SERVED: April 29, 2009

NTSB Order No. EA-5444

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 27th day of April, 2009

LYNNE A. OSMUS, Acting Administrator, Federal Aviation Administration, Complainant, v. DONALD H. KRIVITSKY and JOSEPH S. JABLECKI, Respondents.	Docket SE-18355

OPINION AND ORDER

Respondents, proceeding pro se, have appealed from the oral initial decision of Administrative Law Judge William R. Mullins, issued on December 2, 2008, following a hearing on the Administrator's motion for summary judgment.[1] The law judge

[1] A copy of the transcript of the proceedings is attached.

granted the Administrator's motion for summary judgment, thereby finding that the Administrator had established that respondents' aircraft was ineligible for an airworthiness certificate under 49 U.S.C. § 44704(d)[2] and 14 C.F.R. §§ 21.183(c) and (d).[3] We

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[2] The relevant portion of 49 U.S.C. § 44704(d) provides as follows: "The registered owner of an aircraft may apply to the Administrator for an airworthiness certificate for the aircraft. The Administrator shall issue an airworthiness certificate when the Administrator finds that the aircraft conforms to its type certificate and, after inspection, is in condition for safe operation."

[3] Title 14 C.F.R. §§ 21.183(c) and (d) provide as follows:

(c) Import aircraft. An applicant for a standard airworthiness certificate for an import aircraft type certificated in accordance with § 21.29 is entitled to an airworthiness certificate if the country in which the aircraft was manufactured certifies, and the Administrator finds, that the aircraft conforms to the type design and is in condition for safe operation.

(d) Used aircraft and surplus aircraft of the U.S. Armed Forces. An applicant for a standard airworthiness certificate for a used aircraft or surplus aircraft of the U.S. Armed Forces is entitled to a standard airworthiness certificate if—

(1) He presents evidence to the Administrator that the aircraft conforms to a type design approved under a type certificate or a supplemental type certificate and to applicable Airworthiness Directives;

(2) The aircraft (except an experimentally certificated aircraft that previously had been issued a different airworthiness certificate under this section) has been inspected in accordance with the performance rules for 100—hour inspections set forth in § 43.15 of this chapter and found airworthy by—

(i) The manufacturer;

(ii) The holder of a repair station certificate as provided in Part 145 of this chapter;

(iii) The holder of a mechanic certificate as authorized in Part 65 of this chapter; or

(iv) The holder of a certificate issued under Part 121 of this chapter, and having a maintenance and

remand for clarification concerning the law judge's order, and any necessary further proceedings, in accordance with this decision.

The Administrator alleged that respondents own an Alouette II Model SE 3130 helicopter (hereinafter "N225RW") that is not eligible for an airworthiness certificate under 49 U.S.C. § 44704(d) or 14 C.F.R. §§ 21.183(c) and (d). The Administrator's emergency order[4] stated that the helicopter was manufactured in 1959 in France, and that the United States has a bilateral agreement with France that covered the importation and exportation of the helicopter. The order also alleged that, pursuant to the bilateral agreement, the FAA issued Type Certificate No. 7H1 for N225RW, and that one of the requirements for the issuance of such a type certificate was certification from the state of manufacture that indicates that the aircraft was examined, tested, and found to meet the applicable airworthiness requirements of the Federal Aviation Regulations. The order also stated that, when the FAA issued its airworthiness certificate to N225RW on July 21, 2004, the Type

(..continued)
inspection organization appropriate to the aircraft type; and

(3) The Administrator finds after inspection, that the aircraft conforms to the type design, and is in condition for safe operation.

[4] Respondents have waived the expedited procedures normally applicable to emergency proceedings.

