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NTSB Order No. EA-5221

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 28th day of April, 2006

MARION C. BLAKEY, Administrator, Federal Aviation Administration, Complainant, v. THEROL WAYNE LAW, Respondent.	Docket SE-17238

OPINION AND ORDER

Respondent has appealed from the oral initial decision of Administrative Law Judge Patrick G. Geraghty in this matter,[1] issued following an evidentiary hearing held on March 30, 2005. The Administrator's order suspended respondent's mechanic certificate, with Airframe and Powerplant ratings, for 180 days,

[1] A copy of the initial decision, an excerpt from the hearing transcript, is attached.

based on alleged violations of 14 C.F.R. §§ 43.13(a)[2] and 43.2(a)(1) and (2).[3] The law judge found that respondent had violated each of these regulations, and reduced the suspension of respondent's mechanic certificate to 120 days. We deny respondent's appeal.

The Administrator's October 22, 2004 order, which served as the complaint before the law judge, alleged that respondent had approved a Textron Lycoming engine for subsequent service after respondent performed an overhaul wherein he sent the crankshaft, connecting rods, and pistons to a non-certified facility for balancing. The complaint also stated that the engine's

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[2] The applicable portion of 14 C.F.R. § 43.13(a) states:

> (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....

[3] Title 14 C.F.R. § 43.2(a)(1) and (2) states that a certificate-holder may not describe an aircraft, airframe, aircraft engine, propeller, appliance, or component part as being "overhauled" unless the certificate-holder: (1) has used methods, techniques, and practices acceptable to the Administrator, and has disassembled, cleaned, inspected, repaired as necessary, and reassembled; and (2) has tested the part in accordance with approved standards and technical data, or in accordance with current standards and technical data acceptable to the Administrator, which have been developed and documented by the holder of the type certificate, supplemental type certificate, or a material, part, process or appliance approval under 14 C.F.R. § 21.305.

manufacturer, Lycoming, had no approved process for balancing crankshafts, connecting rods, or pistons in the field. In addition, the complaint alleged that respondent ordered a non-certified employee to perform a magnetic particle inspection of the engine's crankshaft, and that this employee did not follow the inspection requirements of a Lycoming Service Instruction bulletin. Similarly, the complaint alleged that respondent performed a "ground run" on the engine that was not consistent with any approved standard or technical data acceptable to the Administrator. These allegations arose out of an inspection that an FAA air safety inspector performed after one of respondent's customers notified the FAA that he believed the work respondent had completed on his aircraft's engine rendered the aircraft unairworthy.

In the instant appeal, respondent argues that: the law judge did not correctly interpret the requirements set forth in § 43.13(a); respondent is not required to comply with manufacturer's service bulletins, instructions, or letters in the absence of an Airworthiness Directive mandating such compliance; the Administrator did not present adequate evidence that respondent had failed to test the engine properly (as required by § 43.2(a)(2)); and the law judge failed to follow

the appropriate provision of the FAA Sanction Guidance Table[4] when he ordered suspension of respondent's mechanic's certificate, rather than a monetary civil penalty.

We do not find respondent's argument that the law judge misinterpreted § 43.13(a) persuasive. Respondent's appeal brief on this point only argues that the Administrator did not prove that respondent had failed to comply with the methods, techniques, and practices prescribed in the current manufacturer's manual, because the manual was silent on balancing the crankshaft, connecting rods, and pistons in the field. Instead, respondent attempts to argue that, because the requirements in the regulation are phrased in a disjunctive fashion, the Administrator was required to prove that respondent followed neither the methods in the manufacturer's manual, nor the manufacturer's instructions for continued airworthiness, nor a technique that the Administrator had approved. Respondent argues that the Board should presume that he complied with any of these elements that the Administrator did not prove.

