified that a minor repair scheme does not become acceptable to the Administrator until "the Administrator reviews it and accepts it." (2 Tr. 145.) He explained, on redirect, that an Engineering Repair is not, by definition, acceptable to the Administrator, although an Engineering Repair may contain data that is acceptable to the Administrator depending on the FAA's review and acceptance of that data. (2 Tr. 152.)

The Law Judge's Initial Decision

The law judge interpreted the GMM language to mean that in all cases the SRM must be followed for repair of structural damage, as follows: "'[i]n all cases' means just what it says; no deviation from the repair methods provided in the SRM

was permitted." (Initial Decision at 5.) The law judge held that this requirement applied to both major and minor repairs. (*Id.*)

The law judge held that note 7 of America West's Policies and Procedures Manual "does not warrant a different result." (Initial Decision at 6.) He explained that note 7 merely sets forth three sources of accepted procedures, including vendor-supplied information and industry standard practices. He held further that America West's SRM "must override any arguably conflicting terms in its Policies and Procedures Manual (2 Tr. 135-36.)" (Initial Decision at 6.)

The law judge wrote:

> Minor repairs require no prior approval or acceptance by the FAA. As such, the agency may never get to inspect the repair or ask for underlying data. That is in fact often the case. Nonetheless, the agency asserts, and I agree, that it has a responsibility to ensure that repairs of whatever nature conform to requirements and, concomitantly, that it may invoke its powers of enforcement against those responsible for repairs that fall short. (2 Tr. 131.)

(Initial Decision at 6.)

The law judge rejected America West's argument that a minor repair by definition has no effect on airworthiness. He explained that while a minor repair may have no safety implications, it may make the aircraft unairworthy if, as a result of the repair the aircraft no longer conforms to its type design. He held that in these cases, because the repairs deviated from the SRM instructions, the aircraft no longer conformed to their type designs. Thus, he held, America West operated the aircraft in an unairworthy condition, contrary to 14 C.F.R. § 121.153. (Initial Decision at 7.)

The law judge also rejected America West's argument that Boeing approved by telex the application of speed tape to trailing edge delaminations subsequent to these incidents. (Initial Decision at 9.) The law judge wrote:

> Referencing 737-300 aircraft -- not the 200 series implicated in this case -- Boeing stated that it did not generally recommend speed tape "as a temporary structural repair" for trailing edge flap delaminations, although speed tape "can be used as a temporary repair for certain types of damage *noted in the SRM* . . . Each type of damage should be reviewed on a case by case basis" (emphasis supplied)(Exh. C-13; *see also* 1 Tr. 142-43). The manufacturer specifically referenced the SRM in its consideration of the proper application of speed tape for temporary repairs, whose terms, of course, permitted no such method of repair. Moreover, a telex specifically limited the application of speed tape to edge delaminations no longer than two inches long and 1.5 inches deep (Exh. R-10) -- an area admittedly exceeded in this case (1 Tr. 136). Clearly, Boeing did not approve of Respondent's action in this proceeding. (1 Tr. 137).

(Initial Decision at 9-10.)

Regarding the Denver flap case, the law judge held that the SRM was not ambiguous with respect to the distinction between repairs to surfaces and trailing edges. Regarding the St. Louis flap case, he held that the Boeing 757-200 SRM provision permitting the use of speed tape as temporary protection for delaminated flap trailing edges was irrelevant because of the differences in the wing construction in the Boeing 737 and 757. Hence, he held, it was inappropriate for America West to apply a method found in the Boeing 757-200 SRM to a Boeing 737. (Initial Decision at 10.)

The law judge also found Don Lee Jensen's testimony that Boeing was amending its 737-200 SRM to permit the application of speed tape to trailing edge delamination to be of "doubtful probative value." (Initial Decision at 10-11.) He also held that any SRM amendment after these incidents was irrelevant.

The law judge affirmed the penalties sought by Complainant, finding that they were appropriate "to the nature of the violations and the aims of the Act and regulations." (Initial Decision at 11.)

Discussion

After a review of the record and the arguments presented by both parties, the law judge's initial decision is affirmed, and America West's appeal is denied.

