SERVED: March 22, 2016

NTSB Order No. EA-5774

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 22nd day of March, 2016

MICHAEL P. HUERTA, Administrator, Federal Aviation Administration, Complainant, v. PATRICK THEO FREIWALD, Respondent.	)	Docket SE-30172

OPINION AND ORDER

1. *Background*

Respondent, who proceeds *pro se*, appeals the oral initial decision of Administrative Law Judge William R. Mullins, issued in this proceeding on February 24, 2016.[1] By that decision, the law judge affirmed the Administrator's emergency order revoking respondent's mechanic

[1] A copy of the law judge's initial decision, an excerpt from the hearing transcript, is attached.

certificate with airframe and powerplant (A&P) ratings and his inspection authorization. The law judge determined the Federal Aviation Administration (FAA) proved respondent violated 14 C.F.R. §§ 43.12(a)(1),[2] 43.13(a) and (b),[3] and 43.15(a)[4] when respondent performed improper maintenance and repairs on a Beechcraft Musketeer B-23 aircraft (hereinafter, N2338Q); made false entries in the aircraft's maintenance logbook; and certified N2338Q was airworthy following an annual inspection when the aircraft was not airworthy. We remand this case for further proceedings consistent with this Opinion and Order.

a. *Facts*

Respondent held a mechanic certificate with A&P ratings, as well as an inspection authorization, before the Administrator's emergency revocation action.[5] In 2015, respondent entered into an agreement with Robert Greenberger, owner of N2338Q, to perform an annual inspection and repairs to the aircraft, which was hangared at Orlando Apopka Airport (X04) in

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[2] Section 43.12(a)(1) states, "[n]o person may make or cause to be made … [a]ny 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."

[3] Section 43.13(a) requires each person performing maintenance, alteration, or preventive maintenance on an aircraft to use the methods, techniques, and practices prescribed in the current manufacturer's maintenance manual or Instructions for Continued Airworthiness prepared by the manufacturer, or other methods, techniques, and practices acceptable to the Administrator. Paragraph (b) of the section requires each person performing maintenance, alteration, or preventive maintenance on an aircraft to do the work in a manner and use materials of such a quality that the condition of the aircraft or part on which he or she works will be at least equal to its original or properly altered condition.

[4] Section 43.15(a) provides each person performing an inspection required by part 91, 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; and (2) If the inspection is one provided for in part 125, 135, or § 91.409(e) of title 14, Code of Federal Regulations, perform the inspection in accordance with the instructions and procedures set forth in the inspection program for the aircraft being inspected.

[5] Complaint ¶ 1, Answer ¶ 1.

Orlando, Florida.[6] The agreed-upon work was to include repairs and/or alteration of the aircraft's left and right aileron bottom skins and flight control skins, fuel selector valve, flight control cable, trim tab, and conduct an annual inspection.[7] When he concluded his work, respondent gave Mr. Greenberger a checklist indicating respondent completed each of the tasks required for N2338Q's annual inspection.[8] On August 1, 2015, respondent made an entry into the maintenance logbook, in which he certified he performed the annual inspection of N2338Q and "the aircraft is airworthy" and returned to service.[9] Respondent's maintenance logbook entry also stated he:

- Installed flight control skins in accordance with the Beechcraft 23 Series Service Manual (Beechcraft Service Manual);
- Removed and reinstalled the fuel selector valve with new seals, O-ring, and lock ring and he observed no leakage;
- Lubricated the flight control cable and adjusted the tension;
- Lubricated and adjusted the trim tab; and
- Completed the repairs in accordance with the Beechcraft Service Manual and FAA Advisory Circular 43.13-1B, Acceptable Methods, Techniques, and Practices – Aircraft Inspection and Repair (AC 43.13-1B).[10]

On or about August 12, 2015, Mr. Greenberger and Scott Charlton, a certified mechanic with A&P ratings, arrived at X04 to retrieve N2338Q and fly it to another airport.[11] Both men noticed problems with the flight controls and a fuel leak at the fuel selector; consequently, Mr. Greenberger scrubbed the flight and asked Charles Clary, also a certified mechanic with

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[6] Tr. 11-13, 58, Exhibit A-1.

[7] Tr. 13-17, Exhibit A-1.

[8] Tr. 17-18, Exhibit A-2.

[9] Complaint ¶ 4, Answer ¶ 4, Exhibit A-4.

