SERVED: April 22, 2009

NTSB Order No. EA-5440

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 21st day of April, 2009

LYNNE A. OSMUS, Acting Administrator, Federal Aviation Administration, Complainant, v. AIR TREK, INC., Respondent.	Docket SE-18284

OPINION AND ORDER

The Administrator appeals the oral initial decision of Administrative Law Judge William A. Pope, II, issued in this emergency revocation proceeding on October 17, 2008.[1] By that decision, the law judge affirmed the Administrator's order as to respondent's violation of 14 C.F.R. §§ 91.13(a), 119.59(b)(2),

[1] A copy of the initial decision, an excerpt from the hearing transcript, is attached. Respondent waived the expedited procedures normally applicable to emergency revocation proceedings under the Board's rules.

and 119.5(g)[2] of the Federal Aviation Regulations (FARs), and reduced the sanction from a revocation to an indefinite suspension of respondent's air carrier certificate. The law judge dismissed the remaining allegations as to violations of §§ 91.7(a), 119.69(a), and 135.25(a).[3] We deny the Administrator's appeal.

The complaint initially contained allegations of violations of 14 regulatory provisions, and 38 factual allegation paragraphs within 10 counts. Counsel for the Administrator almost immediately began experiencing difficulties in presenting his case. At the outset of the 9-day hearing, on September 16, 2008, the Administrator withdrew seven paragraphs in three counts, and two regulatory violations. By the fourth day of the proceedings, the Administrator had withdrawn half of the factual allegations,

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[2] Section 91.13(a) prohibits operation of an aircraft in a careless or reckless manner so as to endanger the life or property of another. Section 119.59(b)(2) states that the certificate holder must allow the Administrator to make any test or inspection to determine compliance. Section 119.5(g) states that no person may operate as a direct air carrier or as a commercial operator without, or in violation of, an appropriate certificate and appropriate operations specifications.

[3] Section 91.7(a) states that no person may operate a civil aircraft unless it is in an airworthy condition. Section 119.69(a) states that each Part 135 certificate holder must have sufficient qualified management and technical personnel to ensure the safety of its operations and that, except for a certificate holder using only one pilot in its operations, the certificate holder must have qualified personnel serving in the following or equivalent positions: (1) Director of Operations; (2) Chief Pilot; (3) Director of Maintenance. Section 135.25(a) states that no certificate holder may operate an aircraft unless that aircraft (1) is registered as a civil aircraft of the United States and carries an appropriate and current airworthiness certificate issued under the FARs; and (2) is in an airworthy condition and meets the applicable airworthiness requirements of the FARs, including those relating to identification and equipment.

6 counts, and 8 FAR violations. The contents of the complaint remaining at the conclusion of the hearing are summarized here:

Count I:

* * *

2. Air Trek is the operator of the following aircraft:
   a. N247AT, a Cessna 340 aircraft.
   b. N236AT, a Cessna 414 aircraft.
   c. N658AT, a Cessna 414 aircraft.
   d. N622AT, a Cessna 500 aircraft.
   e. N633AT, a Cessna 500 aircraft.
   f. N511AT, a Cessna 500 aircraft.
   g. N744AT, a Cessna 500 aircraft.
   h. N639AT, a Westwind 1124A aircraft.

3. Air Trek was the operator of three aircraft that have crashed in Part 135 flights in the past three years. One ... resulted in six fatalities.[4]

4. The [FAA] conducted an inspection of Air Trek's operations ... from May 5, 2008, through May 9, 2008.

5. On or about June 5, 2008, the FAA attempted to conduct further inspections ... but were denied access ... and were requested to leave Air Trek's facility.

6. ...the FAA has determined ... that Air Trek is not qualified to hold an air carrier certificate.

7. Additionally, the items listed below demonstrate that Air Trek is unable or unwilling to maintain operational control of its air carrier operations.

8. Additionally ... Air Trek is unable or unwilling to operate to the highest degree of safety, which Air Trek is required to do in order to operate as a Part 135 certificate holder.

9. [These] ... demonstrate that Air Trek operated numerous aircraft in a careless or reckless manner so as to endanger the life or property of another.

Count II:

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[4] We note that two of the pilots involved in accidents testified on behalf of the Administrator, but neither through these witnesses nor with any other evidence did the Administrator connect the other allegations in the complaint to these accidents.

10. For months/years beginning in at least 2005 ... on numerous occasions operated or caused, directed or permitted aircraft to be operated under Part 135 when it did not have a maintenance system for recording and correcting aircraft maintenance discrepancies, which met the requirements of Part 135.

11. For months/years beginning in at least 2005 ... on numerous occasions directed, caused or permitted pilots to operate ... under Parts 91 or 135 when maintenance discrepancies had not been entered in the aircraft's maintenance logbook as required by the [FARs] and Air Trek's operations manual.

12. Specifically, Air Trek directed, caused, or permitted ... employees to orally report aircraft maintenance discrepancies to Air Trek management personnel, rather than enter them in the aircraft maintenance logbook as required.

13. Additionally, Air Trek directed, caused, or permitted ... employees to write aircraft maintenance discrepancies on sheets of paper unapproved by the [FAA] or Air Trek's operations manual.

14. ...for months/years beginning in at least 2005, Air Trek on numerous occasions ... permitted to be operated aircraft in operations under Part 135 when it maintained a deceptive system for recording and correcting aircraft maintenance discrepancies.

Count III:

15. For months/years beginning in at least 2005, Air Trek operated numerous Part 135 flights without complying with the weight and balance calculation requirements contained in its Operations Manual.

16. ...Operations Manual requires that all pilots use actual weights in weight and balance calculations.

17. ...it is the practice of Air Trek pilots to use unapproved predetermined weights and center of gravity data that is attached to a reference sheet on the load manifest container on the aircraft and/or other unapproved data or computer generated programs to calculate weight and balance calculations.

* * *

Count X:

35. Air Trek does not have sufficient qualified management and technical personnel to ensure the safety

of its operations.

> 36. ...Air Trek management directed, caused, or permitted a culture of non-compliance with regulatory requirements to exist which resulted in the operation of numerous unairworthy aircraft; the operation of numerous flights with unqualified crewmembers; and the operation of numerous aircraft under Part 135 when Air Trek maintained a deceptive system for recording and correcting aircraft maintenance discrepancies.

At the hearing, held in Tampa, Florida, from September 16 to September 18, and from October 6 to October 8, 2008, and then in Miami, Florida, from October 15 to October 17, 2008, the Administrator presented numerous exhibits and the testimony of numerous witnesses.[5] Respondent also presented exhibits and testimony, including that of pilot employees and its management officials. The law judge's decision contains a thorough recitation of the evidence and his findings in a very well-reasoned decision.

The law judge concluded that the evidence established a "*de minimis*" violation of § 119.59(b)(2) "by the Respondent refusing permission" to two aviation safety inspectors to inspect aircraft at respondent's facility. Initial Decision at 1892. The law judge explained that the situation was complicated by an apparent misunderstanding or miscommunication between counsel for the Administrator and counsel for respondent.[6] The law judge

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[5] The Administrator's witnesses included the FAA inspectors assigned to investigate the alleged violations, and several pilots formerly employed by respondent.

[6] The inspectors arrived at respondent's facility after service of a previous order *suspending* respondent's certificate; respondent had already retained counsel and appealed that order. (After this attempted inspection, the Administrator withdrew the suspension order and served the emergency revocation order which is the subject of the instant appeal.) An Air Trek official

specifically found that this violation alone, or in conjunction with other violations, did not warrant revocation.

The law judge next found instances of failure to properly record discrepancies in the logbooks of respondent's aircraft during 2005 to 2007 at its Winchester, Virginia, facility, which did not comport with the company's operations specifications and was, therefore, a violation of § 119.5(g). The law judge found, however, that no violations "occurred at the Punta Gorda [Florida][7] facility from 2007 on" (id. at 1894), and found there was insufficient evidence to conclude that the chief pilot condoned or encouraged the practice, or that the practice was so widespread "that it amounted to a systemic pattern of misconduct" (id. at 1895).

The law judge further found that respondent admitted during the hearing that pilots were authorized by management to report mechanical irregularities orally or in writing to maintenance personnel, or in the maintenance log, but noted that he did not

(..continued)
requested that the inspectors wait at a nearby coffee shop until he talked to his attorney. After discussions between counsel for respondent and counsel for the Administrator, but before a resolution of the issue raised by respondent's counsel that the inspection was an inappropriate attempt to obtain discovery in respondent's appeal of the suspension order, the inspectors were directed, through their supervisory channels, to return home without conducting the inspection. The law judge found that the initial statement by the Air Trek official constituted a "refusal to allow the inspection ... which was not rescinded," and affirmed a violation of the regulation. Id. at 1893. Respondent does not appeal the law judge's finding.

[7] The Florida facility was respondent's only operating location after its Virginia facility closed in 2007, apparently due, at least in some part, to the discovery of these problems at the Virginia facility.

find any credible evidence that after closure of the Winchester facility there was any pattern of failure to timely report discrepancies and repairs in the aircraft mechanical discrepancy logs aboard the aircraft at Punta Gorda. The law judge noted that Exhibit R-11, copies from aircraft maintenance discrepancy logs, corroborated his finding, and also found there was insufficient evidence to support a finding that Air Trek operated unairworthy aircraft from Punta Gorda.

Explaining his finding regarding the requirement to report maintenance discrepancies, the law judge stated it was not reasonable for the Administrator to interpret the requirement as not satisfied by an oral or written report by the pilot or the maintenance staff with the pilot's expectation that the discrepancy would be properly recorded in the aircraft log with a statement by a mechanic listing the repairs and certifying the aircraft for return to service. Id. at 1896. The law judge stated it was "the pilot-in-command's responsibility to ensure that whoever he delegates to make the entry in the aircraft's maintenance log does, in fact, do so, but he does not necessarily have to be the person who actually makes the entry in the aircraft log." Id. at 1896-97. The law judge also found that, because the pilot-in-command is required to review the most recent five pages of the aircraft discrepancy log "to assure himself that any prior discrepancies reported in the log have been corrected," that "was impossible to do at Winchester before it was closed." Id. at 1897. The law judge found, however, that such was not the case in Florida and noted that, "more than at

least five discrepancy reports are routinely kept aboard the aircraft at Punta Gorda," and credited the chief pilot's testimony in that regard. Id.

The law judge concluded there was "no specific evidence of operation of unairworthy aircraft with specific discrepancies at specific times," and that, in the absence of such evidence, respondent did not have a reasonable opportunity to defend against the charge that it operated unairworthy aircraft. Id. at 1895. In summarizing his findings as to maintenance discrepancies and airworthiness, the law judge stated:

> The company's system allowing pilots-in-command to not record discrepancies in the aircraft discrepancy log themselves, but to report discrepancies on a piece of paper ... or orally to report a discrepancy was too decentralized at Winchester during the 2005/'07 period.
>
> That made it impossible for pilots using aircraft there, not to mention the FAA, to track discrepancies and their repair, thus jeopardizing the safety and airworthiness of the company aircraft at Winchester. That situation, however, did not occur at the Punta Gorda facility.
>
> The proof of these failures at the Winchester facility is largely anecdotal without supporting records demonstrating actual failures to properly record discrepancies and repairs. Further, it does not appear that the failures were pervasive in both of the company's facilities, or intended by management.
>
> And while the failures certainly created an opportunity for unairworthy aircraft to be used or dispatched from Winchester before the discrepancies were corrected, there is a lack of evidence showing specific aircraft were dispatched at specific times with specific uncorrected discrepancies so that they were unairworthy.
>
> Accordingly, I find that the Administrator has proven by anecdotal evidence repeated instances of violation of FAR Section 119.5(g), by failure to comply with the company's operations specifications, by pilots failing to record or have reported all discrepancies in aircraft mechanical discrepancy logs aboard the

> aircraft kept at the Winchester, Virginia facility prior to 2007.
>
> Pilots at that facility could not determine the airworthiness of their aircraft from the five most recent discrepancies that had been recorded and entered in the discrepancy log, because often there was no discrepancy log, or that they had been corrected.

Id. at 1897-98. As a result of these operational violations, the law judge also found a residual violation of § 91.13(a), careless or reckless operation, but specifically noted that his finding was limited to the Virginia facility prior to 2007, and that he made no such finding with regard to the Florida facility. The law judge further found that the Administrator had not:

> proven an actual violation of FAR Section 91.7(a), and 135.25(a), and 119.5(g) by [] actually operating a specific aircraft at a specific time and place and with a specific uncorrected discrepancy that rendered it unairworthy. The proof rises only to the level of a distinct possibility limited to the Winchester facility prior to 2007.