I. Violations of Section 43.13(a)

On appeal, America West presents three arguments contesting the law judge's finding that America West violated Section 43.13(a) by not using methods, techniques and practices acceptable to the Administrator.[18] These arguments may be summarized as follows:

1. The law judge ignored the testimony of Raymond Borowski;

2. The law judge was in error when he concluded that the America West GMM applied to these incidents; and

3. It was error for the law judge to find that the America West GMM and the Boeing SRM override conflicting terms in America West's Policies and Procedures Manual.

Each of these arguments is flawed and is, therefore, rejected.

Before addressing these arguments individually, an examination of Section 43.13 is in order because throughout the testimony, the arguments presented by counsel, and the law judge's decision, insufficient attention has been paid to the actual language and requirements of that regulation as it applies to the subject repairs.

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[18] America West does not appear to be arguing on appeal that the Administrator failed to prove by the preponderance of the evidence that America West violated Section 43.13(b) which requires that each person performing maintenance "do that work in such a manner that the condition of the aircraft, airframe, aircraft engine, propeller, or applicance worked on will be at least equal *to* its original or properly altered condition (with regard to aerodynamic function, structural strength, resistance to vibration and deterioration, and other qualitites affecting airworthiness.)" 14 C.F.R. § 43.13(b). Consequently, whether a preponderance of the evidence supports the law judge's finding that America West violated Section 43.13(b) in these incidents is not addressed in this decision.

Section 43.13(a) provides in pertinent part:

> Each person performing maintenance . . . on an aircraft . . . shall use the methods, techniques, and practices prescribed in the current manufacturer's maintenance manual . . ., or other methods, techniques, and practices acceptable to the Administrator, ... He shall use the tools, equipment, and test apparatus necessary to assure completion of the work in accordance with accepted industry practices.

14 C.F.R. § 43.13(a). Hence, under Section 43.13(a), maintenance must be performed using the techniques, methods and practices in the current manufacturer's manual, such as the Boeing SRM, ***or*** using ***other*** methods, techniques and practices acceptable to the Administrator.[19] Under Section 43.13(c), the methods, techniques and practices set forth in a Part 121 air carrier's maintenance manual, such as America West's GMM, are deemed acceptable to the Administrator, unless the Administrator notifies the carrier to the contrary. 14 C.F.R. § 43.13(c).

Thus, the question arising from these repairs was whether the use of speed tape to attempt to seal the damage to these Boeing 737 aircraft was acceptable to the Administrator. The answer is no. Had America West employed the methods provided in the Boeing SRM, as required by its GMM, then it clearly would have used methods acceptable to the Administrator and there would be no violation. The only remaining question, then is whether the methods it did use were otherwise

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[19] *Accord*, In the Matter of Thunderbird Accessories, FAA Order No. 90-11 at 9 (March 19, 1990), in which the Administrator explained that "[s]ince the procedure Respondent used was not prescribed in the current manufacturer's maintenance manual, Respondent would run afoul of section 43.13(a) unless that method was 'acceptable to the Administrator.'" The Administrator wrote further that "[h]aving proved by a preponderance of the evidence that the procedure was not prescribed by the manual, Complainant needed to show only that the procedure had not otherwise been deemed acceptable to the FAA." (*Id.*, at 10.)

acceptable to the Administrator, and a careful review of the record reveals no compelling evidence that that is the case.[20]

A. The Testimony of Raymond Borowski

America West argues at length that:

> The fact that the decision of the Administrative Law Judge is totally devoid of any reference to the substance of [expert witness Raymond] Borowski's testimony and the fact that a number of Borowski's expert opinions were unrebutted by the testimony of Rodriguez demonstrates conclusively that fundamental error was committed by the Administrative Law Judge and that the FAA has not established the FAR violations by a preponderance of the evidence.

(Respondent's Appeal Brief at 15-16.) America West's reliance on Mr. Borowski's testimony is misplaced because Mr. Borowski's confusing and often unsubstantiated testimony lacked depth, logic and persuasiveness. It does not compel a finding that America West did not violate Section 43.13(a) in these instances.

