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NTSB Order No. EA-3859

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 6th day of April, 1993

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JOSEPH M. DEL BALZO,	)	
Acting Administrator,	)	
Federal Aviation Administration,	)	
	)	
Complainant,	)	
	)	
v.	)	Dockets SE-11112,
	)	SE-11114,
	)	SE-11115
GUY RUSSELL, RUSSELL B.HASTINGS,	)	
and WILLIAM M. CARAWAY,	)	
	)	
Respondents.	)	
	)	

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**OPINION AND ORDER**

Respondents have appealed from an oral initial decision issued by Administrative Law Judge Joyce Capps at the conclusion of a two-day evidentiary hearing held in these (consolidated) cases on October 17 and 18, 1990.<sup>1</sup> In that decision the law judge found that the respondents had falsified official records

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<sup>1</sup> Attached is an excerpt from the hearing transcript containing the oral initial decision.

pertaining to flight and duty time while employed by EMS Helicopters, Inc. (a hospital emergency medical evacuation service), in violation of 14 C.F.R. 61.59(a)(2),<sup>2</sup> and affirmed orders revoking the pilot certificate of each of the three respondents.<sup>3</sup>

The Administrator charged respondents Russell (a line pilot for EMS) and Caraway (lead pilot at the Jackson, Mississippi, EMS facility) with recording incorrect duty times in some of their Monthly Pilot Duty and Flight Records in that they did not reflect certain flights (documented by the pilots themselves in another set of records called "Flight Reports") which occurred outside of the pilots' listed duty hours. The Administrator also alleged that those same records had been remade in preparation for an FAA inspection which occurred on April 20, 1987, in order to show compliance with the rest requirements of 14 C.F.R.

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<sup>2</sup> Section 61.59(a)(2) provides 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 --  
\* \* \*

(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;

<sup>3</sup> In addition, the law judge found respondent Caraway in violation of the eight-hour rest requirement set forth in 14 C.F.R. § 135.271(d). Respondent Caraway admits that he violated this regulation by making flights on August 30, 1986 and September 14, 1986 when he had not had the required rest.

135.271.<sup>4</sup>

Respondent Hastings (chief pilot for the entire EMS operation, including the Jackson, Mississippi facility) was charged with altering certain Monthly Pilot Duty and Flight Records of respondent Caraway and another EMS pilot (Ed Lowry) to show false duty times in order to show compliance with the rest requirements of section 135.271. He was also charged with directing all three EMS pilots at the Jackson, Mississippi facility (Russell, Caraway, and Lowry) to remake their Monthly Pilot Duty and Flight Records for the seven months preceding the FAA's announced April 20, 1987, inspection in order to show that they met the rest requirements of section 135.271.

It is undisputed that the Monthly Pilot Duty and Flight Records at issue here were maintained by EMS pilots in order to show compliance with the flight and duty time limitations of section 135.271, and were in fact submitted to the FAA for that purpose at the April 20, 1987, inspection. It is also undisputed that EMS maintained two other sets of records which contained

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<sup>4</sup> Although section 135.271 sets forth several rest requirements, the Administrator was apparently only concerned in this case with the eight-hour rest requirement contained in section 135.271(d):

**§ 135.271 Helicopter hospital emergency medical evacuation service (HEMES)**

(d) Each flight crewmember must receive at least 8 consecutive hours of rest during any 24 consecutive hour period of a HEMES assignment. A flight crewmember must be relieved of the HEMES assignment if he or she has not or cannot receive at least 8 consecutive hours of rest during any 24 consecutive hour period of a HEMES assignment.

relevant information relating to flight and duty time: Flight Reports (listing the particulars of each individual flight, including exact flight times), and monthly Mission Logs (listing all EMS flights for the month in chronological order).

It is undisputed that the Flight Reports, which were used by EMS for billing purposes, were always accurate and that the information from these forms was faithfully transferred to the Mission Logs. It is also apparently agreed that, although the Flight Reports and Mission Logs were not intended to serve as a record of the pilots' duty and rest hours, those records contained enough information for the FAA to determine whether there was compliance with the eight-hour rest requirement at issue here.<sup>5</sup> (Although the Flight Reports and Mission Logs were not presented to the FAA at the announced April 20, 1987, inspection of EMS, they were presented, at the inspector's request, at the unannounced reinspection on April 29, 1987.)

