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NTSB Order No. EA-3937

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 2nd day of July, 1993

JOSEPH M. DEL BALZO,)	
Acting Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-11653
v.)	
)	
ANDREW F. POTANKO,)	
)	
Respondent.)	
)	

OPINION AND ORDER

Both respondent and the Administrator have appealed from the oral initial decision of Administrative Law Judge William R. Mullins, rendered at the conclusion of an evidentiary hearing on May 31, 1991.¹ By that decision, the law judge modified to a six-month suspension an order of the Administrator (complaint) revoking respondent's aircraft mechanic's certificate with

¹An excerpt from the hearing transcript containing the initial decision is attached.

airframe and powerplant ratings.² The law judge affirmed the following charges: sections 39.3, 43.9(a)(1), 43.13(a) and (b), 43.15(a)(1), 91.27(a)(1), and 91.29(a) of the Federal Aviation Regulations ("FAR," 14 C.F.R. Parts 39, 43, and 91). We will deny respondent's appeal and grant the Administrator's appeal, in part.

The alleged violations occurred at various times between January 10, 1989, and October 8, 1989, in connection with the repair and ultimate consolidation of two aircraft, a Cessna 150F and a Cessna 150G. Some factual background is necessary.

Respondent owned Militair Flying Club and Militair, Inc., a company that salvages, maintains, and rents small airplanes. In November 1988, Ms. Ellen Simpson bought Militair Flying Club from respondent under the agreement that respondent would be its chief flight instructor and that Militair, Inc., would perform all aircraft maintenance. As part of the deal, Ms. Simpson agreed to buy a Cessna 150F, N6737F (hereinafter 37F), after respondent repaired it. The aircraft had been damaged in an accident in September 1988, resulting in, according to respondent, extremely heavy damage to the wings, fuselage, gear, and interior. To effect the repair, respondent bought a Cessna 150G, N6248S

²The Administrator's revocation order charged respondent with violations of sections 39.3, 43.9(a)(1), 43.12(a)(1) and (3), 43.13(a) and (b), 43.15(a)(1), 45.13(e), 45.21(b), 91.27(a)(1), 91.29(a), and 91.31(c) of the Federal Aviation Regulations ("FAR," 14 C.F.R. Parts 39, 43, 45, and 91). See Appendix for text of pertinent regulations. At the close of the Administrator's case-in-chief, the law judge dismissed the charge under FAR section 43.12(a)(3). The Administrator has not appealed this dismissal.

(hereinafter 48S), that had an intact frame but no engine or propeller, intending to combine its useable parts with 37F to form one aircraft. The log books for 48S were not available, but respondent determined that they were not needed because he was using parts from 48S to repair 37F.

Respondent effected the repairs between January and May of 1989. He utilized the fuselage, wings, horizontal stabilizer, landing gear, and instrument panel from 48S (the 150G). From 37F (the 150F) he salvaged the engine, elevator, vertical stabilizer and rudder, propeller, seats, and most of the instruments and controls. According to respondent's testimony, he also used 37F's wing control surfaces, pulleys, wing tips, and navigation lights. After all the reconstruction was completed, respondent removed the identification data plate from the wrecked fuselage of 37F and affixed it to the fuselage of the repaired aircraft. He also painted over the markings on the tailcone from 48S and substituted the ones from 37F.

In a motion filed April 2, 1991, respondent argued to the law judge, as he does now on appeal, that the violations should be dismissed against him under section 821.33 of the Board's rules (49 C.F.R. § 821.33)³ because the complaint did not allege

³ Section 821.33 provides, in pertinent part:

§ 821.33 Motion to dismiss stale complaint.