Certificate Data Sheet (TCDS) No. 7H1 was at revision level 14, which became effective on May 12, 2004, and contained a basis for certification that N225RW was airworthy.[5] The order further alleged that, on an "Application for Airworthiness Certificate" (FAA Form 8130-6), dated July 21, 2004, Robert Williford applied for a standard airworthiness certificate as "Owner" of N225RW and certified that N225RW was airworthy. The order also stated that John Marrs, an airframe and powerplant mechanic, certified that he had inspected N225RW and found it airworthy, and that Designated Airworthiness Representative (DAR) Robert Cernuda issued a standard airworthiness certificate in the Normal category for N225RW, in accordance with 14 C.F.R. § 21.183(d).[6] The order later alleged that, at the time that Mr. Marrs and DAR

[5] The TCDS for an aircraft is a formal description of the aircraft, and contains limitations as well as information required for type certification, such as airspeed limits, weight limits, thrust limitations, and the like. Federal Aviation Administration, Type Certificate Data Sheets (Make Model), *available at* http://www.airweb.faa.gov/Regulatory_and_Guidance_Library/rgMakeModel.nsf/MainFrame?OpenFrameSet. Type Certificate Data Sheets may be revised through a TCDS revision. The Administrator issues each such revision a number with which to identify and reference the revision.

[6] The Director, Aircraft Certification Service, or the Director's designee, may select Designated Airworthiness Representatives to act as representatives of the Administrator in order to conduct examinations, inspections, and testing services that are "necessary to issue, and to determine the continuing effectiveness of, certificates, including issuing certificates, as authorized by the Director of Flight Standards Service in the area of maintenance or as authorized by the Director of Aircraft Certification Service in the areas of manufacturing and engineering." 14 C.F.R. § 183.33(a).

Cernuda certified the aircraft as airworthy, they did not have the required data available to them to ensure that the aircraft complied with its type certificate, and that the aircraft was ineligible for the standard airworthiness certificate under 14 C.F.R. § 21.183(d). The order lists numerous reasons why the aircraft was ineligible for certification at the time DAR Cernuda issued the certificate.

The order also alleged that, in the latter part of 2006, FAA inspectors began a review of Alouette helicopter records and discovered that the recorded documentation on many such helicopters, including N225RW, did not support the issuance of a standard airworthiness certificate in the Normal category. The order stated that, as a result of this finding, the FAA sent Respondent Krivitsky a letter to two addresses, dated November 16, 2006, that informed Respondent Krivitsky that N225RW needed a reexamination, and asked him to contact the FAA to arrange for the reexamination. The order alleged that, on April 10, 2007, the FAA sent an additional letter to CAVU Copters, Inc.,[7] which stated that the FAA was exercising its authority to reinspect N225RW to determine whether N225RW was eligible to hold a standard airworthiness certificate. The

[7] The order states that CAVU Copters, Inc. was the corporation from which respondents purchased N225RW. Respondent Krivitsky was the service agent for CAVU Copters, Inc.; hence, the FAA sent correspondence to both respondents and CAVU Copters, Inc.

letter also requested that CAVU Copters, Inc., within 10 days of receipt of the letter, provide a properly completed Certificate of Airworthiness for Export signed by a representative of France, or an attestation certifying that N225RW complied with its type certificate and was in a condition for safe operation. The order alleged that, although the FAA sent the April 10, 2007 letter to the two addresses listed for CAVU Copters, Inc., the letter was nevertheless returned as "refused." The order stated that, on February 5, 2008, an FAA inspector sent an email message to both respondents and again requested to reexamine and review the records for N225RW. The order alleged that respondents have not made N225RW or its records available for inspection. As a result of these allegations, the Administrator's order asserted that N225RW did not meet the requirements of 49 U.S.C. § 44704(d) and 14 C.F.R. §§ 21.183(c) and (d), and ordered immediate suspension of the standard airworthiness certificate for the aircraft.[8]

Respondents filed a timely answer to the Administrator's order, in which they denied several allegations in the order and requested a hearing. Respondents' answer stated that, although

[8] We note that the Administrator's allegations and charge in this case is unusual; the Administrator did not charge either respondent with a violation of 14 C.F.R. § 91.7(a), which prohibits the operation of an unairworthy aircraft, or any other regulation. Instead, the Administrator suspended the airworthiness certificate for N225RW, and named the aircraft's owners as respondents.

revision 14 to the Type Certificate became effective on May 12, 2004, no one in the field received it until September 2004. Respondents stated that they had been awaiting an FAA inspection of N225RW. Respondents also argued that the regulations did not require that the aircraft receive an Export Certificate of Airworthiness from France. Respondents further alleged that the Administrator had impeded their attempts to comply with the requirement that they receive a Certificate of Airworthiness, and that the Administrator had erred with regard to numerous aspects of their oversight of these types of aircraft.