On appeal, respondents each argue that the law judge's findings of falsification are not supported by the evidence and

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<sup>5</sup> FAA Inspector Parrottino testified that the most dependable documents to prove compliance with flight and duty time requirements would have been the Flight Reports. (Tr. 194-5.) He explained that "duty time" encompasses both flight time and time spent doing other official duties, such as telephone calls, training, or recordkeeping (Tr. 187-8), and that any time not spent on such official duties during an "assignment" (time during which the pilot is assigned to be present at the hospital facility so as to be available for emergency medical evacuation flights) could be considered "rest time" (Tr. 193). Inspector Parrottino stated that, absent some evidence showing that the pilot was performing official duties, he would assume the pilot was at rest between flights (Tr. 191).

are not in accordance with Board precedent and policy.<sup>6</sup> Because we agree that the law judge's initial decision is not in conformance with our precedent, we need not address respondents' other arguments. As explained below, we have determined that the cases should be remanded due to the law judge's failure to make the requisite findings regarding respondents' knowledge of the falsity of their statements.

In order to establish a violation of section 61.59(a)(2), the Administrator must show falsity, materiality, and knowledge. Hart v. McLucas, 535 F.2d 516, 519 (9th Cir. 1976). With regard to falsity, respondents Russell and Caraway openly admit that in many instances they made flights outside of the time periods listed as their duty time on their Monthly Pilot Duty and Flight Records. It is also clear from the record that respondent Hastings made (and also caused respondent Russell to make) alterations to the duty times on some Monthly Pilot Duty and Flight Records which rendered at least some of those entries incorrect in that they did not reflect documented flights conducted outside of the (altered) duty hours. (See Tr. 177, 178; Exhibits A-10, A-11). As for the materiality of those statements, contrary to respondents' apparent belief that a false statement is material only if it conceals an actual violation, any incorrect statement of flight and duty time contained in records used to show compliance with regulatory requirements

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<sup>6</sup> The Administrator has filed reply briefs opposing respondents' appeals and urging affirmance of the initial decision.

(such as those at issue in this case) is material, regardless of whether or not the incorrect statement conceals an actual violation.<sup>7</sup>

Thus, the first two elements of a section 61.59(a)(2) violation, falsity and materiality, were established. As to the third element, knowledge, the Administrator was required to prove that respondents had actual knowledge of the falsity of their entries at the time they made (and, in the case of respondent Hastings, caused to be made) those entries. Administrator v. Juliao, NTSB Order No. EA-3087 at 5 (1990); Administrator v. Motrinec, NTSB Order No. EA-3296 at 3-4 (1991), both citing Hart v. McLucas. On this point, respondents Russell and Caraway each indicated that they were confused by the flight and duty time regulation (section 135.271), and were unsure as to just what should have been recorded in the "duty hours" columns on the Monthly Pilot Duty and Flight Records. (Tr. 241-2, 267, 309, 339.) Because the form only provided space for two times ("From" and "To") each day, Russell and Caraway used those spaces only to record the hours they were present in the EMS flight office during their 24-hour assignments, as distinguished from those nighttime hours when they were in the pilots' sleeping quarters down the hall.

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<sup>7</sup> For a statement to be material it need only be capable of influencing a decision of the agency in making a required determination. Twomey v. NTSB, 821 F.2d 63, 66 (1st Cir. 1987) (backdating of application for medical certificate by 7 days was material misstatement because the false backdate could influence FAA's determination as to whether pilot was qualified to fly as pilot in command during those 7 days).

Although respondents Russell and Caraway admit that they piloted some emergency medical evacuation flights (and for that amount of time were again on "duty") during the nighttime hours, they explained that they did not attempt to record those flights as duty time because: a) there was no space available on the form to indicate a pilot going on and off duty more than once in a single day;<sup>8</sup> and b) they apparently believed that the Monthly Pilot Duty and Flight Records would be used in conjunction with the Flight Reports and Mission Logs (which clearly documented these omitted flights) in order to show compliance with the flight, duty, and rest requirements of section 135.271. (Tr. 238, 262-3, 291, 312, 335-7.)<sup>9</sup> Accordingly, the testimony of respondents Russell and Caraway indicates that they were not aware that the duty time entries they made were false.