Id. at 1898-99.

Regarding the second area of alleged operation in violation of operations specifications (incorrect entry of weight and balance figures and inappropriate calculation thereof), the law judge found that, while “there were seven or eight instances of entry of figures for weight and balance taken from [‘examplar’ templates carried with the trip manifest] at the Punta Gorda facility in 2008,” he did not find “any evidence of failure of the pilot-in-command ... with respect to these particular instances to properly calculate the weight and balance from actual weights and to use those calculations in the operation of his aircraft.” Id. at 1899. The law judge then said:

> The same cannot be said, however, of the Winchester

> facility prior to its closure, where it appears that the figures for weight and balance were not calculated from actual weights, but were simply copied from the exemplars kept on board the aircraft....

Id. The law judge credited the chief pilot's testimony that:

> he prepared the exemplars using weights that were likely to be close to actual weights so the pilots could check their computation of weight and balance against the exemplars to make sure their calculations were not out of line.
>
> He stated, and I credit his testimony, that he did not intend for the weights and center of gravity figures in the exemplars to be entered as actual, calculated weights and balances on load manifests. He said, and I credit his testimony, that when he found out in 2008 that some pilots or co-pilots were copying figures from exemplars, he instituted training sessions for all pilots on how to properly calculate weight and balance and remove[d] the exemplars from the aircraft....
>
> One reason in particular that I find [the chief pilot] did not intend the figures on the exemplars to be copied as actual weights is that I see no particular advantage to the company from the practice. The responsibility for calculating weight and balance is placed on the pilot-in-command or the First Officer at his direction by the company operations specifications and the General Operations Manual, which require use of actual weight.
>
> The problem is that some pilots, but not necessarily all pilots at the Winchester facility prior to 2007, and to a much more limited extent by two co-pilots at the Punta Gorda facility in 2008, took shortcuts to eliminate work for them[selves] by not following the authorized procedures in the operations specifications and General Operations Manual regarding recording actual weights on load manifests.
>
> There is no evidence, however, that the company made a practice of flying overweight or out of balance aircraft, such that it would lead to routinely falsify[ing] the weight and balance figures by not using actual weights as required by the company's operations specifications.

Id. at 1900-01. The law judge found that:

> the Administrator has proven at least seven violations of the operations specification requirement to use actual weights ... and an undetermined number of

> similar violations in the 2005 to 2007 period, all in violation of ... 119.5(g).... A residual violation of ... 91.13(a) accompanies this operational violation.

Id. at 1902. The law judge also found a violation of § 119.5(g) regarding use of an Excel spreadsheet program for calculating weight and balance figures, but specifically noted that it did not "amount[] to a violation that warrants revocation of the Respondent's operation[s] certificate." Id. at 1903.[8]

The law judge addressed the allegation that respondent "does not have sufficient qualified management and technical personnel to ensure the safety of its operations," finding the charge "to be vague to the point of being confusing," and "largely unsubstantiated by the evidence." Id. The law judge noted that:

> ...the Administrator does not charge any named members of Air Trek's management with being unqualified, but rather arguably that there are not enough qualified management personnel. And there is no evidence concerning technical personnel whatsoever.
>
> What the Administrator does allege is that the company does not have sufficient qualified management. Sufficient is not the same thing as any, and it is unclear whether the Administrator is charging that the existing management personnel, apparently referring to the Director of Operations, Director of Maintenance, and the Chief Pilot, although that is not stated ... in the complaint, are all unqualified, or that the company needs more qualified management personnel.
>
> This confusing wording impacts adversely on the Respondent's ability to prepare a defense. In any

[8] The law judge noted that the procedure "should have been, but was not, submitted to the FAA for approval," that the FAA did not seem to suggest that the use of the spreadsheets would not be approved, that there was evidence that the Administrator had knowledge of the use of the spreadsheets for some period of time, that no action was taken to curtail their use, and that the issue could have been precluded as an issue "by the Administrator's Aviation Safety Inspector simply telling the Respondent that the use of the Excel spreadsheets to calculate weight and balance required FAA approval." Id. at 1902-03.

> event, there is no evidence that the Directors of Operation[s] and Maintenance and the Chief Pilot are technically unqualified.

Id. at 1903-04. The law judge stated that the Administrator seemed to be charging, as charged in the complaint's paragraph alleging the operation of unairworthy aircraft, that the Air Trek management were "unqualified because of the practices they directed, caused, or permitted." Id. at 1904. That allegation reads as follows:

> [Air Trek] management directed, caused, or permitted a culture of non-compliance with regulatory requirements to exist, which resulted in the operation of numerous unairworthy aircraft and the operation of numerous aircraft under Part 135 when Air Trek maintained a deceptive system for recording and correcting aircraft maintenance discrepancies.

Id. at 1903. As to that allegation, the law judge stated:

> While a "culture of non-compliance," is a flowery phrase, it adds little to clarity. But there is no evidence that the culture of non-compliance, whatever that may be, actually resulted in the operation of any, let alone numerous ... unairworthy aircraft, or that the operation of numerous aircraft when Air Trek maintained a deceptive system for recording and correcting aircraft [discrepancies] actually resulted in the operation of any unairworthy aircraft.
>
> At most ... the evidence shows that the violations of the FARs ... created the possibility during the 2005 to '07 period at [the] Winchester facility of operation of unairworthy aircraft, but not the actuality.

Id. at 1904-05. The law judge stated: "The evidence I find does not show that Air Trek's management intentionally maintained a deceptive system as charged, or intentionally operated unairworthy aircraft." Id. at 1906. The law judge noted that management was "lax during the 2005 to 2007 period in making sure that its ... personnel at its Winchester facility followed the procedures required by its operations specification[s] and

General Operations Manual," but went on to find that "this laxity ... [does not rise] to the level of showing lack of qualification, or coupled with the violations I have found, warrants revocation of the Respondent's operating certificate." Id. The law judge found that, therefore, the Administrator had not proven a violation of § 119.69(a), requiring Part 135 certificate holders to have "sufficient qualified management and technical personnel to ensure the safety of its operations." Id. The law judge concluded:

> All of these are problems that can be easily remedied by closer supervision ... by the company's managers and by the FAA. The situation does not warrant revocation of the ... operating certificate, but it does warrant an indefinite suspension of the ... certificate until the company has in place operating and maintenance procedures and training with adequate oversight and safeguards acceptable to the Administrator.

Id. at 1908.

The Administrator presents three issues on appeal: (1) whether the law judge erred in finding Air Trek's violations did not occur in Florida and in modifying the sanction; (2) whether the law judge erred in not admitting certain exhibits; and (3) whether the law judge erred in not finding a violation of §§ 119.69(a), 91.7(a), and 135.25. Respondent, in reply, urges us to uphold the law judge's decision.[9] For facility of discussion, we will address the Administrator's

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[9] The National Air Transportation Association and the National Business Aviation Association have together moved for leave to file an *amicus curiae* brief arguing in support of the law judge's modification of sanction and his finding of no violation of § 119.69(a) regarding sufficiency of management personnel. Because the brief was timely filed and does not unduly broaden the matters at issue or prejudice the parties, we have accepted this *amicus* brief and considered these arguments.

arguments on appeal in reverse order.

The Administrator argues that the law judge erred in not finding a violation of the FAR provisions requiring sufficient qualified management and technical personnel, and operation of unairworthy aircraft under Parts 91 and 135. We concur with the law judge in that the Administrator never made it clear that the allegation was that respondent did not have a sufficient number of qualified management and technical personnel or, alternatively, whether the Administrator was alleging that respondent's management and technical personnel were not sufficiently qualified to fulfill their respective positions in the company. Now, on appeal, the Administrator argues for the first time that, "based on the record of this proceeding, it is obvious that the ... officials are not sufficiently qualified," that the officials "either knew, or should have known, of the deficient manner in which Air Trek was operating as an air carrier," that the record "has established that Air Trek management's actions have resulted in an air carrier where discrepancies are not being logged, as required, and where pilots are directed not to log discrepancies, as required, by Air Trek management," and compares the facts in this case to those of Administrator v. Air East Management, NTSB Order No. EA-5089 (2004).[10] Adm. Br. at 34-35.

[10] The facts of this case are distinguishable from Air East, where pilots were directed not to log mechanical discrepancies at all. In the instant case, the pilots were not so instructed. They were instructed, rather, that a discrepancy could be reported in any of three ways: by entering it in the log themselves, by orally reporting it to maintenance personnel who would then enter it in the log, or by leaving a written note in

The Administrator's brief is long on argument and short on proof. We concur with the law judge's findings regarding the qualifications of respondent's management personnel, and adopt them as our own. The law judge found that other violations had occurred, and acknowledged the contribution of respondent's management to those violations, but found that respondent's "laxity" did not "rise[] to the level of showing lack of qualification, or ... warrant[] revocation...." Initial Decision at 1906-07. The Administrator has not provided any basis for us to overturn the law judge's determination that the Administrator did not establish by preponderant evidence that respondent's management officials were not sufficiently qualified to safely run the operations of an air carrier, and we affirm the law judge's decision in this regard.

The Administrator next argues that the law judge erred by not admitting three of the Administrator's exhibits into evidence at the hearing. Exhibit A-12a includes copies of the "exemplars" described earlier, "which give maximum takeoff weight for [the] aircraft with centers of gravity, fuel weight, gallons of fuel aboard the aircraft in air ambulance or charter configuration, with varying numbers of persons on board." Id. at 1876. Also included in that exhibit are copies of "load manifests with takeoff weight, forward center of gravity limit, aft center of gravity, and takeoff center of gravity limits." Id. at 1876-77.

(..continued)
the maintenance department for a mechanic to enter it in the log. The law judge found that the Administrator did not establish that this was a violation either of the FARs or of respondent's operations specifications, and we agree with the law judge.

The exhibit shows that the "takeoff weight and center of gravity figures on load manifests match exactly the figures shown on the exemplar sheets ... for various passenger loads." Id. at 1877. The law judge noted that, of the manifests reviewed by investigators, 12.9 percent of them contained these matching figures and that these matching documents were the ones included in Exhibit A-12a, which was admitted into evidence. Exhibit A-12b contained photographs of the load manifests with portions of the exemplar positioned above the load manifests. Id. Although Exhibit A-12a, was admitted, Exhibit A-12b was not admitted, "because of difficulty with authenticating the photographs and failure by the Administrator to disclose color photographs, which showed considerabl[y] more detail than the black and white photographs provided to the Respondent prior to the hearing as required by the prehearing Order." Id. Exhibit A-12c contains color photographs of the exemplars contained in Exhibit A-12b, and Exhibit A-12d contains color photographs of the load manifests contained in Exhibit A-12b. See Adm. Br. at 32. Exhibits A-12c and A-12d were not admitted into evidence because of the failure to disclose them in discovery prior to the hearing.

The law judge has broad latitude in conducting hearings and admitting evidence.[11] The admission of evidence rests in the sound discretion of the law judge.[12] We have reviewed the entire

[11] See Administrator v. Corredor, NTSB Order No. EA-5322 at 3 (2007), citing Administrator v. Nickl, NTSB Order No. EA-5287 at n.4 (2007).

[12] See Administrator v. Santana, NTSB Order No. EA-5152 at 3

transcript of these proceedings, and we find that the Administrator has not shown that the law judge abused his discretion in exercising his legitimate control over the admissibility of evidence.

There was extensive testimony about the information in these exhibits. Even if the law judge erred by excluding the latter three exhibits, which we do not find, the Administrator was not prejudiced, as there was significant testimony adduced regarding the issue of weight and balance figures, and the law judge thoroughly discussed this issue and the evidence in his decision.

Finally, we address the Administrator's combined arguments that the law judge erred in finding that violations did not occur in Punta Gorda and in modifying the sanction. The Administrator intersperses, within the specific argument regarding the law judge's alleged errors, a general argument that respondent lacks the qualifications to hold a certificate. The Administrator asserts that, because the law judge found that the violations occurred only "in the Winchester, VA facility does not detract from the Acting Administrator's belief that the trust that Air Trek will operate to the highest degree of safety is gone." Adm. Br. at 22. We rejected the argument, earlier in this opinion, that respondent's officers were not qualified to occupy such positions of an air carrier, and we now reject this argument regarding lack of qualifications. The facts and the issue addressed in the case cited by the Administrator to support the

(..continued)
(2005); see also 49 C.F.R. § 821.35(b).

argument regarding lack of qualifications are entirely distinguishable from the case now before us. In that case, Administrator v. Guerin, NTSB Order No. EA-3827 (1993), we affirmed the revocation of a mechanic's certificate, finding that *falsification* of aircraft logbooks impacted that respondent's non-technical qualification to hold a certificate, indicating that the issue was trust and not inability. We do not have such a situation in this case, nor does the Administrator argue that we do.