America West correctly argues that expert testimony should be evaluated based upon its logic, depth and persuasiveness, rather than simply based upon upon its credibility. In the Matter of Valley Air Services, FAA Order No. 94-3 (March 10, 1994); In the Matter of Metcalf, FAA Order No. 93-17 (June 10, 1993). The law judge did not explain why he did not rely upon Mr. Borowski's testimony. For this reason, it cannot be determined whether the law judge dismissed Mr. Borowski's testimony as not credible, as America West contends, or whether the law judge

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[20] It should be understood that this decision does *not* stand for the proposition that the methods, techniques and practices described in an aircraft manufacturer's maintenance manual are binding upon air carriers and others performing maintenance. America West violated Section 43.13(a) when making the subject repairs because it did not follow the manufacturer's maintenance manual, which is an FAA-approved document, or any other methods that had been accepted by the Administrator or his delegates. The Administrator had not accepted, implicitly or explicitly, the use of speed tape to repair damage of this kind and degree for the Boeing 737 models involved in this matter.

simply found Mr. Borowski's testimony to be so unpersuasive as not to warrant discussion in the otherwise thorough initial decision. Regardless, when analyzed under the appropriate standard, Mr. Borowski's testimony clearly was not persuasive on the issue of whether America West violated Section 43.13(a).

Mr. Borowski testified that America West's operating certificate gave it the authority to "deviate from previously issued, previously approved, previously accepted procedures such as the Boeing 737 SRM Repair Manual" when making minor repairs. It is true that minor repairs do not require approved data; however, section 43.13(a) does require that all repairs be made in accordance with the methods, techniques, and practices acceptable to the Administrator. In making minor repairs, America West was obligated to use methods acceptable to the Administrator, and there was no showing that the methods employed had been accepted by the Administrator, either implicitly or explicitly. Simply stated, Mr. Borowski provided no support for his contention that a carrier may deviate from previously accepted procedures, and it appears that Mr. Borowski mistakenly was using the terms "accepted" and "approved" interchangeably, as he frequently did throughout his testimony.

Mr. Borowski testified that regardless of the statement in its GMM that all structural repairs must be made in accordance with the manufacturer's SRMs, America West was free to use any data approved by the Administrator or any other data acceptable to the Administrator. (2 Tr. 45, 48, 64.) He was correct in the sense that by not following the Boeing SRMs and thereby acting contrary to its own company policy, America West could still be in compliance with 14 C.F.R. § 43.13(a) as long as it was using approved or accepted methods of repair. It is true that the

regulations alleged to have been violated do not make compliance with the repair methods set forth in the Part 121 certificate holder's maintenance manual mandatory.[21] Pursuant to Section 43.13(c), a Part 121 certificate holder's maintenance manual is a source of acceptable repair methods, but it is not necessarily the only source. However, that does not change the outcome in these cases because in making these repairs, America West not only did not follow its own company policy, but also it failed to use methods acceptable to the Administrator.

America West's argument, supported by Mr. Borowski's testimony, that a Part 121 certificate holder could not possibly maintain its fleet by strict adherence to the manufacturer's SRM in repairing minor damage is a red herring.[22] Again, the regulations do not require strict adherence to the SRMs. It was America West's GMM that specified that the Boeing SRM should be followed. America West was free to deviate from its own GMM; however, if it chose to do so, it had to use a repair method that was acceptable to the Administrator.

Mr. Borowski's testimony that the FAA does not require the submission of formal documentation, such as test reports, drawings or prototypes, regarding minor repairs is not contested. Regardless, the minor repair methodologies must be acceptable to the Administrator and must be available for review by the

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[21] *See* Applicability and Enforcement of Manufacturer's Data, FAA Order No. 8620.2 (November 2, 1978), in which it is stated as follows:

> FAR 43.13 requires all persons to use methods, techniques, and practices acceptable to the Administrator while performing aircraft maintenance. The manufacturer's maintenance manuals, service bulletins, and service letters have always been regarded as a source of acceptable data for complying with FAR 43.13(a) and (b); however, such acceptability does not, in itself, impose an enforcement or mandatory compliance requirement.

(*Id.*, at para. 3.)

[22] There were adequate methods provided in the applicable Boeing SRMs to repair the aircraft.

