SERVED: April 15, 1993

NTSB Order No. EA-3863

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 13th day of April, 1993

JOSEPH M. DEL BALZO, Acting Administrator, Federal Aviation Administration, Complainant, v. ROBERT S. BORREGARD, Respondent.	Docket SE-12960

OPINION AND ORDER

Respondent has appealed from the oral initial decision of Administrative Law Judge Jerrell R. Davis, issued on March 11, 1993, following an evidentiary hearing.[1] The law judge affirmed an emergency order of the Administrator revoking respondent's mechanic certificate and inspection authorization. We deny the appeal.

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

The amended order of emergency revocation charged:

> 3. You made three different entries in the aircraft maintenance records of a Cessna Model 182 civil aircraft no. N3627C, stating that you had completed an annual inspection and approved it for return to service on at least 3 different dates, to wit:
>
> a. September 1, 1992;
> b. October 24, 1992;
> c. October 28, 1992; and
> d. November 1, 1992.
>
> 4. In fact, the annual inspection for N3627C had not been completed on any of the above dates.
>
> 5. Your entries referenced in paragraph 3, above, were intentionally false in that you knew the annual inspection for N3627C had not been completed on any of the above dates when you made said entries.
>
> 6. The above entries were material.
>
> 7. Your alterations in the aircraft logbook were done for a fraudulent purpose.

Respondent was charged with violating 14 C.F.R. 43.12(a)(3).[2]

The following facts were established at the hearing and not seriously challenged by respondent on appeal. In approximately mid October 1992, Squadron Two Flying Club hired respondent to perform an annual inspection on N3627C. Respondent had done no work for this group before, and had been looking for new employment. Tr. at 312-314.

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[2] § 43.12(a)(3) reads:

> 43.12 **Maintenance records: Falsification, reproduction, or alteration.**
>
> (a) No person may make or cause to be made:
>
> (3) Any alteration, for fraudulent purpose, of any record or report under this part.

The aircraft's annual inspection was late, and should have been completed in September. For unrelated reasons, the FAA had become interested in the aircraft, and had asked the club for various records, including maintenance records. The club president and his son, Keith Mason, the director of maintenance, apparently determined to attempt to disguise that the aircraft was "out of annual" when it was flown. Keith Mason therefore asked respondent to back date the annual inspection to September for administrative reasons of "maintaining continuity" (i.e., continuity in the records). Exhibit C-3 and Tr. at 113.

Respondent complied. As he apparently had already entered October 28 and October 24 in the aircraft and engine logbooks, respectively, he placed peel-off labels over those dates and wrote in September 1.[3] The peel-off labels clearly showed up as alterations as, for example, they covered certain information preprinted on the logbook pages. See Exhibit C-4. As requested, Keith Mason forwarded copies of these logbook pages to the FAA.

Soon after, Mason reported to respondent that the FAA was questioning whether entries had been altered. Respondent then was told of the FAA involvement, and he proceeded to report the incident to an FAA inspector he had dealt with in the past. Respondent took more labels and covered the September dates, reinserting October 24 and October 28.[4] Later, he voided the

[3]The testimony establishes that these labels were more permanent than the easily removed "Post-it" type. Tr. at 123-124.

[4]There was considerable discussion at the hearing regarding

October 24 and 28 entries and made new ones showing a November 1, 1992 annual inspection date. Respondent admits that the annual inspection had not been completed by any of these dates, as the required gear swing was not performed until after November 1. Tr. at 323-328.

On appeal, respondent argues both procedural and substantive errors by the law judge. We find no procedural basis to overturn the initial decision. Respondent's lack of counsel is not grounds for reversal. Respondent sought no delay to obtain new counsel, nor is "assigned counsel" (Appeal at 4) provided in Board cases. Furthermore, the law judge thoroughly explained the hearing procedures to respondent, and at no point did respondent object or ask questions.