[10] Complaint ¶¶ 4, 14, 18, 32, 39; Answer ¶¶ 4, 14, 18, 32, 39; Exhibit A-4.

[11] Tr. 37-40, 57-58, 62.

A&P ratings, to examine the aircraft.[12] On August 31, 2015, Mr. Clary inspected N2338Q and observed fuel leaking in the area of the fuel selector valve, the flight control cable tension was set over the limit and unlubricated, the trim tab was unlubricated, and other problems that he catalogued in N2338Q's maintenance logbook.[13] Mr. Clary also removed and disassembled the fuel selector valve and observed the lock ring was corroded, distorted, and not new; the O-ring was flat rather than round, showed signs of past seepage, and was not new; and the overall condition of the fuel selector valve was poor.[14] Mr. Clary did not return N2338Q to service, and Mr. Greenberger filed a complaint with the FAA on September 1, 2015 concerning respondent's work and airworthiness certification.[15]

On September 4, 2015, FAA Aviation Safety Inspector Alexander Honig reported to X04 to investigate the complaint.[16] During the investigation, Inspector Honig inspected and took numerous photographs of the aircraft and noted several deficiencies in respondent's work. Inspector Honig observed Teflon tape applied the fuel line, severe corrosion within the battery compartment, and the use of unapproved blind rivets that were incorrectly installed on the flight controls.[17] After his inspection, Inspector Honig concluded N2338Q did not conform to the Beechcraft Musketeer 23 Type Certificate Data Sheet and that respondent's annual inspection,

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[12] Tr. 37-40, 58-59, 157-59.

[13] Tr. 158-61, 172-79, Exhibit A-39.

[14] Tr. 178-88, Exhibits A-14 through A-17, A-41, A-42. In his testimony, Mr. Clary used the term "snap ring" to refer to the lock ring but explained the terms are interchangeable. Tr. 182.

[15] Tr. 40, Exhibits A-8, A-39.

[16] Tr. 72.

[17] Tr. 81, 83-89, 91-93, 152; Exhibits A-11, A-14 through A-32, A-41, A-42.

airworthiness, and return to service certifications in the maintenance logbook were not consistent with Inspector Honig's observations, the Beechcraft Service manual, and AC 43.13-1B.[18]

b. *Procedural Background*

On January 27, 2016, the Administrator issued an emergency order revoking respondent's mechanic certificate with A&P ratings and inspection authorization. The order, which became the complaint in this case, alleged respondent performed deficient repair and/or alteration of N2338Q and returned the aircraft to service; that respondent knowingly made false entries in the maintenance logbook attesting he performed the work; and that respondent knowingly made false certifications that he performed an annual inspection of N2338Q and that the aircraft was airworthy.[19] Respondent filed a timely notice of appeal, and the proceedings were conducted in accordance with the expedited procedures applicable to emergency cases under 49 U.S.C. §§ 44709 and 46105(c).[20] Chief Administrative Judge Alfonso Montaño conducted a prehearing teleconference on February 18, 2016 and issued a Prehearing Order the same day.[21] Judge Mullins conducted the hearing and issued an oral initial decision on February 24, 2016.

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[18] Tr. 119, 129-30, Exhibits A-13, A-34, A-36.

[19] The complaint set forth the allegations in seven sections numbered "I" through "VII" concerning: (I) repairs and/or alteration of the flight control skins; (II) removal and reinstallation of the fuel selector valve with new seals, O-rings, and lock rings; (III) battery installation; (IV) flight control cable adjustment and lubrication; (V) trim tab adjustment and lubrication; (VI) aircraft airworthiness and return to service; and (VII) annual inspection signoff. Complaint ¶¶ 5-53.

[20] Respondent filed a Petition for Review of the Administrator's Determination of Emergency on January 29, 2016, which also served as his notice of appeal. 49 CFR § 821.54(a). Chief Judge Montaño denied respondent's Petition on February 4, 2016.

