News from the Hill

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Service Bulletins: Do I Have to Follow Them?

A great deal of industry buzz has been circulating about a case recently decided by the National Transportation Safety Board. The matter is known as Blakey v. Law, and the case has one question on everyone's lips: "Is it mandatory that I follow the instructions found in a service bulletin?"

Traditionally, service bulletins have been considered non-mandatory items as compared with airworthiness directives, which are considered to be regulatory — and, therefore, mandatory — in nature. The answer to the question regarding service-bulletin compliance depends, in part, on the specific facts of the matter (like the answer to any good legal question).

Nonetheless, in most cases, the answer will be, "No, a service bulletin is not intrinsically mandatory under the FAA's system."

Despite this general rule, the recent Blakey v. Law case demonstrates the devil is in the details, as always. Although the Law case involved engine overhaul, there are definitely some lessons to be learned from this case for AEA membership. In particular, the Law case has established some new precedents on certain details regarding compliance with manufacturers' publications and pre-approval of methods for topics not covered in the manufacturers' manuals that are likely to cause significant problems in the industry.

The Law case makes it clear there are ways service bulletins can be incorporated by reference to make them legal requirements, including the testing standards found in an overhaul manual (which would be required in overhauls) and the methods, techniques and practices found in the manuals to the extent they reflect the primary acceptable method and that method is not superseded by other explicit FAA guidance (such as an airworthiness directive). The Blakey v. Law case illustrates how the service bulletin suggestions can become legal requirements.

The Facts

Blakey v. Law involved an A&P mechanic, Therol Wayne Law, who overhauled a Lycoming engine. As part of the overhaul, Mr. Law was required to perform magnetic particle inspection. Mr. Law used an employee who did not hold any certifications to perform this inspection.

Lycoming, however, had published a service bulletin requiring the person who performs the magnetic particle inspection "be qualified and certified in accordance with ASNT Personnel Qualification SNT-TC-1Aor MIL-STD-410."

The FAA accused Mr. Law of failure to follow the instructions contained in this service bulletin. Instead of following the service bulletin, there was conflicting evidence he may have relied on instructions from another manufacturer or he may have relied on no guidance at all (depending on which witness' testimony was to be believed). Either way, the facts of the case made it clear that Law used an employee to perform the inspection who did not have the qualifications called-out in the service bulletin.

Discussion of the Law

The easiest way to address these sorts of issues is to separate two different elements that support maintenance[1] activities. The first is "data." The second is "method," or methods, techniques or practices. These are colloquial terms — not regulatory terms — but they should serve our purposes.[2] We also need to assess what we mean when we describe something as the manufacturer's "instructions for continued airworthiness."

Data

Data represents the engineering analysis that proves the end result you are trying to achieve is "correct" in the sense it will render an airworthy result that meets the requirements of the regulations. This is the sort of engineering data approved by

[1] Throughout this article, the term "maintenance" means inspection, overhaul, repair, preservation and the replacement of parts.
[2] One of the reasons for the warning about colloquial use is that 14 C.F.R. § 121.369(c) uses the term "data" to mean the same thing as the word "method" in this article.

designated engineering airworthiness representatives (approval reflects a finding that the data meets all of the applicable requirements of the regulations, including the broad airworthiness requirements).

The maintenance regulations require you return the product to a condition at least equal to original condition (such as type-certificated condition or properly altered condition, or a condition described by a supplemental type certificate or other FAA-approved configuration).[3]

Your "data" is what demonstrates you are meeting the requirements of the regulations by returning the item to a configuration deemed appropriate by the regulations. Essentially, it is the "proof" that the work you are performing will lead to a correct result.

When you perform major repairs or alterations, the FAA must approve your data.[4] For minor repairs and minor alterations, there is no general requirement for the data to be approved by the FAA. An important part of the reason minor repairs and minor alterations are excluded from the FAA-approval prerequisite is because the FAA does not have the resources to approve all minor repairs and minor alterations.

Even if the operation is minor and there is no approved data requirement, an after-the-fact analysis should still show the work returned the product to a condition at least equal to its original or properly altered condition with respect to the work performed; if not, the requirements of the regulations have not been met.

