UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

Served: July 5, 1991

FAA Order No. 91-8

In the Matter of:	Docket No. CP89WP0148
WATTS AGRICULTURAL AVIATION, INC. d/b/a GROWERS AIR SERVICE	

ORDER
(ERRATA)

Please note the followng corrections to the Decision and Order in the above-captioned case which was served on April 11, 1991:

1. Page 19, line 13 - "13.232(j)(3)" should read "13.233(j)(3)";

2. Page 20, line 3 - "13.232(j)(2)" should read "13.233(j)(3)";

3. Page 20, line 8 - "13.232(j)(2)" should read "13.233(j)(3)".

This Order should be attached to the previously-issued Decision and Order.

JAMES B. BUSEY, ADMINISTRATOR
Federal Aviation Administration

by: JAMES S. DILLMAN*
Assistant Chief Counsel

Issued this 5th day of July, 1991.

* Issued under authority delegated to the Chief Counsel and the Assistant Chief Counsel for Litigation by Memorandum dated January 29, 1990, pursuant to 49 U.S.C. § 322(b) and 14 C.F.R. § 13.202.

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In the Matter of:	)	
WATTS AGRICULTURAL AVIATION, INC. d/b/a GROWERS AIR SERVICE	)	Docket No. CP89WP0148

DECISION AND ORDER

Respondent Watts Agricultural Aviation, Inc., d/b/a Growers Air Service, ("Respondent") has appealed from the written initial decision served by Administrative Law Judge Burton S. Kolko on March 2, 1990.[1/] In his decision, the law judge held that Complainant proved that Respondent violated Section 91.29(a) of the Federal Aviation Regulations (FAR), 14 C.F.R. § 91.29(a),[2/] by operating an aircraft in an unairworthy condition and Section 91.173(a) of the FAR, 14 C.F.R.

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

2/ Section 91.29(a) of the FAR, 14 C.F.R. § 91.29(a), provides as follows:

> No person may operate a civil aircraft unless it is in an airworthy condition.

§ 91.173(a),[3/] by failing to keep appropriate maintenance and inspection records. Due to his finding that Complainant did not prove one of the alleged violations set forth in the Complaint, the law judge reduced the civil penalty sought by Complainant from $1,750 to $1,400.

Complainant alleged that on July 2, 1988, Respondent operated N5224S, a Model AT-301 Air Tractor, in the vicinity of Davis, California. The pertinent allegations in the Complaint are as follows:[4/]

[3/] Section 91.173(a) of the FAR, 14 C.F.R. § 91.173(a), provides in pertinent part:

> (a) Except for work performed in accordance with § 91.171, each registered owner or operator shall keep the following records for the periods specified in paragraph (b) of this section:
>
> (2) Records containing the following information:
>
> (v) The current status of applicable airworthiness directives (AD) including, for each, the method of compliance, the AD number, and revision date. If the AD involves recurring action, the time and date when the next action is required.
>
> (vi) Copies of the forms prescribed by § 43.9(a) of this chapter for each major alteration to the airframe and currently installed engines, rotors, propellers, and appliances.

[4/] There was one other allegation regarding Respondent's failure to add certain equipment installed after the aircraft's original certification on the weight and balance report and the equipment list. The law judge ruled in Respondent's favor on this point, and Complainant did not appeal that ruling.

3. Incident to said operation, the following records were not kept:

a. A current status of applicable Airworthiness Directives (ADs) including for each, the method of compliance, and the AD number and revision date.

b. A copy of FAA Form 337 required for an alteration to the currently installed propeller.

4. Incident to said flight, the following discrepancies were present:

a. The wing carry-through structure's safe-life was exceeded by 754 hours.

b. The required fuel placards were not displayed on either wing.

5. You operated N5224S in an unairworthy condition.

Complainant alleged further that by reason of the above, Respondent had violated Section 91.29(a) of the FAR, in that Respondent operated an unairworthy aircraft, and Section 91.173(a) of the FAR, in that it failed to keep appropriate maintenance and inspection records containing the information specified in that section.[5/] In his written initial decision, the law judge affirmed all but one of the alleged violations.[6/]

5/ Complainant also alleged that Respondent had violated Section 43.9(a) of the FAR, 14 C.F.R. § 43.9(a), but withdrew that allegation at the hearing.