[21] NTSB Form 2005.4, Internal Memo to the Docket File, February 18, 2016; Prehearing Order, February 18, 2016.

c. *Law Judge's Order*

Judge Mullins determined the Administrator failed to prove the allegations in complaint sections I and III and affirmed the allegations in sections II, IV, V, VI, and VII.[22] The law judge also affirmed the Administrator's sanction of revocation.[23] In affirming sections II, IV, V, VI, and VII, the law judge summarized witness testimony, noted relevant exhibits, and concluded the evidence established the respondent intentionally falsified his maintenance logbook entries.[24] The law judge also determined the evidence established respondent violated 14 C.F.R. §§ 43.13(a) and (b), 43.15(a) because "much of the work done that day or alleged to have been done wasn't done."[25] The Administrator did not appeal the law judge's findings; hence, this Opinion and Order does not address the charges the Administrator failed to prove.

c. *Issues on Appeal*

Respondent contends the law judge erred in giving weight to the Administrator's witness testimony because it was contradictory, unsupported by evidence, and respondent was able to discredit the witnesses during cross-examination. Respondent also contends the law judge erred in excluding a scientific study, email communications between respondent and Mr. Greenberger purporting to show N2338Q's fuel system was sabotaged, and DVD evidence purporting to show respondent performing post-maintenance ground runs in N2338Q. Lastly, respondent argues he was unable to obtain subpoenas for eyewitness testimony.

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[22] Initial Decision at 245-50.

[23] Id. at 250.

[24] Id. at 247-51.

[25] Id. at 251.

2. *Decision*

While we give deference to our law judge's rulings on certain issues, such as credibility determinations[26] or evidentiary rulings,[27] we review the case, as a whole, under *de novo* review.[28]

a. *Witness Credibility*

With regard to the issue of intentional falsification, we long have adhered to a three-prong test. The Administrator must prove an airman: (1) made a false representation, (2) in reference to a material fact, and (3) with knowledge of the falsity of the fact.[29] In Administrator v. Dillmon,[30] after remand from the Court of Appeals for the District of Columbia Circuit,[31] we clarified our analysis of this three-prong test, to emphasize a law judge's credibility determinations occupy an important role in analyzing whether the Administrator has fulfilled the third prong of the test. Moreover, we defer to our law judge's credibility findings unless those findings are arbitrary and capricious.[32] In Administrator v. Porco, we also held the law judge's credibility determination should be based explicitly on factual findings in the record.[33]

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[26] Administrator v. Porco, NTSB Order No. EA-5591 at 13 (2011), aff'd sub nom., Porco v. Huerta, 472 Fed.Appx. 2 (D.C. Cir. 2012) (per curiam).

[27] Administrator v. Ledwell, NTSB Order No. EA-5582 (2011).

[28] Administrator v. Smith, NTSB Order No. EA-5646 at 8 (2013); Administrator v. Frohmuth and Dworak, NTSB Order No. EA-3816 at 2 n.5 (1993); Administrator v. Wolf, NTSB Order No. EA-3450 (1991); Administrator v. Schneider, 1 N.T.S.B. 1550 (1972) (in making factual findings, the Board is not bound by the law judge's findings).

[29] Hart v. McLucas, 535 F.2d 516, 519 (9th Cir. 1976) (citing Pence v. United States, 316 U.S. 332, 338 (1942)).

[30] NTSB Order No. EA-5528 (2010).

[31] 588 F.3d 1085 (D.C. Cir. 2009).

[32] Administrator v. Porco, NTSB Order No. EA-5591 at 13 (2011), aff'd sub nom., Porco v. Huerta, 472 Fed.Appx. 2 (D.C. Cir. 2012) (per curiam).

[33] Porco at 22, 28-29.

In the case *sub judice*, the law judge did not make the required credibility findings. The law judge summarized some of the testimony and stated it was "clear," that he was "satisfied," and that the evidence "established" the Administrator proved the allegations.[34] However, the law judge's resolution of the issues in this case required him to assess the credibility of the witnesses and make express credibility determinations, which he failed to do.[35] It is well settled that we will not "substitute our own credibility determinations for the law judge's or supplement the law judge's determinations in any manner," nor will we "rely on implied credibility determinations which may only be gleaned from the law judge's final ruling in a given case."[36] We decline to depart from our well-settled jurisprudence in this regard.

b. *Evidentiary Rulings*

Our law judges have significant discretion in making evidentiary rulings. In this regard, we will only overturn a law judge's evidentiary ruling when the appealing party can show the law judge's ruling amounted to an abuse of discretion, and resulted in prejudice to the party.[37] In the case *sub judice*, we find the law judge's evidentiary rulings concerning the scientific study did not amount to an abuse of discretion and did not prejudice respondent and we reject respondent's

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[34] Tr. 247 ("[T]he testimony of Mr. Greenberger clearly established to my satisfaction…"), 249 ("I'm satisfied that from the testimony of Mr. Honig…" and "[T]he testimony was clear."), 250 ("And I think that was clearly established").