Subsequent to respondents' answer, the Administrator filed a motion for summary judgment, to which the Administrator attached numerous exhibits in an attempt to establish that N225RW had been manufactured in France, used by the German military, and subsequently sold to respondents. The motion and accompanying exhibits also showed that N225RW had been improperly certified as airworthy, as DAR Cernuda and Mr. Marrs had not reviewed the requisite records. The motion further stated that DAR Cernuda did not follow FAA policies concerning the review of required records.

Respondents opposed the Administrator's motion, and alleged that several material facts were in dispute. The law judge denied the Administrator's motion and ordered a hearing to determine whether Type Certificate revision 14 was effective at

the time that the Administrator issued the certificate of airworthiness, and concerning several paragraphs of the order that respondents denied.

At the hearing, the Administrator and Respondent Krivitsky restated their arguments. In particular, the Administrator's counsel asked the law judge to reconsider his denial of the motion for summary judgment, based on the fact that N225RW had received its airworthiness certificate on July 21, 2004, when revision 14 of the TCDS was already effective. Tr. at 7–8, 11. The Administrator's counsel also stated that respondents would be unable to provide "any kind of an airworthiness certificate." Tr. at 8.

Respondent Krivitsky replied to these arguments by stating that the Administrator is now attempting to revoke the airworthiness certificates of approximately 70 of these aircraft, because several other DARs certified the same types of aircraft in the same periods of time, based on their lack of awareness that revision 14 of the TCDS was effective at the time of certification. Tr. at 9–10. Respondent Krivitsky stated that, when he purchased N225RW, he believed it had an airworthiness certificate and relied on the FAA to have "done their job properly." Tr. at 10. Respondent Krivitsky also argued that, at the time of the aircraft's certification, it met the requirements for a standard airworthiness certificate, as it

was covered by a bilateral agreement with France that fulfilled United States standards, and that DAR Cernuda certified the aircraft as airworthy. Tr. at 11. Respondent Krivitsky implied that it was unfair for owners such as himself and Respondent Jablecki to suffer for the Administrator's errors in providing such faulty certifications. Tr. at 15.

The law judge observed that the Administrator had admitted that DAR Cernuda made a mistake in certifying the aircraft as airworthy, but that the Administrator was nevertheless taking action against all such helicopters that had received airworthiness certifications in error. Tr. at 13. The law judge also noted that respondents may have remedies for the Administrator's alleged mistake in other courts. Tr. at 16. The law judge granted the Administrator's motion for summary judgment, but did not explain his reasoning. Tr. at 17.

We remand this case back to the law judge for further fact-finding and clarification. In order for the Board to issue a well-reasoned decision on the merits of this case, the law judge must provide factual conclusions concerning several allegations in the complaint, as well as legal analyses concerning certain issues. Such allegations include the following: given that both parties agree that revision 14 of the Type Certificate was effective at the time of the certification, did the Administrator prove that N225RW did not fulfill the requirements

of revision 14 at the time that DAR Cernuda certified the aircraft as airworthy? If so, which requirements? Furthermore, given that both parties agree that DAR Cernuda erred in certifying the aircraft as airworthy, does this mistake preclude the Administrator from pursuing this action against respondents? Also, did respondents fail to provide the Administrator with the requisite paperwork or allow the Administrator to inspect the aircraft upon request, and, if so, does this failure amount to a violation of 49 U.S.C. § 44704(d), or 14 C.F.R. §§ 21.183(c) or (d)?

We note that we have previously held that the Administrator has the burden of proving that the aircraft was unairworthy by a preponderance of the evidence. Administrator v. Van Der Horst, NTSB Order No. EA-5179 at 3 (2005); see also Administrator v. Schwandt, NTSB Order No. EA-5226 at 2 (2006) (it is the Board's role to determine, after reviewing the evidence the Administrator presents, whether the Administrator has met the requisite burden of proof). In addition, we have long held that the standard for airworthiness consists of two prongs: (1) whether the aircraft conforms to its type certificate and applicable Airworthiness Directives; and (2) whether the aircraft is in a condition for safe operation. Administrator v. Doppes, 5 NTSB 50, 52 n.6 (1985) (citing 49 U.S.C. § 1423(c)); see also Administrator v. Anderson, NTSB Order No. EA-3976 at 2

(1993); Administrator v. Nielsen, NTSB Order No. EA-3755 at 4 (1992); Administrator v. Copsey, 7 NTSB 1316, 1317 (1991). We have recognized that, "the term 'airworthiness' is not synonymous with flyability." Doppes, supra note 12, at 52 n.6.