As for the specific argument that the law judge erred in finding that violations did not occur in Florida, any such specific findings do not impact our ultimate resolution of this case. The Administrator focuses too narrowly on the law judge's distinction between the Virginia and Florida locations of respondent's two facilities. After carefully reviewing the record, we conclude that the law judge did not make a finding that no violations occurred at the Florida facility. His findings were that violations occurred during certain periods of time, or his findings were qualified by terms limiting the prevalence of the scope of the violations. He did not find that violations never occurred. We believe that the Administrator has taken out of context certain of the law judge's findings, and has tried to fashion an argument that supports the contention that the law judge inappropriately modified the sanction in this case. The law judge made extensive findings regarding when and where, and to what extent, violations occurred.[13]

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[13] See, e.g., pages 7-12, supra.

Considering the arguments on appeal and the facts and circumstances in the proceedings below, it is clear that the Administrator had legitimate concerns regarding respondent's operations. However, as the law judge found, based on the documentary evidence and his credibility-based determinations, there is insufficient evidence to support many of the Administrator's allegations. While the record indicates, for example, that some Air Trek pilots may have operated aircraft with maintenance discrepancies that rendered aircraft unairworthy, the record does not establish with sufficient specificity a date and discrepancy to find even a single instance of such operation, much less a widespread occurrence of aircraft being operated in unairworthy conditions, at either of respondent's locations of operation.

In the aggregate, we do not find that the Administrator has established sufficient support for the complaint's allegation regarding lack of qualifications, as well as the other allegations that the law judge dismissed. Although we would, obviously, have a negative view of a "deceptive" system of recording maintenance discrepancies, there is insufficient evidence of any such system here. We do not in any way condone a system of reporting maintenance discrepancies that does not ensure that discrepancies are accurately and timely entered in the aircraft's maintenance log. While a pilot may be able to delegate the physical act of writing up the discrepancy, the pilot may not shirk the responsibility of making sure that the entry is actually and accurately made. We are singularly

unimpressed with a system that relies upon notes being clamped in a vise at a maintenance workstation. Such pieces of paper are subject to being lost. Further, such a system is, by definition, not timely enough to satisfy our safety concerns; when the discrepancy is not immediately entered into the aircraft's maintenance log, where the next pilot can readily identify the status of any maintenance discrepancy, the possibility always exists that the aircraft could be operated by that next pilot with a serious mechanical problem. One can readily imagine the scenario in which an aircraft arrives at its home facility when no mechanic is available, and a piece of paper is left for the mechanic, but an emergency flight is dispatched without reference to the note, which is still waiting in the vise.

Turning to sanction, the argument that we must defer to the Administrator's choice of revocation is, under the circumstances, unavailing. Not all of the violations initially alleged by the Administrator have been proved. The Administrator, in her brief, does not acknowledge that more than half of the original complaint was withdrawn within the first few days of the hearing, or that the law judge then affirmed only half of the remaining regulatory allegations. For these reasons, and because the Administrator has not sufficiently demonstrated lack of qualifications, we do not find the Administrator's choice of sanction is entitled to deference.

On balance, however, the record demonstrates actual and apparent inadequacies in respondent's operations that should, in the interest of safety, be corrected to the satisfaction of the

Administrator. The law judge found that the inadequate recording of mechanical discrepancies in some instances made it impossible for the pilot-in-command to ensure that aircraft were in airworthy condition, and he found, although he noted that it was a *de minimis* violation, that respondent was recalcitrant in responding to the Administrator's attempt to inspect its aircraft. Under such circumstances, safety in air commerce and the public interest does require significant action, and we therefore affirm the law judge's order modifying sanction to an indefinite suspension, until such time as respondent can satisfy the Administrator that respondent can safely fulfill all the responsibilities of its certificate.[14]

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's appeal is denied; and

2. The law judge's decision, affirming violations only of 14 C.F.R. §§ 91.13(a), 119.5(g), and 119.59(b)(2), and modifying the sanction to an indefinite suspension of respondent's air carrier certificate, is affirmed.

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

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[14] See Administrator v. M&N Aviation and Sky Way Enterprises, NTSB Order No. EA-5260 (2006). We expect the FAA will provide respondent with an opportunity to demonstrate that it can operate in a manner acceptable to the Administrator. We do not view this result as a *de facto* revocation of respondent's certificate; we expect the FAA and respondent will work together in good faith, as expeditiously as practical, to resolve the FAA's concerns and demonstrate to the Administrator's satisfaction that respondent can properly operate in accordance with its certificate and regulatory requirements. See Administrator v. Darby Aviation, NTSB Order No. EA-5159 (2005).

UNITED STATES OF AMERICA

NATIONAL TRANSPORTATION SAFETY BOARD

OFFICE OF ADMINISTRATIVE LAW JUDGES

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In the matter of:                 *
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ROBERT R. STURGELL,               *
ADMINISTRATOR,                    *
Federal Aviation Administration,  *
                                  *
                  Complainant,    *
     v.                           *    Docket No.:  SE-18284
                                  *    JUDGE POPE
AIR TREK, INC.,                   *
                                  *
                  Respondent.     *
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U.S. Tax Court
51 S.W. First Avenue
Courtroom 1201
Miami, Florida

Friday,
October 17, 2008

The above-entitled matter came on for hearing, pursuant to notice, at 9:30 a.m.

BEFORE: WILLIAM A. POPE, II,
Administrative Law Judge

APPEARANCES:

On behalf of the Administrator:

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Federal Aviation Administration
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8 ORAL INITIAL DECISION
9 ADMINISTRATIVE LAW JUDGE POPE: On the record.
10 The following is my Oral Initial Decision in the matter
11 of the Administrator, Federal Aviation Administration,
12 Complainant, versus Air Trek, Inc., Respondent, Docket Number SE-
13 18284.
14 This is a proceeding under the provisions of 49 U.S.C.
15 Section 44709, formerly Section 609 of the Federal Aviation Act
16 and the provisions of the Rules of Practice and Air Safety
17 Proceedings of the National Transportation Safety Board.
18 Air Trek, Inc., the Respondent, has appealed the
19 Administrator's Emergency Order of Revocation dated June 10th,
20 2008, which pursuant to Section 821.31(a) of the Board's Rules
21 serves as the Complaint in which the Administrator ordered the
22 revocation of Air Trek's air carrier certificate because of
23 alleged violations of the Federal Aviation Regulations. The
24 Respondent waived proceeding under the Board's Rules pertaining to
25 Emergency cases on July 7, 2008.

1 DISCUSSION

2 At the beginning of the hearing, the Administrator
3 amended the Complaint by dismissing Count 4, Paragraph 18 through
4 22; Paragraph 24E; 1, and 2, and 3 of Count 5; Paragraph 26B of
5 Count 6; and the alleged violations of FAR Sections 135.185(a),
6 and 135.77.

7 At the beginning of the fourth day of this hearing, the
8 Administrator dismissed most of the remaining counts and
9 paragraphs of the Complaint, including those previously dismissed.
10 Those dismissed now are: Count 4, Count 5, Count 6, Count 7,
11 Count 8, Count 9, and Paragraphs 37 and 38 of Count 10. Also
12 dismissed by the Administrator were the alleged violations of FAR:
13 Sections 135.185(a), 135.301(b), 135.63(a), 135.77, 39.3,
14 43.13(a), 135.263(a), and 91.417(a)(2)(b).

15 The remaining counts in paragraphs charged that:

16 1. On or about June 5, 2008, the Respondent denied
17 access to its premises for FAA personnel to conduct further
18 inspection of aircraft.

19 2. Beginning in at least 2005, on numerous occasions,
20 maintenance discrepancies were not entered in aircraft maintenance
21 logbooks as required by the Respondent's operations manual,
22 resulting in operation of aircraft in Part 135 operations when it
23 maintained a deceptive system for recording and correcting
24 aircraft maintenance discrepancies.

25 3. Beginning in 2005, the Respondent permitted its

1 pilots to use unapproved, pre-determined weights and centers of
2 gravity data and computer programs to calculate weight and balance
3 of aircraft. The remaining alleged violations are of FAR Sections
4 119.69(a), 91.7(a), 135.25(a), 119.59(b)(2), and 119.5(g).
5 I have evaluated the charges in the Complaint in the
6 aggregate including those which the Respondent contends are stale.
7 The Complaint in this case explicitly alleges a lack of
8 qualification and seeks revocation of the Respondent's air carrier
9 certificate, Administrator v. Systems International Airways, Inc.,
10 NTSB Order Number EA-4156 (1994).
11 Section 821.33(b) of the Board's Rules of Practice in
12 air safety proceedings provides, (b), "In those cases where the
13 Complaint alleges lack of qualification of the Respondent, the Law
14 Judge shall first determine whether an issue of lack of
15 qualification would be presented if all of the allegations, stale
16 and timely, are assumed to be true. If so, the Law Judge shall
17 deny the Respondent's motion. If not, the Law Judge shall proceed
18 as in Paragraph (a) of this section."
19 In this case, I found, and now find, that assuming that
20 all the allegations of the Complaint, stale and timely, are true,
21 they are collectively and in the aggregate show a pattern of
22 disregard for the FAR’s that presents an issue of lack of
23 qualification and, therefore, the Motion to Dismiss them as stale
24 is denied.
25 At the start of the hearing, the Respondent stipulated

1 with respect to Paragraph 12 of the Complaint, "Air Trek directed,
2 caused, or permitted employees to orally report aircraft
3 maintenance discrepancies to aircraft maintenance personnel," and
4 with respect to Paragraph 13 of the Complaint that, "Air Trek
5 directed, caused, or permitted employees to report aircraft
6 maintenance discrepancies to aircraft management personnel in
7 writing on a sheet of paper."
8 The Administrator's case began with the testimony of
9 Angela Aman, who was employed by Air Trek from October 2006 to
10 January 2007 as a co-captain and First Officer at its Winchester,
11 Virginia facility, followed by Chad Ballantine, who was employed
12 by Air Trek from October 2000 to October 2006 as manager and
13 safety officer of the company's base of operations in Winchester,
14 Virginia; Captain and First Officer John Robillard, who was
15 employed by Air Trek in June 2008 until the Emergency Order of
16 Revocation, was issued on June 10, 2008; John Roberts, who was
17 employed by Air Trek as a First Officer from January to June 2006
18 at the Winchester facility; Steven White who was employed by Air
19 Trek from 2005 to 2006 as a Captain and First Officer at the
20 Winchester facility.
21 Steven Wade, who was employed by Air Trek from the end
22 of 2006 until mid June 2008 as a Captain on the Cessna 414 and the
23 Citation at the Punta Gorda, Florida facility; Robert Bailey who
24 was employed by Air Trek for two and a half years until mid 2008;
25 and Garrett Lunde who was employed by Air Trek as a Senior

1 Citation Captain from 2006 to July 2006 at the Winchester,
2 Virginia facility.
3 Angela Aman, whose ATP license is suspended after an
4 accident involving an Air Trek aircraft, testified that
5 Wayne Carr, Air Trek's Chief Pilot and President, directed her to
6 write discrepancies on a legal pad, sign the paper, and put it on
7 a clipboard. She did that once. She said she concluded that that
8 was not a good way to keep track of discrepancies and that she and
9 other pilots began leaving discrepancies on a computer if they
10 knew they had been taken care of for the next pilot.
11 She said that there were times when discrepancies were
12 not taken care of before the aircraft was flown again. She cited
13 a problem with lights on an enunciator panel that she never saw
14 written up in the maintenance log.
15 Ms. Aman said she performed weight and balance
16 calculations as the non-flying pilot and that she used canned
17 weights and data from a chart provided by the Respondent. She did
18 not recall who specifically told her to do that, it was just the
19 way she was trained to do it. She was told it was the
20 responsibility of the pilot-in-command to fill out the weight and
21 balance form.
22 Chad Ballantine, now a staff engineer for ALPA, Airline
23 Pilots Association, testified under subpoena after the
24 Administrator granted special enforcement consideration immunizing
25 him against any certificate action. He was employed by the

