UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

Served: July 22, 1992

FAA Order No. 92-48

In the Matter of:	
USAIR, INC.	Docket No. CP91NM0183

DECISION AND ORDER

Complainant has appealed from the oral initial decision issued by Administrative Law Judge Burton S. Kolko at the conclusion of the hearing held in this matter on October 31, 1991, in Seattle, Washington.[1/] The law judge held that Complainant did not establish that Respondent USAIR, Inc., operated an unairworthy aircraft in a careless or reckless manner, in violation of Sections 121.153(a)(2)[2/]

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

2/ 14 C.F.R. § 121.153(a)(2) provides:

Aircraft requirements: General

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

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

and 91.9[3/] of the Federal Aviation Regulations (FAR), 14 C.F.R. §§ 121.153(a)(2) and 91.9(a). Complainant has appealed from the law judge's dismissal of the complaint. For the reasons set forth below, the law judge's decision is reversed, and the civil penalty is reduced from $15,000 to $5,000.

On June 9, 1989, Respondent operated civil aircraft N804US, a McDonnell-Douglas 80 (MD-80), as regularly scheduled Flight 2831 from Seattle-Tacoma International Airport (SEATAC) in Washington to Bellingham, Washington. The location of the aircraft prior to departure required that it be pushed back from the gate by a tug vehicle. The pushback operation was under the direction of Kat Diamond, a recently hired employee of Elsinore, the company contracted by Respondent to conduct pushback operations at SEATAC International Airport.[4/] Ms. Diamond was in contact with the tug and the aircraft by use of a headset.[5/] Immediately after the tug driver initiated

---

3/ Section 91.9 of the FAR, 14 C.F.R. § 91.9 (codified as Section 91.13 of the FAR, 14 C.F.R. § 91.13, effective August 18, 1990) provided: "No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another."

4/ Mary Greer, Respondent's Seattle Station Manager, testified that Respondent maintained direction and control of Elsinore. Richard Yeatter, Respondent's Director of Maintenance Training, testified that Respondent provided training for Elsinore. Respondent has not denied responsibility for the actions of its pushback operations contract personnel.

5/ According to Respondent's Memorandum of June 16, 1989, Ms. Diamond was still in training at the time of the incident. On the date of the incident, her supervisor decided that Ms. Diamond could work without supervision.

pushback, the aircraft's nose gear water deflector[6/] rode up onto a chock that had been improperly placed behind the nose wheel.[7/] Ms. Diamond instructed the tug driver to stop[8/] and then to pull the aircraft back. The water deflector popped up and and then down as it was pulled off the chock. Ms. Diamond removed the improperly placed chocks, but she did

---

6/ The nose gear water deflector or "splash guard" is installed on the sides and rear of the MD-80 nose gear wheels. The nose gear water deflector prevents water spray from entering the engine air inlets as the aircraft rolls through standing water.

7/ Chocks should only be placed fore and aft of the left main wheels of the MD-80, according to Respondent's General Maintenance Manual. Chocks should not be placed against the nose wheels of the MD-80 aircraft. Respondent's Quality Assurance Director, Joseph Kania, testified that Elsinore employees followed the same chocking procedures as provided in Respondent's maintenance manual.

8/ Ms. Diamond did not testify at the hearing. The law judge did not admit into evidence her handwritten statement concerning the incident. The law judge excluded the statement because he found it, and a later clarifying statement by Ms. Diamond given to FAA Safety Inspector John Hubbard, inconsistent and not reliable, probative or credible.

Although Ms. Diamond's initial statement contained misspellings and incorrect terminology for aircraft parts, it was error for the law judge to exclude it. The law judge should have admitted the statements as admissible hearsay under Section 13.222(c), 14 C.F.R. § 13.222(c), and then accorded them whatever weight he found apropriate. The record contains independent evidence of what Ms. Diamond witnessed during the pushback that tends to corroborate the documents excluded by the law judge. Inspector Hubbard and John Matthews, the captain of Flight 2831, testified at the hearing as to what Ms. Diamond told them after the incident. Further evidence of Ms. Diamond's actions is found in the following documents: Respondent's internal accident report of June 9, 1989; Respondent's inter-office memorandum of June 16, 1989; Captain Matthews' report of June 26, 1989, and Respondent's September 6, 1989 correspondence. These documents were admitted into evidence at the hearing.

not tell the captain what had happened.