Respondent also claims that he was prevented from introducing witnesses in his defense and that documentary evidence he sought to introduce was excluded. We see no indication of either event in the record, and respondent cites no place in the transcript where the law judge rejected either documentary evidence or proffered witnesses. The law judge did not abuse his discretion in explaining to respondent, at the outset, that extensive character witnesses would not be useful or accepted, as their testimony would not shed light on the

(..continued)
the propriety (or impropriety) of using different inspection dates in the engine and aircraft logbooks. The Administrator never tied this issue to the charge, the answer is not clear in the record (there being extensive conflicting testimony by experienced individuals), and we need not resolve it to decide respondent's appeal.

incidents that were the subject of the complaint. Our conclusion of no procedural error is confirmed by a review of respondent's attachments to his appeal, which constitute, in effect, an offer of proof. It appears from this attachment that none of the proposed witnesses had any first-hand knowledge of the incidents, but would have testified to after-the-fact events. The proffered evidence, even if accepted, would not affect our conclusions. Overall, we see no procedural error or irregularity that denied respondent due process or a fair hearing.

Respondent further argues that there was no emergency that warranted an emergency order, and that he was denied proper notice of FAA enforcement actions because the FAA employee he contacted did not inform him of the pending investigation. However, the FAA employee he contacted was not the investigating official. Even if he knew of the investigation at the time, we cannot find that a failure to notify respondent would be a violation of respondent's due process rights. In any case, respondent was well aware, through his direct contacts with Inspector Smith, that an investigation had begun. As to the emergency nature of the order, the Board does not review the Administrator's exercise of his emergency powers. Administrator v. Anderson, 5 NTSB 564, 565 (1985).

Turning to substantive issues, the regulation with which respondent is charged, 14 C.F.R. 43.12(a)(3), prohibits alteration of records for fraudulent purposes. We typically cite and apply the elements of fraud, as listed in Hart v. McLucas,

535 F.2d 516, 519 (9th Cir. 1976), citing Pence v. United States, 316 U.S. 332, 338 (1942), viz.: 1) a false representation; 2) in reference to a material fact; 3) made with knowledge of its falsity; 4) with the intent to deceive; and 5) with action taken in reliance on the representation. In the past, we have applied Hart in the context of 14 C.F.R. 43.12(a)(1), which prohibits fraudulent or intentionally false record entries.

Respondent first argues that the misrepresentation was not material (the second Hart criteria). We must disagree. The alterations misrepresented the completion date of the aircraft's annual inspection.[5] Contrary to respondent's contention, the misrepresentations were not on a copy, although only a copy was forwarded to the FAA. The alterations and incorrect information were placed directly in the official logs. Under the circumstances, respondent's arguments that he did not endorse the "copy" as an official document and that the falsity of the September 1, 1992 insertion was reported to the FAA are unconvincing.[6]

[5]As we noted in Administrator v. Olsen, NTSB Order EA-3582 (1992) and Administrator v. Cassis, 4 NTSB 555, 557 (1982), reconsideration denied, 4 NTSB 562 (1983), aff'd Cassis v. Helms, Admr., FAA, et al, 737 F.2d 545 (6th Cir. 1984), reliability and accuracy of aircraft and pilot records are vital to aviation safety. "[A]ny logbook entry which in any way illustrates compliance with any certification or rating requirement in 14 CFR 61 is material for purposes of a Section 61.59(a)(2) violation." Id., 4 NTSB at 557.

[6]Respondent did not make the report until he was advised by Mr. Mason that copies of the altered entries had been sent to the FAA. In any case, we fail to see how his report to the FAA could affect the materiality of the alteration.

Respondent continues that the Administrator did not prove any intent to deceive. He suggests that, because the FAA immediately had questions about the document and because its falsity was reported by respondent, the required intent could not exist. While it might be superficially appealing, it does not logically follow, for example, that, because a $10 bill is not a good counterfeit, the counterfeiter had no intent to deceive. The law judge found that respondent "intentionally altered entries in the maintenance records of the aircraft for a fraudulent purpose." Tr. at 412. This finding is not subject to reversal even if the reason respondent might have believed -- maintaining continuity in the records -- was not the Masons' actual purpose.[7] Nor is the finding reversible because, after making the alteration and learning that the FAA was aware of it, respondent alerted an FAA employee. Moreover, respondent continued to make alterations in the logbook that he knew were false in an apparent attempt to deceive the FAA that proper entries had been made and thereby bring an end to the investigation.