1 Respondent from October 2000 to October 2006. He was the base
2 manager of the Respondent's Winchester, Virginia facility and a
3 Captain and First Officer.
4 He said he frequently documented discrepancies by
5 writing them on a piece of paper that he left in a vice at the
6 Punta Gorda, Florida facility, or on a mechanic's desk at the
7 Winchester facility, or he wrote them on a white board. He never
8 reported discrepancies in the logbook.
9 He said that the mechanic at Winchester called the Punta
10 Gorda facility and the discrepancy was documented there. He said
11 he was told to use this procedure several times during training by
12 Wayne Carr, particularly with reference to the Punta Gorda
13 facility. He said he was familiar with the Air Trek operations
14 manual, which required entry of discrepancies into the aircraft
15 logbook.
16 He said that aircraft discrepancies at the Winchester,
17 Virginia facility usually were not taken care of until the
18 aircraft got to Punta Gorda, and that he had flown aircraft with
19 un-repaired discrepancies. He said there were times when he
20 delayed departures while discrepancies were corrected. He was
21 aware that another pilot reported irregularities in the aircraft
22 logbook.
23 He said he was instructed by Wayne Carr and Mr. Wohlers
24 the Pilot Coordinator, to fill out weight and balance forms using
25 the generic chart found in a can on each aircraft. The chart gave

1 weight and balance figures for the aircraft when used as an
2 ambulance and for charter according to the number of people on
3 board. The figures for weight and balance were taken then and
4 entered in on the flight manifest.
5 He said that Air Trek's General Operations Manual
6 required use of actual weights. He said that typically the person
7 in the right seat made the calculations. He said he believed that
8 some irregularities eventually wound up in the logbook.
9 John Robillard, a retired Continental Airlines pilot who
10 holds single and multi-engine ATP with type ratings on jets and
11 helicopters started with Air Trek in June of 2008 as a First
12 Officer and left when the FAA issued an Order of Suspension. He
13 said as First Officer, he reported discrepancies to the Captain
14 and wrote them on a piece of paper.
15 He presumed the discrepancies were reported to
16 Maintenance. He saw discrepancies written on envelopes. He did
17 not recall that anyone instructed him to do that. He said he was
18 not used to how discrepancies were written up at Air Trek and it
19 was a problem for him because there was no record in the aircraft
20 maintenance log. He said he asked the mechanics if discrepancies
21 had been taken care of. He said he could not determine aircraft
22 airworthiness.
23 John Roberts, holder of an ATP with 13,800 flight hours,
24 was employed by Air Trek as a First Officer from January to June
25 2006. He said the pilot-in-command wrote up discrepancies on a

1 piece of paper and put the paper on a clipboard. He said he was
2 not instructed that it should be done that way; that was just how
3 it was done.
4 The parties agreed that Air Trek's General Operations
5 Manual, the GOM, in effect then in January to June 2006 said the
6 pilot-in-command should record discrepancies in the aircraft
7 maintenance log, or have it done, the same as is stated in the new
8 GOM in effect now.
9 Mr. Roberts stated that Wayne Carr, during flight
10 training, showed him the chart on the inside of the can kept in
11 each aircraft that was used in calculating weight and balance. He
12 said he thinks Mr. Carr told him to vary weights from flight-to-
13 flight so no pattern would be shown. Mr. Roberts said he did not
14 check to see if irregularities were corrected.
15 He said some logbooks had no records and entries and
16 others were old. On cross-examination, Mr. Roberts acknowledged
17 that he became involved in a dispute with Wayne Carr after he
18 resigned over whether he should repay a portion of the cost of his
19 training pursuant to a contract he had signed. He said he wound
20 up paying Air Trek $5,000 to settle a lawsuit.
21 He told Dana Carr, in a letter dated June 25, 2008, that
22 the latter was gambling the future of the company on $4,800 and
23 threatened to take action on discrepancies he listed in his
24 letter. He admitted that he had not discussed his concerns with
25 management. He said he was a member of an Internet Blog, along

1 with other ex-employees from the Virginia facility, and he was
2 rooting for the FAA to revoke Air Trek's certificate.
3 Steven White was employed by Air Trek from 2005 to 2006
4 at its Winchester facility, then at its Punta Gorda facility as a
5 Captain and First Officer. He holds an ATP certificate with
6 helicopter and flight instructor ratings and has 20,000 flight
7 hours including for West Airlines, a carrier for United Airlines.
8 He left the company because he was terminated after a crash for
9 which he was found to be negligent.
10 He said he was wrong and had not fulfilled his duties as
11 the pilot-in-command, although he was not the flying pilot. He
12 said he faxed discrepancies to Wayne Carr who said a number of
13 times that was the way they did things here. He said that was
14 what Wayne Carr said when he raised concerns with him, that he
15 could not tell what discrepancies had been dealt with and which
16 had not.
17 Once, when he wrote up a discrepancy, Wayne Carr
18 appeared displeased when he wrote it up in the discrepancy log in
19 the aircraft. That was a problem with a crack in the radar.
20 Wayne Carr said not to worry about it. He said that a fuel leak
21 in the Westwind aft baggage compartment existed for six or seven
22 months.
23 A vertical speed indicator read incorrectly for six or
24 seven months and he wrote this irregularity on a piece of paper
25 and put it in the vice at the Winchester maintenance facility.

1 From there it was sent to Punta Gorda. He said he was grossly
2 negligent in the crash because the aircraft landed too high, too
3 fast, and too far down the runway.
4 He said the required procedure was for the pilot-in-
5 command to enter or have entered discrepancies in the discrepancy
6 log. He said he was never instructed not to report discrepancies
7 at all and could not say that discrepancies did not eventually
8 appear in the discrepancy log.
9 Randall Wade was employed by Air Trek from December 2006
10 until mid June 2008 as a Captain on the Cessna 414 and the
11 Citation. He holds an ATP with type rating on the Citation and
12 has 3,100 flight hours. He said he was told by other pilots and
13 Wayne Carr to write discrepancies on a piece of paper and put it
14 in the vice in the Maintenance Shop at Punta Gorda.
15 He said he does not recall verbatim what the GOM says
16 regarding discrepancies. He said he saw discrepancy logs in
17 aircraft and started using them without the company telling him
18 to. He said the last discrepancy he wrote up in the discrepancy
19 log was repaired the next day. He said if he flew the same
20 aircraft the next day, he would check to make sure any
21 discrepancies had been corrected.
22 He did not know what procedures other pilots followed.
23 He does not know if all discrepancies he wrote up were ever
24 reported in the discrepancy log. He said if he knew something was
25 wrong with an aircraft, he would not fly it. He said he was never

1 told not to report an irregularity.

2 He said Air Trek had a computer weight and balance form
3 and he used the computer eight to ten months after he was hired.
4 He said that Dan Wohlers, the Senior Pilot, had set up the system
5 and told him to use it. He said he asked for the weights of the
6 pilots, medical staff, and entered those weights along with the
7 weight of fuel, patient and family members, baggage in the
8 computer and then calculated if the aircraft was out of balance.
9 Prior to that, he had used weights and balance figures from the
10 chart in the can.

11 Greg DeVries gave him training to do that. Weight and
12 balance computing procedures were the same at Winchester and Punta
13 Gorda. He said he always had access to maintenance and
14 Wayne Carr by company provided satellite phones. Recalled as a
15 witness for the Respondent, he said he took an ATP check ride with
16 an FAA Inspector. He did a computer-generated weight and balance
17 calculation for the Citation after getting the pilot's weight, the
18 FAA Inspector and the fuel load. The official weight of the
19 aircraft is in the computer program. He used the computer-
20 generated weight and balance form.

21 Robert Bailey was employed by Air Trek as a Captain, on
22 the Citations, the Westwind and the Twins for two and a half years
23 until the company ceased operations after the FAA's Emergency
24 Revocation Order in June of 2008. He holds an ATP with Citation
25 type ratings and has 4,300 flight hours. He testified under an

1 FAA special enforcement agreement protecting him against
2 certificate action by the FAA.
3 Dan Wohlers of Air Trek gave him one-on-one training on
4 procedures for reporting discrepancies and use of the computer.
5 Mr. Bailey said he filled out discrepancy forms, but the common
6 practice was to write discrepancies on a sheet of paper and put
7 the paper in a vice in the Maintenance shop. He was told to do
8 that by other pilots and Wayne Carr. He said he was never told
9 not to report irregularities.
10 It was stipulated that pilots were permitted, and
11 authorized, and directed by management to report mechanical
12 irregularities orally or in writing to Maintenance and/or report
13 them in the maintenance logs up until the time of revocation. He
14 said that, prior to flights, he checked with Maintenance to see if
15 discrepancies had been corrected.
16 Lots of times that was done verbally and he saw nothing
17 in writing. He said that initially he did weight and balance
18 calculations from the data sheet in the can, but later on used
19 actual weights. He said that initially he had been instructed by
20 other pilots and Wayne Carr to use figures on the data sheet in
21 the can, but to vary them from time-to-time to make it look like
22 the numbers had been calculated.
23 He said the company GOM required use of actual weights.
24 About Spring 2007, he was instructed by Dan Wohlers to use the
25 Excel spreadsheet in which he entered numbers to calculate weight

1 and balance and he stopped using the preprinted charts from the
2 can.
3 He said there were recurrent problems with gauges and
4 pressurization and anti-ice. He documented the problems, but
5 sometimes flew the aircraft with the same indications. On cross-
6 examination, he recalled reporting a number of discrepancies on
7 discrepancy forms.
8 Garrett Lunde holds an ATP multi-engine and commercial
9 single engine and commercial rotary wing helicopter ratings. He
10 worked as a Citation pilot for Air Trek in January 2006 to July
11 2006 at its Winchester facility. He is a graduate of the U. S.
12 Naval Academy. He received special enforcement consideration from
13 the FAA for his testimony.
14 His testimony was limited to conversations he had with
15 management of Air Trek concerning reporting of discrepancies and
16 calculating weight and balance. He said that any time he wanted
17 to MEL an item he was to call Wayne Carr. He said on one occasion
18 he wanted to MEL the anti-skid on an aircraft. Wayne Carr said
19 they had their own way of tracking things like that he would
20 prefer that it not be written up in the aircraft MEL discrepancy
21 log.
22 At a meeting held by Wayne Carr and Dana Carr with the
23 pilots of the Winchester facility in June 2006, Wayne Carr and
24 Dana Carr produced a sack of forms to show how they tracked
25 maintenance and correction of discrepancies in accordance with the

1 aircraft manuals. He said he saw only the names of Lester Carr
2 and Wayne Carr on the forms, not the names of the mechanics who
3 did the work.
4 Wayne Carr held up a stack of papers and said this was
5 how we keep track and document maintenance when we have time and
6 are available to do it. Wayne Carr said he would prefer not to
7 give copies of the documents to the pilots. The papers were
8 typed, but had lots of handwritten notes and were not on any
9 particular type of form the witness had ever seen.
10 Wayne Carr said there would be consequences if we chose
11 to write up discrepancies on the appropriate forms and that they
12 had their own way of doing things.
13 On objection by the Respondent, I ruled that if the
14 Administrator is unable to prove the requirements for writing
15 weight and balance in the 2005 to 2007 period, then conversations
16 about the practice at those times become irrelevant and will not
17 be considered.
18 Mr. Lunde said he first met Wayne Carr, Dana Carr, and
19 Lester Carr when he was first employed and went to Punta Gorda for
20 training.
21 Dana Carr said they would have to break him of the
22 military habit of things always working on aircraft. Throughout
23 his employment with Air Trek, Dana Carr repeatedly said we can pay
24 pilots or fix airplanes.
25 Mr. Lunde stated that pilots were instructed to use

1 spreadsheet forms in the front of the trip can to perform weight
2 and balance calculations.
3 On cross-examination, Mr. Lunde acknowledged that he had
4 been a member of an Internet Blog called Topix, T-o-p-i-x, to
5 which other ex-Air Trek pilots also belonged and that in March
6 2007, he had posted an obscene, sexually oriented Blog directed
7 towards Wayne Carr and Dana Carr further expressing his desire to
8 see them and Lester Carr in jail and Air Trek going out of
9 business. See Exhibit R-93.
10 On redirect, he said he had made those comments because
11 he was frustrated because the company had not been more closely
12 scrutinized.
13 Aviation Safety Inspector Patricia Mathes was accepted
14 as an expert on 135 air carrier operations. She said she reviewed
15 Air Trek pilot records, flight and duty records, and training
16 records. None of these are relevant, however, since the
17 Administrator dismissed the charges in the Complaint relating to
18 these issues.
19 She reviewed Air Trek's operations specifications to see
20 if they had the required operations specifications and reviewed
21 them to familiarize herself regarding the requirements for
22 reporting discrepancies and calculating weights and balances.
23 Exhibit A-3, which is Section A006, Management and
24 Personnel of Air Trek's operations specifications lists Dana Carr
25 as the Director of Operations for 135, Wayne A. Carr as Chief

1 Pilot for Part 135 operations, and Lester M. Carr as Director of
2 Maintenance for Part 135 operations.
3 Exhibit A-8 is the company operations manual under Part
4 135 and it states that the President of the company is responsible
5 for the total company operations. The President of the company is
6 Wayne Carr. The specific duties of the Director of Operations,
7 Director of Maintenance, Chief Pilot, and other company managers
8 are described in detail.
9 Exhibit A-14 is a copy of A-96, Actual Weight Program
10 for All Aircraft from the Air Trek operations specifications
11 effective 10/24/07. It provides in part that the certificate
12 holder is authorized to use only actual weights when determining
13 the aircraft weight and balance.
14 A-81 is A-96, Actual Weight Program for All Aircraft
15 from the Air Trek operations specifications approved 9/8/05 and
16 10/25/05. It was offered as the operations specifications of Air
17 Trek in 2006 and 2007. However, it was excluded as an exhibit
18 because it was not timely disclosed by the Administrator to the
19 Respondent as required by the prehearing Order and the Principal
20 Operations Inspector James R. Herndon was not present at the
21 hearing and he had not been disclosed as a witness in the
22 Administrator's response to the prehearing Order.
23 The evidence shows the Administrator did not disclose
24 A-81 and the witness to authenticate it to the Respondent until
25 September 24th, 2008. As I noted, I excluded A-81 and reference

1 to it from evidence.