Where the complaint states allegations of offenses which occurred more than 6 months prior to the Administrator's advising respondent as to reasons for proposed action under section 609 of the Act, respondent may move to dismiss such allegations

a lack of qualification and the alleged offenses occurred more than six months prior to the Administrator advising respondent of any possible action against him. Respondent claims that the Administrator's act of amending the original complaint on April 9, 1991, to include the specific charge that respondent lacked the necessary care, judgment, and responsibility to hold a mechanic certificate was simply a belated attempt to circumvent the stale complaint rule and, as such, should be disregarded. The law judge denied respondent's motion. On appeal, respondent now claims that the law judge erred by 1) allowing the Administrator to amend the complaint, thus depriving respondent of notice that lack of qualification was alleged; and 2) failing to limit the hearing to issues of lack of qualification only. The Administrator argues in his appeal that respondent

(..continued)

pursuant to the following provisions:

(a) In those cases where a complaint does not allege lack of qualification of the certificate holder:

(1) The Administrator shall be required to show by answer filed within 15 days of service of the motion that good cause existed for the delay, or that the imposition of a sanction is warranted in the public interest, notwithstanding the delay or the reasons therefor.

* * *

(b) In those cases where the complaint alleges lack of qualification of the certificate holder:

(1) The law judge shall first determine whether an issue of lack of qualification would be presented if any or all of the allegations, stale and timely, are assumed to be true. If not, the law judge shall proceed as in paragraph (a) of this section.

(2) If the law judge deems that an issue of lack of qualification would be presented by any or all of the allegations, if true, he shall proceed to a hearing on the lack of qualification issue only, and he shall so inform the parties. The respondent shall be put on notice that he is to defend against lack of qualification and not merely against a proposed remedial sanction.

intentionally falsified a logbook entry and the law judge erred by not finding so. He also contends that respondent switched identification plates without authorization.

We have considered the briefs of the parties and the record below, and conclude, for the reasons that follow, that safety in air commerce or air transportation and the public interest require that the Board deny respondent's appeal and grant the Administrator's appeal, in part.

Respondent asserts that the Administrator's complaint is stale because the Notice of Proposed Certificate Action, dated June 29, 1990, did not advise respondent of the pending action against him until more than six months after the alleged violations took place. According to the order of revocation, dated February 13, 1991, the violative conduct occurred between January and October 1989, more than six months prior to respondent's notification. On March 8, 1991, respondent filed a motion for summary judgment, claiming that the Administrator did not timely file his complaint and, on April 2, 1991, respondent filed a motion to dismiss a stale complaint, stating that the Administrator did not allege a lack of care, judgment, or responsibility.⁴ He filed a motion to strike the amendment,

⁴The Amendment to Order and Complaint filed by the Administrator on April 9, 1991, stated as follows:

"Based upon the matters set forth above, the Administrator has determined that you lack the necessary care, judgment and responsibility to hold an FAA Mechanic Certificate with Airframe and Powerplant ratings, and therefore lack qualification to hold that certificate."

asserting that he was deprived of notice and an opportunity to be heard at an informal conference to respond to the additional charges.⁵ In defense of the amendment, the Administrator argued then, as he does now, that it merely made explicit what was already implicit in the revocation order and included no new allegations. The law judge issued an order denying both motions.

We agree with the Administrator's statement that the alleged intentional falsification alone was sufficient to present an issue of lack of qualification.⁶ We have repeatedly emphasized that a mechanic who does not make accurate logbook entries lacks the requisite care, judgment and responsibility mandated by his certificate. See Administrator v. Morse, NTSB Order No. EA-3766 at 12 (1992). Even so, a complaint should be looked at as a whole to determine whether an issue of lack of qualification is presented. Administrator v. Konski, 4 NTSB 1845, 1847 (1984); Administrator v. Wingo, 4 NTSB 1304, 1305 (1984). To answer respondent's argument that the law judge did not put him on notice that he would have to defend against a charge of lack of

⁵Respondent and his attorney attended an informal conference with FAA counsel on November 15, 1990.

⁶The instant case can be distinguished from Administrator v. Hawes, NTSB Order No. EA-3830 (1993), wherein the Board affirmed the law judge's decision dismissing a revocation order (complaint) as stale. In Hawes, we disagreed with the Administrator's argument that a revocation case always involves a lack of qualification issue, thereby implying that a complaint seeking revocation can never be stale. Id. at 5. We observed that the violations in Hawes did not warrant revocation. Charges of record falsification and fraud, however, do support revocation. See Administrator v. Altman, 3 NTSB 3311, 3314 (1981) and cases cited therein.

qualification, Board precedent reveals that a specific instruction to that end is not required. Administrator v. Muscatine Flying Service, Inc., 5 NTSB 1785, 1789, appeal denied, 822 F.2d 1094 (1987). The denial of respondent's motion was notice enough. See Administrator v. McGhee, NTSB Order No. EA-3580 (1992).

