SERVED: December 15, 1992

NTSB Order No. EA-3749

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 November, 1992

THOMAS C. RICHARDS, Administrator, Federal Aviation Administration, Complainant, v. GLENN A. VALENTINE, and EDWARD A. RAND, Respondents.	Dockets SE-10793 SE-10941

OPINION AND ORDER

The Administrator has appealed from the oral initial decision of Administrative Law Judge Joyce Capps, issued on August 10, 1990, following an evidentiary hearing.[1] The law judge dismissed all charges against respondents. We deny the appeal.

[1]The initial decision, an excerpt from the hearing transcript, is attached.

By orders issued January 18, 1990 (Valentine) and April 4, 1990 (Rand), the Administrator proposed to revoke respondents' airline transport pilot certificates for violations of 14 C.F.R. 61.59(a)(2) and 135.343.[2] The primary charge -- intentionally false or fraudulent recordkeeping -- concerned pilot training records maintained for Mall Airways.[3] Respondent Rand was alleged to have signed as check airman a Proficiency Check Form when he had not conducted the check ride. Respondent Valentine was accused of directing Rand to sign the form and of certifying the training record entries when the checks had not been made by

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[2]These rules are as follows:

§ 61.59 Falsification, reproduction, or alteration of applications, certificates, logbooks, reports, or records.

(a) No person may make or cause to be made:

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(2) Any fraudulent or intentionally false entry in any logbook, record, or report that is required to be kept, made, or used, to show compliance with any requirement for the issuance, or exercise of the privileges, or any certificate or rating under this part[.]

§ 135.343 Crewmember initial and recurrent training requirements.

No certificate holder may use a person, nor may any person serve, as a crewmember in operations under this part unless that crewmember has completed the appropriate initial or recurrent training phase of the training program appropriate to the type of operation in which the crewmember is to serve since the beginning of the 12th calendar month before that service . . . .

As to § 135.343, the Administrator alleged that respondent Valentine had not undergone recurrent emergency training required by § 135.351, and that respondent Rand had not completed "the appropriate recurrent training program. . .".

[3]At the time, Valentine was Mall's Director of Operations and Rand was its Chief Pilot and check airman.

a certified check airman.

The law judge dismissed the Part 61 falsification claims against both respondents, finding that the Administrator had failed to prove that their actions were "knowingly fraudulent" or that there was any intent to lie. Tr. at 332. The Part 135 claim was found to be stale, and was dismissed pursuant to our stale complaint rule, 49 C.F.R. 821.33. Tr. at 13. We address each finding in turn.

1. Section 61.59(a)(2). In his appeal, the Administrator challenges the law judge's finding in respondents' favor, claiming it to be inherently incredible and inconsistent with her specific statements indicating disbelief of respondents' explanations. We find the law judge's conclusions neither inherently incredible nor internally inconsistent.

This dispute arose in connection with Mall Airways' acquisition, in addition to its fleet of Beech 99 aircraft, of a Beech King Air 90. Both types of aircraft are considered of the same class and, therefore, crew were not required to undergo additional flight checks (see § 135.293(b)) to operate the King Air. Tr. at 37. Nevertheless, Mall decided to provide some flight training, as well as the required ground training (see § 135.293(a)), so as better to familiarize crew with this aircraft.

Mall had no special form to show these types of training, and, according to respondents, it determined to use the basic "Airman Proficiency/Competency Check" form (Mall form MFC-1) that

it used for flight checks. Check airman Rand admitted that, although he signed the forms for three individuals (see Exhibits A-1, 2, and 5), he was not in the aircraft on the specified days and did not act as the check airman. Respondents testified that Exhibits A-1, 2, and 5 were not intended to indicate that regulation-required proficiency checks had been given. The required subsection 293(b) checks had been given earlier on the Beech 99, and were documented on other MFC-1 forms for each individual (see Exhibits R-4-6). Instead, respondents aver, the Administrator's Exhibits A-1, 2, and 5 were intended only to document the required § 135.293(a) testing (conducted by Rand), and to show that the extra flight training (termed "differences training"), which was performed by a Mall flight instructor shortly after the 293(b) flight check in the Beech 99, had been given. Respondent Rand testified that he completed and signed the disputed forms in conjunction with and after consultation with the flight instructor.[4]

Both respondents testified that, although they understood the sequence of events and the meaning of the second, later set of MFC-1 forms, there could be misunderstanding by those unfamiliar with Mall's procedures (who might interpret the form

[4]Thus, using one set of the forms as an example, Exhibits A-1 and R-5, and according to respondents, R-5 indicates that Craig Skinner was given his required 12-month proficiency check in the Beech 99 on November 20, 1987, by respondent Rand. In contrast, their intent with Exhibit A-1 was to show that, on December 1, 1987, Mr. Skinner was given .7 hours of flight training in the King Air by Mark Carter, and was given the subsection 293(a) competency test by respondent Rand.

as a King Air proficiency check under subsection 293(b)). They averred, however, that they had no intent to deceive and argued that they had nothing to gain from their actions, notably because a flight check in the King Air was not required. Respondent Valentine further testified that Mall's various Principal Operations Inspectors (POIs) had been aware of, understood, and had informally approved this procedure. (It is unrebutted that copies of both the proficiency check and differences training forms were routinely sent to the local Flight Standards District Office and produced no question or objection.)[5]