[35] Administrator v. Reynolds, NTSB Order No. EA-5641 at 8 (2012).

[36] Administrator v. Langford, NTSB Order No. EA-5673 at 8 (2013) (quoting Administrator v. Langford, NTSB Order No. EA-5625 at 5-6 (2012)); see also Administrator v. Dustman, NTSB Order No. EA-5657 at 15 n. 42 (2013).

[37] See e.g., Administrator v. Leyner, NTSB Order No, EA-5732 at 4 n.19 (2014) (citing Administrator v. Walker, NTSB Order No. EA-5656 at 15 n.39 (2013); Administrator v. Giffin, NTSB Order No. EA-5390 at 12 (2008) (citing Administrator v. Bennett, NTSB Order No. EA-5258 (2006)); Administrator v. Martz, NTSB Order No. EA-5352 (2008); Administrator v. Zink, NTSB Order No. EA-5262 (2006); Administrator v. Van Dyke, NTSB Order No. EA-4883 (2001).

argument concerning the emails and his eyewitness. However, we find the law judge erred in excluding respondent's DVD evidence.

The Prehearing Order instructed the parties to exchange exhibits and exhibit lists no later than two days prior to the hearing and stated, "Any exhibits not so identified and exchanged will not be received into evidence, except for the purposes of rebuttal or impeachment that could not reasonably have been anticipated at the time the exhibits were identified and exchanged."[38] Respondent did not comply with the Prehearing Order and did not provide the Administrator with exhibits or exhibit and witness lists prior to the hearing.[39] However, the law judge granted respondent leniency and received many of his exhibits into evidence.[40]

Respondent sought to introduce into evidence a scientific study of sulfuric acid on 2024T3 aircraft aluminum conducted by the Sukaman Corporation in England.[41] The law judge permitted the Administrator to voir dire the exhibit and did not admit the document because respondent failed to provide it to FAA prior to the hearing explaining, "This is the very kind of document that opposing counsel and the opposing side needs time to review."[42] The law judge did not abuse his discretion in declining to admit the document into evidence.

Respondent also argues the law judge precluded him from introducing into evidence emails purporting to prove N2338Q's fuel system had been sabotaged. However, a review of the transcript shows respondent did not raise or present the issue of potential sabotage during the

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[38] Prehearing Order at 3-4.

[39] Tr. 48, 51.

[40] Initial Decision at 248; Tr. 53, 147, 215, 221; Exhibits R-1, R-2, R-6, R-8, and R-15.

[41] Tr. 222-23.

[42] Tr. 224-27, see also Initial Decision at 248.

hearing nor did he attempt to introduce testimony or evidence in this regard. Respondent did not raise this issue at the hearing; therefore, it is deemed waived on appeal.[43]

Respondent argues he was unable to secure subpoenas for eyewitness testimony due to the last minute reassignment of the presiding law judge. This argument is without merit. Reassignment of the presiding judge in no way precluded respondent from submitting a subpoena request to Chief Judge Montaño directly or to the Office of Administrative Law Judges. Chief Judge Montaño instructed respondent during the February 18 teleconference and in the February 18 Prehearing Order to submit subpoena requests as soon as possible, and respondent failed to do so; therefore, we reject his complaint of prejudice based upon the absence of his witness.[44]

Respondent sought to admit DVD evidence of him performing ground runs in N2338Q recorded on August 4, 2015, which respondent contends would show the fuel selector valve, flight control cable, and trim tabs were functioning properly and that N2338Q was airworthy.[45] The law judge excluded the videos because the courtroom was not equipped for viewing or projecting this type of evidence and respondent did not provide a way to view the DVD.[46] In excluding the DVD evidence, the following exchange occurred:

> Respondent: …I submit R-3. I have them labeled, a handful of videos taken on August 4. It's time and date stamped that shows me operating the aircraft.
>
> It's internal and external pre and post runs of the aircraft. There's no leaks. It shows operation of the fuel selector valve. And this was made August 4.

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[43] 49 C.F.R. § 821.49(a)(1).

[44] See Administrator v. Nazimek, 6 N.T.S.B. 74 (1988) (citing Administrator v. Kocsis, 4 N.T.S.B. 461 (1982)).

[45] Tr. 216, 218, 227-30.

[46] Tr. 217.

