

SERVED: March 27, 1998

NTSB Order No. EA-4648

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 26th day of March, 1998

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JANE F. GARVEY,	)	
Administrator,	)	
Federal Aviation Administration,	)	
	)	
Complainant,	)	
	)	Docket SE-15141
v.	)	
	)	
THUNDERBIRD PROPELLERS, INC.,	)	
	)	
Respondent.	)	
	)	

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**OPINION AND ORDER**

The respondent has appealed from the oral initial decision Administrative Law Judge William R. Mullins rendered in this proceeding on February 27, 1998, at the conclusion of a five-day evidentiary hearing convened on February 23.<sup>1</sup> By that decision, the law judge affirmed the emergency revocation of respondent Thunderbird Propellers, Inc.'s (hereinafter "Thunderbird," "TPI," or "respondent") authority, pursuant to Air Agency Certificate

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<sup>1</sup>An excerpt from the hearing transcript containing the

No. IG2R897K, to operate a repair station for propellers under Part 145 of the Federal Aviation Regulations ("FAR"), 14 C.F.R. Part 145.<sup>2</sup> For the reasons discussed below, the appeal will be denied.

The Administrator's January 22, 1998 Emergency Order of Revocation contains numerous allegations of FAR violations set forth in eight separate counts.<sup>3</sup> The law judge dismissed, for want of sufficient proof, the charges in Count IV of the Complaint. While he determined that the Administrator had sustained her burden of proof as to the allegations in the remainder of the Complaint, he agreed with the respondent, as to Counts I, II, VI, VII, and VIII, that the charges should be dismissed as stale under Section 821.33 of the Board's Rules of Practice, 49 C.F.R. Part 821.<sup>4</sup> As to Counts III and V, however, the law judge concluded that the intentional falsification and operation-during-suspension charges they alleged were not subject

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initial decision is attached.

<sup>2</sup>The Administrator has filed a reply opposing the appeal.

<sup>3</sup>A copy of the relevant parts of the Emergency Order of Revocation, which served as the complaint in this proceeding, is attached as an appendix to this decision.

<sup>4</sup>Although the Administrator did not appeal from any aspect of the law judge's decision, she urges us on respondent's appeal to reinstate the charges dismissed as stale because, in her view, the law judge erroneously failed to consider whether the multiple charges in Counts I, II, VI, VII, and VIII, viewed collectively rather than in isolation, demonstrated a pattern of conduct that was sufficient to show that respondent lacked qualification to hold its certificate. We decline to rule on this issue, as no reason appears for the Administrator's failure to present it in a timely-filed appeal.

to dismissal for staleness because they established that respondent lacks qualification to hold an air agency certificate.<sup>5</sup> We find no basis in respondent's appeal for disturbing the law judge's assessment.<sup>6</sup>

The respondent presents essentially two objections to the conclusion that it intentionally falsified, in violation of FAR section 43.12,<sup>7</sup> work orders concerning Hartzell propellers it

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<sup>5</sup>Inasmuch as intentional falsification and operation during a certificate suspension clearly each raise an issue of lack of qualification under Board precedent, none of the individual constituent or related charges alleged in either Count III or V was eligible for dismissal for staleness under section 821.33, as respondent contends. It is, therefore, of no consequence that some of those charges would separately warrant a far less severe sanction if they occurred in a different context.

<sup>6</sup>We find no merit in respondent's suggestion that our decision in Administrator v. Thompson, NTSB Order No. EA-4170 (1994), counsels dismissal of the intentional falsification charge the law judge upheld in this case. Unlike Thompson, wherein we found that the Administrator was estopped from revoking the certificate of an airman who had relied to his substantial detriment on FAA assurances that he was no longer in enforcement jeopardy, the return of TPI's certificate, suspended briefly in 1996 for its refusal to permit an inspection, did not constitute absolution by the Administrator for any suspected violations that the inspection uncovered. It reflected, essentially, no more than that TPI had, in order to have its certificate restored, ultimately submitted to the inspection it had previously refused.

<sup>7</sup>FAR section 43.12 provides as follows:

§ 43.12 **Maintenance records: Falsification, reproduction, or alteration.**

- (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;
  - (2) Any reproduction, for fraudulent purpose, of any record or report under this part; or
  - (3) Any alteration, for fraudulent purpose, of any

overhauled by, among other things, indicating that it had installed A-2043-1 nuts, which is the only fastener the manufacturer authorized, when, in fact, it had installed MS-20365-624 nuts.<sup>8</sup> It first contends, in effect, that the regulation does not reach any intentional falsification that may have occurred in this connection because the descriptions of the nuts used were on parts lists attached to the work orders that it was not required to make or keep under Part 43.<sup>9</sup> We disagree. The listing of parts replaced during an overhaul does, we think, and as the Administrator asserts, fall within respondent's obligation, under FAR sections 145.57(a) and 145.61, to "maintain adequate records of all work that it does," so that it can demonstrate its compliance with Part 43 maintenance standards, which, of course, address the performance criteria for both the methods and materials that must be utilized.<sup>10</sup> We are doubtful

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record or report under this part.

<sup>8</sup>"MS" stands for mil spec or military specification. Testimony in the record (tr. at 192) suggests a significant cost savings in using the MS nut: \$.14 per MS unit, compared to \$4.00 for the A-2043 nut. The propeller overhauls at issue in this proceeding typically required ten of the A-2043 nuts.

<sup>9</sup>The law judge did not make any express findings as to the other allegations within Count III which the Administrator maintained revealed additional instances of intentional falsifications in the work orders. As we do not know whether this omission reflected an oversight or a judgment that the other allegations had not been proved, we will confine our review to the allegations involving the nuts alone.