Administrator or his delegate (2 Tr. 145), even if the FAA does not require the submission of test data or other substantiation of those minor repair methods .

America West argues, based on Mr. Borowski's testimony, that the law judge failed to understand that Part 121 certificate holders are not obligated to report the substance of minor repairs to the FAA for approval prior to making minor repairs to their aircraft. (Appeal Brief at 19.) America West is missing the point. The problem here is not that America West did not contact the FAA about these particular minor repairs before putting the aircraft back in service.[23] The problem was that America West employed *methods* that had not been accepted by the Administrator.

B. Applicability of the GMM to these Repairs

America West argues on appeal:

> Reduced to its essence, the Administrative Law Judge holds that because the America West GMM contained the sentence, "[i]n all cases the Structural Repair Manual must be followed for repair of damage;" America West maintenance had absolutely no alternative but to utilize the procedures set forth in the Boeing 737-300 and 200 SRM's to make the minor repairs in question. This conclusion is wholly erroneous and ignores completely the expert testimony of Paul Jackson, the Chief Structures Engineer . . . .

(Respondent's Appeal Brief at 21-22.)

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[23] The law judge was correct when he held that the FAA may never get to inspect individual minor repairs because such minor repairs do not require FAA approval or acceptance before the aircraft can be returned to service. (Initial Decision at 6). There are so many aircraft requiring minor repairs nationwide, that it would be impossible for the FAA inspectors to inspect each repair before the aircraft could be allowed to operate again. As the law judge stated, "[o]perations would be severely hamstrung if mechanics and engineers cleared every minor repair beforehand with the FAA . . . ." (Initial Decision at 7.) Nonetheless, as the law judge found, the FAA can, after the fact, inspect aircraft and any repairs made thereto, and question the nature of the repair. (2 Tr. 138.) Indeed, as the law judge held, the FAA has the oversight responsibility to ensure that repairs of whatever nature conform to requirements. That the FAA cannot inspect every minor repair because of its limited resources and the vast number of minor repairs each day does not nullify that oversight responsibility.

Mr. Jackson had testified that he had understood that the America West A&P mechanics were required to follow the GMM, but that America West engineers in the Engineering Department could issue Engineering Repairs that could deviate from SRM procedures in designing minor repairs for particular minor damage to particular aircraft. Such practice, according to Mr. Jackson, was permitted under America West's Policies and Procedures Manual.

This argument can be disposed of briefly. As already stated in this decision, neither Section 43.13(a) nor (c) makes it mandatory that persons performing maintenance employ the methods, techniques and practices set forth in the manufacturer's maintenance manual or the air carrier's maintenance manual. Both are sources, but not necessarily the exclusive sources, of methods, techniques and practices acceptable to the Administrator. Mr. Jackson may have understood, and correctly so, that America West engineers could deviate from the America West GMM and the applicable Boeing SRMs. However, he also understood that Section 43.13 requires that all repairs be made utilizing accepted procedures. (1 Tr. 157, 171-172.) Hence, when developing Engineering Repairs, America West engineers were required to use procedures accepted by the Administrator.[24]

C. The Policies and Procedures Manual

America West argues in essence that its Policies and Procedures Manual, which was accepted by the Administrator, permitted the repairs made with speed tape in the instances giving rise to this proceeding. As will be explained further, this argument lacks merit.

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[24] In any event, Engineering Repairs were developed for only two of the three subject repairs. No Engineering Repair was prepared in the Denver flap case.

The Major/Minor Structural Repair Logic Diagram itself directs that when there is structural damage not involving a primary structure and the repair can be accomplished by standard SRM guidelines and/or replacement, then the repair is a minor repair and should be accomplished in accordance with the SRM. (Respondent's Exhibit 16.) Thus, the logic diagram itself expresses America West's company policy decision that when minor repairs can be made by following the methods set forth in the aircraft manufacturer's SRMs, that those methods should be used. The logic diagram provides further that minor repairs should be accomplished per data acceptable to the Administrator when the repair cannot be accomplished by SRM methods, replacement, or existing repairs specifically approved by the FAA. Note 7, which applies to both of these branches of the logic diagram states that "Repair may be accomplished based on the non-criticality of the component using accepted procedures, i.e., vendor-supplied information, Advisory circular 43.13, and/or industry standard practices. (Respondent's Exhibit 16.) As the law judge correctly held, note 7 simply provides sources of acceptable data to the Administrator. Note 7 does not override the logic diagram's expression of a policy preference for using specific SRM methods for particular minor repairs.