> It had been previously submitted to the NTSB a week or two ago, but I'd like to submit it to evidence again. And it shows that there was no leaks after I ground run it.
>
> Law Judge: How am I supposed to learn something from that?
>
> Respondent: I don't know.
>
> Law Judge: It's your case in chief.
>
> Respondent: Okay. Well, I wasn't aware that you weren't able to look at a DVD video. It's a post inspection –
>
> Law Judge: I don't have any way to look at that. Let's go on.[47]

The law judge did not exclude the DVD evidence based on respondent's noncompliance with the Prehearing Order, the Administrator did not object to the DVD, and the Prehearing Order did not set forth a requirement as to the format of evidence to be presented at the hearing. The law judge excluded the DVD evidence as a matter of inconvenience, and he made no effort to ascertain whether there was any available equipment to view the DVD evidence. In the case *sub judice*, video of respondent performing post-maintenance tests on N2338Q could have been relevant to rebut sections II, IV, V, VI, and VII of the complaint, and it could have been relevant to impeach the credibility of the Messrs. Greenberg, Clary, and Charlton all of whom testified about the condition of either the fuel selector valve, the flight control cable, or the trim tab, thus calling into question the sufficiency of the Administrator's case in chief. It was prejudicial error for the law judge to exclude evidence based on inconvenience, especially where, as here, that evidence may have been wholly exculpatory.

c. *Remand Instruction and Briefing Schedule*

In light of the absence of express credibility determinations and our determination the law judge erred in excluding respondent's DVD evidence, we remand this case to the law judge

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[47] Tr. 216-17.

with the instruction to make credibility determinations as to sections II, IV, V, VI, and VII of the complaint based explicitly on factual findings in the record and to reconvene the evidentiary hearing for the limited purpose of considering respondent's DVD evidence. The law judge shall provide the parties an opportunity to examine the witnesses concerning the DVD evidence, present evidence to rebut the DVD, and supplement closing arguments. Because respondent did not waive the expedited procedures applicable to emergency cases, our statutory mandate is to serve the appeal decision within 60 days of the Administrator's issuance of the emergency order, which is March 29, 2016. As a result, and in light of our keeping with the 60-day deadline, we set forth an aggressive briefing schedule below, under the assumption that either or both parties may decide to appeal the law judge's post-remand decision. In this regard, we must waive the application of some of our rules concerning the deadlines for filing certain pleadings. The law judge and parties must adhere to the new schedule, as follows:

REQUIREMENT	**DEADLINE**
Law Judge's service of decision	March 23, 2016
Notice(s) of Appeal	March 24, 2016
Appeal brief(s)	March 24, 2016
Reply brief(s)	March 25, 2016

In addition, we direct the law judge to serve his decision on remand to the parties and the Board <u>via facsimile or email during regular business hours</u>, in addition to the typical method of certified mail. Parties and the law judge's office should communicate over the telephone to ensure timely, complete receipt of the decision. Moreover, in addition to submitting the briefs via overnight delivery, we ask parties to also transmit their appeal and reply briefs via facsimile to the Office of General Counsel, at (202) 905-0228. Provided the law judge and parties fulfill these

new required deadlines, we fully intend to serve a decision disposing of this case by March 29, 2016.

ACCORDINGLY, IT IS ORDERED THAT:

This case is remanded to the law judge for further proceedings consistent with this Opinion and Order.

HART, Chairman and SUMWALT AND WEENER, Members of the Board, concurred in the above opinion and order. DINH-ZARR, Vice Chairman, concurred, in part, and dissented, in part, and submitted the following statement.

Vice Chairman T. Bella Dinh-Zarr, Concurring, in Part, and Dissenting, in Part:

I concur, in part, and dissent, in part, from the majority's opinion. I would reverse the law judge's oral initial decision and grant respondent's appeal.

I concur with the majority in their analysis on the merits of this case. In this case, the law judge's oral initial decision is devoid of credibility determinations as are required for the Board to properly review the third prong of the Hart v. McLucas[1] test with respect to the allegations involving intentional falsification.[2] Additionally, the law judge abused his discretion in excluding respondent's DVD evidence to the prejudice of respondent's case.[3]

Under 49 U.S.C. §§ 44709(e)(4) and 1133, the Board must dispose of emergency appeals within 60 days of the appeal of the Administrator's emergency order. In this case, our decision must be served on the parties no later than Tuesday, March 29, 2016. Today is Monday, March 21, 2016. The majority, in their order on remand, intend to remand, on an expedited basis, the case to the law judge with instruction to reconvene the hearing with the parties and the witnesses to consider the excluded DVD evidence, permit for recall of the witnesses, make credibility determinations, and have a revised decision completed by Wednesday, March 23, 2016, in order to permit the parties to appeal the law judge's revised decision to the Board on an expedited basis. Even assuming the law judge is able to pull together the logistics to reconvene the hearing, I have serious concern about whether such a rushed hearing would provide due process or is consistent

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[1] Hart v. McLucas, 535 F.2d 516, 519 (9th Cir. 1976).