Here, the Administrator showed that respondent did not comply with any methods, techniques, or practices that the manufacturer or the Administrator had accepted. The record is

[4] FAA Order 2150.3A, Compliance and Enforcement Program (1994), *available at* http://www.airweb.faa.gov/Regulatory_and_Guidance_Library/rgOrders.nsf/0/79cb479888aa5a8a86256d0f00676576/$FILE/2150.3a_part2.pdf.

clear that the manufacturer had not established any particular process for balancing crankshafts, connecting rods, or pistons in the field. As a result, respondent was left with one choice in complying with § 43.13(a): obtain approval for his process from the Administrator. We have previously held that where the maintenance manual is silent on a particular issue, the mechanic should seek approval from the Administrator regarding how to address that issue.[5] Respondent essentially asks the Board to find that, where a manufacturer has not set forth an approved process, there can be no violation of § 43.13(a). We are not inclined to formulate such a policy, and remind respondent that we are required to defer to the Administrator's interpretation of her regulations.[6]

Respondent also argues that he is not required to comply with manufacturers' service bulletins, instructions, or letters

[5] Administrator v. Hampton, NTSB Order No. EA-5189 at 9 (2005); Administrator v. Anderson, NTSB Order No. EA-3562 at 1—2 (1992).

[6] Title 49 U.S.C. § 44709(d)(3) requires the Board to defer to the Administrator's validly adopted interpretations of FAA law and regulations; see also Garvey v. NTSB, 190 F.3d 571, 576-79 (D.C. Cir. 1999).

In Federal Aviation Admin. v. Thunderbird Accessories, Inc., FAA Order 90-0011, 1990 WL 656264 at 4 (Mar. 19, 1990), the Administrator interpreted the requirements of § 43.13(a) as follows: "[h]aving proved by a preponderance of the evidence that the procedure was not prescribed by the manual, Complainant needed to show only that the procedure had not otherwise been deemed acceptable to the FAA." In accordance with 49 U.S.C. § 44709(d)(3), we defer to this interpretation.

in the absence of an Airworthiness Directive from the Administrator that specifically requires such compliance. Respondent presents this argument because Textron Lycoming Service Instruction No. 1285B (May 23, 1997), in the record as Exhibit C-4, requires that "[p]ersonnel performing Magnetic Particle Inspection shall be qualified and certified in accordance with ASNT Personnel Qualification SNT-TC-1A or MIL-STD-410." At the administrative hearing, respondent did not dispute the Administrator's allegation that one of respondent's employees who did not hold any certificates, Mr. Kim Mathews, completed a magnetic particle inspection on the Lycoming engine in question. Therefore, respondent relies solely on the argument that manufacturers' service instructions do not apply to mechanics performing maintenance on Part 91 aircrafts, and respondent supports this argument with citations to several dated cases, most of which are oral decisions issued by law judges.

We do not find this argument persuasive. While compliance with service instructions or service bulletins may not be mandatory in the absence of an Airworthiness Directive, a manufacturer may legitimately incorporate such service publications into a manual by reference. The Lycoming overhaul manual incorporates all future service instructions by

reference. Exhibit C-5 at i ("In addition to this manual and subsequent revisions, additional overhaul and repair information is published in the form of service bulletins and service instructions. The information contained in these service bulletins and service instructions is an integral part of, and is to be used in conjunction with, the information contained in this overhaul manual."); Transcript (Tr.) 110. We conclude that the record supports a finding that, by using a non-certified person to perform the inspection, and by not using the manufacturer's prescribed inspection technique, respondent violated the regulations as alleged in the Administrator's complaint.

In addition, respondent argues that the Administrator did not prove that he violated 14 C.F.R. § 43.2(a)(2) by failing to test the Lycoming engine after overhauling it. Respondent's argument rests on the issue of whether he used a Service Instruction from Engine Components, Inc. (ECI) entitled "Break-In Instructions for Cylinder Repair or Cylinder Replacement." Exhibit R-1. Respondent argues that, since he replaced many of the cylinders in the Lycoming engine with cylinders from ECI, ECI's procedures for testing should apply. However, the Administrator asserts that respondent told FAA Inspector Ralph Chadburn that he "had not followed a specific run-in procedure,

but had run it like they normally do, and that would be to start the engine, verify that it is working, check, go fly the airplane." Tr. 65. Inspector Chadburn testified that he asked respondent whether respondent had followed Lycoming procedure or ECI procedure for testing, and that respondent stated that he had not followed any specific procedure. Tr. 66, 117. Respondent did not impeach this witness or present contrary testimony. As a result, the law judge found that respondent had not established, either with entries in the engine logbook or with testimony and evidence at the hearing, that he had fulfilled the requirements of the ECI service instruction. Tr. 208-209. Given the lack of documentation and the way in which respondent replied to Inspector Chadburn's inquiries, we agree with the law judge's conclusion that the Administrator met her burden on this issue.[7]