Method

"Method" reflects the way you accomplish your tasks. If you have approved data but use an incorrect method, you may not achieve the expected result.

Generally, the method you use for performing maintenance or alteration must come from one of two "sets" of methods.

The first broad source of acceptable methods is the manufacturer's maintenance instructions. This means the manufacturer's manual and/or the instructions for continued airworthiness. To the extent those two may not be one and the same, in some particular cases, they are both considered acceptable to the FAA.

Manufacturers often are required to produce instructions for continued airworthiness for their products. They also are required to have a mechanism for supplementing the instructions and for publishing the supplements. It is normal for manufacturers to use the service bulletin system as the mechanism for supplementing instructions for continued airworthiness.

The exact scope of what constitutes "the manufacturer's manual" was part of the issue that arose in the Blakey v. Law case, but the court made it clear (and the regulations also made it clear) that when service bulletins are used to supplement the instructions for continued airworthiness, those service bulletins are considered to be a part of the manual.

The second set of permissible methods is anything considered acceptable to the FAA.[5] The exact scope of what is considered "acceptable" is a matter for some debate as well. However, at least one case has suggested that basic tenets of administrative law require an airman has notice of the potential that a method is impermissible, and therefore, a method cannot be considered unacceptable absent either guidance from the FAA stating unacceptability or a method that is sufficiently objectively unreasonable so as to be clearly unacceptable.[6]

It is possible to use the wrong methods (and violate the Section 43.13(a) methods rule) while at the same time coming to a correct configuration at the end, and thus be in compliance with the requirements of section 43.13(b).

In another case, Busey v. Swanson, the FAA showed the respondent had failed to use appropriate methods, but the FAA failed to show the results were improper, so the NTSB affirmed the FAA's finding that the methods were improper, but overturned the FAA's finding that the condition was inadequate.[7]

It is also theoretically possible to use acceptable methods and come to an inappropriate configuration (a configuration for which the data fails to meet the original or properly altered condition). But this should be rare because properly completed acceptable methods are supposed to lead to an appropriate configuration, and data showing an inappropriate configuration had been reached, often would be taken as prima facie evidence (evident without proof or reasoning) that the respondent had not used acceptable methods.

One reason "data" (which must be approved for major repairs and alterations) is treated differently from "methods" (which do not need to be preapproved as long as they are acceptable) is because of the tremendous variety of possible repairs and alterations. There are just too many different types of repairs and configurations to expect a manufacturer or anyone else to anticipate all of the possibilities and to provide methods for each and every

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[3] 14 C.F.R. § 43.13(b).
[4] E.g. 14 C.F.R. §§ 121.379(b), 135.437(b), 145.201(c)(1) (requiring the data supporting a major repair or major alteration to be approved by the FAA).
[5] 14 C.F.R. § 43.13(a).
[6] In re Simmons, NSTB Order EA-350, 1 NTSB 1697, 1699 (July 12, 1972).
[7] Busey v. Swanson, NTSB Order No. EA-2971 (Aug 14. 1989).

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one of them.

The Manuals

Finally, we have the manufacturer's instructions for continued airworthiness, or ICAs. Design approval holders are required by the regulations to produce ICAs.[8] A method for performing maintenance or alteration is acceptable if it is published in the ICAs.[9] The manuals must be made available to anyone who is required to comply with them.[10]

Several complaints about manufacturers' manuals have been raised in recent years, including the proposition they are being withheld from parties required to comply with them (several parties have filed petitions with the FAA in the last decade to try to remedy this situation, but the FAA has not yet taken any steps in response to those petitions).

Some manufacturers have countered that the fact the industry is permitted to use other acceptable practices means the industry is not required to comply with the manuals.

The Analysis

In Blakey v. Law, the Administrator accused Law of two violations with important ramifications for AEA members. The first was failure to use acceptable methods. The second was failure to properly follow the manufacturer's guidance during an overhaul.

Remember, Mr. Law used an employee who did not possess the certifications called-out in the service bulletin. The decision does not suggest the employee failed in any way to perform the inspections properly.

