UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

Served: June 10, 1993

FAA Order No. 93-18

In the Matter of:	Docket No. CP92NM0042
WESTAIR COMMUTER AIRLINES, INC. d/b/a UNITED EXPRESS	

DECISION AND ORDER

Respondent Westair Commuter Airlines, Inc., d/b/a United Express, has appealed from the written initial decision issued by Administrative Law Judge Burton S. Kolko.[1/] The law judge found that Respondent, an air carrier, was responsible for the careless or reckless taxi operation of five aircraft at Portland, Oregon, International Airport (PIA) in violation of Section 91.13(b) of the Federal Aviation Regulations, (FAR), 14 C.F.R. § 91.13(b).[2/] The law judge reduced the

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

2/ Section 91.13(b), 14 C.F.R. § 91.13(b) provides in part:

> No person may operate an aircraft, other than for the purpose of air navigation, on any part of the surface of an airport used by aircraft for air commerce ... in a careless or reckless manner so as to endanger the life or property of another.

$4,000 civil penalty sought by Complainant to $3,000. For the reasons set forth below, the decision of the law judge is affirmed with further reduction of sanction.

The facts of this case are not in dispute. Respondent admitted that on three separate occasions on January 11, and 18, 1991, its mechanics taxied five of Respondent's British Aerospace Co. (BAC) Model 3201 aircraft onto runways at PIA without Air Traffic Control (ATC) clearances. Respondent stipulated that the taxi operations by its mechanics were within their scope of employment. It was dark when these incidents occurred.

Two runway incursions occurred on January 11, within less than one hour of each other, as two of Respondent's aircraft were taxied from a gate to Respondent's maintenance base. On both occasions, the ground controller instructed the aircraft to turn off Taxiway Charlie onto Taxiway Echo and to hold short of Runway One Zero Right (10R). Both aircraft failed to turn onto Taxiway Echo, continuing instead on Taxiway Charlie and onto Runway Two Zero (20) without ATC clearance. Runway Two Zero (20) was not an active runway.

The third incident, which occurred on January 18, involved three of Respondent's aircraft being taxied one behind the other in heavy fog from Respondent's maintenance base to a gate. The lead aircraft, N473UE, requested progressive taxi instructions, and permission for N472UE and N475UE to follow it. The ground controller instructed N473UE to cross Runway Two Zero (20), turn left on Taxiway Echo and hold short of Runway One Zero Right (10R). The other aircraft were

instructed to follow N473UE. N473UE, however, turned right on Taxiway Echo instead of left as instructed. As a result, N473UE had to make a 180 degree turn to get back to where the controller had instructed it to taxi. N472UE and N475UE, meanwhile, correctly turned left onto Taxiway Echo but failed to hold short of Runway One Zero Right (10R). All three aircraft entered Runway One Zero Right (10R) without ATC clearance. Runway One Zero Right (10R) was an active runway, although there were no other aircraft in the vicinity at the time.

The law judge, citing In the Matter of USAir, Inc., FAA Order 92-48 (July 22, 1992), found that Respondent was responsible for the runway incursions by its mechanics.[3/] The law judge reduced the civil penalty by $1,000 based on his finding that a controller omission, the lack of an airport sign, and the markings on a taxiway, contributed to the runway incursions of January 11.[4/] The law judge found that controller conduct and airport visual cues did not contribute to the runway incursions of January 18.

Respondent argues on appeal that it may not be held legally responsible for the careless or reckless operation of

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3/ Respondent incorrectly argues on appeal that Complainant may not cite FAA Order No. 92-48 against Respondent because it was issued after the dates of the runway incursions and of the complaint. Under 5 U.S.C. § 552(a)(2)(A), the final opinion of an agency may be cited as precedent by an agency against a party if it has been indexed and either made available or published. FAA Order No. 92-48 was served on July 22, 1992, and indexed shortly thereafter.