Additionally, respondent contends that the law judge should have dismissed the Administrator's complaint when he found that the lack of qualification allegations were not supported by a preponderance of the evidence. He argues that according to Rule 33, the Administrator was required to show good cause for the delay. Since this was not proved, respondent maintains, the complaint should have been dismissed. However, under section 821.33(a)(1), good cause for the delay must be demonstrated if the complaint does not allege a lack of qualification. As explained supra, this is not the situation in the instant case.

According to the Administrator, respondent violated FAR section 43.12(a)(1) by making an intentionally false logbook entry and the law judge erred in deciding that a preponderance of the evidence did not prove the charge. The entry made by respondent, the Administrator alleges, implied that the wings, vertical and horizontal stabilizers, and elevator came from 37F when, in fact, they came from 48S.⁷

⁷Respondent made the following entry, dated 3/15/89: "All other components from Cessna No. 6737F installed on this aircraft such as wings, vertical & hor stabilizer & elevator as removed from 6737F." He also identified by part number the fuselage front, center and tailcone assemblies. The part numbers were

An intentionally false statement consists of (1) a false statement, (2) made in reference to a material fact, (3) with knowledge of its falsity. Administrator v. Zumwalt, NTSB Order No. EA-3304 (1991) at 4, n. 4. Respondent argues that his statement was not false because the parts described were "like or equal to" the damaged ones removed from 37F and therefore the representation was not false. The statement, however, implies that the parts were the same ones that came from 37F. The vagueness of the entry helps to make it appear that respondent merely repaired 37F with a few unidentified parts.

Respondent does not contest that he had the logbook for 37F but did not have the book for 48S. Arguably, it was easier to refer to the new, intact aircraft as 37F. However, the law judge believed that the evidence did not prove by a preponderance that respondent made the aforementioned entry with the knowledge that it was not accurate.⁸ Although the Board may overturn a law judge's credibility determination when it is "inconsistent with the overwhelming weight of the evidence," Chirino v. NTSB, 849

(..continued)

inconsistent with the parts approved by Cessna for use on the 150F aircraft. See Exhibits C-3, C-14, and C-15. The law judge concluded that a mechanic who intended to make a false entry into a logbook would not have identified the parts by number.

The fact that the entry, although signed and approved for return to service by respondent, was actually made by another mechanic (Mr. Harper) has no import. Mr. Harper testified that he relied on what respondent told him regarding the source of the parts. Tr. at 103, 112.

⁸The law judge stated, "I think that the log book entry is obviously wrong, but there's a quantum leap, I think, to show that it was made fraudulently or intentionally false from just sloppy recordkeeping." Tr. at 268-69.

F.2d 1525, 1530 n.6 (D.C. Cir. 1988), that is not the case here.

Therefore, we will not disturb the law judge's disposition of the section 43.12(a)(1) charge.

With respect to the identification data plate, the law judge found that respondent removed the plate for maintenance purposes and placed it back in approximately the same position, this time on the fuselage from 48S, which was used to replace the warped cabin area. He surmised that this action did not violate section 45.13(e). The Administrator maintains that the resolution of the issue is not that simple. He asserts that respondent did not repair 37F, but instead added parts from that aircraft to 48S in order to create one, intact aircraft.⁹

Respondent argues that the logbooks and data plate follow the engine, not the fuselage, and that his substitution of parts from 48S in no way changed the identity of the aircraft.¹⁰ We find his argument unconvincing. It appears that respondent clutches this tenuous argument because he had the logbooks for 37F only and, therefore, classifying the repaired aircraft as 37F would simplify his paperwork responsibilities. Surely, he cannot be considered to have rebuilt an aircraft around an engine, pulleys, ailerons, a data plate, and other disjointed parts. We do not adopt the interpretation advanced by respondent that he removed and replaced the data plate from 37F for the purpose of

⁹No evidence was submitted regarding whether respondent completed FAA form 337 for the repairs at issue.