[2] See Administrator v. Dillmon, NTSB Order No. EA-5528 (2010); Administrator v. Singleton, NTSB Order No. EA-5529 (2010); and Administrator v. Reynolds, NTSB Order No. EA-5641 at 8 (2012). See also Administrator v. Porco, NTSB Order No. EA-5591 at 19-20 (2011), aff'd sub. nom., 472 Fed.Appx. 2 (D.C. Cir. 2012) (per curiam).

[3] See Administrator v. Rigues, NTSB Order No. EA-5666 at 8-10 (2013).

with our prior jurisprudence in handling evidentiary errors such as this one in emergency proceedings.

While I acknowledge that the Board on one prior occasion has remanded an emergency appeal to a law judge, that case is easily distinguishable from the case *sub judice*. In Administrator v. Porco,[4] the Board remanded the case to the law judge solely for written credibility determinations—no additional hearing was necessary. In the case at hand, the evidentiary issue is interwoven with the credibility issues. The judge needs to consider the evidence, consider additional witness testimony, and then make credibility determinations tied to specific findings of fact and then make conclusions of law. In past emergency appeals involving erroneous evidentiary rulings, the Board has not remanded a case for an additional hearing. Rather, we have drawn an adverse inference to the benefit of the respondent and have dismissed the allegation, or, if necessary in the interests of justice, the entire appeal.[5]

I believe the majority is departing from our jurisprudence in remanding this case, under these particular circumstances, to the detriment of respondent's due process rights in this emergency proceeding. While I concur in the majority's decision that the law judge erred in failing to make credibility determinations and in excluding respondent's DVD evidence, I dissent in the resulting decision to remand the case on an expedited basis. I would reverse the law judge's decision and grant respondent's appeal.

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[4] See Administrator v. Porco, NTSB Order No. EA-5589 (2011).

[5] See Administrator v. Rigues, NTSB Order No. EA-5666 (2013).

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
OFFICE OF ADMINISTRATIVE LAW JUDGES

IN THE MATTER OF:	
MICHAEL P. HUERTA, ADMINISTRATOR, FEDERAL AVIATION ADMINISTRATION,	
Complainant,	Docket No. SE-30172
v.	
PATRICK T. FREIWALD,	
Respondent.	

Wednesday,
February 24, 2016

Courtroom 3C
Brevard County Courthouse
Moore Justice Center
2825 Judge Fran Jamieson Way
Viera, Florida

The above-entitled matter came on for hearing, pursuant to notice, at 9:30 a.m.

BEFORE:

THE HONORABLE WILLIAM R. MULLINS,
Administrative Law Judge

APPEARANCES:

On Behalf of the Complainant, Federal Aviation Administration:

GREGORY S. LANDER, ESQ.
of: Federal Aviation Administration
Enforcement Division
Southwest Team
10101 Hillwood Parkway
Fort Worth, Texas 76177

On Behalf of the Respondent, Patrick T. Freiwald:

PATRICK T. FREIWALD, pro se
683 Carnation Court
Winter Park, Florida 32792

ALSO PRESENT:

ALEXANDER P.M. HONIG, Aviation Safety Inspector, Federal Aviation Administration

ORAL INITIAL DECISION AND ORDER

ADMIN. LAW JUDGE MULLINS: Back on the record at this time. Mr. Court Reporter, this portion of the transcript should be captioned Oral Initial Decision and Order.

This has been a proceeding before the National Transportation Safety Board held under the provisions of Section 44.709 of the Federal Aviation Act of 1958, as amended, on the appeal of Patrick T. Freiwald, who I will refer to as the respondent, from an emergency order of revocation that has revoked his airman's mechanic certificate with airframe and power plant ratings, and also his inspection authorization.

The emergency order of revocation serves as the complaint in these proceedings and was filed on behalf of the Administrator of the Federal Aviation Administration through the Enforcement Division.

The matter has been heard before me, William R. Mullins. I'm an administrative law judge for the National Transportation Safety Board and as is provided by the Board's rules I will issue a bench decision at this time.