In determining whether an aircraft is airworthy in accordance with the aforementioned standard, the Board considers whether the operator knew or should have known of any deviation in the aircraft's conformance with its type certificate. See, e.g., Administrator v. Thibert, NTSB Order No. EA-5306 at 8—9 (2007); Administrator v. Yialamas, NTSB Order No. EA-5111 (2004); Administrator v. Bernstein, NTSB Order No. EA-4120 at 5 (1994); see also Administrator v. Easton, NTSB Order No. EA-4732 at 2 (1998) (acknowledging that significant risks exist when a pilot fails to confirm that an aircraft is airworthy following maintenance). While these cases decided whether the Administrator proved that the respondents in each case had operated an unairworthy aircraft, rather than whether the aircraft's certification of airworthiness was at issue, we nevertheless view them as instructive concerning the overall airworthiness standard. We therefore encourage the law judge to be mindful of this precedent in his evaluation of whether the Administrator has fulfilled her burden.

Based on the foregoing, we direct the law judge to provide a decision setting out both facts and application of law to

those facts sufficient to allow the Board to perform its review, should the parties again decide to appeal the remanded decision to the Board.

ACCORDINGLY, IT IS ORDERED THAT:

This case is remanded to the law judge for further proceedings consistent with this opinion and order.

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

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 A. STURGELL,               *
ACTING ADMINISTRATOR,             *
Federal Aviation Administration,  *
                                  *
                   Complainant,   *
     v.                           *    Docket No.:  SE-18355
                                  *    JUDGE MULLINS
DONALD H. KRIVITSKY               *
JOSEPH S. JABLECKI                *
                                  *
                  Respondents.    *
* * * * * * * * * * * * * * * * * *
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NTSB Courtroom
624 Six Flags Drive
Suite 150
Arlington, Texas

Tuesday,
December 2, 2008

The above-entitled matter came on for hearing, pursuant to Notice, at 8:58 a.m.

BEFORE: WILLIAM R. MULLINS
Administrative Law Judge

APPEARANCES:

On behalf of the Administrator:

STEVE HAROLD, ESQ.
Federal Aviation Administration
Southwest Region
2601 Meacham Boulevard, 6th Floor
Ft. Worth, Texas 76137

On behalf of the Respondent:

JOSEPH S. JABLECKI, PRO SE
140 Rolling Hill Drive
Daphne, Alabama 36526

I N D E X

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WITNESSES	DIRECT	CROSS	REDIRECT	RECROSS
None.				

E X H I B I T S

EXHIBIT NUMBER	MARKED	RECEIVED
RESPONDENT		
R-1	9	Not Offered

1 P R O C E E D I N G S

2 ADMINISTRATIVE LAW JUDGE MULLINS: We'll go on the record
3 at this time.

4 This is a hearing before the National Transportation Safety
5 Board being held here in Arlington, Texas. Today is the 2nd day of
6 December 2008. And the case is captioned Administrator, Federal
7 Aviation Administration, Complainant, versus Don H. Krivitsky and
8 Joseph S. Jablecki, Respondents. Board Docket Number is SE-18355.

9 And as you mark exhibits to introduce, be sure and mark
10 that exhibit with that number in addition to the normal numbering
11 system.

12 Now, for the record, I'd like to state that, through some
13 error on behalf of our office in Washington, this case initially was
14 in two parts. There were two cases: versus Mr. Krivitsky and another
15 one versus Mr. Jablecki. But the subject matter of the litigation
16 is a helicopter that the Administrator is seeking to revoke the
17 airworthiness certificate. And so the case ultimately now is under
18 the one Board Docket Number SE-18355, and will proceed under that
19 number.