When the tug stopped initially, Flight 2831's Captain, John Matthews, heard a loud noise coming from the nose wheel area underneath his seat in the cockpit. Captain Matthews asked Ms. Diamond whether the tow bar had broken. He turned the aircraft wheel well lights on so that she could see underneath the aircraft because it was night. Ms. Diamond reported to him that the tow bar had not broken and that everything was "okay." Pushback resumed, and the aircraft proceeded to taxi and take off.

Captain Matthews testified that after takeoff the landing gear was retracted, and the nose gear red warning light came on. He verified that the landing gear was up, but the red light would not go off. The captain stated that there was no wind noise coming in to indicate that the landing gear doors were open. He testified that he decided not to recycle the gear to see if the red warning light would go out because of the "incident" that had occurred during pushback. Captain Matthews decided to return to the airport and land. He testified that he did this as a safety precaution although everything else was normal and the aircraft flew fine. The aircraft returned and landed at SEATAC International Airport without further incident.

After landing, Captain Matthews testified, he went outside the aircraft to investigate. According to his report dated June 26, 1989, he asked Ms. Diamond what had occurred, and she

responded that the nose wheel had hit a "block." Captain Matthews felt around the nose wheel deflector and kicked it. One side of the nose gear water deflector swung free. He testified that the crack on the water deflector had not been visible until he moved the deflector. He claimed that if Ms. Diamond had told him prior to takeoff that the nose gear water deflector had been on the chock and had popped into the air, he would have made a detailed inspection at that time.

According to the mechanic, who replaced the nose gear water deflector after the aircraft returned to the airport, the water deflector had broken on the right side. As a result, the right side of the deflector swivelled freely and separately from the rest of the water deflector. According to the mechanic, the broken portion of the water deflector could have rotated downward when the plane left the ground, blocking the nose wheel door from closing. The break, the mechanic explained, was difficult to detect visually without lifting the water deflector. Joseph Kania, Respondent's Quality Assurance Director, testified that the broken water deflector could have prevented the landing gear doors from closing completely.

The law judge held that Complainant did not establish that Respondent knew or should have known that it had an aircraft with a defect that departed from its type design, and rendered it potentially unsafe. According to the law judge, nothing known to Respondent through its agents prior to takeoff

indicated that the red light would go on after takeoff.

The Administrator has held that an aircraft is airworthy when: 1) it 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 Watts Agricultural Aviation, FAA Order No. 91-8, at 17 (April 11, 1988), (citing Section 603(c) of the Federal Aviation Act of 1958, as amended, 49 U.S.C. App. § 1423(c)), appeal docketed, No. 91-70365 (9th Cir. 1991).

John Hubbard, an FAA Aviation Safety Inspector, testified that the nose gear water deflector on the MD-80 is part of the type design for that aircraft, and that a broken deflector does not conform to the aircraft's type certificate. That alone rendered the aircraft unairworthy. Airworthiness is not synonomous with flyability. An aircraft that does not conform to its type certificate is unairworthy, even if it may be in a condition for safe operation. Morton v. Dow, 525 F.2d. 1302, 1307 (10th Cir. 1975).

Respondent's aircraft also was not in a condition for safe operation. Mr. Hubbard, the FAA Aviation Safety Inspector, and Mr. Kania, Respondent's Quality Assurance Director, agreed that the broken deflector could have prevented the landing gear doors from closing during the flight. Both also agreed that water or other debris ingested by the engine during takeoff or landing could have caused safety problems. Mr. Hubbard gave as examples of safety problems an engine flameout and a possible crash. These facts alone made the

aircraft unsafe for operation with the broken water deflector. Mr. Kania ignored the safety problems associated with water or debris ingestion when he concluded that the aircraft could operate safely without the deflector.