Respondent's next argument, that there was no reliance on the false alteration, leads us to a slight modification of the initial decision. The law judge found that the Administrator had

[7]The law judge's subsidiary finding (Tr. at 412) that respondent had "unwittingly allowed himself to be duped into a deception perpetrated by . . . Squadron Two Flying Club . . . ." can, in this context, be read to reflect the fact that respondent was not originally told of the Masons' true purpose in seeking the alteration.

not proven this fifth element of Hart. The law judge then proceeded to find that respondent made an intentionally false entry. On this basis, he found that respondent violated § 43.12(a)(3).

The problem with this analysis is that this finding, while available as a lesser offense under § 43.12(a)(1), is not available under § 43.12(a)(3), the only section charged in the order of revocation. Notwithstanding, we conclude that a violation of subsection (a)(3) has been proven.

The law judge and the Administrator's counsel engaged in considerable debate regarding application of Hart to § 43.12(a)(3), as compared to its usual application in § 43.12(a)(1) cases. The Administrator argued at the hearing, and continues to argue in his reply, that the fifth Hart criterion -- action taken in reliance on the false representation -- should be modified here to reflect the different language of (a)(3). Thus, according to the Administrator, all that should be required is proof of an intent that someone rely on the alteration, not proof of actual reliance.

Hart discussed the fraud criteria only in passing, as the issue before the court was the knowledge required for an intentional falsification finding under (a)(1). Even assuming Hart applies to subsection (a)(3) cases, where the question is only whether an alteration was made with a fraudulent purpose in mind, not whether the entry itself perpetrated a fraud, we think

that Hart's applicability in (a)(3) cases is logically concluded with our inquiry into whether a respondent intended to deceive, as this inquiry mirrors the regulation's prohibition against fraudulent purpose. Having upheld the law judge's finding on that point, we affirm the law judge's ultimate conclusion that respondent violated subsection (a)(3).

Finally, we must reject respondent's various arguments against certificate revocation. Just as a lesser violation of intentional falsification under (a)(1) is sufficient for revocation,[8] so is a violation of (a)(3). Respondent's after-the-fact contacts with the FAA are not satisfactory mitigation, nor is the absence of actual harm from the alteration. Accord Roach v. National Transp. Safety Bd., 804 F.2d 1147, 1157 (10th Cir. 1986), cert. den'd, 486 U.S. 1006 (1988). Cf. Administrator v. Fallon, NTSB Order EA-2678 (1988) (disclosure prior to discovery may be considered in mitigation). Similarly, any separate responsibility or liability of the aircraft owner does not excuse respondent's behavior. The law judge found that respondent knew that the alteration was false and would be used in some fashion to deceive. And, the financial harm to respondent from revocation and his prior clean record are not elements to be taken into account in determining the appropriate sanction. Administrator v. Williams, NTSB Order EA-3588 (1992).

We also reject respondent's suggestion that the revocation extend only to his inspection authorization, allowing him to

[8] Cassis, supra.

retain his mechanic certificate. A finding of logbook alteration with fraudulent purpose (or even the lesser charge of intentionally false entry) calls into question a respondent's ability and willingness -- qualification -- to hold either of these certificates. Administrator v. Garrelts, NTSB Order EA-3136 (1990). Accord Administrator v. Barron, 5 NTSB 256 (1985) (both medical and operating certificate revoked for intentional falsification of medical application); and Olsen, supra (although violations stemmed from respondent's activities under his mechanic certificate, suspension of private pilot certificate upheld).

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied; and

2. The initial decision is modified, as set forth in this opinion.

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