<sup>10</sup>Consistent with her position that propeller overhauls employing unauthorized parts run afoul of the applicable performance standards, the Administrator, in Count III, alleged, and the law judge affirmed (see I.D. at 693), violations of FAR sections

that maintenance records that did not describe in some way the parts replaced or repaired during an overhaul could be deemed "adequate" for this purpose.

Respondent next contends that, assuming the parts list is a document to which the regulation applies, the charge of intentional falsification must fail because the false listing that A-2043 nuts had been used was not material, since, in the

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43.13(a) and (b) and 145.57(a). Those provisions state as follows:

**§ 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 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).

**§ 145.57 Performance standards.**

(a) Except as provided in § 145.2, each certificated domestic repair station shall perform its maintenance and alteration operations in accordance with the standards in part 43 of this chapter. It shall maintain, in current condition, all manufacturers' service manuals, instructions, and service bulletins that relate to the articles that it maintains or alters.

respondent's opinion, and as testified to by its President and General Manager, Paul D. Finefrock, the MS nut is equal to or superior to the nut Hartzell specifies must be used.<sup>11</sup> Once again, we disagree.

In the first place, it is far from clear to us that the record before us can fairly be said to establish dispositively that the two nuts are interchangeable in any or all of the parameters that are relevant to Hartzell, whose manuals do not contemplate the use of the MS nut.<sup>12</sup> In the second place, we do not agree that it would not be material to falsely indicate in maintenance records which nut actually had been used even if the MS nut could be shown to meet all of Hartzell's design and airworthiness specifications. The point here is not so much the adequacy of the unauthorized part, but the accuracy of records that must be relied on in order for others, unaware of the false listing, to obtain quality control or other information about it; for example, in the event a failure in service dictated an examination of similar parts from the same shipment or supplier. Stated differently, it may on occasion be necessary to know a part's source even where multiple parts are, or could be,

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<sup>11</sup>Materiality, along with falsity and knowledge of the falsity, are the three elements which must be proved to establish a charge of intentional falsification. See Hart v. McLucas, 535 F.2d 516, 519 (1976).

<sup>12</sup>We suspect that TPI's customers would not think it unimportant to know which nuts had actually been used on their propellers, given the large cost differential. The record does not reflect whether the savings achieved by using the cheaper nuts was passed on to customers.

approved for a particular application. Falsely listing parts thwarts such traceability concerns.

In any event, it is enough, for purposes of assessing materiality, to determine whether the false entries "had the natural tendency to influence, or were capable of influencing" the decision of the FAA inspector charged with determining respondent's compliance with Part 43 or Part 145 standards in its propeller repair work. See Cassis v. Helms, 737 F.2d 545, 547 (1984). There can be no question but that the false entries had that potential here, for an inspector reviewing TPI's work orders would have no reason not to conclude, mistakenly, that the correct nuts had been installed, and, therefore, that Part 43 performance standards were being adhered to. As the law judge observed: "And here there was no reason to use the entry that the 2043 nut was used except to falsely encourage someone to believe that the manuals had been followed" (I.D. at tr. page 693).

Respondent's second objection to the initial decision attacks the law judge's determination that a preponderance of the evidence supports the allegations in Count V to the effect that TPI performed propeller work on a Bonanza aircraft at a time when the repair station's certificate was under suspension for refusal to permit a facility inspection.<sup>13</sup> Specifically, respondent

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<sup>13</sup>The Administrator alleged in Count V that respondent's conduct violated FAR sections 43.9(a), 145.57(a), and 145.3. The text of section 145.57(a) is given, supra, in note 10. That charge results from respondent's failure to meet Part 43's requirement that maintenance entries be made for the work accomplished on the

contends that the law judge's findings of facts as to the charges in this count are contradicted by evidence the respondent maintains should have been given more weight. Our review of the record reveals that the only evidence that is contrary to the law judge's findings is the testimony of respondent's Mr. Finefrock, who denied that his shop had done the propeller work that virtually all of the other evidence adduced on the question strongly, if not conclusively, suggested it had done. In other words, respondent's objection to the law judge's decision concerning Count V is actually an indirect challenge to the law judge's clear, albeit implicit, rejection, as a matter of credibility, of Mr. Finefrock's self-serving denial of his company's involvement.

Respondent has not established that the law judge's credibility determination was arbitrary or clearly erroneous, and the record otherwise contains ample circumstantial proof, fully recounted by the law judge, that respondent did in fact perform maintenance on the Bonanza when its authority to do so lawfully

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Bonanza, as specified in section 43.9(a). FAR section 145.3 sets forth the general prohibition against performing unauthorized repair station work. It reads as follows:

**§ 145.3 Certificate required.**

No person may operate as a certificated repair station without, or in violation of, a repair station certificate. In addition, an applicant for a certificate may not advertise as a certificated repair station until the certificate has been issued to him.

had been taken away.<sup>14</sup> In these circumstances, no valid reason appears for disturbing the law judge's resolution of the conflicting evidence the parties submitted on Count V.

**ACCORDINGLY, IT IS ORDERED THAT:**

1. The appeal of Thunderbird is denied; and
2. The Emergency Order of Revocation, as modified by the law judge, and the initial decision are affirmed.

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>14</sup>The law judge's credibility finding is not subject to reversal because, for example, no direct evidence was adduced as to the physical delivery of the Bonanza to TPI's hangar or as to the identity of the individuals at TPI who worked on the aircraft.