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NTSB Order No. EA-4567

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 3rd day of July, 1997

BARRY L. VALENTINE, Acting Administrator, Federal Aviation Administration, Complainant, v. JAMES W. NUNES, JIMMY D. HINESLY, CARMEN J. ALVARO, GERARD J. GALLUCCI, Respondents.	)	Dockets SE-14898 SE-14899 SE-14904 SE-14905

OPINION AND ORDER

The Administrator and the respondents have appealed from the oral initial decision of Administrative Law Judge William Pope II, rendered in this consolidated proceeding at the conclusion of an evidentiary hearing held June 3 through June 12, 1997.[1] By that decision, the law judge affirmed the Administrator's

[1] An excerpt from the hearing transcript containing the initial decision is attached.

emergency orders revoking the mechanic certificates with airframe and power plant ratings of respondents Hinesly and Gallucci on allegations that they each violated Section 43.12(a)(1) of the Federal Aviation Regulations (FAR), 14 C.F.R. Part 43, and revoking the mechanic certificate of respondent Alvaro on allegations of violations of FAR §§ 43.12(a)(1), 43.13(a) and (b), but not 43.15(a)(1). Finally, the law judge affirmed only the allegations of FAR §§ 43.13(a) and (b) and 43.15(a)(1) as to respondent Nunes, and reduced his sanction to a suspension of his mechanic certificate for 180 days.[2]

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[2] FAR §§ 43.12(a)(1), 43.13(a) and (b), and 43.15(a)(1) provide as follows:

> § 43.12 **Maintenance records: Falsification, reproduction, or alteration**.
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> (a) No person may make or cause to be made:
> (1) Any fraudulent or intentionally false entry in any record or report that is required to be made, kept, or used to show compliance with any requirement under this part....
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> § 43.13 **Performance rules (general).**
>
> (a) Each person performing maintenance, alteration, or preventive maintenance on an aircraft, engine, propeller, or appliance 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 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.
> (b) Each person maintaining or altering, or performing

Upon consideration of the briefs of the parties and of the entire record, we grant the Administrator's appeal as to respondent Nunes and reinstate the finding of a violation of FAR § 43.12(a)(1) and the revocation of his mechanic certificate. Further, we deny the respondents' appeals and otherwise affirm the law judge's initial decision.

All four respondents worked for the same repair station, SabreTech, of Orlando, Florida. Because the allegations relate to the maintenance, repair and falsification of maintenance records of the same engines, the cases were consolidated for hearing. The subject maintenance and repair relate to two separate incidents: the performance of a "C" check on both engines, and the repair of PS-12 fan frame nipple fittings (hereinafter referred to as probes) on the number 2 engine of Aircraft N191G, a Boeing Model 737. The testimony of the

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> preventive maintenance, shall do that work in such a manner and use materials of such a quality, that the condition of the aircraft, airframe, aircraft engine, propeller, or appliance 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).

§ 43.15 **Additional performance rules for inspections**.

(a) *General*. Each person performing an inspection required by Part 91, 123, 125, or 135 of this chapter shall--

(1) Perform the inspection so as to determine whether the aircraft, or portion(s) thereof under inspection, meets all applicable airworthiness requirements....

witnesses is outlined by the law judge in his initial decision. The following brief discussion of the facts is set forth in order to frame the legal issues presented.

According to the Administrator's witnesses, on October 26, 1996, two mechanics, both relatively new to the company, were assigned task cards that required them to remove the engines' fan blades, clean them, lubricate them, put them back in the engines, and balance them. Both mechanics questioned their assignments, recognizing that the facility was not equipped to perform this maintenance. Nevertheless, the law judge found, their lead mechanic, respondent Hinesly, directed them to "sign off" the task cards and the cards were then placed in a box so that they could be "bought off" by an inspector. These mechanics worked the first shift.