Moreover, the preponderance of the evidence does not support a finding that America West employed accepted industry practices when it made these repairs with speed tape. There was no evidence that other airlines would use speed tape to make similar repairs in similar circumstances. Furthermore, there was no evidence that even if these repairs could be classified as standard in keeping with industry practices, that those practices had been accepted by the Administrator. Mr. Rodriguez testified that he had not seen any FAA approval or acceptance of the

application of speed tape on the types of damage to the types of Boeing 737 involved in these incidents. (2 Tr. 20.)[25]

II. Violations of Section 121.153

With the delamination in the St. Louis and Denver flap cases, the puncture in the fan cowl case, and the speed tape applied to the damage in all three cases, the aircraft were clearly no longer in conformance with their type designs, and as a result, the aircraft were, by definition, unairworthy. An aircraft is airworthy when it: (1) conforms to its type design or supplemental type design and to any applicable Airworthiness Directives; and (2) is in a condition for safe operation. In the Matter of Horizon Air Industries, FAA Order No. 95-11 at 12, note 3 (May 10, 1995); In the Matter of Watts Agricultural Aviation, FAA Order No. 91-8 at 17 (April 11, 1991), petition for review denied Watts Agricultural Aviation v. Busey, No. 91-70365 (9th Cir. October 1, 1992),[26] *see* 49 U.S.C. § 44704(c).[27]

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[25] The National Transportation Safety Board was faced with a somewhat similar situation in Administrator v. Wright, 3 NTSB 608 (1977). In that case, the respondent failed to comply with a Beechcraft manual which advised that all control surfaces (except flaps) should be rebalancedafter repainting. The respondent, who had repainted the aircraft but had failed to balance the ailerons after the paint job, claimed that he had complied with accepted industry practices, contending that it was a general practice of other maintenance personnel not to balance after repainting. The NTSB held that under Section 43.13(a), persons performing maintenance must use the methods, techniques and practices acceptable to the Administrator rather than general industry practice. In analyzing Section 43.13(a), the NTSB wrote that "[t]he phrase 'accepted industry practices' pertains to the 'tools, equipment, and test apparatus necessary to complete the work,' whereas the 'methods, techniques and practices must be those 'acceptable to the Administrator." (*Id.*, at 610.) In addition, the NTSB wrote that they concurred with the law judge that "a specific manual provision pertaining to a particular aircraft takes precedence over general practices pertaining to other aircraft. (*Id.*, at 610.)

[26] The NTSB has applied the same 2-prong test for airworthiness. *See e.g.*, Administrator v. Bailey and Avila, NTSB Order No. EA-4294 at 11 (December 13, 1994); Administrator v. Doppes, 5 NTSB 50, 52 note 6 (1985).

[27] It is provided in 49 U.S.C. § 44704(c)(1) that "[t]he Administrator shall issue an airworthiness certificate when the Administrator finds that the aircraft conforms to its type certificate and, after inspection, is in condition for safe operation."

In finding that America West violated Section 121.153, the law judge cited In the Matter of Watts Agricultural Aviation, supra, and Administrator v. Gaskell, 6 NTSB 139 (1988). The law judge relied upon these cases in finding that the aircraft were unairworthy because the repairs, by deviating from the SRM (and not otherwise having been accomplished using methods acceptable to the Administrator), did not bring the aircraft into conformance with their type designs. (Initial Decision at 7.) America West argues on appeal that the law judge's reliance was misplaced, and that that case law does not support the law judge's decision.[28]

Specifically, with reference to the two-prong test for airworthiness set out in the Watts Agricultural Aviation case, America West argues that Complainant failed to prove that the Boeing 737 aircraft as repaired with speed tape did not conform to their type design or supplemental type design.[29] America West argues "[h]ere the FAA's case is completely lacking in that the type design has not even been introduced into evidence and there has been no specific evidence presented that the

