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NTSB Order No. EA-4294

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 18th day of November, 1994

DAVID R. HINSON, Administrator, Federal Aviation Administration, Complainant, v. MAURICE BAILEY and GILBERT E. AVILA, Respondents.	)	Dockets SE-12030 and SE-12049

OPINION AND ORDER

Respondents have appealed from the oral initial decision issued by Administrative Law Judge Patrick G. Geraghty at the conclusion of an evidentiary hearing held in this case on December 17, 1992.[1] In that decision, the law judge affirmed orders suspending respondents' mechanic certificates for 120 days

[1] Attached is an excerpt from the hearing transcript containing the oral initial decision.

each, based on their allegedly improper approval of a Piper PA-32 aircraft for return to service after a 100-hour inspection (respondent Bailey) and an annual inspection (respondent Avila), when the aircraft was unairworthy due to numerous discrepancies. Both respondents were charged with violating 14 C.F.R. 43.15(a),[2] and respondent Bailey was also charged with violating 14 C.F.R. 43.13(a) and (b).[3] For the reasons discussed below,

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[2] **§ 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;
(2) If the inspection is one provided for in Part 123, 125, 135, or §91.409(e) of this chapter, perform the inspection in accordance with the instructions and procedures set forth in the inspection program for the aircraft being inspected.

[3] **§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

respondents' appeals are denied, and the initial decision is affirmed.

The Piper PA-32 aircraft here at issue was delivered to respondent Bailey for accomplishment of a 100-hour inspection and an annual inspection, in preparation for its planned use in Part 135 operations conducted by Wendy's Mag Air. Respondent Bailey testified that he worked on the aircraft for several weeks and was assisted by, among others, respondent Avila. In an aircraft logbook entry dated November 11, 1990, respondent Bailey (who at that time held only a mechanic certificate and not an Inspection Authorization ("IA")) signed off on a 100-hour inspection, certifying that the aircraft was airworthy as of that date. In an aircraft logbook entry dated November 16, 1990, respondent Avila (who held an IA in addition to his mechanic certificate) signed off on an annual inspection, certifying that the aircraft was airworthy. However, a subsequent inspection conducted by FAA Inspector Ernest Keener on November 28, 1990, which was prompted by a report from Wendy's Mag Air that the aircraft had numerous discrepancies,[4] revealed the following:

a. the firewall frame was cracked and the forward baggage compartment lower sill was loose;

b. oil leaked from the case halves;

c. a fastener was missing from the aft fuselage access door;

(..continued)
deterioration, and other qualities affecting airworthiness).

[4] Inspector Keener was, at that time, the principal operations inspector for Wendy's Mag Air.

d. the pilot and co-pilot seat back adjusters were broken;

e. alternator belts adjustment bolts were not safetied or keyed;

f. the propeller control nut was stripped;

g. the battery access panel was not secured;

h. the bottom portion of the cowling was not secured by required screws and lock plates;

i. the gear strut fluid was inadequate;

j. several screws were missing from the fuel selector fairing;

k. a used [Cessna] tachometer, which was not appropriate for this [Piper] aircraft, had been installed;

l. the tachometer cable used in installing the tachometer was too long;

m. the scat tube located at the fuel servo was worn and deteriorated;

n. the front cowling pins and engaging gears were worn out with resultant looseness in the cowling latches;

o. the engine temperature gauge was inoperative;

p. the flap control linkage, specifically the forward rod in the right wing, was worn and deteriorated;

q. the aileron control linkage, specifically the forward end of the rod in the right wing, was worn and deteriorated;

r. both rod ends of the aileron control linkage in the left wing were worn and deteriorated;

s. arm rests were missing in the right aft portion of the cabin and the right aft passenger door;

t. the rear passenger door slide lock fastener was loose and pulling through the door assembly;

u. entrance doors forward and aft had badly worn hinges;

v. the upper rudder bearing was loose and worn;

w. the emergency locator transmitter was inoperable;

x. the flap hinge fittings were badly corroded;

y. the starter power cable connector lug was cracked;

z. the alternate air control cable was worn almost halfway through;

aa. upper and lower cowling needed surface skin repairs and reworking of metal fasteners, respectively;

bb. the engine spark plugs needed replacing;

cc. an improper fire extinguisher was installed [charged against respondent Bailey only];

dd. the muffler piping system was corroded and perforated;

ee. Airworthiness Directive 76-18-04 was not complied with.[5]