6/ See footnote 4, supra.

Gordon Read, an FAA Aviation Safety Inspector, testified that during investigation of the crash of N5224S he examined the wreckage, and the aircraft and maintenance records relating to N5244S. Robert Barabino, a mechanic at McClellan Air Force Base, and Joseph Moody, a mechanic and the president of Chico Flight Center, testified on behalf of Respondent. Mr. Barabino and Mr. Moody both testified based upon their review of the aircraft records. Neither Mr. Barabino nor Mr. Moody examined the wreckage.

The Evidence and The Law Judge's Decision

The evidence with regard to each of the pertinent allegations, and the law judge's decision as to each, were as follows:

Paragraph 3(a). The aircraft records contained the following "AD notes":

> 82-06-12 Complied with 11 May 82 tach time 2394.73 PEW
>
> 83-18-01 Complied with 11/24/83 tach 3340 Peter Dabaghian
>
> 82-06-12 Recurring 2000 hrs. changed gear tach 3970 B.M.

(Complainant's Exhibit 5, p. 42).

Mr. Read testified that contrary to Section 91.173(a)(2)(v), Respondent failed to maintain records reflecting the current status of compliance with AD Nos. 82-06-12 and 83-18-01. These notes were incomplete, he

explained, because: 1) no AD revision dates were mentioned; 2) the [second] note pertaining to AD No. 82-06-12 did not include the date or time when compliance with that AD would next be due; and 3) the note about AD No. 83-18-01 did not include the method of compliance.

Mr. Moody testified that the records indicate that Respondent had complied with all of the applicable airworthiness directives. With regard to the AD note pertaining to AD No. 83-18-01, he first testified that the time for compliance was not included. However, he later testified that the AD note mentions the time of compliance, because it is stated in the note: "recurring, 2000 hours" (TR-103-4), and therefore, that the AD note is complete.

The law judge held that Complainant proved that the AD notes were incomplete because the revision dates for each AD were not recorded and the method of compliance with one AD was not included. (The law judge apparently rejected Complainant's argument that the date of next compliance was not included.) (Initial Decision at 3).

Paragraph 3(b). Mr. Read testified that Respondent should have maintained a copy of FAA Form 337 reflecting a "major modification" (installation of a roller bearing) which was made to the propeller. FAA Form 337 is a historical record of maintenance. He referred to an Aircraft Propulsion Systems, Inc., engineering specification (pertaining to a supplemental type certificate issued by the FAA) in which it is written that

because the installation of the roller bearing constitutes "a major modification," FAA Form 337 must be issued by the licensed powerplant mechanic or the FAA-approved propeller repair station which performed the modification. (Complainant's Exhibit 7, p. 5).

On cross-examination, Mr. Read testified that Respondent had informed him that it once had a yellow tag (a logbook recording device) for this modification and that a yellow tag indicates that the part can be returned to service. Mr. Barabino testified that if a repair station supplies a yellow tag, the propeller can be installed on an airplane without FAA Form 337.

The law judge held that Complainant proved that Respondent had failed to maintain a record of the alteration to the propeller, as required, and he rejected Respondent's effort to shift responsibility to the repair station, stating that 14 C.F.R. § 91.173 does not permit the owner or operator to transfer its recordkeeping duties to others. He wrote further that ". . . Respondent cannot fairly suggest that it had no knowledge of the repair while at the same time asserting that the yellow tag permitted the aircraft to return to service." (Initial Decision at 5). He concluded that if indeed Respondent did not have knowledge of the repair -- a proposition which he considered incredible -- then Respondent at least had constructive notice of the repair due to the

receipt of the yellow tag, and therefore, it should have acquired a completed FAA Form 337 from the repair station. (Id.)