4/ Complainant did not appeal the reduction in civil penalty by the law judge.

its aircraft by its mechanics under Section 91.13(b). Respondent argues that although it "operated" the five BAC aircraft under Section 1.1 of the FAR,[5/] it was not the "person operating the aircraft" under Section 91.13(b).[6/] This distinction is not supported by the Federal Aviation Act of 1958, as amended, (the Act), 49 U.S.C. App. § 1301 et seq., and the FAR. The Act and the FAR define "person" as: "any individual, firm, ... corporation, company....."[7/] Any "person" who authorizes the operation of aircraft is deemed to be engaged in operating the aircraft under the Act,[8/] and the FAR. Respondent authorized its mechanics to use its aircraft for taxi operations. Respondent, as well as Respondent's mechanics, may be charged as the "person operating" the five aircraft under Section 91.13(b).

Respondent argues further that Section 91.13(b) of the FAR

5/ Section 1.1, 14 C.F.R. § 1.1 provides:

> [o]perate, with respect to aircraft, means use, cause to use or authorize to use aircraft, for the purpose (except as provided in § 91.13 of this chapter) of air navigation including the piloting of aircraft, with or without the right of legal control (as owner, lessee, or otherwise).

6/ See footnote 2 for the text of Section 91.13(b).

7/ See Section 101 of the Act, 49 U.S.C. App. § 1301(32), and Section 1.1 of the FAR, 14 C.F.R. § 1.1.

8/ Section 101, 49 U.S.C App. § 1301(31), provides:

> "[o]peration of aircraft" or "operate aircraft" means the use of aircraft for the purpose of air navigation and includes the navigation of aircraft. Any person who causes or authorizes the operation of aircraft, whether with or without the right of legal control (in the capacity of owner, lessee, or otherwise) shall be deemed to be engaged in the operation of aircraft within the meaning of this Act.

is not enforceable under the Act because the definition of "operate aircraft" in the Act,[9/] does not address the operation of aircraft for purposes other than air navigation, such as the taxi operations at issue here. This argument is without merit. The Administrator issued Section 91.13(b) and its predecessor, Section 91.10, to clarify that the prohibition against careless or reckless operation of aircraft extended to the ground operation of aircraft on the surface of airports. See 31 Fed. Reg. 13352 (1966), 32 Fed. Reg. 9640 (1967). The issuance of Section 91.13(b) was well within the Administrator's powers under the Act to promote aviation safety. See Sections 307, 313, 601 of the Act, 49 U.S.C. App. §§ 1348, 1354, 1421.

Respondent also argues on appeal that the careless or reckless conduct of its mechanics may not be imputed to it as the employer because Respondent did not participate in, authorize, or permit the runway incursions. Respondent states that the runway incursions were contrary to its policies and procedures for taxi operations, and that there was no evidence of inadequate training or supervision of its mechanics. Respondent cites four decisions of the National Transportation Safety Board (NTSB) in support of its argument.[10/]

9/ See footnote 8.

10/ Administrator v. Diaz-Saldana, 1 NTSB 1599 (1972); Administrator v Bischoff, 2 NTSB 1013 (1974); Administrator v. Charter Flight Services, Inc. and Michael S. Wiskus, NTSB Order EA-3131 (April 30, 1990); Administrator v. Orco Aviation, Inc., NTSB Order EA-3579 (June 9, 1992).

Decisions of the NTSB may be persuasive but are not binding precedent. See In the Matter of Terry and Menne, FAA Order 91-12 (April 12, 1991), petition for reconsideration denied, FAA Order 91-31 (August 2, 1991), affirmed, Terry v. Busey, 976 F.2d 1446 (D.C. Cir. 1992). Moreover, none of the cases cited by Respondent directly support Respondent's position. None of the cases cited hold that an employer is responsible for the acts and omissions of its employees only when the employer participated in, authorized, or permitted the violation of the FAR.[11/] None of the cases cited address the issue of employer responsibility for the acts of its employees or agents except for Administrator v. Orco Aviation, Inc., NTSB Order EA-3579 (June 9, 1992) (air carrier was not responsible for the acts of its agent because the agent acted outside the scope of its authority by using unauthorized pilots expressly prohibited by the agency agreement). Respondent's mechanics were authorized to conduct the taxi operations. In Orco Aviation, in contrast, the agent specifically was not authorized to use certain persons as pilot in command, but did so anyway.