At the time of Inspector Keener's November 28 inspection, the aircraft had been flown for a total of only three hours after respondents had signed off on the 100-hour and annual inspections. Inspector Keener (himself the holder of a mechanic certificate and IA) testified that all of these discrepancies should have been detected and corrected in the course of a 100-

[5] In addition, respondent Bailey was also charged with performing improper maintenance in the following respects:

a. replacing the engine tachometer with a unit not designed, appropriate, or approved for use in a Piper PA-32;

b. failing to safety the aileron control cable turnbuckle;

c. installing an improper scat hose assembly on the fuel control servo/alternate air control box;

d. failing to safety the alternator belt adjusting arm bolt after checking the alternator belt during the course of the subject inspection; and

e. failing to address and comply with Airworthiness Directive 76-18-04 which was then applicable to the aircraft.

hour or annual inspection. He testified that, collectively, they rendered the aircraft unairworthy in that it did not meet its type certificate data sheet,[6] and that the aircraft was also unsafe for flight.

Respondents flatly denied that some of the listed discrepancies existed (e.g., items d, e, f, i, k, r, w, bb and ee), but offered no explanation of how these conditions could have developed so soon after completion of their respective inspections. Although they conceded the existence of some of the other alleged discrepancies (e.g., items a,[7] c, g, m, p, q, s, u, v, x, z, and dd), they essentially denied that these items affected the airworthiness of the aircraft or, in the case of item y (cracked starter power cable connector lug), that it was sufficiently visible for them to have discovered it. And finally, as to a few of the cited discrepancies, their positions were unstated, unclear, or conflicting.[8] Respondents both

[6] Before an aircraft may be considered airworthy, it "(1) must conform to its type certificate, if and as that certificate has been modified by supplemental type certificates and by Airworthiness Directives; and (2) must be in condition for safe operation." Administrator v. Nielsen, NTSB Order No. EA-3755 at 4 (1992), citing Administrator v. Doppes, 5 NTSB 50, 52 n. 6 (1985).

[7] Inexplicably, respondents claim in their appeal brief that there is no testimony that the cracked firewall frame [item a] existed at the time of their inspections (App. Br. at 12), yet they both admitted at the hearing that it did exist, although they disputed that it had any airworthiness implications. (Tr. 109-10, 140.)

[8] For example, it is not clear from respondents' testimony whether they admitted or denied the existence of items b and l. Further, respondents appeared to take different positions with regard to items h, j, n, o, and aa, in that respondent Bailey

testified that they truly believed the aircraft was airworthy when they signed off on their respective inspections. (Tr. 114, 161.) However, they also claimed that an unnamed pilot sent by the aircraft owner "stole" the keys to the aircraft and took the aircraft from them before all of their work had been completed. (Tr. 122-4, 148.)[9]

The law judge found that the Administrator had established the existence of all of the listed discrepancies, and stated that he had resolved all issues of credibility in favor of the Administrator's witnesses (i.e. Inspector Keener, and Robert Doody, the Wendy's Mag Air mechanic who first noted the discrepancies). Noting Inspector Keener's testimony that the aircraft was not airworthy, and that all of the discrepancies should have been discovered during the inspections, the law judge upheld the orders of suspension in their entireties.

On the specific issue of whether compliance with AD 76-18-04 had been shown (item ee), the law judge found that a work order purporting to show that the AD had been complied with (Exhibit R-34) was not a part of the aircraft records, thereby implicitly

(..continued)
seemingly admitted their existence, but respondent Avila denied them. No attempt was made to explain or to reconcile these conflicts.

[9] It is not clear from the record whether respondents intended to suggest that, therefore, they should not be held responsible for any unairworthy conditions on the aircraft. We agree with the law judge that such a suggestion should be rejected because at the time of the alleged "theft" of the aircraft, respondents had already signed off on the inspections certifying unequivocally that the aircraft was airworthy. (Tr. 191-92.)

rejecting respondent Bailey's testimony that he put the work order into the aircraft's logbook. (Both Inspector Keener and mechanic Doody had testified that they were unable to determine from the available aircraft records whether this AD had been complied with.) Regarding the improper tachometer (item k), the law judge again credited the Administrator's witnesses, who stated that an improper Cessna tachometer installed in the aircraft failed on its first flight (on November 20th) and had to be replaced, and concluded that the only credible explanation was that (contrary to respondents' denials) the improper tachometer was installed by respondent Bailey on November 2, 1990.[10] Similarly, regarding the stripped propeller control nut (item f), the law judge explicitly credited the Administrator's witnesses, and observed that respondents offered no explanation of how the nut could have become stripped during the short time the aircraft was operated.