Paragraph 4(a). With regard to the allegation that the safe-life of the wing carry-through structure was exceeded by 754 hours, Mr. Read testified that it is stated in the type certificate data sheet that the carry-through structure of the wing is life-limited at 5000 hours. (Complainant's Exhibit 3, p. 5). It is provided further that the life-limit can be extended to 7000 hours if the wing is modified in compliance with a service letter issued by Snow Engineering Company, the manufacturer of the Air Tractor. Respondent had not complied with the service letter, and Mr. Read testified that the aircraft's total time, as measured by its tachometers,[7/] was 5754 hours at the time of the accident.[8/]

7/ A tachometer measures the time that an aircraft engine is running.

8/ Mr. Read explained how he determined that the wing carry-through structure's safe-life was exceeded by 754 hours. He testified that his examination of the records revealed that the tachometer in this aircraft was replaced at 3970 hours, and that an additional 1784 hours, as measured by the new tachometer, were applied subsequently to the aircraft. The aircraft, he concluded, had a total of 5754 hours because total time is the sum of the times recorded on the former and present tachometers.

Mr. Read sent a letter of investigation to Respondent and received a response written by Respondent's president, Ralph J. Holsclaw. In this letter, dated July 27, 1988, Mr. Holsclaw responded that because the tachometer "at 2000 RPM has at least a 10-11% error," the airframe total time would be approximately 5000 hours. (Complainant's Exhibit 8). Mr. Read testified that he disregarded this response because the actual operating RPM or average operating RPM of that engine had not been established. Mr. Read testified, in essence, that it would be arbitrary and unsafe to reduce all tachometer times by a certain percentage because, for example, when an Air Tractor descends, its engine operates at only 1200 RPM. Thus, he explained, tachometer time cannot be converted to clock hours unless there is a record of the actual engine speeds during the operation of the aircraft.

Respondent introduced a letter dated December 9, 1988, from Leland Snow at Air Tractor, Inc., to Mr. Read, in which Mr. Snow wrote:

> Our tachometers recorded an hour at 1796 RPM. The Air Tractor operates at 2100 RPM loaded and 2000 RPM empty, for an average of 2050 RPM. This calculates 4,994 hours for an aircraft showing 5700 hours on the tach. . . . The engine normally runs while the aircraft is being loaded, so take another hundred or so hours off the time.

(Respondent's Exhibit 1). Respondent also introduced a document which purported to be Service Letter No. 75, dated December 12, 1988, in which it was stated that at engine speeds

below 1796 RPM, the tachometer accumulates hours at a slower rate than clock hours, while at engine speeds above 1796 hours, the tachometer accumulates hours faster than clock hours. (Respondent's Exhibit 2).[9/] Relying upon these documents, Robert Barabino and Joseph Moody testified that the aircraft did not have 5000 hours at the time of the accident.

The law judge held that Complainant proved that the safe-life of the carry-through structure of the wing was exceeded. He wrote: "Although the tachometer reading may not be completely accurate, the FAA is entitled to rely on an operator's recording device as long as it is used consistently throughout the service life and is not in error to the point of affecting safety (See Tr. 75)." (Initial Decision at 7).

9/ Complainant filed a Motion to Strike, requesting that the Administrator strike Respondent's Exhibit 2 because it was not provided to Complainant's counsel until the day of the hearing, despite to the law judge's Order to Compel Discovery. (Complainant had objected to the admission of that exhibit at the hearing, but the law judge overruled the objection.)

Complainant's Motion to Strike is denied. Although I am dismayed that the law judge's Order to Compel Discovery was disregarded and, more fundamentally, that at least theoretically Complainant could have been prejudiced by Respondent's failure to exchange documents in discovery in a timely fashion, I deny Complainant's motion because, like the law judge, I find this exhibit to be both irrelevant and unpersuasive. (Initial Decision at 8). Moreover, whereas the law judge could have enforced his Order to Compel Discovery by refusing to admit this document, he was not required to do so by Section 13.220(n) of the Rules of Practice, 14 C.F.R. § 13.220(n) (1989).

He concluded that the tachometer was consistently used and was not grossly in error. (Id.)

Paragraph 4(b). The type certificate data sheet provides that certain information must be displayed on placards in full view of the pilot:

> (7) Next to fuel filler caps: Fuel 38* U.S. gal. Min. Octane 87. Fuel tanks are interconnected. Allow sufficient time for fuel level to equalize before top-off of tank. No aromatic fuel.