Respondent Nunes was an inspector for the second shift. He admits that during his shift he saw these two cards, and he knew immediately that it was impossible for these two mechanics to have performed the work as indicated. According to Nunes, they had neither the time, tools, or materials to lubricate the fan blades in accordance with the task card instructions. Nevertheless, and notwithstanding the fact that he was required to inspect their work by observing at least the re-installation and vibration check of the fan blades, Nunes stamped both task cards with his inspection stamp. He claimed that he knew that the task cards had been mistakenly placed with the package of tasks that had been submitted by the aircraft owner, and he

claimed that he knew that the task was unnecessary because the engines had been lubricated elsewhere during an engine overhaul.[3] The law judge found that, believing that the task cards were therefore superfluous, "it did not matter" if Nunes "bought off" the mechanics' work.[4]

The second incident concerned the repair of two engine probes. The record reveals that during an inspection it was observed that a probe was significantly bent. A non-routine work card was generated and assigned to a mechanic. The work card mistakenly described the part as a temperature probe.

The first mechanic assigned the work card removed the bent probe. He and another mechanic attempted to identify the part in the Boeing manual and, when they could not, they returned the part to their lead mechanic, respondent Gallucci. The mechanics advised respondent Gallucci that they could not find approved technical data on the part. Respondent Gallucci took the part to the machine shop and had it straightened. The part subsequently

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[3] There was a great deal of testimony on whether the cards could have been marked "PCW" because of the earlier overhaul. In the Board's view this testimony was irrelevant. As SabreTech's Director of Technical Operations, Jack Keating, testified, regardless of whether the owner intended to request the lubrication, and regardless of whether any or all of the mechanics knew that the task cards were mistakenly in the package, once the cards were issued by the customer and put in the package, the tasks were required to be performed. (TR-469).

[4] Nunes also claimed that he did not falsify the records by making an entry on the cards with his inspection stamp because, fearing that these two mechanics may have performed unnecessary and/or improper maintenance on the fan blades, he did "inspect" their work, by insuring that the work area had been cleaned up and by putting his hand into the engine and feeling that the blades were actually lubricated. (TR-1521).

broke in two. Respondent Gallucci directed another mechanic to epoxy the parts together. One mechanic refused to install the part. Another mechanic installed it, but refused to sign the work card. Respondent Alvaro directed the mechanic to sign the work card. The mechanic refused.

A second probe was later identified with a problem, and another non-routine job card was generated. Respondent Gallucci took the task cards for both probes from the assigned mechanic. The mechanic testified that he heard respondent Gallucci tell respondent Alvaro to handle it, and respondent Alvaro asked if it should be signed off to standard practices. Gallucci said yes, according to the testimony. Respondent Alvaro subsequently signed the work card as the mechanic, stating that the probes had been "adjusted" in accordance with "737 M." Underneath that entry he wrote, "77-20-1". Respondent Alvaro admits that the work card (Exhibit A-9) bore an incorrect reference since there was no section "77-20-1" in the manufacturer's manual, and that the description of the corrective action taken was incomplete since there was no description of how the probe was adjusted. *See also* Exhibit A-12. Respondent Gallucci claims he used good judgment in having the part straightened, since it was just a piece of bent metal. The evidence established that the engine manufacturer confirmed that the part was not serviceable, and that the engine manual required that it be replaced.

We turn first to the procedural issues raised by respondent Nunes. Respondent asserts that the complaints should be

dismissed because the Administrator failed to prove that the aircraft in question held a U.S. airworthiness certificate at the time of the maintenance. Respondent also asserts that the law judge should have dismissed the complaint as stale. We find no merit in either claim.

The Board's case file establishes that prior to the hearing, respondent's counsel attempted to discern through discovery whether the subject engines were installed on an aircraft that had an airworthiness certificate issued by the United States at the time of the alleged maintenance.[5] The Administrator did not produce the requested evidence by the first day of hearing, and respondent's counsel moved, as a preliminary matter, to compel production of the certificate. The Administrator's counsel responded on the record that a certified copy of the registration was on its way.[6] A copy of the document was never placed in evidence in this proceeding.[7]

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[5] This request was certainly appropriate given the fact that the aircraft had Chinese writing on it, had records showing that it had been overhauled in France that same year, and because there was evidence that the aircraft was operated in India shortly after the events involved herein.

[6] The Board acknowledges receipt of respondents' motion to strike, dated July 1, 1997. The Board's decision in this proceeding, as in all of our cases, is based on our review of the transcript of the proceedings and documents contained in the Board's case file. Argument of counsel is not considered evidence.