In addressing respondents' suggestions that Wendy's Mag Air was at fault for not correcting some of the discrepancies here at issue, which they claimed still existed at the time of the hearing (some two years after their allegedly improper inspections), the law judge correctly noted that this was irrelevant to the cases before him, in that it simply amounted to a claim that another entity may also have committed violations subsequent to respondents' alleged violations.

[10] An aircraft logbook entry signed by respondent Bailey indicates that a new tachometer was installed on November 2, 1990.

In their appeal brief, respondents make numerous ill-articulated arguments, none of which are compelling. First, in an argument applicable only to respondent Bailey's case, respondents challenge the law judge's issuance of a pre-trial order precluding respondent Bailey from introducing evidence relating to any subject on which he had failed to answer the Administrator's discovery request. This order was the result of Bailey's non-compliance with the law judge's prior order denying his motion to dismiss the Administrator's discovery as improper, and compelling Bailey to respond to the Administrator's discovery. The preclusion order was clearly within the law judge's authority to sanction a failure to comply with his discovery orders.[11] It is clear from the record in this case that the Administrator's discovery request (for identification of Bailey's prospective witnesses and affirmative defenses, and also for any documents related to his 100-hour inspection) was not improper, and that Bailey's basis for objecting (that the Administrator was using discovery as a substitute for an investigation) is meritless. Accordingly, the preclusion order is not a basis for reversal.

However, we also note that it is far from clear from the record that respondent Bailey actually would have been precluded from introducing the evidence he now claims he would have offered

[11] See Administrator v. Henry, 5 NTSB 858 (1985); Administrator v. Southern Flyers, Inc., NTSB Order No. EA-3825 (1993); Administrator v. Security Investment Bancorp and Patriot Airlines, NTSB Order No. EA-4137 (1994).

if allowed (for example, evidence showing that: the tachometer was proper; wear was within acceptable limits; and his inspection complied with 14 C.F.R. Part 43, Appendix D). As we recognized in Administrator v. Henry, 5 NTSB 858, 861 (1985), even after a preclusion order has been entered, a law judge should still evaluate each specific evidentiary submission to determine whether it falls within the proper scope of the preclusion order. In this case, Bailey was only precluded by the order from presenting evidence on matters covered in the Administrator's discovery request. The matters he now claims he was precluded from introducing may well have been deemed admissible by the law judge. Yet no mention was made of the preclusion order or its implications at the hearing (held some nine months after the order was issued), and at least one matter he claims he was unable to present, and which appears to have been squarely precluded by the order (Exhibit R-34, Bailey's eight-page work order describing the action he took on 74 discrepancies, including compliance with AD 76-18-04), was not objected to by the Administrator, and was indeed admitted into evidence without discussion. In sum, we think that respondent Bailey should have pursued the issue of the scope of the preclusion order at the law judge level, and that by failing to do so he effectively waived his right to challenge it on appeal to the full Board.[12]

Respondents next argue that these suspensions are barred

[12] We have often stated our preference for allowing our law judges to resolve discovery disputes in the first instance.

because the FAA failed to follow its own internal enforcement guidance, which respondents assert requires counseling, education, training, and encouragement of voluntary compliance before initiating enforcement action. However, we have consistently refused to address such arguments, making clear that we do not view it as our role to evaluate the FAA's enforcement program or to second-guess the Administrator's exercise of his prosecutorial discretion.[13]

Respondents also attempt to challenge the adequacy of the Administrator's evidence showing the aircraft's alleged unairworthiness, and suggest that there is no clear or binding definition of "airworthiness." However, none of these arguments are convincing. It is well-established that an aircraft is deemed "airworthy" only when it conforms to its type certificate (if and as that certificate has been modified by supplemental type certificates and by Airworthiness Directives), and is in condition for safe operation. Administrator v. Nielsen, NTSB Order No. EA-3755 at 4 (1992), citing Administrator v. Doppes, 5 NTSB 50, 52 n. 6 (1985). Respondents are simply incorrect in asserting that they are not bound by case law. Moreover, we note that this definition is reflected in section 603(c) of the Federal Aviation Act (49 U.S.C. 1423(c)) and in section 21.183 of the FARs (14 C.F.R. 21.183), both setting forth criteria for the FAA's issuance of airworthiness certificates.