2 MR. WINTON: Judge, what was that date that you said he

3 disclosed it?

4 ADMINISTRATIVE LAW JUDGE POPE: I said September 24,

5 2008. Is that incorrect?

6 MR. WINTON: No, I thought you said December.

7 September, you said.

8 ADMINISTRATIVE LAW JUDGE POPE: I said September.

9 MR. WINTON: Thank you.

10 ADMINISTRATIVE LAW JUDGE POPE: Do you disagree with

11 that?

12 MR. WINTON: No, that's fine.

13 Aviation Safety Inspector David Baron, an Airworthiness

14 Inspector, accompanied Aviation Safety Inspector Magill to do a

15 follow up inspection at the Air Trek Punta Gorda facility on some

16 additional aircraft the FAA wanted to inspect. He said that he

17 spoke with Dana Carr of Air Trek, who asked them to leave the Air

18 Trek facilities and denied them access to Air Trek aircraft and

19 records.

20 He said that Dana Carr said that he would let the

21 Inspectors look at the records and aircraft, but first he would

22 have to consult with his Washington attorney and he asked them to

23 leave. He said he would call them on his cell phone as soon as he

24 heard back from his attorney.

25 Inspector Baron stated that Mr. Carr called him once to

1 say that he had not yet contacted his attorney and a second time
2 to say that his local attorney had told him to do nothing until
3 the attorney in Washington gave his okay.
4 About 27 minutes later, Inspector Baron received a call
5 from Inspector Mathes stating that the Washington attorney had
6 spoke to FAA Attorney Brendan Kelly and the Inspectors were not
7 allowed on the Air Trek property. Inspectors Baron and Magill
8 were instructed to return to home base.
9 Aviation Safety Inspector John S. Johnston, an FAA
10 Operations Inspector and a former Principal Operations Inspector
11 was the SEIT Team leader on an inspection of Air Trek between June
12 5 and June 9, 2008. He and Inspector Ian Kincaid concentrated on
13 weight and balance. He introduced Exhibit A-11A, the weight and
14 balance section of the company's operations manual dated 8/28/07,
15 which requires Paragraph 2-1F, that all pilots use actual weights
16 in computing weight and balance.
17 A-12A includes laminated sheets found in cans aboard
18 each of the Respondent's aircraft, which give maximum takeoff
19 weight for various of the Respondent's aircraft with centers of
20 gravity, fuel weight, gallons of fuel aboard the aircraft in air
21 ambulance or charter configuration, with varying numbers of
22 persons on board.
23 Also included in the exhibit are load manifest -- also
24 included in the can are load manifests with takeoff weight,
25 forward center of gravity limit, aft center of gravity, and

1 takeoff center of gravity limits.

2 The takeoff weight and center of gravity figures on load
3 manifests match exactly the figures shown on the exemplar sheets
4 found in the cans on the planes for various passenger loads.

5 Inspector Johnston said that they asked for manifests
6 for the last 30 days. Out of 108 manifests they received, the
7 ones in Exhibit A-12 were the only ones using figures from the
8 laminated sheets in the cans now referred to as exemplars. That
9 worked out to be 12.9 percent.

10 He and Inspector Kincaid spoke to pilot Randall Wade
11 about one of the manifests and pointed out the First Officer had
12 copied the figure. Pilot Wade had said he was going to counsel
13 the First Officer not to do that again. Exhibit A-11 was
14 admitted. Exhibit A-12 was separated into A-12A and A-12B. A-12A
15 was admitted.

16 A-12B, which contains photographs of load manifests with
17 portions of the exemplar positioned above the load manifests were
18 not admitted because of difficulty with authenticating the
19 photographs and failure by the Administrator to disclose color
20 photographs, which showed considerable more detail than the black
21 and white photographs provided to the Respondent prior to the
22 hearing as required by the prehearing Order.

23 Inspector Johnston stated that the only approved method
24 for use of Air Trek pilots to calculate weight and balance was
25 using data in the operations specifications. He said the FAA's

1 concern was that they had no way of knowing the skill of the
2 operator of a computer, use of the Excel spreadsheets had not been
3 approved by the FAA.
4 He agreed that neither the company's operations
5 specifications, or the General Operations Manual, say that Air
6 Trek could not use Excel spreadsheets. Inspector Johnston stated
7 he considered Air Trek to be minimally compliant.
8 Chapter 48 of FAA Order 8900.1 at Paragraph 3-4008
9 states that it is the operator/applicant's privilege to revise
10 these procedures, weight and balance procedures, or develop
11 procedures tailored to the specific needs of the operation. Under
12 these circumstances it is the ASI, Aviation Safety Inspector's
13 responsibility to evaluate the procedures to ensure regulatory
14 compliance and suitability to the operation.
15 FAR Section 19.49(a)(9) provides that each certificate
16 holder must obtain operations specifications containing
17 authorization for the method of controlling weight and balance of
18 aircraft.
19 Inspector Mathes identified Exhibit A-81 as copies of
20 Air Trek's operations specifications dated 8/9/05, 9/8/05, and
21 10/25/05, which she said she had obtained from the FAA archives
22 through a computer program only available to the FAA. She said
23 that during the 2005 period, Inspectors entered data in the
24 computer programs manually, but it was the regular practice of the
25 FAA to keep such records.

1 She stated that she first saw these documents between
2 March and May 2008, but that she did not show copies to Attorney
3 Kelly, Attorney Winton, or to his client Air Trek. She said that
4 normally the Tampa Flight Standards District Office would retain a
5 hard copy. A-81 was rejected.
6 Exhibit A-79, Air Trek General Operations Manual
7 procedures for reporting mechanical irregularities was admitted.
8 The revision date is 3/31/06. It provides in part and in summary,
9 at Paragraph 5-2 that:
10 "The pilot-in-command shall (a) enter or have entered in
11 the aircraft maintenance discrepancy log each mechanical
12 irregularity that comes to his attention; (b) before each flight
13 he shall determine the status of each irregularity entered in the
14 maintenance discrepancy log at the end of the preceding flight;
15 and (c), each person that takes corrective action shall enter the
16 action taken in the aircraft maintenance discrepancy log; and (d),
17 the aircraft maintenance discrepancy log shall remain in the
18 aircraft at all times."
19 The Respondent stipulated again that it allowed oral
20 reporting of discrepancies. Inspector Mathes stated she had
21 evaluated all of the evidence assembled by the team, of which she
22 was a member, and found several areas where the certificate holder
23 was operating contrary to Regulations by recording irregularities
24 contrary to the General Operations Manual on pieces of paper or
25 orally, but not in the maintenance logs so pilots had no way of

1 knowing what irregularities were reported, or if they had been
2 corrected.
3 The Respondent had proper procedures, but did not follow
4 them and its operations were unsafe, she said. She also said that
5 not using actual weights to calculate weight and balance
6 jeopardizes safety. Exhibit A-12B, C, and D were rejected.
7 A motion to dismiss the Complaint made by the Respondent
8 at the conclusion of the Administrator's case was taken under
9 advisement.
10 The Respondent's first witness was David Cassidy, a
11 pilot for Southwest Airlines for 26 years before he retired at age
12 60 and took employment with Air Trek in July of 2007. He was
13 Second Officer on the Cessna's and pilot-in-command on other
14 aircraft, including the Cessna 500. He is the company's safety
15 officer.
16 He said that he always used actual data when calculating
17 weight and balance and never used unapproved data. He said there
18 are several ways to compute weight and balance, including by
19 longhand, calculator, or spreadsheet. He said that spreadsheet
20 method does the addition, subtraction, and division.
21 He said that as pilot-in-command he is responsible for
22 all calculations of weight and balance, which he enters on the
23 manifest. He said the primary way of doing calculations is by
24 using the spreadsheet. He said he uses the exemplars on the cans
25 to cross-check his calculation of weight and balance and that they

1 are usually close.

2 He said he was never told by anyone to use pre-
3 determined weights and balances from the can. He said he recalls
4 doing a check ride on the Citation Jet with the Air Trek POI and
5 that he did the weight and balance computation on the computer
6 spreadsheet. He discussed the calculation with the POI, who
7 voiced no objection. He also did a similar calculation with POI,
8 Steve Hall, on the Cessna 414.

9 He said he was never told not to enter discrepancies on
10 the aircraft maintenance log. He never heard the Carr's tell that
11 to anyone, nor has anyone reported to him that that occurred. He
12 said the management never said to operate an aircraft with a
13 discrepancy. He never heard the Carr's tell that to anyone, nor
14 has anyone reported to him that that occurred.

15 He said management never said to operate an aircraft
16 with a discrepancy. I think I said that, but I'm saying it again.
17 He said that sometimes he would write up discrepancies in the log
18 and sometimes he would tell the mechanic, who would write up the
19 discrepancy in the log. He said Wayne Carr, who trained him, told
20 him that he could either write up the discrepancy in the log, or
21 write it on a note for the mechanics to do it as his
22 representative.

23 Captain Jeffrey Dick, formerly employed by Air Trek from
24 October 2001 to 2007 as a Senior Westwind Captain with 11,000
25 hours holds an ATP and is type rated on the Westwind, Citation

1 500, and the Airbus A-320. He testified that Air Trek pilots
2 could enter discrepancies in the maintenance discrepancy log, or
3 write the discrepancies on a sheet of paper, which would be left
4 in the vice in the Maintenance Shop, or could verbally report the
5 discrepancy to Maintenance.
6 He said he would call in discrepancies to the
7 Coordinator at the end of flights. He said that when he left
8 discrepancies written on pieces of paper in the vice, he would
9 call later to follow up on whether the discrepancies were
10 repaired. He said he would look in the discrepancy maintenance
11 log on the aircraft for discrepancy write-ups before he went out
12 again.
13 He said every time a plane left, there would be someone
14 there from the Maintenance staff. He said he had a satellite
15 telephone, which he could use to call in discrepancies. He said
16 he was never told not to write up a discrepancy in the maintenance
17 discrepancy log. He said he has grounded aircraft while en route
18 for discrepancies and there has never been any repercussions
19 suffered by him for that.
20 He said that prior to departure, he checked the
21 maintenance discrepancy log and checked hours until the next
22 maintenance checks were needed, and talked to Maintenance about
23 the status of the aircraft. He said he was not aware of any
24 deceptive maintenance system at Air Trek. He said he never saw an
25 irregularity he reported not become part of the maintenance log.