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[28] America West argues that the facts of Administrator v. Gaskell are distinguishable from the three incidents giving rise to this appeal. In Gaskell, the respondent had returned an aircraft to service with a temporary speed tape patch on a pressure relief door on the right forward cowling was contrary to the Western Airlines' maintenance manual and the Boeing maintenance manual. The law judge found that the respondent had violated Sections 43.13(a), 43.13(b), and 91.29 of the FAR, but not Section 91.9, and the NTSB affirmed and adopted those findings. On appeal, the only issue was whether the law judge had properly reduced the sanction from 30 to 15 days. The NTSB affirmed the reduction of civil penalty based upon the finding that the FAA had not proven that the allegation in the complaint that respondent had acted recklessly so as to endanger life or property in violation of Section 91.9. Factually, Gaskell is similar enough to the America West action that it is understandable why the law judge cited Gaskell. Regardless of whether Gaskell is more egregious factually, as America West contends, or not, nonetheless, the NTSB found that the application of speed tape, when not called for in the manufacturer's maintenance manual or the carrier's maintenance manual rendered the aircraft unairworthy under 14 C.F.R. § 91.29(a). Section 91.29(a) provided "No person may operate a civil aircraft unless it is in airworthy condition."

[29] As America West notes, the parties stipulated that the aircraft were not rendered in an unsafe condition by the temporary repairs; thus, the first prong of the test for airworthiness is not at issue.

B737 type certificate data sheet precludes the use of aluminum speed tape under the circumstances presented here." (Respondent's Appeal Brief at 28.)

Although Complainant did not introduce the type designs, there was ample evidence, nonetheless, that the aircraft, with this damage and these temporary "repairs" were no longer in conformance with their type designs. Inspectors Sebring and Kensche testified that the aircraft were no longer in their original or properly altered conditions. (1 Tr. 44, 52-53, 69, 73-74, 89-90.) Furthermore, the fact that delamination and punctures/holes were listed as damage in the Boeing SRMs is strong circumstantial evidence that the delamination and the puncture/hole involved in these cases were not included in the type designs of these aircraft. Also, Mr. Bororwski testified, in effect, that the speed tape was not included in the type designs of the aircraft. (2 Tr. 68.)[30] Certainly, Complainant presented enough evidence in its case-in-chief, even without the type certificate data sheet, to raise a reasonable inference that the aircraft, with the delamination or hole and with speed tape repairs, no longer conformed to their original type designs. Thus, Complainant made out a prima facie case, which America West did not rebut. In the Matter of Hereth, FAA Order No. 95-26 at 15-16 (December 19, 1995). Consequently, it is found that a preponderance of the evidence supports the law judge's finding that America West violated Section 121.153 with regard to each of the aircraft involved.

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[30] Mr. Borowski was questioned on cross-examination whether if these Boeing aircraft had come out of the factory with the speed tape on them, they would have been in conformance with their type designs. He responded: "Well, presumably, of course, Boeing would see to it that that speed tape were made a part of the original type design, otherwise, the airplane would not be in conformity." (2 Tr. 68.)

III. Sanction

Finally, America West argues that the National Transportation Safety Board's decision in Administrator v. Gaskell, *supra*, would support a reduction of sanction. In Administrator v. Gaskell, the law judge reduced the suspension because the Complainant had not proven one of the alleged violations. Thus, even if the facts in the Gaskell case were more egregious than those in the America West incidents, the Gaskell decision does not support a reduction of the civil penalty in the America West cases.

The law judge's finding that the penalties sought by Complainant are appropriate to the nature of the violations, and the aims of the Federal Aviation Act and the implementing regulations is affirmed. Each of these cases involved both maintenance (Section 43.13) and operational violations (Section 121.153). The law judge properly noted that these assessments "will further the agency's goals of compliance and deterrence" and will "impress upon the Respondents and others the need to conform to the [Federal Aviation Regulations] and implementing manuals." (Initial Decision at 11.)

Accordingly, America West's appeal is denied, and the law judge's decision is affirmed except as noted in this decision.[31]

DAVID R. HINSON, ADMINISTRATOR
Federal Aviation Administration

Issued this 13 day of February, 1996.

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[31] 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) (1995).