The law judge correctly noted that it was necessary for Complainant to prove that Respondent knew or should have known before takeoff that the aircraft was unairworthy, i.e., that the nose gear water deflector was broken. See Daily v. Bond, 623 F.2d 624, 626 (9th Cir. 1980).

Respondent was responsible for the acts and omissions of its captain and ground crew that were within their scope of employment. Cf. Administrator v. Reeves Aviation, Inc., NTSB Order EA-2675 (February 2, 1988) (air carrier is charged with the duty to maintain its aircraft and is responsible for the acts of its employees in the scope of their employment). Upon initial arrival of the MD-80 at SEATAC International Airport, Respondent's ground crew improperly chocked the nose gear wheels, contrary to Respondent's general maintenance manual. The pushback operator was inadequately trained and supervised. Ms. Diamond saw the nose gear water deflector ride up on the chock, and saw it pop in and out. She should have informed the captain about what she saw happen to the water deflector. Captain Matthews testified that if she had told him at the time what had happened to the deflector, he would not have taken off without a detailed inspection of the nose gear wheel area.

When the plane and tug stopped abruptly at Ms. Diamond's

direction, Captain Matthews heard what he described as a loud noise, coming from the nose gear wheel area. His prior experience indicated to him that the noise may have resulted from a broken tow bar. Once Ms. Diamond told the captain that the tow bar had not broken, Captain Matthews should have investigated further what caused the loud noise. He should not have relied on the opinion of a pushback operator that everything was "okay," because he should have suspected that her opinion was beyond the expertise associated with her position. The captain or co-pilot should have investigated, or a mechanic should have been called. Although the crack on the broken deflector was difficult to detect visually, once the deflector was moved, it became clear that it was broken.

The failure of Respondent's pushback operator to communicate to Respondent's captain what happened to the nose gear water deflector, together with the captain's failure to further investigate the incident, are omissions attributable to Respondent. Air carriers have a duty to perform their services with the highest possible degree of safety. See Section 601(b) of the Act, 49 U.S.C App. § 1421(b). Respondent knew or should have known that the MD-80 was not airworthy prior to takeoff. Consequently, Respondent operated an unairworthy aircraft in violation of Section 121.153(a)(2) of the FAR, 14 C.F.R. § 121.153(a)(2).

Respondent's operation of an unairworthy aircraft also constituted a violation of Section 91.9 of the FAR, 14 C.F.R. § 91.9. That section prohibits any careless or

reckless practice in which danger is inherent. See In the Matter of Terry and Menne, FAA Order No. 91-12, at 9 (April 12, 1991). Absent extraordinary circumstances, careless or reckless operation of an aircraft follows as a residual violation when operation of an unairworthy aircraft is established. See Administrator v. Valley, NTSB Order No. EA-3283, at 6 (May 3, 1991); Administrator v. Gasper, NTSB Order No. EA-3242, at 3, n. 4 (January 14, 1991).

Respondent also argues that if the law judge's decision is reversed, the Administrator on appeal may not impose a civil penalty in this case. Respondent argues that no civil penalty can be imposed because Complainant did not specifically argue in its appeal brief that a civil penalty would be appropriate.

This argument must be rejected. Complainant, in its appeal brief, argues for the complete reversal of the law judge's decision. Complainant's request for reinstatement of the $15,000 civil penalty sought in the complaint is implicit in the appeal. The issue of civil penalty is properly before the Administrator on appeal.

Under Sections 901 and 905 of the Federal Aviation Act, as amended, 49 U.S.C. App. §§ 1471, 1475, Respondent is subject to a maximum civil penalty of $10,000 for each violation. Neither party has presented arguments addressing the amount of the civil penalty. A $15,000 civil penalty, however, is not required under the facts of this case. A $5,000 civil penalty adequately reflects the seriousness of the violations committed by Respondent, and will deter future similar violations.

A civil penalty in the amount of $5,000 is assessed.[9/]

THOMAS C. RICHARDS, ADMINISTRATOR
Federal Aviation Administration

Issued this 20th day of July, 1992.

9/ 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).