1 On cross-examination he said he knew he was responsible
2 to see that discrepancies he was aware of got in the maintenance
3 log before the aircraft was flown again. He acknowledged that the
4 Farr's do not discuss alternative ways of reporting discrepancies
5 that was used by Air Trek. He identified maintenance discrepancy
6 forms in Exhibit R-11 that he had either signed, or had his
7 printed name on it indicating someone had filled out the form for
8 him. He said he was never told not to write up a discrepancy.
9 Dana Carr, called by the Respondent, is the Director of
10 Operations for Air Trek and its Vice President, he and his brother
11 Wayne Carr are the owners of the company. He started flying over
12 30 years ago and has 7,500 hours mostly in the Cessna Citation.
13 Air Trek has been in operation for 30 years. He identified
14 photographs of the aircraft listed as being on Air Trek's
15 operations specification in the Complaint.
16 They include the Westwind Jet, a Citation 2 Jet, two
17 Citation 500 Jets, two Citation 414 piston engine aircraft, and a
18 Cessna 340 piston engine aircraft. The company employed a medical
19 staff of 26, 13 pilots, eight A&P mechanics, plus assistants, and
20 four flight coordinators when the suspension was issued in June
21 2008. The company provides medical transportation for patients.
22 They provided 1,000 flights last year.
23 He said that maintenance of company aircraft is always
24 available. When flights return, mechanics are waiting until the
25 night. They get the aircraft ready for its next mission. He said

1 that every aircraft has cell phones and satellite phones for the
2 crew and the medical staff.
3 He said that he meets the Director of Maintenance three
4 times a day. The vice into which discrepancies written on paper
5 are put is in the Maintenance Shop on a table at the door. He
6 said he has overall supervisory responsibility for all operations,
7 including Maintenance and the Chief Pilot.
8 He said that on June 5, 2008, Inspectors Baron and
9 Magill arrived unannounced at Air Trek and said they were there to
10 do a Part 91 inspection. He said that Air Trek no longer had a
11 certificate since they had turned it in because of the Emergency
12 Suspension. He told the Inspectors that he needed to talk to his
13 counsel first and asked them to go to the airport restaurant and
14 wait for him to call.
15 He called the Inspectors several times over 45 minutes
16 to tell them he had not yet contacted his attorney. The
17 Inspectors did not return, but not because he told them they could
18 not. His last conversation with them was that they had been told
19 to leave and they were on their way back to the office.
20 He said he had a proficiency check ride with an FAA
21 Inspector Grillo. He said he used the Excel computer program to
22 calculate weight and balance and Inspector Grillo said it looked
23 good to him. Referring to A-11A and ALJ-2, the Air Trek
24 operations manual, weight and balance, he agreed that the pilot-
25 in-command must utilize actual weight in the aircraft flight

1 manual to calculate weight and balance.

2 He said the Excel computer program was developed by Dan

3 Wohlers, Air Trek's Senior Administrative Captain and on --

4 Let's take a couple of minute recess here.

5 (Whereupon, a recess was taken from 6:45 p.m. to 6:50

6 p.m.)

7 ADMINISTRATIVE LAW JUDGE POPE: Let's go back on the

8 record.

9 He said he had a proficiency check ride with an FAA

10 Inspector Grillo. He said he used the company's Excel program to

11 calculate weight and balance and Inspector Grillo said it looked

12 good to him.

13 Referring to A-11A and ALJ-2, the Air Trek operations

14 manual, weight and balance, he agreed that the pilot-in-command

15 must utilize actual weight in the aircraft flight manual to

16 calculate weight and balance.

17 He said the Excel computer program was developed by Dan

18 Wohlers, Air Trek's Senior Administrative Captain. And when he

19 used it, he put in the information from the flight manual and put

20 in data from the aircraft, actual weights. To get results from

21 the Excel program, it is only necessary to put in weights and

22 stations.

23 He agreed that there was no approval from the FAA to use

24 the vice to keep reports of discrepancies. He said he did not say

25 we could either fix planes or pay pilots. The remark is out of

1 context. What he was talking about was the pilots wanted the
2 company to make major modifications and these needed to be
3 budgeted.
4 Lester Carr is the Director of Maintenance and a brother
5 of Dana and Wayne Carr, the owners of the company. He retired
6 after 20 years in the U.S. Air Force and started working for his
7 brothers in 1995, under the lead mechanic at that time. He said
8 he obtained an A&P certificate and in 2003 became the Director of
9 Maintenance.
10 He said he holds a private pilot's certificate with
11 multi-engine and instrument ratings and is checked out in the
12 right seat of all company aircraft. He said the company does all
13 phases of maintenance on its aircraft except engine overhauls. He
14 said that when he arrives at work in the morning, he checks the
15 vice for discrepancies, talks to the lead mechanic about what is
16 pressing and what write-ups need to be looked at.
17 He meets with the Director of Operations at 11:00 a.m.
18 and when he leaves in the evening, he talks to the Flight
19 Coordinator about the status of the aircraft. He said the
20 Maintenance Shop is open from 6:00 a.m. to midnight. Most
21 returning flights are met by mechanics and all dispatched flights
22 have mechanics present.
23 He said that the method of reporting discrepancies are
24 for the discrepancy to be written in the aircraft log by the
25 pilot, or reported by the pilot orally in a call to the Director

1 of Maintenance, or left in writing for the Maintenance staff.
2 There were verbal instructions to pilots that they could secure
3 written discrepancies in the vice in the Maintenance Shop or
4 report discrepancies to mechanics who passed them on to the
5 Director of Maintenance, or fill out a maintenance discrepancy log
6 form on the aircraft, or report the discrepancy orally.
7 He said he does a review and records discrepancies and
8 actions taken on them on the discrepancy forms in the aircraft.
9 He said he never permitted operation of an aircraft when a
10 discrepancy had not been entered into the maintenance discrepancy
11 log. Neither did his brothers.
12 He said his brothers Dana and Wayne are the owners of
13 the company and he does not hold an officer position. He said
14 they never pressured him or any pilot to operate an unairworthy
15 aircraft. He was not aware of any aircraft being dispatched
16 without discrepancies being written up in the aircraft maintenance
17 discrepancy log. He is not aware of any deception in the system
18 operated by Air Trek.
19 He said that the GOM, which is Exhibit A-79, says
20 "pilots-in-command shall enter or have entered irregularities in
21 the mechanical discrepancy log." The GOM does not say that they
22 cannot be reported orally, or written on a separate piece of
23 paper. He said mechanics write up orally reported discrepancies
24 on discrepancy forms kept in the shop and on the airplane. He
25 said the mechanics are trained on how to write up discrepancies.

1 Wayne Carr is the Chief Pilot, President, and co-owner
2 with his brother Dana of the Respondent company, which they have
3 owned and operated for more than 30 years. He basically designed
4 the company's standard operating procedures and wrote the
5 operations specifications and General Operations Manual. He is a
6 very experienced pilot.
7 He testified that he teaches his pilots how to do weight
8 and balance calculations. He said Dan Wohlers was the former
9 Chief Pilot until he suffered an illness, and he had Dan Wohlers
10 develop a web-based training program for the company pilots. He
11 testified that the specific method of calculating the weight and
12 balance is not contained in the GOM.
13 He stated that the CG varies with the weight and
14 distribution of the load in the aircraft. He identified an
15 aluminum can as the container on the company aircraft, in which
16 load manifest forms are now kept. He said there was an exemplar
17 attached to the outside of the can formerly with representative
18 weight and balance calculations, which he said are close to what
19 the pilots would see in actual calculations.
20 He said the purpose of the exemplars was to be used by
21 the pilots as a crosscheck to make sure that their actual
22 calculations did not contain gross errors. He said he removed the
23 exemplars in 2008 and retrained all of his pilots to use actual
24 weights.
25 He said he was aware that some pilots at the Winchester

1 base were misusing the exemplars as actual weights when the base
2 at Winchester was closed. He said that was very widespread at the
3 Winchester facility and he called all of the pilots together and
4 retrained them on the correct procedures to use actual weights.
5 At that time, he had no knowledge that the exemplars
6 were being similarly misused at the Punta Gorda facility. He said
7 he never authorized use of pre-determined weights. He said Dan
8 Wohlers designed the Excel program spreadsheet to be used to
9 calculate weight and balance. On three occasions, ASIs, Aviation
10 Safety Inspector, observed him use the Excel program to calculate
11 weight and balance.
12 He said he had no knowledge that discrepancies were not
13 being recorded in aircraft logs. He said that to his knowledge,
14 no aircraft was launched prior to discrepancies being written up
15 in the aircraft logbook. R-11 is approximately 85 discrepancies
16 written on discrepancy forms over the period of about a year from
17 2007 to 2008. Some were filled out by pilots, some by mechanics.
18 Currently, blank discrepancy forms and completed
19 discrepancy forms are kept aboard aircraft, the company aircraft,
20 in a large book referred to as the operational flight supplement.
21 The book also contains operations specifications, sheets to use to
22 compute weight and balance, and other information for use of the
23 pilots. There is also an MEL log aboard all aircraft.
24 He denied that he ever told a pilot not to write up a
25 discrepancy. At Winchester, pilots were instructed to fax either

1 the completed discrepancy forms or paper write-ups to him at Punta
2 Gorda. He said aircraft with reported discrepancies were taken
3 off line.
4 He said that on one occasion he said that he could
5 either fix aircraft or pay pilots, but that was in reference to a
6 very expensive instrument upgrade the Winchester pilots were
7 seeking. He denied that he ever directed anyone to operate an
8 unairworthy aircraft or that he had deferred maintenance to
9 operate an unairworthy aircraft.
10 Richard Peck was the Respondent's final witness. He was
11 accepted as an expert in air carrier operations. Among other
12 things, he said he had examined Exhibit A-12A and agreed that
13 there appeared to have been copying of the figures from the
14 exemplars in A-12A on to load manifests. The forms are from the
15 Punta Gorda facility and are dated 2008.
16 He said he interviewed all of the pilots who said they
17 had calculated the weight and balance from actual weights and had
18 given the figures to the co-pilot to enter on the load manifest.
19 For some undetermined reason, instead the co-pilots had copied the
20 figures from the exemplar. He said that was a record keeping
21 violation, but the pilots told them they had used correctly
22 calculated actual weight and balance for the flight.
23 FINDINGS AND CONCLUSIONS
24 I have had the opportunity to hear the testimony of the
25 witnesses in this case and to observe their demeanor, as well as

1 to examine the exhibits. I find the following pilot witnesses to
2 be credible, although others evidenced hostility towards Air Trek
3 or its management of sufficient gravity to raise the possibility
4 of their giving untruthful testimony.
5 Let me pause here a minute.
6 (Pause.)
7 Pilots Angela Aman, Chad Ballantine, John Robillard,
8 Steven White, Randall Wade, and Robert Bailey; Not so, however,
9 with respect to witnesses John Roberts and Garrett Lunde.
10 Mr. Roberts was involved in a contractual dispute with
11 Air Trek and its principals, which caused him to have ill feelings
12 and to be hostile towards Air Trek.
13 I have observed his demeanor as a witness and I find him
14 to be credible only to the extent that his testimony is consistent
15 with and corroborated by testimony from another witness who I had
16 found to be credible.
17 And the same is true, but even more so, with regard to
18 Witness Garrett Lunde. I find that he is so biased against Air
19 Trek and its principals that he lost any semblance of civility and
20 good judgment by posting obscene blogs on the Internet expressing
21 his wish that the principals of the company be jailed, suffer
22 sexual assault, and that the company be put out of business. I do
23 not find him to be a credible witness and I decline to give his
24 testimony any weight.
25 I find that the Administrator has proven a diminimus

1 violation of FAR Section 119.59(b)(2) by the Respondent refusing
2 permission on or about June 5, 2008 to two Aviation Safety
3 Inspectors to inspect aircraft at the Respondent's Punta Gorda,
4 Florida facility, as alleged in Paragraph 5 of the Complaint.
5 However, that violation falls far short of an attempt by
6 the Respondent to completely frustrate the Administrator's
7 Inspectors' attempt to conduct an inspection of aircraft at the
8 Respondent's Punta Gorda facility.
9 And the situation is further complicated by an apparent
10 misunderstanding or miscommunication between counsel for the
11 Administrator, Mr. Kelly, and counsel for the Respondent,
12 Mr. Winton.
13 The evidence shows that the two Inspectors, David Baron
14 and ASI Magill appeared unannounced at the Respondent's facility
15 and asked to inspect aircraft and records. They were asked to
16 leave the premises by Dana Carr, the company's Director of
17 Operations until the company's Washington counsel was contacted.
18 The conditions for admitting the Inspector to the
19 company's facilities were not resolved between Mr. Kelly and
20 Mr. Winton, and Mr. Kelly, apparently, instructed another
21 supervisory Inspector, Ms. Mathes, to tell the Inspectors to go
22 home. It appears that Mr. Winton did not say that no inspection
23 could take place, but he wanted any inspection to be coordinated
24 through him while Mr. Kelly, on the other hand, interpreted
25 Mr. Winton's position to be that of refusal.