(Complainant's Exhibit 3, p. 4, n. 2). Mr. Read testified that in addition to this requirement, a placard reading "AUTO FUEL -- 87 OCTANE MINIMUM" was required at or near the fuel filler cover. (See Complainant's Exhibit 5, p. 50). He stated, "I had noted at the scene that there was no placard readable on the fuel access cap." (TR-23-24)(emphasis added).

The law judge rejected Respondent's argument that in light of Mr. Read's testimony that he observed no readable placards on the fuel filler caps, Complainant had failed to satisfy its burden of proof that there was no readable placards next to the fuel filler caps, as required by the type certificate data sheet. He wrote that "[o]ne failing to observe the placard 'on' the fuel access cap would undoubtedly notice it 'next to' the cap had it been placed there as required," and, consequently, he held that there was no placard next to the cap. (Initial Decision at 9).

Respondent's Appeal

In this appeal, Respondent argues that Complainant failed to satisfy its burden of proof. Respondent argues specifically that the evidence indicates that:

1. Respondent maintained adequate records of compliance with applicable ADs;

2. Respondent's failure to keep a copy of FAA Form 337 reflecting an alteration to the propeller does not constitute a violation of Section 91.173(a)(2)(v) because:

a. the FAA-approved repair station, which made the alteration to the propeller, issued a "yellow tag";

b. the FAA-approved repair station is required to issue FAA Form 337; and

c. Respondent was not aware of the alteration;

3. despite the tachometer reading of 5754 hours at the time of the accident, the 5000-hour safe-life of the propeller was not actually exceeded because the tachometer recorded hours faster than clock hours; and

4. the only evidence presented by Complainant was that there were no readable fuel placards <u>on</u> the fuel access caps, while the requirement was that there be fuel access caps <u>near</u> the fuel access caps.

Respondent also maintains that "Complainant is barred from relitigating issues in connection with N5224S relating to the wing carry-through structure, fuel placards, currency of ADs and weight and balance recalculation under the Doctrine of Collateral Estoppel." (Appeal Brief at 20).

Based upon review of the entire record, including the briefs submitted by both parties, Respondent's appeal is denied. The reasons for the denial are set forth below.

Disposition of Respondent's Appeal

Paragraph 3(a). The law judge's finding that the AD notes were incomplete is affirmed. It is clear from the record itself that the AD notes were incomplete because: 1) they did not include the revision numbers of the ADs with which Respondent had complied, and 2) the method of compliance was only included in one of the three notes. Section 91.173(a)(2)(v) specifically requires that the method of compliance and the AD revision number be recorded.

The fact that Respondent may have actually complied with the ADs does not relieve Respondent of its responsibility under this regulation to maintain complete records. See Administrator v. Air Maryland, Inc., NTSB Order EA-2951 at 9 (June 13, 1989)(in which it was held that the fact that Air Maryland may have provided all or some of the required hazardous materials training to its pilots did not obviate its recordkeeping requirement under 14 C.F.R. § 135.63(a)(4)). As the NTSB has declared, "[a] policy of leniency toward recordkeeping inevitably encourages carelessness in the timely performance of required maintenance, to the derogation of safety in air transportation." Administrator v. Newman, 1 NTSB 2008, 2010 (1972), aff'd, Newman v. Shaffer, 494 F.2d 1219 (2d Cir. 1974).

Paragraph 3(b). The law judge's finding that FAA Form 337 should have been maintained by Respondent in its records is affirmed. Section 91.173(a)(2)(vi) requires each registered owner or operator to maintain copies of the forms prescribed by 14 C.F.R. § 43.9(a) for each major alteration to the propeller. Section 43.9(a) provides that major alterations shall be entered on a form prescribed in Appendix B by the person performing the work, and Appendix B specifies that FAA Form 337 is to be completed. Respondent did not have a copy of FAA Form 337 reflecting the modification to the propeller, and as a result, it violated Section 91.173(a)(2)(vi).