Finally, respondent appeals the law judge's imposition of a 120-day suspension of his mechanic's certificate. Prior to the instant appeal, the Administrator had cited the FAA's Sanction

[7] If we assumed, *arguendo*, that respondent had proven that he followed the ECI instructions, we are not prepared to find that complying with those instructions would suffice for purposes of testing an engine after overhaul, as § 43.2(a)(2) requires. The Administrator presented testimony that these ECI instructions were not sufficient with regard to testing after an engine overhaul. Tr. 132-33. In addition, the law judge acknowledged that it was "clear … that this service instruction does not apply to an overhaul." Tr. 208-209.

Guidance Table in recommending a 180-day suspension. Tr. 181. The Administrator argued that she had presented four distinct violations, and that, pursuant to the Sanction Guidance Table, each violation called for a suspension period of 30 to 120 days; hence, the Administrator sought a 180-day suspension (45 days per violation). The law judge reduced this suspension period to 120 days, citing respondent's seemingly inadvertent misunderstanding of the regulatory requirements of §§ 43.13(a) and 43.2(a)(1) and (2). Tr. 211; see also Exhibit C-8 at 2.

Respondent appeals the law judge's order of a 120-day suspension by arguing that the Administrator applied the wrong section of the Sanction Guidance Table: respondent argues that § III.A. of the Table applies to respondent, rather than § III.C., as the Administrator alleged. Section III.A. is organized under the heading, "Owners and Operators Other than Required Crew Members" and orders civil penalties, rather than periods of suspension. See note 4, supra, at § III.A. Respondent states that he is the "owner" of his aircraft repair shop, and, therefore, § III.A. of the Table applies to him. We cannot agree with this interpretation. The Administrator took action against respondent's mechanic's certificate, not his company's repair station certificate. The Administrator's complaint does not even refer to respondent as the owner of the repair shop.

The Administrator intended the word "owners" in this heading to mean owners of *aircraft*, rather than owners of *repair shops*. Admin.'s Brief at 19. The context of this heading clearly supports this meaning. As we stated above, the Board is required to defer to the Administrator's interpretations of her policies and regulations. See note 6, supra. In addition, we have previously held that the Board's imposition of a civil penalty in lieu of a suspension is inappropriate where the Administrator's choice of certificate action is neither arbitrary nor capricious. Administrator v. Lepinski, NTSB Order No. EA-5019 at 2 (2003).

Respondent also contends that the Administrator's suspension of his mechanic's certificate deprives him of his right to a jury trial under the Constitution and the Federal Aviation Act. This argument is unavailing, given existing Board precedent and federal case law that establishes the Administrator's constitutional authority to choose to pursue certificate action or a civil penalty. Hill v. NTSB, 886 F.2d 1275, 1282 (10th Cir. 1989) (citing Curtis v. Loether, 415 U.S. 189, 194 n.8 (1974), and stating that the Seventh Amendment's right to a jury trial does not apply to cases involving administrative penalties such as actions against certificates); Go Leasing v. NTSB, 800 F.2d 1514, 1518 (9th Cir. 1986) (stating

that Federal Aviation Act authorizes Administrator to issue orders suspending, revoking, amending, or modifying aviation certificates in interests of safety, and holding that Administrator's decision regarding when to employ certificate action instead of seeking monetary civil penalties is not unconstitutional); Administrator v. Dilley, NTSB Order No. EA-3945 at 2 (1993). As such, we decline to reject the Administrator's choice of suspending respondent's certificate rather than imposing a civil penalty in this case. We agree that the law judge's 120-day suspension, which includes the minimum amount for each of the four violations, was proper.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied; and

2. The 120-day suspension of respondent's mechanic certificate shall begin 30 days after the service date indicated on this opinion and order.[8]

ROSENKER, Acting Chairman, and ENGLEMAN CONNERS, HERSMAN, and HIGGINS, Members of the Board, concurred in the above opinion and order.

[8] For the purpose of this order, respondent must physically surrender his certificate to a representative of the Federal Aviation Administration pursuant to 14 C.F.R. § 61.19(g).