1 It is clear, however, that under FAR Section
2 119.59(b)(2), that the company's initial refusal to allow the
3 inspection on June 5, which was not rescinded, was a violation of
4 that Regulation. Although it was Inspector Mathes who actually
5 told the Inspectors to go back to their office that was only after
6 passage of an hour or more during which no approval came from
7 Mr. Carr for them to enter the facilities.
8 It may be that had communication between Mr. Kelly and
9 Mr. Winton continued, an arrangement for the inspection could have
10 been worked out. However, the Respondent's initial un-rescinded
11 refusal constitutes a violation of FAR Section 119.59(b)(2), since
12 the burden of complying with the Regulation was on the Respondent.
13 The fact that the Administrator may have been seeking
14 further information to support revocation is largely irrelevant.
15 This is not a criminal case and the rules in criminal cases
16 pertaining to Government access to Defendants represented by
17 counsel simply do not apply. The Administrator has a regulatory
18 right to conduct inspection, regardless of whether a certificate
19 action has been or will be taken.
20 I do not find, however, that this violation standing
21 alone, or in conjunction with others warrants revocation under the
22 extant conditions. I further note that it appears that this issue
23 could have been resolved at the time by the two attorneys working
24 out arrangements for the inspection without, in any way,
25 prejudicing the Administrator's right to access to the company's

1 records and aircraft.

2 The evidence of record establishes that there were
3 instances, perhaps numerous instances, of failure to properly
4 record discrepancies in the logbooks of the Respondent's aircraft
5 kept during the 2005 to 2007 period at its Winchester facility.
6 This is based on the anecdotal, but I find reliable testimony of
7 pilots mentioned above, who were working at the Winchester
8 facility at that time.

9 It further may be, and probably did occur, that on some
10 occasions aircraft may have been operated from the Winchester
11 facility before discrepancies were either reported in the aircraft
12 log or repaired. However, I find no evidence to show that this
13 occurred at the Punta Gorda facility from 2007 on.

14 Neither do I find any reliable evidence that Wayne Carr
15 was aware of what was happening at the Winchester facility prior
16 to its closing around 2007, nor do I find any reliable evidence
17 that he ordered pilots there not to report discrepancies on
18 mechanical discrepancy logs kept on the aircraft.

19 It was their choice to record the discrepancies in the
20 log, or report them orally, or in writing to him, or to Punta
21 Gorda maintenance, if the mechanic at the Winchester facility
22 could not make the repair.

23 However, clearly the discrepancy reporting system at the
24 Winchester facility prior to 2007 was broken and the pilots there
25 were not complying with the company's operations specifications,

1 General Operations Manual, or the Farr's.

2 Supervision from Punta Gorda, Florida was inadequate and
3 created the opportunity for this to go on, apparently largely
4 undetected. But I do not find sufficient evidence to conclude
5 that Wayne Carr condoned, or encouraged the practice, or that it
6 was so widespread throughout the company operations that it
7 amounted to a systemic pattern of misconduct.

8 I further find that there is no specific evidence of
9 operation of unairworthy aircraft with specific discrepancies at
10 specific times. In the absence of such evidence, it is virtually
11 impossible for the Respondent to defend against the charge that it
12 violated the FAR's by operating unairworthy aircraft from its
13 Winchester facility at that time. It remains no more than a
14 possibility, but it is something, which if the practice had
15 continued, would compellingly call for correction, if not harsher
16 sanction.

17 The Respondent admitted by stipulating during the
18 hearing that pilots were permitted and authorized and directed by
19 management to report mechanical irregularities orally, or in
20 writing to Maintenance, and/or report them in the maintenance log
21 up until the time of revocation.

22 However, I do not find any credible evidence that after
23 closure of the Winchester facility there was any pattern of
24 failure to timely report discrepancies and repairs in the aircraft
25 mechanical discrepancy log kept aboard Respondent's aircraft

1 operating from Punta Gorda. The evidence admitted at the hearing,
2 including Exhibit R-11, tends to corroborate this.
3 Neither is there sufficient evidence to support a
4 finding that the Respondent operated unairworthy aircraft from its
5 facility at Punta Gorda, it's only facility after the closure of
6 the Winchester facility about 2007.
7 What happened at the Winchester facility prior to 2007
8 was clearly contrary to the company's operations specifications,
9 which require the pilot-in-command to enter or have entered in the
10 aircraft maintenance discrepancy log each mechanical failure that
11 comes to the pilot's attention before, during, and after
12 completion of each flight, exhibit A-79, the company's operations
13 manual airworthiness procedures, Paragraph 5-2.
14 But procedures at the Punta Gorda facility after early
15 2007 do not fall into that category. It is not a reasonable
16 construction to interpret the requirement as satisfied -- as not
17 satisfied by an oral or written report by the pilot-in-command,
18 Wayne Carr, or the Maintenance staff with the expectation that the
19 discrepancy will be properly recorded in the aircraft log, along
20 with a statement by an A&P mechanic listing the repairs and
21 certifying the aircraft is fit to return to service.
22 It is the pilot-in-command's responsibility to ensure
23 that whoever he delegates to make the entry in the aircraft's
24 maintenance log does, in fact, do so, but he does not necessarily
25 have to be the person who actually makes the entry in the aircraft

1 log.

2 The pilot-in-command is also required to review the most
3 recent five pages of the aircraft discrepancy log to assure
4 himself that any prior discrepancies reported in the log have been
5 corrected. That, of course, was impossible to do at Winchester
6 before it was closed.

7 But the evidence from Wayne Carr, who I find to be a
8 credible witness, is that more than at least five discrepancy
9 reports are routinely kept aboard the aircraft at Punta Gorda in
10 the operational flight supplement. There's also a minimum
11 equipment list aboard the aircraft there and a form to record
12 discrepancies. Exhibit A-79, Paragraph 5-2A3.

13 The company's system allowing pilots-in-command to not
14 record discrepancies in the aircraft discrepancy log themselves,
15 but to report discrepancies on a piece of paper left in a vice, or
16 orally to report a discrepancy was too decentralized at Winchester
17 during the 2005/'07 period.

18 That made it impossible for pilots using aircraft there,
19 not to mention the FAA, to track discrepancies and their repair,
20 thus jeopardizing the safety and airworthiness of the company
21 aircraft at Winchester. That situation, however, did not occur at
22 the Punta Gorda facility.

23 The proof of these failures at the Winchester facility
24 is largely anecdotal without supporting records demonstrating
25 actual failures to properly record discrepancies and repairs.

1 Further, it does not appear that the failures were pervasive in
2 both of the company's facilities, or intended by management.
3 And while the failures certainly created an opportunity
4 for unairworthy aircraft to be used or dispatched from Winchester
5 before the discrepancies were corrected, there is a lack of
6 evidence showing specific aircraft were dispatched at specific
7 times with specific uncorrected discrepancies so that they were
8 unairworthy.
9 Accordingly, I find that the Administrator has proven by
10 anecdotal evidence repeated instances of violation of FAR Section
11 119.5(g), by failure to comply with the company's operations
12 specifications, by pilots failing to record or have reported all
13 discrepancies in aircraft mechanical discrepancy logs aboard the
14 aircraft kept at the Winchester, Virginia facility prior to 2007.
15 Pilots at that facility could not determine the
16 airworthiness of their aircraft from the five most recent
17 discrepancies that had been recorded and entered in the
18 discrepancy log, because often there was no discrepancy log, or
19 that they had been corrected.
20 There's a residual violation of FAR Section 91.13(a),
21 which accompanies this operational violation. The finding of this
22 violation, however, is limited to the Winchester, Virginia
23 facility prior to 2007. I make no such finding with regard to the
24 Punta Gorda facility.
25 I do not find that the Administrator has proven an

1 actual violation of FAR Section 91.7(a), and 135.25(a), and
2 119.5(g) by it actually operating a specific aircraft at a
3 specific time and place with a specific uncorrected discrepancy
4 that rendered it unairworthy. The proof rises only to the level
5 of a distinct possibility limited to the Winchester facility prior
6 to 2007.
7 That is sufficient, however, to require correction by
8 the company of its procedures and oversight of its pilots, and
9 other personnel to eliminate such a possibility ever occurring
10 again.
11 It is further undisputed by Chief Pilot Wayne Carr that
12 there were seven or eight instances of entry of figures for weight
13 and balance taken from the exemplars at the Punta Gorda facility
14 in 2008.
15 I do not find, however, that there is any evidence of
16 failure of the pilot-in-command at the Punta Gorda facility with
17 respect to these particular instances to properly calculate the
18 weight and balance from actual weights and to use those
19 calculations in the operation of his aircraft. Here it was a
20 record keeping violation.
21 The same cannot be said, however, of the Winchester
22 facility prior to its closure, where it appears that the figures
23 for weight and balance were not calculated from actual weights,
24 but were simply copied from the exemplars kept on board the
25 aircraft in the cans.

1 Chief Pilot Wayne Carr acknowledged that it was unlikely
2 that the weight shown on the exemplars could be the actual weight
3 of the loaded aircraft with patient and crew and baggage. He
4 stated, and I credit his testimony in this regard, that he
5 prepared the exemplars using weights that were likely to be close
6 to actual weights so the pilots could check their computation of
7 weight and balance against the exemplars to make sure their
8 calculations were not out of line.
9 He stated, and I credit his testimony, that he did not
10 intend for the weights and center of gravity figures in the
11 exemplars to be entered as actual calculated weights and balances
12 on load manifests. He said, and I credit his testimony, that when
13 he found out in 2008 that some pilots or co-pilots were copying
14 figures from exemplars, he instituted training sessions for all
15 pilots on how to properly calculate weight and balance and removed
16 the exemplars from the aircraft cans.
17 One reason in particular that I find Wayne Carr did not
18 intend the figures on the exemplars to be copied as actual weights
19 is that I see no particular advantage to the company from the
20 practice. The responsibility for calculating weight and balance
21 is placed on the pilot-in-command or the First Officer at his
22 direction by the company operations specifications and the General
23 Operations Manual, which require use of actual weight.
24 The problem is that some pilots, but not necessarily all
25 pilots at the Winchester facility prior to 2007, and to a much

1 more limited extent by two co-pilots at the Punta Gorda facility
2 in 2008, took shortcuts to eliminate work for themselves by not
3 following the authorized procedures in the operations
4 specifications and General Operations Manual regarding recording
5 actual weights on load manifests.
6 There is no evidence, however, that the company made a
7 practice of flying overweight or out of balance aircraft, such
8 that it would lead to routinely falsifying the weight and balance
9 figures by not using actual weights as required by the company's
10 operations specifications.
11 However, the credible pilot testimony is compelling that
12 management made remarks, whether casual or more specific, that
13 encouraged some pilots, particularly at the Winchester facility
14 prior to 2007, to believe that it was acceptable to use the
15 exemplar figures rather than actual weights. The need for the
16 Respondent to better train and oversee its employees is obvious.
17 The purported operations specification concerning the
18 use of actual weights in calculating weight and balance during the
19 2005 to 2007 period was not admitted into evidence and reference
20 to it was excluded.
21 However, there is sufficient credible testimonial
22 evidence, without the actual operations specifications in effect
23 at the time being in evidence, from the Air Trek pilots who were
24 employed at Air Trek at the Winchester facility to establish the
25 requirements for use of actual weights that appeared in all

1 company operations specifications throughout the entire period of
2 2005 to 2008.
3 In any event, I find the Administrator has proven at
4 least seven violations of the operations specification requirement
5 to use actual weights on the load manifests, and an undetermined
6 number of similar violations in the 2005 to 2007 period, all in
7 violation of FAR Section 119.5(g) as charged. A residual
8 violation of FAR Section 91.13(a) accompanies this operational
9 violation.
10 It appears that while instituting the use of the Excel
11 spreadsheets may well have largely eliminated failure to use
12 actual weights in calculating weight and balance, the use of the
13 Excel spreadsheets from the Microsoft Excel computer program
14 itself was a new procedure for calculating weights and balances by
15 the Respondent, which should have been, but was not, submitted to
16 the FAA for approval.
17 The Administrator does not, however, seem to be
18 suggesting that the use of the Excel spreadsheets would not be
19 approved and there is some credible evidence that the
20 Administrator, or some of its representatives have knowledge
21 through one or more Inspectors of the use of the Excel
22 spreadsheets by the Respondent for some period of time, but no
23 action was taken by the Administrator to curtail the use.
24 This issue could have been precluded, as an issue in
25 this proceeding, by the Administrator's Aviation Safety Inspector