The other NTSB decisions cited by Respondent generally hold that certificate actions for careless or reckless

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11/ Administrator v. Bischoff, 2 NTSB 1013 (1974) held that the co-owner of the aircraft could be charged with careless or reckless "operation" because he participated in, authorized, or permitted the violations as a co-occupant of the aircraft. Furthermore, there was no indication of an employer-employee relationship between the occupants of the aircraft.

operation may be brought against the individual owner or manager of the air taxi or air carrier, as well as against the pilot. It does not follow, as Respondent appears to argue, that such actions against air taxis and air carriers are necessarily limited to cases where the "operator" is the owner or manager of the air taxi or air carrier.

The Administrator has held that an air carrier is responsible for the acts or omissions of its employees committed while acting within the scope of their employment. See In the Matter of USAir, Inc., FAA Order 92-48 (July 22, 1992), petition for reconsideration denied, FAA Order No. 92-70 (December 21, 1992) (air carrier held responsible for the acts and omissions of its ground crew and captain during pushback operations) (hereinafter In the Matter of USAir, Inc.).

Respondent argues unconvincingly that Complainant misapplied the law by bringing this action against the air carrier, instead of its mechanics, presumably by basing the action on the general principles set out in In the Matter of USAir, Inc. The Administrator based the finding that the employer was responsible for the acts and omissions of its employees in In the Matter of USAir, Inc., on principles of agency and tort law. See Restatement (Second) of Agency, §§ 219, 220, 228, see also W. Prosser and W. Keeton, The Law of Torts, §§70, 71 (5th ed. 1984).[12/]

12/ Respondent's attempt to distinguish In the Matter of USAir, Inc., from this case does not succeed. That

(Footnote 12 continued on next page.)

Respondent agrees that as an air carrier it has the duty to perform its services with the highest possible degree of safety under the Act. See Section 601(b), 49 U.S.C. App.§ 1421(b). Respondent admitted that its mechanics taxied its aircraft onto runways without ATC clearance during taxi operations that were within the mechanics' scope of employment. Respondent does not dispute the law judge's finding that the runway incursions were inherently dangerous. See In the Matter of Watkins, FAA Order 92-8 (January 11, 1992). Section 91.13(b) prohibits any careless or reckless conduct on the surface of airports that is inherently dangerous. See, e.g., In the Matter of Terry and Menne, FAA Order No. 91-12 at 9 (Section 91.9 prohibits any careless or reckless practice in which danger is inherent). The law judge, thus, correctly found Respondent responsible for the violations of Section 91.13(b).

Respondent would have the FAA limit all enforcement action in this case to Respondent's certificated mechanics. The Administrator's enforcement powers, however, are not so limited. It is within the Administrator's discretion to decide which party or parties to bring an action against. In

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(Footnote 12 continued from previous page.)

decision's holding concerning employer responsibility did not distinguish between aircraft operations for air navigation and those for purposes other than air navigation, nor did it depend solely on the lack of training or supervision by the air carrier. The USAir captain's duty to investigate the loud noise he heard during pushback, and the residual nature of the careless or reckless violation there, do not render the holding in that case inapplicable here.

this case the choice to proceed against the air carrier was reasonable given that the runway incursions appeared to be systemic: three different inherently dangerous incidents involving five aircraft using the same route in a short period of time. Indeed, the incidents at PIA led Respondent to modify its taxi operations throughout the country. An action brought solely against the individual mechanics would most likely not have had the same corrective effect.