The NTSB found that where a manufacturer's manual states that the manufacturer's service bulletins are incorporated by reference, the service bulletins become part of the manual and, therefore, they are acceptable methods for performing maintenance. Although the case does not state as such, this conclusion is based partly on the regulations that require each manufacturer to have (and to describe) a procedure for updating the instructions for continued airworthiness.[11]

Past case law also has made it clear that where the manufacturer has published a way of doing things, a mechanic must follow that method unless the mechanic has some other indicia of acceptability from the FAA.[12]

The Critique

In the opinion in this case, the NTSB states that the instruction to use someone with specific credentials was a valid work instruction, and that failure to follow this instruction was a violation of 43.13(a) (the "method" regulation).

Similarly, the failure to use the manufacturer's instructions was deemed a violation of the overhaul rule, which specifies no one may call something "overhauled" unless it "has been tested in accordance with approved standards and technical data, or in accordance with current standards and technical data acceptable to the Administrator," which have been developed and documented by the manufacturer.[13]

The problem with the NTSB's conclusion is, the regulations were read as they might be loosely paraphrased, not as the regulations actually are written. The case seems to interpret 43.13(a) as if it required the maintainer to follow the manufacturer's manuals in all matters — and not just to adhere to the manuals for methods, techniques and practices.

Similarly, the plain language of the overhaul rule states that the testing must be done to "approved standards and technical data," but that is a description of how to perform the testing — not who can perform the testing.

The regulations specifically require that each person performing maintenance or alteration must use the prescribed "methods, techniques or practices" (or another acceptable alternative). A big problem in this case is, the requirement to use persons with certain qualifications imposes limits on certificated persons that contradict the regulations. The regulations provide qualifications for certificated persons and specify the privileges of the certificates issued by the FAA.

If a manufacturer can dictate the qualifications for performing certain types of work, then the manufacturer can supplant the FAA's authority and dictate different qualifications to perform certain types of work. This means a person who has certain privileges issued by the FAA as part of that person's certificate can have those privileges curtailed by the manufacturer.

Obviously, a manufacturer does not have the power to limit what a private person can do unless the FAA grants him that authority. The FAA only can grant authority to do things within the

[8] See 14 C.F.R. §§ 23.1529, 25.1529, 27.1529, 29.1529, 31.82, 33.4 and 35.4 (requiring the production of manuals in accordance with cross-referenced appendices).
[9] 14 C.F.R. § 43.13(a).
[10] 14 C.F.R. § 21.50(b).
[11] E.g. 14 C.F.R. Part 33 App'x 33.1(c) (requiring the manufacturer to submit to the FAA a procedure for incorporating and distributing changes to the manual).
[12] E.g. In re Wright, EA-1058, 3 NTSB 608, 609-610 (Aug. 17, 1977).
[13] 14 C.F.R. § 43.2(a).

FAA's own jurisdiction and authority. The FAA, however, does not have the authority to amend the privileges of a certificate unless the FAA goes through a legal process (known as a "609" action for historical reasons). Therefore, the FAA cannot authorize a manufacturer to act as its agent in limiting the privileges of a certificate without going through the same sort of legal process.

A manual provision directing the mechanic to use the inspection methods found in a standard would be appropriate and enforceable. A provision directing the mechanic to have certain qualifications as a prerequisite to performing certain work is supplanting the FAA's existing regulatory structure — which assigns privileges to certain certificates — in an impermissible manner.

While the decision of the court might have been overturned at the appellate level, the court's decision stands today as valid precedent. This means NTSB precedent currently directs that maintenance and alteration be performed in strict adherence to the language of the manual, including service bulletins, despite the more narrow language of the regulations.

Until a decision of this sort is appealed to the Court of Appeals, or the Administrator herself issues supervening policy, the decision likely will represent a difficulty for the industry because those in the industry will be unable to ignore service bulletin instructions even when they clearly do not make sense.

The concern over service-bulletin provisions that do not make sense is a very real concern — some service bulletins have prohibited installers from installing parts made by competitors (such as prohibitions against PMA parts). Some service bulletins have directed that only the OEM can do certain types of work and not the OEM's competitors.