As I indicated at the outset of this hearing the matter was scheduled for Judge Montano. And because of the untimely death of Judge Geraghty, Judge Montano was called to Denver for the funeral and so I appeared here today on

his behalf and for the Board.

The matter came on for hearing pursuant to notice to the parties here in Viera, Florida. Today is the 24th day of February of 2016.

And the Administrator was present throughout these proceedings, and represented by Mr. Greg Lander, Esquire, of the Enforcement team.

And the Respondent represented himself and was present throughout these proceedings.

The parties were afforded a full opportunity to offer evidence, to call, examine and cross-examine witnesses. In addition, the parties were afforded an opportunity to make argument in support of their respective positions.

Mr. Court Reporter, this portion of the transcript should be captioned Discussion.

DISCUSSION

I will not read the emergency order of revocation into the record. It's obviously part of the record, part of the pleadings, and there are seven major subdivisions in that order. And I will address those subdivisions individually.

Generally, I will tell you that this matter involved an annual inspection performed by Mr. Freiwald on

an aircraft, a Beech 23, serial number M403, and the November number was N2338Q, and the owner of that aircraft was Mr. Robert E. Greenberger, who testified here today.

And the annual inspection was signed off on August 1, 2015. And there have been a great number of photographs introduced, and those were all taken on September 4, shortly -- more than a month later.

The Administrator had 4 witnesses and 43 exhibits. The witnesses were Mr. Robert Greenberger, the owner of the aircraft; Mr. Scott Charlton who was one of the -- he's also an A&P but he also went out to fly the airplane shortly -- just a few days after the annual; Mr. Alexander Honig, who is a federal aviation airworthiness inspector who testified here today -- aviation safety inspector; and Mr. Clary, who was also a mechanic who worked on the aircraft subsequent to this time, and he testified about some of his observations.

And I don't -- like I said, I don't want to go through all of the exhibits. Most of them were photographs. The principal exhibit for my consideration was the log book entry made by Mr. Freiwald, and that's at Exhibit A-4.

A-1 is the written agreement between the aircraft owner and respondent. Exhibit 2 was an annual inspection checklist signed off and initialed by -- and all

those checklists -- by Mr. Freiwald.

Again, there are a great number of photographs that were admitted and I will talk about them as I address each of the major subheadings in the emergency order of revocation, and I will discuss the testimony of the witnesses as it would apply to those subdivisions of the emergency order.

The respondent, as I said, was present throughout these proceedings and he testified, and he was the only witness that he called.

Paragraph 1 -- or not paragraph 1, but subheading 1 of the emergency order of revocation in paragraph 5, states that you performed a repair or alteration of civil aircraft N2338Q by removing the left and right aileron bottom skins and then installing flight control skins, and in performing this alteration -- paragraph 6 -- you used blind rivets to install.

And the issue here today has been -- and the allegation was that the use of blind rivets, or CherryMAX rivets, on the control surfaces is prohibited by the regulation, federal aviation regulation, and the only acceptable alternative would be if it was approved by the aircraft manufacturer, which it was not.

There was testimony and allegations here about

the coating on those CherryMAX rivets, and respondent argued that the CherryMAX rivet manual which he introduced as Exhibit R-2 allowed that, but for my purposes today the rivets were improperly installed because they weren't authorized, and anything else that went with those kind of rivets just wasn't authorized either.

The log book entry states that the work was done in accordance with the FAR maintenance circular and it was not. As a result, the Administrator has alleged that the entry was intentionally false, and also that because the work wasn't done according to the manual, and since it’s false, then that the aircraft did not meet its airworthy -- was not returned to service in airworthy condition.

Respondent offered a NASA manual, and I suggested to him at the time he offered it that it wasn't NASA that issued him his A&P certificate. It was the Federal Aviation Administration.

That, plus the fact that he cited the FAR in his log book entry -- he didn't cite to the NASA entry -- I think the Administrator has clearly established that the allegations of this subheading 1, in that these were blind rivets that weren't authorized and the respondent put that in the log book -- I'm not -- it was an incorrect entry. I don't think, based on the respondent's testimony today,

that his -- there was established by a preponderance of the evidence his intent to falsify this. I just think he did poor work and made an entry that was inconsistent with that poor work.

So, as to subheading 1, I find that it was established, but I don't think there was any intent to falsify the document. I think it was just error on the part of the respondent.