Respondent argues on appeal that the law judge erred in not finding that fog, ground controller confusion, and the lack of visual cues contributed to the January 18, incident. However, Respondent's mechanics knew that there was heavy fog before they began to taxi. The fog was not unexpected, and cannot be a mitigating factor. See, e.g., Administrator v. Galleta, 1 NTSB 641, 642 (1969). The mechanics should not have taxied the aircraft if they were unsure of their ability to operate in fog. More experienced personnel should have been called. Furthermore, the fog cannot explain the failure of N473UE to follow instructions by turning right on Runway Two Zero (20) instead of left.

Contrary to Respondent's argument, the record does not show confusion by the ground controller on January 18. The controller's request to N473UE to repeat its call sign immediately after N473UE's initial request for a progressive instruction shows only that the controller did not hear or did not understand the communication, and asked that it be repeated. Contrary to Respondent's argument, the controller did respond to N473UE's request to "do a 180," within 47

seconds after she finished two other transmissions to the three aircraft. At that point the controller was determining which aircraft had made the wrong turn. The controller testified that due to the fog, she was relying on Airport Surface Detection Equipment (ASDE) to keep track of the aircraft.

Respondent's argument that had the controller given each aircraft a progressive taxi instruction, N472UE and N475UE would not have entered onto Runway One Zero Right (10R) is not supported by the record. The lead aircraft, N473UE, requested a progressive taxi instruction to taxi with N472UE and N475UE, from the maintenance base to a gate. N472UE and N475UE requested permission to follow N473UE to the gate. The controller complied, addressing the progressive taxi instructions to N473UE and instructing each of the other aircraft to follow N473UE. All three aircraft acknowledged the instructions. N472UE and N475UE clearly received the progressive taxi instructions addressed to N473UE because unlike the lead aircraft, they turned left onto Taxiway Echo as instructed. Their failure to hold short at Runway One Zero Right (10R) cannot be blamed on the controller. It would have served no purpose for the controller to repeat the same progressive taxi instruction two additional times for N472UE and N475UE because the instructions had already been received, and the original request to the controller was to follow the lead aircraft.

The law judge correctly noted that the lack of a sign identifying Taxiway Echo at the intersection of Taxiway

Foxtrot could not be blamed for the January 18, incident. The wrong turn by N473UE occurred well before the intersection of Echo with Foxtrot, and the other aircraft made the left turn onto Taxiway Echo as instructed.[13/]

Respondent's final argument on appeal is that the law judge did not consider the corrective action that it took after the incidents as a factor for mitigation of the civil penalty.

Corrective action may mitigate a civil penalty where there is sufficient, specific evidence of swift or comprehensive corrective action. See In the Matter of Delta Airlines, FAA Order No. 92-5 (January 14, 1992), In the Matter of Airport Operator, FAA Order No. 91-40 (September 30, 1991).

In this case, immediately after the incidents, Respondent's PIA Maintenance Director wrote memos to the mechanics advising them of the seriousness of the incidents. Meetings, at which FAA personnel were present, were held with the mechanics to review taxi procedures. Taxi operations were restricted to eight of the 30 mechanics. After the second incident, one mechanic was fired, another suspended, and all of the mechanics were prohibited from taxiing until they took additional training. Respondent's mechanics throughout the

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13/ On appeal Respondent mentions some other airport visual cues which it claims contributed to the January 18, incident. These visual cues are derived entirely from a video (Respondent's Exhibit 11) made three weeks after the incidents by Respondent, and entered into the record at the hearing solely as a visual aid, not as independent evidence of any fact.

country were retrained in taxi operations under a revised maintenance training program.

Mitigation of the sanction is merited because Respondent's corrective action was swift and comprehensive. A reduction of the sanction is warranted because the law judge did not consider Respondent's corrective action in arriving at the civil penalty. Accordingly, a total civil penalty of $2,000 for the violations of the FAR established in this case, is hereby assessed. The law judge's decision is otherwise affirmed.[14/]

JOSEPH DEL BALZO
Acting Administrator
Federal Aviation Administration

Issued this 9 day of June, 1993.

14/ 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. App. § 1486), this decision shall be considered an order assessing civil penalty. See 14 C.F.R. §§ 13.16(b)(4) and 13.233(j)(2) (1992).