¹⁰It should be noted that an aircraft engine has its own separate identification plate attached to it.

repairing the aircraft; rather, the evidence indicates that he affixed the data plate from 37F to the fuselage of 48S, an action that is prohibited under FAR section 45.13(e). Respondent also changed the registration marks on the tailcone to be consistent with those from 37F.

The Administrator contends that the unauthorized switching of the data plates, especially when combined with the other proven offenses, supports the revocation of respondent's mechanic's certificate. He relies on Administrator v. Lott, 5 NTSB 2394 (1987), reconsideration denied, NTSB Order No. EA-2663 (1988), a revocation case where the respondent was found to have, among other things, affixed a data plate from a wrecked aircraft onto a salvaged airplane that, although flyable, was sold for "parts," with no records or data plate. Although the facts are not identical to those of the instant case, it offers some guidance. In Lott, the Board stated that "the true identity of an aircraft is highly material since it is essential in determining the maintenance, repair and alteration history of that aircraft and its conformity to its type design and applicable airworthiness directives." Id. at 2397. Respondent's action created an inaccurate history for the resultant aircraft.

Based on the foregoing, the Board finds that a preponderance of the evidence establishes that respondent violated FAR sections 45.13(e), 45.21(b), and 91.31(c), and we grant the Administrator's appeal as to those charges. Consequently, we must reevaluate the sanction. The original order sought

revocation and the law judge reduced the sanction to a six-month suspension. In his appeal, the Administrator seeks reinstatement of revocation, regardless of whether the intentional falsification charge is upheld. After carefully evaluating the evidence, we have determined that respondent's transgressions, while serious, do not warrant revocation. Our finding that the Administrator met his burden to prove the violations of FAR sections 45.13(e), 45.21(b), and 91.31(c), combined with the violations found by the law judge, justifies the imposition of an eight-month suspension.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;
2. The Administrator's appeal is granted, in part;
3. The initial decision, as modified by this opinion, is affirmed; and
4. The eight-month suspension of respondent's mechanic certificate with airframe and powerplant ratings shall commence 30 days after service of this order.¹¹

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

¹¹For the purpose of this order, respondent must physically surrender his certificate to a representative of the Federal Aviation Administration pursuant to FAR § 61.19(f).

APPENDIX

§ 39.3 No person may operate a product to which an airworthiness directive applies except in accordance with the requirements of that airworthiness directive.

§ 43.9 Content, form, and disposition of maintenance, preventive maintenance, rebuilding, and alteration records....

(a) Maintenance record entries. Except as provided in paragraphs (b) and (c) of this section, each person who maintains, performs preventive maintenance, rebuilds, or alters an aircraft, airframe, aircraft engine, propeller, appliance, or component part shall make an entry in the maintenance record of that equipment containing the following information:

(1) A description (or reference to data acceptable to the Administrator) of work performed.

§ 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;

* * *

(3) Any alteration, for fraudulent purpose, of any record or report under this part.

"§ 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 methods, 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).

§43.15 **Additional performance rules for inspections.**

(a) General. Each person performing an inspection required by Part 91, 123, 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.

§ 45.13 **Identification data.**

(e) No person may install an identification plate removed in accordance with paragraph (d)(2) of this section on any aircraft, aircraft engine, propeller, propeller blade, or propeller hub other than the one from which it was removed.

§ 45.21 **General.**

(b) Unless otherwise authorized by the Administrator, no person may place on any aircraft a design, mark, or symbol that modifies or confuses the nationality and registration marks.

§ 91.29 (now 91.7) **Civil aircraft airworthiness.**

(a) No person may operate a civil aircraft unless it is in an airworthy condition.

§ 91.31 (now 91.9) **Civil aircraft flight manual, marking, and placard requirements.**

(c) No person may operate a U.S. registered civil aircraft unless that aircraft is identified in accordance with part 45.

Section 91.27 (now 91.203) states that no person may operate a civil aircraft without an appropriate and current airworthiness certificate.