On appeal, the Administrator focuses on respondents' admissions: that the forms could be misread to mean that proficiency checks in the King Air were given; that respondent Rand signed them as check airman when he was not in the aircraft; and that Mall did not have written approval from the FAA for this recordkeeping format. The Administrator also notes that, pursuant to a consent order, Mall was directed to replace Valentine and Rand. We are not convinced that these factors suffice to overturn the law judge's decision, as they are not at all inconsistent with respondents' explanation. Moreover, the law judge's decision is not inherently inconsistent. Her findings, in effect, that respondents should have known better, should have realized the misinterpretation the forms would

[5]Excerpts of depositions of prior POIs contain generally favorable remarks regarding respondents. One former POI testified that he considered this issue a minor "recordkeeping discrepancy" and did not pursue it. Exhibit R-8 at p. 44.

convey, and, when the King Air was acquired, should have changed their manual to include a specific procedure to reflect differences training, are not inconsistent with her belief that respondents had no knowledge or intent to deceive.[6]

We cannot share the Administrator's conviction that respondents were intentionally falsifying pilot training records if only because we can see no good reason for them to do so. As noted, there would be no purpose to falsifying records to make it appear that check rides were given in the King Air because Mall had no need separately to qualify pilots in that aircraft and the crewmembers were already qualified in the Beech 99.

Perhaps the result would be different if the Administrator had demonstrated some benefit to respondents or to Mall in having the FAA believe that King Air check rides were being given. The Administrator, however, offered only one possible reason to support his claim that respondents intended to falsify the training records, and his theory is not at all convincing. He suggested that, with the second form, Mall succeeded in postponing the next necessary flight check 1 month for a number of pilots and, therefore, saved training expenses. The flaw in

[6]The Administrator also claims that the manual prohibited the procedure respondents used to record the differences training. The law judge did not directly address this issue, and we are not convinced. We find the manual ambiguous on this point. Furthermore, that the FAA required (as part of the consent order) that Valentine and Rand be removed from their positions does not make their testimony regarding their intent in completing the MFC-1 forms unreliable or the law judge's decision unsupportable. There is little in the record regarding the background of the consent order.

this argument should be obvious -- Mall incurred considerable added training expense when it provided its crews flight training in the King Air that went beyond regulatory requirements. In sum, in the absence of evidence that respondents had something to gain by falsifying records in the way the Administrator suggests, we cannot find that the law judge's acceptance of their explanation, weak as it may seem, is arbitrary or capricious or otherwise incredible so as to warrant the extraordinary event of reversal. See Administrator v. Bargen, 5 NTSB 757, 760 (1985) (credibility determinations are not to be disturbed absent clear error).[7]

2. Section 135.343. The law judge found (Tr. at 13) that "all charges not having to do with falsification" had to be dismissed under the stale complaint rule, 49 C.F.R. 821.33, and case precedent.[8] The Administrator challenges this finding,

[7]The Administrator has also appealed the law judge's refusal to accept into the record two exhibits the Administrator believes support his claim that respondents' explanation for their behavior is not credible. Although we believe the two exhibits should have been admitted, we find it harmless error. The exhibits add little to the Administrator's case. In the absence of some explanation of an incentive respondents would have had to falsify proficiency checks, minor inconsistencies in training records, when the record otherwise indicates that respondent Rand understood completely his notes and their import (see Tr. at 240-250), will not aid the Administrator in making his case.

[8]The law judge's decision regarding Valentine and Rand was based on her prior finding (id. at 12-13) regarding a third respondent, against whom an order of suspension had been issued. It appears that she reasoned that all these matters had come to the Administrator's attention on November 9, 1988, almost 1 year after the MFC-1 forms were signed. Under Administrator v. Zanlunghi, 3 NTSB 3696 (1981), she reasoned, the Administrator was required expeditiously to issue an order in these cases, absent good cause. In her view, good cause was not presented.

citing Administrator v. Konski, 4 NTSB 1846 (1984). That case involved five incidents on which the Administrator based a general allegation of lack of qualification. The law judge there looked at each incident separately and found that none, considered alone, demonstrated lack of qualification. We rejected this approach, noting that, in determining whether an issue of lack of qualification had been raised, all the allegations, stale and timely, were to be considered together. See 49 C.F.R. 821.33(b)(1).

We do not find Konski especially useful in addressing the question before us. In Konski, the Administrator apparently specifically claimed that all the incidents, as an aggregate, supported revocation, implying therefore that independently they would not. Thus, our approach ensured that the Administrator's concern regarding respondent's behavior over time would be cognizable as a revocation matter. And, our rule required that all the allegations be taken as true in deciding whether an issue of lack of qualification had been raised. Here, in contrast, we are not dealing with the type of preliminary analysis Konski addresses, as there is no need to conduct that inquiry. One of the two alleged violations here is an issue that all agree raises qualification issues and, therefore, can support revocation independent of the other claim. Because Konski did not have to reach the question before us here, it does not, as the Administrator argues, require reversal of the law judge's

decision here.[9]

Moreover, as a practical matter, affirmance of the law judge is the only possible result. With the dismissal of the falsification charge, revival of the subsection 343 charge would produce an anomalous result. Revocation could not likely be obtained on the basis of one such charge,[10] and the law judge's unchallenged staleness finding precludes using subsection 343 as a grounds for suspension. Thus, the Administrator would be left with nothing available to pursue had we determined to remand to a law judge as he requests.

ACCORDINGLY, IT IS ORDERED THAT:

The Administrator's appeal is denied.

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

[9]While we need not go further in our analysis, we note that it could also be argued that the § 135.343 claims were tangential to the lack of qualification issue, appearing to play a minor role in a case whose focus clearly was recordkeeping falsification. In such a circumstance, treating the subsection 343 claims as extraneous to the lack of qualification issues and dismissable as stale would not seem inappropriate.

[10]The Administrator does not argue the contrary.