Respondent's arguments with regard to this allegation may be disposed of easily. A "yellow tag" is not a permanent record. Newman v. Shaffer, 494 F.2d 1219, 1220 (2d Cir. 1974). Indeed, Respondent said that it had a yellow tag for this work, but was unable to produce it. Moreover, Appendix B to Part 43 does not permit the use of a yellow tag as a substitute for FAA Form 337. Respondent did not argue that it had any other record of the modification.

Like the law judge, I find it incredible that Respondent may have been unaware of the repair to the propeller. Moreover, the fact that Respondent's counsel has repeatedly asserted that Respondent was unaware of the repair does not alone constitute proof of that allegation. No one employed by Respondent testified that he was unaware of the repair, and no

documentary evidence was introduced to support this argument presented by Respondent's counsel. For that matter, Mr. Read's testimony that Respondent informed him that there had been a yellow tag for this repair suggests that Respondent did indeed have knowledge of the repair.

Finally, Respondent's attempt to shift the responsibility for this violation to the repair station which performed the modification must be rejected for several reasons. There is no evidence that the repair station did not issue a completed FAA Form 337 other than the fact that Respondent did not have a FAA Form 337 in its records during the investigation. More importantly, under Section 91.173(a)(2)(vi) of the FAR, the responsibility to maintain FAA Form 337 reflecting a major modification to the aircraft belongs to the owner or operator, not to the repair station. See Administrator v. Fleischman, NTSB Order EA-2962 at 10-11 (July 28, 1989), aff'd, Fleischman v. DOT, No. 89-70367 (9th Cir., March 1, 1991)(in which the NTSB rejected a similar argument.)

Paragraph 4(a). The law judge's finding that the safe-life of the wing carry-through structure was exceeded by 754 hours is affirmed, and necessarily then, Respondent's violation of Section 91.29(a) (operating an unairworthy aircraft) is likewise affirmed. Respondent failed to prove that had a clock been used to record time, rather than a tachometer, the records would indicate that the Air Tractor had been in operation less

than 5000 hours. Respondent based its argument on Leland Snow's opinion that since the Air Tractor operates at 2100 RPM loaded and 2000 RPM empty, the average speed of operation is 2050 RPM. (Respondent's Exhibit 1). However, it would be inappropriate to use this average speed because, as Mr. Read pointed out, for example, the engine speed is 1200 RPM when the aircraft descends. Mr. Read's testimony proves that it would be inappropriate to use 2050 RPM (or any other randomly selected RPM) as the average engine speed. Since the actual engine speeds during the aircraft's operation have not been established, and since Respondent had no separate system of recording the aircraft hours, there is no accurate way to determine what would be the correct number of clock hours. Hence, Respondent failed to rebut Complainant's prima facie case that the safe-life of the wing carry-through structure was exceeded.

Respondent did not introduce any evidence that it had consciously and deliberately elected not to modify the wing carry-through structure when the tachometers indicated that the Air Tractor had been in operation for 5000 hours because Respondent believed that the tachometers were an inaccurate measure of actual airframe time. Consequently, Respondent's theory is no more than a post hoc rationalization.

Finally, for purposes of complying with maintenance requirements, operators must select a method of determining time of operation and then must adhere to it. Accurate

recordkeeping is the linchpin behind the FAA's regulatory scheme, and FAA inspectors must be able to determine from a review of the records whether required maintenance has been performed on a timely basis. Therefore, if an operator has been using a tachometer to record time in operation, and the operator has been using that method to determine when to do its required maintenance and inspections, it cannot use as a defense that it was not required to perform certain maintenance because its tachometer is inaccurate. Hence, I agree with the law judge that "[a]lthough the tachometer reading may not be completely accurate, the FAA is entitled to rely on an operator's recording device as long as it is used consistently throughout the service life and is not in error to the point of affecting safety . . . ." (Initial Decision at 7).