Respondent Hastings acknowledged that he visited the Jackson, Mississippi EMS facility in his capacity as Chief Pilot in order to review suspected discrepancies in the pilots' flight and duty time records, in preparation for the FAA's announced

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<sup>8</sup> It was generally agreed at the hearing that the format of EMS's Monthly Pilot Duty and Flight Record did not provide space for detailed enough entries regarding flight, duty, and rest time to serve its intended purpose. Respondents state in their appeal briefs that the company, EMS Helicopters, was cited by the FAA for failing to provide adequate forms to its pilots for keeping track of flight and duty time. (See e.g. Russell App. Br. at 12 and 21.)

<sup>9</sup> With regard to the changes respondent Russell admits he made with the help of respondent Hastings (who was Chief Pilot at the time), Russell testified that he believed they were merely correcting his incorrectly filled-out records so that they would clearly reflect the rest periods he had actually received between flights. (Tr. 319-23, 349.)

April 20, 1987, inspection. (Tr. 365-7.) He testified that when he saw that the pilots were incorrectly showing much of their rest time between flights as "duty time", he decided to use the incorrectly filled-out forms as learning aids to teach the pilots how to properly calculate duty time and rest time so they would know how to properly document their time in the future. (Tr. 378.) He testified that all of the changes he made to the pilots' records were based on information contained in the Flight Reports and Mission Logs (Tr. 393), the accuracy of which is undisputed.<sup>10</sup> Thus, respondent Hastings' testimony also indicates that he did not believe he was making false statements.

The respondents' testimony, if credited, would preclude a finding that they knew of the falsity of their statements. The law judge was of course free to reject the respondents' assertions of innocence and find that they indeed knew of the falsity of their statements. However, the law judge made no such findings. While it might have been possible under different circumstances to infer an implicit rejection of respondents' testimony by virtue of the fact that the law judge found respondents in violation of the regulation, we cannot ignore what

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<sup>10</sup> It is clear that, contrary to Hastings' testimony, at least some of those changes were not in fact an accurate reflection of what actually occurred (see Tr. 177-8, Exhibits A-10 and A-11). However, the point here is that Hastings indicated his belief that the statements were accurate and the law judge did not reject Hastings' asserted belief as incredible, as she should have done in order to properly find that he made intentionally false statements in violation of section 61.59(a)(2). Rather, she suggested that in her mind any alteration of the records would constitute falsification. (Tr. 210-11, 426-7.)

seems to us a misunderstanding of the applicable law. Specifically, we are troubled by comments which indicate the law judge's apparent belief, in contradiction to the knowledge requirement set forth in Hart v. McLucas, that scienter is not a required element of the falsification violation.<sup>11</sup>

Because the law judge apparently did not consider knowledge to be an element of the falsification offense, she made no findings on that critical point. Accordingly, we cannot make a judgment as to the sufficiency of the evidence regarding each of the respondents' asserted lack of actual knowledge, and the case must be remanded.

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<sup>11</sup> The law judge's misunderstanding of the law is most clearly illustrated by her conclusion that respondent Russell was guilty of falsification in spite of her finding that "he didn't know what he did or why he did it." (Tr. 426.)

The law judge also appeared to believe, in error, that any alteration of official records, even a legitimate correction, constitutes falsification. She stated in her initial decision that "[the falsification regulation] illustrates just how important these official documents are and how they cannot be touched." (Tr. 427.) In addition, during the course of the hearing the law judge stated that "when it comes to falsification, I don't have to know their reasons . . . [a]ll I've got to decide here is were there alterations, were there falsifications, that's all I have to decide." (Tr. 210, 211.)

**ACCORDINGLY, IT IS ORDERED THAT:**

This case is remanded for further proceedings consistent with this opinion.<sup>12</sup>

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

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<sup>12</sup> Because the law judge who presided at the hearing in this case has retired and is therefore unavailable to make a credibility determination on the existing record, a new hearing must be held.