The subheading number 2, starting at paragraph 18 of the log book, says that -- the log book entry says that you removed the fuel selector for operational issues, reinstalled fuel selector with new seals, O-rings, lock rings, and no leaks.

The photographs, and there were a number of them of this fuel selector valve, and certainly the testimony of Mr. Greenberger clearly has established to my satisfaction that that work was not done, period, that the O-ring that was taken out was not new. It was obvious from -- after this part had been taken apart and the photographs made -- that there hadn't been any work done on it certainly within the last 30 or 40 days. And I find as to paragraph 2 that was an intentionally false statement in that it wasn't ever taken apart, and those O-rings were never replaced.

Paragraph 3, it says you made an entry in the

maintenance record that you installed a battery. That wasn't proven at all. The log book entry says that the owner entered -- made the entry, and I find that there was not established that allegation as proven.

However, I did find and I do find that the corrosion around this battery, which was subject to the inspection and part of an annual inspection, was not done, was not even dealt with.

And respondent, and I want to say this now, respondent, although I have a memo for the file entered by Judge Montano, respondent was advised to provide his exhibits by Monday of this week. Today is Wednesday, and there was none of the documents that he introduced. And I was very lenient in letting some of those in, but in regard to the corrosion, the respondent offered into evidence a document -- a lengthy document, I guess. It was written up -- or a study done -- or something done in England which was the very kind of document that the Administrator should have had the benefit of looking at, at least.

And I didn't allow that document into evidence simply because the pretrial order was real clear, and Judge Montano's conference call with both parties back last week on Thursday -- it's dated 2/18/16 -- clearly advised both sides to provide their exhibits to each other, and respondent didn't do it. So I didn't allow that in.

And I'm satisfied that from the testimony of Mr. Honig, who has an extensive background in aviation maintenance; Mr. Clary, who was at least problematic as a witness although I don't think his hostility, if you will, or cavalier attitude toward the respondent necessarily reflected on his maintenance expertise, but both he and Mr. Greenberger and Mr. Honig all testified that that corrosion was severe and it could not have occurred within the 3, 4 or 5 days from the time of the inspection.

And I agree with that, and I so find. And therefore I find that the entry that this -- that contaminates the whole annual inspection entry that was made because obviously this was not inspected.

Paragraph 4, or subheading 4, which starts at paragraph 32 states that you stated in your annual inspection that you adjusted flight control cable tension and lubricated, and the testimony was very clear, particularly from Mr. Clary. They went out -- Mr. Charlton testified that the controls were so tight, and it had a flat spot in it I think he described, that they wouldn't fly the airplane after this annual inspection. They just didn't think it was airworthy. And he refused to fly it.

And then when Mr. Clary looked at it they did a -- he asked an IA who did these things to do a tension check and found that it was 65 pounds of tension on this

cable which the manual says it's supposed to be between 24 and 29. And I think that was clearly established.

Also, Mr. Clary testified that when he got back into that area that there was just no lubrication on these control surfaces, and that if those control surfaces had been lubricated that would not have gone away in 35 days. That's supposed to last at least a year. And so I find that that was established under subheading 4 and that entry that work had been done was intentionally false. I don't think it was done.

And that's also paragraph -- subheading 5 -- that starts paragraph 39, talking about adjusted trim tab, freeplay and lubricated. It wasn't lubricated, and I'm satisfied that the evidence has established that.

Subheading 6 and 7 relate to the entry itself, and I think with my discussion here it's clear, although not all of the allegations in the complaint have been satisfied -- that it was clear that the work and -- much of the work done that day or alleged to have been done -- wasn't done, and that the entry saying that it had been done was intentionally false, and clearly in violation of FAR 14 or 14 CFR 43.12(a)(1), 43.13(a), 43.13(b) and 43.15(a).

And as a result of those findings I find that the emergency order of revocation should be affirmed.

Mr. Court Reporter, this portion of the

transcript should be captioned Order.

ORDER

It's therefore ordered that safety in air commerce and safety in air transportation requires an affirmation of the Administrator's emergency order of revocation as issued.

And specifically I find as discussed, that there was intentional falsification of the log book entry as to the completion of this annual inspection in several regards, and that the appropriate order would be one of revocation of respondent's airman's mechanic certificate including airframe and power plant privileges, and his inspection authorization.

And Mr. Court Reporter, if you'd put a signature block for my signature.

EDITED ON _____

March 1, 2016 William R. Mullins

Administrative Law Judge