1 simply telling the Respondent that the use of the Excel
2 spreadsheets to calculate weight and balance required FAA
3 approval.
4 I do not find that this unauthorized use of Excel
5 spreadsheets as a method of calculating weight and balance alone,
6 or in conjunction with other violations, however, even though it
7 constitutes a violation of FAR Section 119.5(g), amounts to a
8 violation that warrants revocation of the Respondent's operation
9 certificate. It is easily correctable and does not reflect
10 deception on the part of the company.
11 In Count 10 of the Complaint, the Administrator charges,
12 in Paragraph 35, that Air Trek does not have sufficient qualified
13 management and technical personnel to ensure the safety of its
14 operations. And in Paragraph 36, specifically "Aircraft
15 management directed, caused, or permitted a culture of non-
16 compliance with regulatory requirements to exist, which resulted
17 in the operation of numerous unairworthy aircraft and the
18 operation of numerous aircraft under Part 135 when Air Trek
19 maintained a deceptive system for recording and correcting
20 aircraft maintenance discrepancies."
21 I find this charge to be vague to the point of being
22 confusing and even so largely unsubstantiated by the evidence.
23 Initially, I note that the Administrator does not charge any named
24 members of Air Trek's management with being unqualified, but
25 rather arguably that there are not enough qualified management

1 personnel. And there is no evidence concerning technical
2 personnel whatsoever.
3 What the Administrator does allege is that the company
4 does not have sufficient qualified management. Sufficient is not
5 the same thing as any, and it is unclear whether the Administrator
6 is charging that the existing management personnel, apparently
7 referring to the Director of Operations, Director of Maintenance,
8 and the Chief Pilot, although that is not stated specifically in
9 the Complaint, are all unqualified, or that the company needs more
10 qualified management personnel.
11 This confusing wording impacts adversely on the
12 Respondent's ability to prepare a defense. In any event, there is
13 no evidence that the Directors of Operation and Maintenance and
14 the Chief Pilot are technically unqualified.
15 Rather, the Administrator seems to be charging, as
16 stated in Paragraph 36, as amended, that the Air Trek management
17 not otherwise named are unqualified because of the practices they
18 directed, caused, or permitted as stated in Paragraph 36 of the
19 Complaint.
20 While a "culture of non-compliance," is a flowery
21 phrase, it adds little to clarity. But there is no evidence that
22 the culture of non-compliance, whatever that may be, actually
23 resulted in the operation of any, let alone numerous, unairworthy
24 aircraft, or that the operation of numerous aircraft when Air Trek
25 maintained a deceptive system for recording and correcting

1 aircraft actually resulted in the operation of any unairworthy
2 aircraft.
3 At most, and this is enough to require procedures and
4 safeguards satisfactory to the Administrator to prevent this from
5 happening in the future, the evidence shows that the violations of
6 the FAR's, which I have found, created the possibility during the
7 2005 to '07 period at Winchester facility of operation of
8 unairworthy aircraft, but not the actuality.
9 Overall, I do not find that the management of Air Trek
10 apparently referring to the three Carr Brothers, two of whom own
11 the company, were without fault. They clearly allowed, or at
12 least did not closely enough supervise their employees at the
13 Winchester facility, to preclude and timely detect incorrect
14 failures by some employees, including some pilots and apparently
15 some mechanics to conscientiously comply with the company's
16 operations specifications and General Operations Manual, which are
17 plain enough on their face as to what they require.
18 Other employees, as the evidence shows, were extremely
19 conscientious and did their level best to follow the correct
20 procedures without being told or closely supervised.
21 Unfortunately, not all employees fell or fall into that
22 category, and much closer training and supervision appears to be
23 required of the Respondent's management since, of course, the
24 Respondent is a corporation and can only act through its
25 representatives.

1 The evidence I find does not show that Air Trek's
2 management intentionally maintained a deceptive system as charged,
3 or intentionally operated unairworthy aircraft. But it was lax
4 during the 2005 to 2007 period in making sure that it's pilots and
5 Maintenance personnel at its Winchester facility followed the
6 procedures required by its operations specification and General
7 Operations Manual.
8 This laxity, unfortunately, extended to management
9 occasionally making ill-advised statements, which may have
10 encouraged some employees to think that they could, with impunity,
11 disregard what was required by the operations specifications and
12 General Operations Manual, but I do not find that this laxity,
13 while requiring corrective action now and much closer supervision
14 by Respondent of its employees, and also much closer supervision
15 of the Respondent by the FAA, rises to the level of showing lack
16 of qualification, or coupled with the violations I have found,
17 warrants revocation of the Respondent's operating certificate.
18 Simply put, I believe that the problems the Respondent
19 experienced are not symptomatic of any sort of pattern and are
20 easily correctible.
21 Accordingly, I find the Administrator has not proven a
22 violation of FAR Section 119.69(a), which states that Part 135
23 certificate holders must have sufficient qualified management and
24 technical personnel to ensure the safety of its operations.
25 The failure to record discrepancies and return to

1 service in aircraft logs, and the use of other than actual weights
2 in calculating weights and balances, even if limited in scale,
3 occurred at the Winchester facility, but nevertheless are serious
4 deficiencies which are contrary to the FAR's, and the FAA approved
5 operations specifications, and General Operations Manual, and
6 created the potential for operation of unairworthy aircraft at
7 that facility on that occasion.
8 This could easily have resulted in serious accidents
9 with property damage, personal injuries, and loss of life.
10 There was testimonial evidence of aircraft being flown with un-
11 repaired discrepancies.
12 However, the evidence is basically anecdotal and is not
13 corroborated by records of any kind and, therefore, is
14 insufficient to support a finding that specific aircraft were
15 flown at specific dates and times with specific discrepancies
16 rendering them unairworthy.
17 I find that these deficiencies in the operations of Air
18 Trek while grave, did not occur at the Punta Gorda facility, but
19 in any event can be remedied by much closer oversight of company
20 operations by its management and by the FAA. And, as I have said,
21 I do not, at this time, warrant revocation of the company's
22 operating certificate.
23 What happened at Air Trek at its Winchester facility in
24 this regard was totally unacceptable from the standpoint of the
25 public interest in aviation safety.

However, I further find that these problems are not embedded in company policy and practices and that some, if not many, pilots adhere to, or at least attempted to adhere to the FAR's, and the company operations specifications, and General Operations Manual on their own.

All of these are problems that can be easily remedied by closer supervision of company operations by the company's managers and by the FAA. The situation does not warrant revocation of the company's operating certificate, but it does warrant an indefinite suspension of the company's operating certificate until the company has in place operating and maintenance procedures and training with adequate oversight and safeguards acceptable to the Administrator.

ORDER

As authority for my decision to modify the Administrator's Order of Revocation to an indefinite suspension, I cite the Board's decision in Administrator v. M & N Aviation, Inc. and Skyways Enterprises, Inc., NTSB Order No. EA-5270 (2006).

I FIND THAT Administration v. Air East, NTSB Order EA-5089 (2004), Administrator v. Aero Leasing, NTSB Order No. EA-5210 (2006), and Administrator v. Brassington, NTSB Order No EA-5180 (2005), are distinguishable factually and do not support revocation in this case.

IT IS SO ORDERED.

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5 DATED AND EDITED ON William A Pope, II.
6 November 6, 2008 Administrative Law Judge
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12 APPEAL
13 ADMINISTRATIVE LAW JUDGE POPE: I will advise the
14 parties that my decision can be appealed to the full National
15 Transportation Safety Board and I have prepared a written document
16 containing the specifics on how to appeal and when the appeal must
17 be filed, which I will now ask counsel to come forward and
18 receive.
19 And I will ask that a copy of this written Appellate
20 instruction be placed in the record as ALJ Exhibit Number 3.
21 (Whereupon, the document referred to
22 as Administrative Law Judge's
23 Exhibit ALJ-3 was
24 marked for identification and
25 received into evidence.)

1 ADMINISTRATIVE LAW JUDGE POPE: If requested to do so I
2 will read that document into the record.
3 Mr. Kelly, do you want me to read it into the record?
4 MR. KELLY: I don't think that's necessary, Judge. I'm
5 familiar with it. I know Mr. Winton is also.
6 ADMINISTRATIVE LAW JUDGE POPE: Mr. Winton, do you want
7 me to read it into the record?
8 MR. WINTON: No, Your Honor, we waive the reading.
9 ADMINISTRATIVE LAW JUDGE POPE: Is there anything
10 further to come before me in this case?
11 MR. WINTON: If I may, for a moment, Your Honor?
12 (Whereupon, Mr. Winton and Mr. Carr conferred.)
13 MR. WINTON: Your Honor, in light of the circumstances
14 and the extended period of time that my client has been on the
15 ground, and the difficulty in working with the Administrator
16 trying to get back in the air up until now, is there any way that
17 we can get any more clarification in your Order for the indefinite
18 suspension pending compliance with regard to what compliance?
19 My understanding is that it would be limited to your
20 findings concerning the remaining Complaint and not issues outside
21 of those findings.
22 ADMINISTRATIVE LAW JUDGE POPE: Mr. Winton, I wish I
23 could do that. However, I do not think the Board has authorized
24 its Judges, or even the Board itself, to substitute its judgment
25 for that of the Administrator. So I don't think that I can go any

1 further than I did in this Order that I just issued.
2 Mr. Kelly, what do you think about that?
3 MR. KELLY: Your Honor, I believe that that's correct.
4 The suspension would have to be until such time as the
5 Administrator is satisfied that the air carrier can operate in
6 full compliance with the Regulations.
7 ADMINISTRATIVE LAW JUDGE POPE: Well, can you give any
8 assurances? I'm not directing you to do anything at this point,
9 but can you give any assurance to Mr. Winton and Mr. Carr
10 privately as to what is likely to transpire now?
11 MR. KELLY: Well, Your Honor, to be honest with you --
12 ADMINISTRATIVE LAW JUDGE POPE: All you have to say to
13 that is, yes or no. I don't want to hear them and I don't want it
14 to be done in my presence, but I'm just asking you if you can, in
15 private, give any assurances to Mr. Winton and Mr. Carr as to what
16 the future holds for them.
17 MR. KELLY: Yes, Your Honor, after consultation with
18 our Flight Standards Division and --
19 ADMINISTRATIVE LAW JUDGE POPE: Well, how soon would
20 that be?
21 MR. KELLY: Your Honor, I need to review your decision.
22 I've just taken copious notes, but I will need to speak with our
23 Flight Standards Division and we'll do that tonight, but I can't
24 tell you right now when I will be --
25 ADMINISTRATIVE LAW JUDGE POPE: Well, I don’t want you

1 to tell me. I'm just trying to facilitate some communication
2 between you and Mr. Winton and Mr. Carr.
3 MR. KELLY: Well, I will commit -- I will commit to
4 telephone, Mr. Winton, on Monday --
5 ADMINISTRATIVE LAW JUDGE POPE: All right.
6 MR. KELLY: -- to at least discuss your decision with
7 him and I will commit to do that, Your Honor.
8 ADMINISTRATIVE LAW JUDGE POPE: Mr. Winton, I don't
9 think I can do anything more.
10 MR. WINTON: I appreciate you even inquiring that far,
11 Your Honor.
12 And just for my clarification, I was trying to keep up
13 with your reading of the decision, or at least orally reporting
14 it, my understanding is that there is a finding of 119.5(g) and
15 91.13(a), but a none finding of 91.7(a), 135.25(a), 119.69(a).
16 ADMINISTRATIVE LAW JUDGE POPE: I believe that is
17 correct, yes.
18 MR. WINTON: Thank you, Your Honor. That would be all.
19 ADMINISTRATIVE LAW JUDGE POPE: Without my going back
20 and looking here at my decision -- my eyes are getting blurry --
21 do you agree that's what the situation is?
22 MR. KELLY: I believe that was your decision, Your
23 Honor, yes.
24 ADMINISTRATIVE LAW JUDGE POPE: All right.
25 Well, if that's it, gentlemen, I wish you all a good

1 evening. And I note that it is now almost a quarter of 7:00 --
2 strike that. Is it a quarter of 8:00?
3 MR. KELLY: Yes, Your Honor.
4 ADMINISTRATIVE LAW JUDGE POPE: And I do appreciate the
5 fact that you've all waited patiently for me to get ready to give
6 my decision at this late hour, and I apologize for the lateness of
7 it.
8 (Whereupon, at 7:45 p.m., the hearing in the above-
9 entitled matter was concluded.)