[7] We cannot fathom why the Administrator failed to enter the evidence into the record. The evidence had apparently arrived from Oklahoma City during the course of the proceeding, and had been shown to respondent's counsel, according to the record. (TR-228). Its introduction would have taken only moments, would not have cluttered an already cluttered record, and would have

Respondent's counsel renewed his discovery request at the beginning of the hearing on June 2, 1997, and again on June 3, 1997. And, apparently, believing that he would be satisfied with the certified records when they were produced, he appears to have conceded that this discovery issue was closed. (TR-229). Nevertheless, counsel again raised this issue as an open discovery issue at the beginning of the hearing on June 5, 1997, apparently because the Administrator's official records consisted only of microfiche, and a printed copy of the certificate had not been produced. (TR-228, 646).

We find merit in the Administrator's assertion that, had respondent's counsel not been satisfied with the production of this evidence in response to his discovery request, his recourse was to raise the issue as an affirmative defense. Instead, he chose to wait, and raised the issue again after the close of the Administrator's case-in-chief, by moving to dismiss the complaints on the basis that no direct evidence of a U.S. airworthiness certificate had been entered into evidence.

The law judge denied the motion, and respondent asserts that the ruling is erroneous. He argues that Board precedent requires dismissal of the Administrator's complaint, citing Administrator v. McConnell, NTSB Order EA-4093 at 7, n.9, recon. denied, NTSB Order EA-4161 (1994), where the Board held that where a respondent places the matter of U.S. registration in issue, the

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foreclosed respondent's making this argument.

Administrator must produce direct proof of registration.

We concur in the law judge's determination that the Administrator produced, consistent with McConnell, sufficient evidence that the aircraft held a U.S. airworthiness certificate at the time in question. The record reveals that an FAA inspector testified that he had researched the aircraft's registration history, and that he found an airworthiness certificate that was effective on the day in question. (TR-715). The precedent on which respondent relies demands production of direct proof, not documentary evidence. Direct proof is evidence that will stand on its own. Thus, the inspector's testimony suffices to establish U.S. registration.[8]

Respondent also moved to dismiss the complaint as stale at the close of the Administrator's case-in-chief, noting that the alleged violation occurred on October 26, 1996, and the order was not issued until April 29, 1997. (TR-1215). Rule 821.33 of the Board's Rules of Practice, 49 C.F.R. Part 821, provides for dismissal of a complaint that states allegations of offenses that

[8] Respondent argues that exhibit R-31 rebuts the inspector's testimony, because it shows that in March 1996, the aircraft was registered in Hong Kong. First, we note, this document was offered into evidence to establish that an engine overhaul had been performed in early March. It was not offered to prove that the aircraft was registered outside the U.S. at the time of the incidents, and we decline to consider it for that purpose since the Administrator was not given the opportunity to object or refute the document as evidence of that claim. In any event, respondent's counsel states on the record that he had in his possession, at the hearing, computer-generated evidence provided by the Administrator that showed the aircraft had a U.S. airworthiness registration, and, apparently, that this evidence showed the registration remained in effect until December 2, 1996. (TR-57).

occurred more than 6 months prior to the Administrator's advising respondent as to the reasons for proposed certificate action, unless the Administrator's complaint alleges a lack of qualifications. The law judge inquired of the Administrator as to when he first became aware of the allegations and asked why it took so long to process the complaint.

The FAA inspector who led the investigation testified that he discovered the alleged violations on December 11, 1996. He described to the law judge a lengthy and complex investigation, and testified that his report was finally sent to the regional office on January 10, 1997. He explained that the case was coordinated with both FAA Headquarters and the region, and that it ultimately arrived in counsel's field office on January 27, 1997.

The law judge next queried FAA counsel on why it took from January 27, 1997 to April 29, 1997 to issue the order. The record shows that FAA counsel advised the law judge that because of the nature of the case and its relationship to certain other cases, it had to be coordinated with FAA's Chief Counsel. FAA counsel stated on the record that he gave this matter "top priority" and that it was "put ahead of everything else" in the office. (TR-1230). The law judge ruled that the FAA had shown it handled the case with due dispatch and due diligence once it had discovered the alleged violations. He denied the motion to dismiss. (TR-1232).