Other service bulletins have imposed license provisions on certain transactions — this is especially true of licenses for software upgrades for avionics. Imagine if the FAA could penalize you because your PAI thinks you violated the software license provisions in a service bulletin.

If the FAA is willing to enforce these sorts of provisions under the rubric of 43.13(a), it spells trouble for independent repair stations, as well as for repair stations with OEM contractual relationships that could be unilaterally modified through carefully worded service bulletins.

Is Pre-Approval Required?

Among the industry, everyone seems to be talking about the service bulletin angle, but few people are discussing the approved method issue raised in the Law case. The NTSB's decision made several troubling comments about approval of methods that appear at odds with traditional approaches to maintenance practices.

The NTSB stated, "Where the maintenance manual is silent on a particular issue, the mechanic should seek approval from the Administrator regarding how to address that issue."

The NTSB suggests, in the absence of a manufacturer's published process for performing a task, the mechanic must "obtain approval for his process from the Administrator." The NTSB draws its conclusions based on the fact the FAA was able to show at trial that Mr. Law "did not comply with methods, techniques or practices that the manufacturer or the Administrator had accepted."

This statement is overly broad in that it would require approved methods, techniques or practices for all Part 43-regulated functions. This belies the plain language of 43.13, which does not require pre-approval. Instead, it merely requires the methods be acceptable.

In fact, a 1972 case suggests where the manufacturer has not published a standard for performance of maintenance, and the FAA has published no guidance on the maintenance in question, the FAA cannot conclude that a violation of 43.13(a) has occurred in the absence of some objective standard against which the mechanic's work can be measured.[14] (Note: This does not preclude a finding of a 43.13(b) violation if the configuration is not at least equal to original or properly altered condition.)

Proponents of the view that all methods should be pre-approved by the FAA will point back to the 1990 Thunderbird case to show the FAA has long held the belief that maintenance methods need to be pre-approved.[15]

Many people in the industry are confused by the Thunderbird case and the line of cases that have followed it because they do not understand how the plain language of 43.13(a), which requires acceptable methods, can be harmonized with the Thunderbird standard, which suggests any maintenance procedure not found in the manufacturer's manual must be approved by the FAA before use or it is not acceptable.

Thus, the Thunderbird case confused the approval of the technical data with the acceptability of the procedures.

The problem with the Thunderbird case, like many cases setting legal standards that contradict the plain language of the regulations, is that Thunderbird was a case in which the respondent appeared pro se, meaning he was not represented by a lawyer.[16]

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[14] In re Simmons, NSTB Order EA-350, 1 NTSB 1697, 1699 (July 12, 1972).
[15] In Re Thunderbird Accessories, FAA Civil Penalty Decision 1990-11, 2 FAD CP-43 (March 19, 1990).
[16] Id. at CP-47 n.9.

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It was on the basis of a case defended by a non-lawyer that the FAA was able to establish the chain of cases that state methods need to pre-approved.

Equating acceptability of a method with pre-approval of the method would place a tremendous burden on the FAA to be able to perform such approvals — a burden the FAA simply does not have the manpower to accomplish. The FAA already is unable to meet its current burden concerning field approvals and other data approvals because of manpower shortages — it has even published statements of this inability in the Federal Register.

Requiring pre-approval of all non-manufacturers' methods used to perform maintenance or alterations would require the FAA to ignore both the plain language of the regulations and also the real-world limits on the FAA's ability to pre-approve the myriad of methods used for performing minor repairs and alterations throughout the industry.

A copy of the NTSB's decision in Blakey v. Law is available online at www.ntsb.gov/alj/O_n_O/docs/aviation/5221.PDF.

The AEA stands ready to assist its members with their questions concerning how to interpret the new case as it applies to their business operations. The AEA also is looking into options, including a petition to the Administrator, to try to establish a clearer standard as to when a restriction in the manufacturers' manuals must be followed or when the manuals have gone beyond the legitimate authority of the manufacturer to establish method techniques and practices.

We would like to see a reasonable standard that makes sense in the current industry and regulatory environment. ❑