Paragraph 4(b). The preponderance of the evidence supports the law judge's finding that there was no readable fuel placard next to the fuel filler caps as required by the aircraft's type certificate data sheet, and that finding is affirmed. There should have been a fuel placard referring to the fact that the aircraft could only use auto fuel and one about the fact that the fuel tanks were interconnected. I agree with the law judge that "[o]ne failing to observe the placard 'on' the fuel access cap would undoubtedly notice it 'next to' the cap had it been placed there as required." (Initial Decision at 9). Respondent could have rebutted this evidence, but it failed to

do so. The only evidence that Respondent introduced on this point was a paragraph in the letter from Air Tractor, Inc., in which it was acknowledged that the metal placards were painted over and that the tank quantity (38) was steel-stamped and visible through the paint. While it may be true that, as stated further in that letter, "[o]ne would think that pilots at Growers would know that the fuel tanks were interconnected after having operated the aircraft for 5,000 hours," (Respondent's Exhibit 1), that does not excuse Respondent's failure to comply with the type certificate data sheet. Indeed, without readable fuel placards, it is simply fortuitous that no accident occurred due to improper fueling practices.

Paragraph 5. As a result of the fact that the safe-life of the wing carry-through structure was exceeded and that the required fuel placards were missing, Respondent was operating an unairworthy aircraft, and therefore, was in violation of 14 C.F.R. § 91.29(a). 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 operations. Section 603(c) of the Federal Aviation Act of 1958, as amended, 49 U.S.C. App. § 1423(c); Administrator v. Doppes, NTSB Order No. EA-2123 at 6 (January 25, 1985). Since the aircraft did not conform to its type certificate, it was not airworthy. Morton v. Dow, 525 F.2d 1302, 1307 (10th Cir. 1975).

Collateral Estoppel. Respondent's last argument that Complainant should be collaterally estopped from assessing a civil penalty against Respondent is rejected. Respondent bases this argument on the fact that similar actions were brought against two mechanics employed by Respondent. In one case, In the Matter of Dabaghian, a hearing was conducted on December 4, 1989, before Administrative Law Judge Henry B. Lasky. Judge Lasky held that Complainant had failed to prove the allegations contained in the Complaint. Complainant filed an appeal from that decision, but subsequently withdrew its appeal. See In the Matter of Dabaghian, FAA Order No. 90-0006 (February 16, 1990). In the other case, In the Matter of Edwards, Complainant withdrew the Complaint on March 12, 1990, before a hearing was held, and the law judge dismissed the Order of Civil Penalty on March 15, 1990.

"Collateral estoppel, like the related doctrine of res judicata, has the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy, and of promoting judicial economy by preventing needless litigation." Parklane Hosiery Co. v. Shore, 439 U.S.

322, 326 (1978).[10/] Under collateral estoppel or "issue preclusion," "[w]hen an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim." Restatement (Second) of Judgments § 27 (1982). The Restatement (Second) of Judgments also provides for issue preclusion between a party to the first action and a non-party. Id., § 29.

Here, Respondent relies upon the non-appealed initial decision and a voluntarily withdrawn complaint as the basis for its assertion of collateral estoppel. However, Section 13.232(j)(3) of the Rules of Practice provides that "[a]ny issue, finding, or conclusion, order, ruling, or initial decision of an administrative law judge that has not been

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10/ Collateral estoppel is part of the broad doctrine of res judicata. K. Davis, Administrative Law Treatise, § 21:2 (2d. ed. 1983). The distinction between collateral estoppel and res judicata has been explained as follows:

> Under the doctrine of res judicata, a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action. Under the doctrine of collateral estoppel, on the other hand, the second action is upon a different cause of action and the judgment in the prior suit precludes relitigation of issues actually litigated and necessary to the outcome of the first action.

Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 n. 5 (1979).

appealed to the FAA decisionmaker is not precedent in any other civil penalty action." 55 Fed. Reg. 27548, 27585 (July 3, 1990)(to be codified as 14 C.F.R. § 13.232(j)(2)). Accordingly, if the Administrator is collaterally estopped by an unappealed initial decision of an administrative law judge in a case against another party, that would result, in essence, in giving precedential value to that initial decision, contrary to Section 13.232(j)(2). Hence, the law judge's decision in In the Matter of Dabaghian cannot collaterally estop the Administrator from reviewing identical issues on appeal in the instant case. Similarly, the law judge's dismissal of the case in In the Matter of Edwards does not estop Complainant in the case at bar because, as Complainant correctly notes in its brief, the former case was not actually litigated and the law judge's dismissal does not contain any findings. Lubrizol Corp. v. Exxon Corp., 632 F. Supp. 326 (S.D. Tex. 1986).