[13] See Administrator v. Connaire, 6 NTSB 257, 261 (1988); Administrator v. Rigsby, NTSB Order No. EA-3860 (1993).

The Administrator's expert (Inspector Keener) testified that the numerous discrepancies he and mechanic Doody observed on the aircraft rendered the aircraft unairworthy on both grounds, i.e., the aircraft did not conform to its type certificate[14] *and* it was not safe for flight. (Tr. 78, 67-68.) Respondents apparently believe that Inspector Keener's failure to "ground" the aircraft upon his discovery of the alleged discrepancies indicates that it was not unairworthy. However, Inspector Keener explained that no such action was necessary because the operator voluntarily agreed not to operate the aircraft. (Tr. 68.) But even in the absence of such an agreement by the operator, we would not consider the FAA's failure to "ground" an aircraft to be evidence of airworthiness.

Regarding the tachometer which was found in the aircraft by Inspector Keener and mechanic Doody, respondents seem to assert that there was insufficient evidence that it was an improper tachometer for this aircraft, or to establish that respondents were responsible for installing it. However, respondents presented nothing to rebut the Administrator's testimony on this point, which indicated that the used Cessna tachometer (which had

[14] Respondents suggest that comparing an aircraft to its type certificate design is impractical because it requires "dismantl[ing] the aircraft to it's smallest pieces and compar[ing] each of those pieces to the specifications for composition of material and physical dimension." (App. Br. at 7.) There is no basis, however, for respondents' premise that such an onerous dismantling requirement exists. We think it is abundantly clear that with the discrepancies shown in this case, an aircraft could not meet the specifications in its type certificate data sheet.

apparently been opened and reset to zero) was not an approved part for this Piper aircraft, and that it did in fact fail on the aircraft's first post-inspection flight. Nor have they established any cause to reject the law judge's reasoning that, in the absence of some other explanation, the only credible conclusion to be drawn is that the improper tachometer was installed on November 2, 1990, on which date respondent Bailey certified in a logbook entry that he installed a "new" tach with zero time. Respondents also contend that Bailey's work order discrepancy list (Exhibit R-34) showing compliance with AD-76-18-04 is sufficient to rebut the charged non-compliance with this AD. However, we see no reason to disturb the law judge's credibility finding that, contrary to Bailey's testimony, this discrepancy list was not included in the aircraft records and, therefore, cannot be used to establish compliance.[15]

Respondents further argue that Inspector Keener's conclusions were not sufficiently tied to specific parameters (such as manufacturer's wear limits), or to the safety of the aircraft. However, Inspector Keener's expert opinion that the discrepancies rendered the aircraft unairworthy was sufficient, without more, to establish a prima facie case on this point. Respondents did not introduce any credible evidence to rebut that opinion. Moreover, the Administrator's evidence also indicated

[15] The Board will not overturn credibility findings unless the law judge acted arbitrarily, capriciously, or the result is against the overwhelming weight of the evidence. Administrator v. Wilson, NTSB Order No. EA-4013 at 4-5 (1993).

that several of the discrepancies presented safety problems as well. See, e.g., Tr. 44-45 (the stripped propeller control nut could allow the engine to overspeed); Tr. 46-47 (screws missing from fuel selector fairing would prevent a pilot from moving the selector valve from one fuel tank to the other); Tr. 50 (the loose passenger door fastener decreased the structural strength of the door); and Tr. 89, 92 (noting the safety implications of an incorrect tachometer with wrong range markings).

In sum, for the reasons stated above, we hold that respondents have not established any error in the law judge's initial decision in this case. Any assertions of error that have not been specifically addressed in this opinion and order are rejected as unsupported.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondents' appeals are denied;

2. The initial decision is affirmed; and

3. The 120-day suspensions of respondents' mechanic certificates shall commence 30 days after the service of this opinion and order.[16]

HALL, Chairman, LAUBER and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

[16] For the purpose of this opinion and order, respondents must physically surrender their certificates to an appropriate representative of the FAA pursuant to FAR § 61.19(f).