

SERVED: July 25, 1997

NTSB Order No. EA-4575

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 23rd day of July, 1997

_____	)	
BARRY L. VALENTINE,	)	
Acting Administrator,	)	
Federal Aviation Administration,	)	
	)	
Complainant,	)	
	)	Docket SE-14229
v.	)	
	)	
JAMES C. ANDERSON,	)	
	)	
Respondent.	)	
_____	)	

**OPINION AND ORDER**

The respondent has appealed from the oral initial decision Administrative Law Judge William R. Mullins rendered in this proceeding on June 5, 1996, at the conclusion of an evidentiary hearing.<sup>1</sup> By that decision, the law judge affirmed an order of the Administrator suspending respondent's airframe and powerplant

<sup>1</sup>An excerpt from the hearing transcript containing the initial decision is attached.

mechanic certificate (No. 574925739) for 15 days for his alleged violation of section 121.701(a) of the Federal Aviation Regulations, "FAR," 14 C.F.R. Part 121.<sup>2</sup> For the reasons discussed below, the appeal will be denied.<sup>3</sup>

The Administrator's August 31, 1995 Order of Suspension (the complaint here) alleged, among other things, the following facts and circumstances concerning the respondent:

2. At all times mentioned herein, your [sic] were employed as a mechanic by MarkAir, Inc., (MarkAir), an air carrier engaged in interstate air transportation under Part 121 of the Federal Aviation Regulations.
3. During the course and scope of your employment with MarkAir, on or about February 23, 1995, you were dispatched to perform maintenance on civil aircraft N674MA, a Boeing Model B-737-200, at the Fairbanks International Airport, Fairbanks, Alaska.
4. The reason you were dispatched to perform maintenance on civil aircraft N674MA as described in paragraph 3 is that the pilot in command had reported a possible flap problem. Upon reaching the aircraft, the pilot in command informed you that the problem required right-hand aileron input to maintain straight and level flight.
5. After the events described in paragraph 4, you performed maintenance on civil aircraft N674MA which included deploying and retracting the flaps and inspecting the left and right inboard aft flap assemblies.

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<sup>2</sup>FAR section 121.701(a) provides as follows:

**§ 121.701 Maintenance log: Aircraft.**

(a) Each person who takes action in the case of a reported or observed failure or malfunction of an airframe, engine, propeller, or appliance that is critical to the safety of flight shall make, or have made, a record of that action in the airplane's maintenance log.

<sup>3</sup>The Administrator has filed a reply brief opposing the appeal.

6. At the time of the maintenance referenced in paragraph 5, civil aircraft N674MA was at an intermediate stop on MarkAir Flight No. 61, a scheduled, passenger-carrying flight operated in air transportation under Part 121 of the FAR by MarkAir from Anchorage, Alaska, to Deadhorse, Alaska.
7. The problem described in paragraph 4 constitutes a reported or observed failure or malfunction of an airframe, engine, propeller, or appliance that is critical to the safety of flight.
8. At the conclusion of the maintenance referenced above, neither you nor anyone else made an entry in the maintenance records for civil aircraft N674MA regarding the above-described maintenance, and the aircraft departed on the next leg of its scheduled flight.
9. Later on February 23, 1995, you were again dispatched to perform maintenance on civil aircraft N674MA at the Fairbanks International Airport, Fairbanks, Alaska, because the problem described in paragraph 4 persisted.
10. You again performed maintenance on civil aircraft N674MA which included deploying and retracting the flaps, inspecting the right, inboard, aft flap assembly, and applying deicing fluid to the flap tracks. Despite these efforts, you observed that the right, inboard flap would not fully retract.
11. At the time of the maintenance referenced in paragraph 10, civil aircraft N674MA was at an intermediate stop on MarkAir Flight No. 62, a scheduled, passenger-carrying flight operated in air transportation under Part 121 of the FAR by MarkAir from Deadhorse, Alaska, to Anchorage, Alaska.
12. The problem described in paragraph 10 constitutes a reported or observed failure of an airframe, engine, propeller, or appliance that is critical to the safety of flight.
13. At the conclusion of the maintenance referenced in paragraph 10, neither you nor anyone else made an entry in the maintenance records for civil aircraft N674MA regarding this maintenance, and the aircraft departed on the next leg of its scheduled flight.

Respondent, for the most part, does not dispute the facts presented in the complaint, including the allegations that he

twice failed to make maintenance entries about the flap problem.

His appeal, rather, takes issue with the law judge's conclusion that the deficiency in the inboard aft flap's operation amounted to a failure or malfunction that was, within the meaning of the cited regulation, critical to the safety of flight. Respondent argues that the problem was not of that magnitude and, consequently, there was no obligation to make a maintenance entry concerning it. As we find no error in the law judge's rejection of that argument, in light of the parties' evidentiary submissions, we will deny the appeal.<sup>4</sup>

Our affirmation of the initial decision does not mean that we agree with the law judge's determination that the dispositive issue in the case was whether the evidence supports a conclusion that the flap malfunction was critical to flight safety. To the contrary, we think the seriousness of the flap malfunction is of doubtful relevance for purposes of assessing whether respondent properly discharged the duty the regulation imposed upon him. The law judge's different and, in our judgment, mistaken construction proceeds from the belief that the regulation requires maintenance entries only with respect to reported or observed failures or malfunctions that are critical to flight

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<sup>4</sup>We agree with the Administrator that the respondent is not free to press on appeal matters in the nature of affirmative defenses, such as whether respondent was denied access to the aircraft's maintenance log, that cannot be resolved because no evidence in support of them was advanced at the hearing. Similarly, assuming, *arguendo*, our authority to review such questions, respondent may not raise for the first time on appeal objections relating to the manner in which the case was investigated or prosecuted.

safety. However, we do not read the regulation to condition the need for a log entry on an assessment of the seriousness of a maintenance problem that was reported or observed. Rather, the regulation imposes a duty to make a log entry whenever a reported or observed failure in a component or system that is critical to flight safety results in someone having taken action to identify and correct it. In other words, it is not the actual problem the aircraft has experienced, but the discrepancy's location that triggers the necessity for the recording of responsive action.

Under either reading of the regulation, however, the Administrator would be entitled to a judgment that his regulatory charge had been proved, for the evidence provided by his two inspectors, through sworn statement and live testimony, supports a finding that a maintenance entry reflecting respondent's troubleshooting efforts needed to be made whether the non-retracting flap was critical to flight safety because of its actual impact on the aircraft's operation or because the flap is part of the aircraft's flight control system. While respondent believes that the law judge should have found his unsworn documentary evidence on the effect of the flap's malfunctioning on flight safety to be dispositive, he has not shown error in the law judge's determination, fully explained in his decision, that the Administrator met his evidentiary burden through the testimony of his expert witnesses.

**ACCORDINGLY, IT IS ORDERED THAT:**

1. The respondent's appeal is denied;
2. The initial decision of the law judge is affirmed; and
3. The 15-day suspension of respondent's mechanic

certificate shall commence 30 days after service of this opinion and order.<sup>5</sup>

HALL, Chairman, FRANCIS, Vice Chairman, HAMMERSCHMIDT, GOGLIA, and BLACK, Members of the Board, concurred in the above opinion and order.

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<sup>5</sup>For purposes of this opinion and order, the respondent must physically surrender his certificate to an appropriate representative of the Administrator, pursuant to FAR section 61.19(f).