The doctrine of collateral estoppel is also inapplicable here because the issues dealt with in In the Matter of Dabaghian did not include some of the issues in the instant case. Complainant alleged that Dabaghian, a mechanic employed by Respondent in the instant case, violated 14 C.F.R. § 43.15(a), by failing to properly determine whether N5224S met all applicable airworthiness requirements when he performed certain 100-hour inspections on it. Complainant alleged in pertinent part that Dabaghian had approved N5224S for return to

service when the required fuel placards had been painted over and were unreadable, and the wing carry-through structure's 5,000 hour safe-life had been exceeded. Thus, two issues in the instant case -- whether the operator should have maintained FAA Form 337 for a major alteration to the propeller and whether the records reflecting compliance with applicable ADs were complete in accordance with the FAR -- did not arise in In the Matter of Dabaghian. In addition, the fuel placards issue was not identical in these cases. Administrative Law Judge Lasky held in In the Matter of Dabaghian that the evidence indicated that Mr. Dabaghian had replaced the fuel placards with readable ones when he inspected the aircraft, and that the fact that the aircraft did not have readable fuel placards after the crash does not prove that Mr. Dabaghian "painted over and made them unreadable without replacing them with new ones." (In the Matter of Dabaghian, Initial Decision, TR-120). In contrast, the issue in the instant case is not what Mr. Dabaghian did or did not do, or saw or did not see, when he inspected the aircraft, but whether the aircraft had readable placards on July 2, 1988, the date of the accident, which was one month after the last 100-hour inspection conducted by Mr. Dabaghian. If, as Administrative Law Judge Lasky found, the aircraft had readable fuel placards when Mr. Dabaghian returned it to service after the 100-hour inspections, then these placards somehow disappeared prior

to the crash. Likewise, whether the aircraft was in an airworthy condition when Mr. Dabaghian returned it to service, as well as on the date of the flight, are two separate, albeit perhaps related, questions.

Finally, Respondent and its mechanic cannot be considered to be privies. Employment alone is insufficient to satisfy the identical party requirement. E.g., Lubrizol Corp. v. Exxon Corp., 632 F. Supp. at 330. Moreover, the fact that Respondent and Mr. Dabaghian were represented by the same attorney in both proceedings is likewise insufficient. Pollard v. Cockrell, 578 F.2d 1002, 1009 (5th Cir. 1978).

THEREFORE, in light of the foregoing, Respondent's appeal is denied, and the law judge's decision is affirmed.[11/] A civil penalty in the amount of $1,400 is hereby assessed.[12/]

JAMES B. BUSEY, ADMINISTRATOR
Federal Aviation Administration

Issued this 10th day of April, 1991.

11/ I have also considered whether any changes made in the Rules of Practice during the pendency of this case may have affected the result in this case, and have concluded that no change in the Rules is pertinent to this case. If Respondent believes that changes in the Rules would have affected the outcome of this case, Respondent may file a petition for reconsideration of this decision and order, pursuant to 14 C.F.R. § 13.234. Such a petition for reconsideration must include a particularized showing of harm, citing the specific rule change (or changes) and its relevance to the challenged findings or conclusions. See 55 Fed. Reg. 15110, 15125 (April 20, 1990). Although the filing of a petition for reconsideration does not normally stay the effectiveness of the Administrator's decision and order, under these circumstances, if Respondent files such a petition I will stay the effectiveness of this decision and order pending disposition of the petition.

12/ Unless Respondent files a petition for reconsideration within 30 days of service of this decision (as described above), or a petition for judicial review within 60 days of service of this decision (pursuant to 49 U.S.C. App. § 1486), this decision shall be considered an order assessing civil penalty. See 55 Fed. Reg. 27574 and 27585 (1990) (to be codified at 14 C.F.R. §§ 13.16(b)(4) and 13.233(j)(2)).