Respondent asserts that the law judge's determination is

incorrect because the Administrator failed to prove "it had spent less time processing this case than it would have had this matter been discovered at the time of its occurrence." (Appeal Brief at 41). We reject this contention. This complaint unquestionably raised an issue of lack of qualification. Once that determination was made, it was unnecessary for the law judge to inquire further. The precedent relied on by respondent in his appeal brief is inapplicable because the cases cited do not involve a complaint that alleged lack of qualifications. In any event, the Administrator's counsel stated on the record that he gave this case "top priority." Thus, there was sensitivity to the fact that this case was not discovered contemporaneously with the act underlying the violation, and it was given heightened attention and priority over other cases pending in counsel's office.

The remaining issues raised by respondents concern the sufficiency of the evidence. Respondents contend that the law judge erred by finding that respondent Hinesly had caused his subordinates to make false work card entries regarding the fan blade lubrications. Respondents further assert that the findings should not be upheld because these same entries did not involve a material fact. Respondents argue that the law judge erred in holding that respondent Gallucci had caused respondent Alvaro to make the work card entries regarding the probes. Finally, respondents contend that respondent Alvaro's entries were not proven to be intentionally false.

The law judge went to great lengths to explain in his initial decision that his findings were essentially based on his credibility determinations, and that he found the testimony of the Administrator's witnesses, particularly the testimony of one mechanic who was involved in both incidents, far more credible than the testimony of the respondents. Respondents have offered us no persuasive reason to reject the law judge's credibility findings, and our review of the record discloses none. The law judge saw and heard the witnesses, and he was in the best position to evaluate their demeanor. Administrator v. Smith, 5 NTSB 1560, 1563 (1986). We adopt his findings of fact, with the exception of one finding as described below, as our own.

The Administrator has appealed the law judge's findings as to respondent Nunes.[9] The Administrator asserts that the law judge erred by ruling that respondent Nunes did not violate FAR § 43.12(a)(1) because of his claimed belief that his entries on the work card were not material, since he believed that the fan lubrication had previously been accomplished. We agree.

Respondent's subjective belief of the materiality of his falsification is irrelevant to these charges. Nunes knew that the fan blades had not been lubricated by his company's mechanics, and yet he indicated by his stamp that the work had been accomplished by them, and that he had inspected that work. Even if he truly believed that the task cards had been

[9] This discussion also addresses respondent Hinesly's contention on appeal that the entries he directed to be made regarding the fan lubrication were not material.

erroneously issued by the customer (a finding that we do not necessarily share with the law judge), and even if Nunes knew that the work had been previously accomplished (a matter about which he could not be certain), there is nothing apparent in his entry that would convey this knowledge to any other person who might look at the task card. Thus, the false information that he entered, i.e., that the lubrication had been performed by SabreTech mechanics, could have been relied on by others. As respondents note in their reply brief, citing Janka v. NTSB, 925 F.2d 1147, 1150 (9th Cir. 1991), "the test of materiality is whether the false statement had the natural tendency to influence, or was capable of influencing the decision in question." The factor that distinguishes Administrator v. Blanton, NTSB Order EA-3850 (1993), cited by respondent and relied on by the law judge in his decision as to respondent Nunes, is that in Blanton it was found that there was no **intent** to falsify.[10] In the case before us, there is no convincing evidence that even remotely suggests that Nunes believed his statement, that the fan lubrication had been accomplished by SabreTech mechanics, to be true. As we recently noted in Administrator v. Anderson, NTSB Order EA-4564 at p. 6, n.7 (June 27, 1997), we think FAR § 43.12(a)(1) "is concerned with insuring the truthfulness or accuracy of written information about an

[10] Blanton believed that the way to reflect the prior accomplishment of the task, consistent with his company's recordkeeping requirements, was to sign off the task cards. Thus, he did not believe that his sign off was false.

aircraft's maintenance history." If aircraft records cannot be relied on as accurate, the viability of the entire aircraft maintenance system is doubtful. Moreover, the necessity for truthfulness and the critical need for accuracy in these records is reflected clearly in our precedent, where we have consistently affirmed revocation as the only appropriate sanction in similar circumstances.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondents' appeals are denied;

2. The Administrator's appeal is granted;

3. The law judge's initial decision is affirmed, except to the extent it has been modified herein; and

4. The emergency orders of revocation are affirmed.[11]

HALL, Chairman, FRANCIS, Vice Chairman, HAMMERSCHMIDT, and BLACK, Members of the Board, concurred in the above opinion and order. GOGLIA, Member of the Board, did not participate.

[11] Respondents' request for oral argument was submitted too late for the Board's consideration.