20 At this time I'd like a statement of appearance for the
21 record.

22 First from the Administrator?

23 MR. HAROLD: Steve Harold from the Office of the Regional
24 Counsel, Southwest Region, 2601 Meacham Boulevard, Ft. Worth, Texas.

25 ADMINISTRATIVE LAW JUDGE MULLINS: Okay.

26 And Mr. Jablecki? Well, let me ask you this, before we

1 go, I have the letter from Mr. Krivitsky about his health problems
2 and he's given you full authority to represent him in whatever interest
3 that you folks have. But he'd mentioned in the letter that you're
4 a doctor?
5 DR. JABLECKI: Yes, sir.
6 ADMINISTRATIVE LAW JUDGE MULLINS: Would you prefer that
7 we refer to you as Dr. Jablecki, or Mr. Jablecki, or --
8 DR. JABLECKI: Whatever makes you comfortable, sir.
9 ADMINISTRATIVE LAW JUDGE MULLINS: Okay.
10 DR. JABLECKI: I'm good with anything.
11 ADMINISTRATIVE LAW JUDGE MULLINS: Well --
12 DR. JABLECKI: Joe is fine. Whatever.
13 ADMINISTRATIVE LAW JUDGE MULLINS: -- we'll see how it
14 works. Okay.
15 DR. JABLECKI: Yes, sir.
16 ADMINISTRATIVE LAW JUDGE MULLINS: Go ahead and announce
17 your appearance for the record, though.
18 DR. JABLECKI: Yes, sir. Dr. Joseph Jablecki, 140 Rolling
19 Hill Drive, co-owner of the Alouette with CAVU Copters.
20 ADMINISTRATIVE LAW JUDGE MULLINS: And where do you live,
21 sir?
22 DR. JABLECKI: 140 Rolling Hill Drive, Daphne, Alabama.
23 ADMINISTRATIVE LAW JUDGE MULLINS: Oh, okay. I do think
24 you put the Alabama in there.
25 DR. JABLECKI: I didn't. I'm sorry, sir.
26 ADMINISTRATIVE LAW JUDGE MULLINS: All right. All right.

1 Is there any preliminary matters that need to be addressed by me prior
2 to opening statement?
3 First from the Administrator.
4 MR. HAROLD: Well, first of all, Your Honor, do you mind
5 if we sit when we --
6 ADMINISTRATIVE LAW JUDGE MULLINS: That'll be fine.
7 MR. HAROLD: -- address the Court, or --
8 ADMINISTRATIVE LAW JUDGE MULLINS: That'll be fine. Small
9 courtroom.
10 MR. HAROLD: Okay. Yes, Your Honor, we have a couple of
11 preliminary matters --
12 ADMINISTRATIVE LAW JUDGE MULLINS: Okay.
13 MR. HAROLD: -- before we get started this morning.
14 First, the Administrator would like to move this Court to
15 reconsider its denial of our motion for summary judgment. As I think
16 Your Honor determined that there were material facts in dispute, but
17 in the denial you mentioned two of them, one of them being the
18 affectivity of Rev 14 of the type certificate data sheet. And the
19 date is clearly on it, and we provided the Court that as an exhibit
20 to that motion, and it was Exhibit 5 to the motion for summary judgment,
21 which clearly shows the date as May 12, 2004.
22 The helicopter -- I don't think anybody's contested that
23 it received its airworthiness certificate July 21, 2004, which is
24 several months after that date of that type certificate data sheet.
25 Additionally, I think in the denial Your Honor mentioned
26 that there was some question as to whether or not the helicopter had

1 been made available for inspection. Well, I would submit to the Court
2 that as far as whether or not it's available for inspection is probably
3 not the core issue.
4 When we look at 44709, obviously there it encapsulates a
5 large number of things, including the books and records of the
6 helicopter, as well as a possible physical examination thereof.
7 In this particular instance, in the 44709 letter that went
8 out in April of 2007, we specifically asked the Respondents to provide
9 us with what is commonly called a CDM (ph.), sometimes an export C
10 of A, to indicate the helicopter had been examined and found to comply
11 with the regulations and with the type certificate 7H1 for this
12 particular helicopter, and was in condition for safe operation.
13 Respondents haven't provided us anything, and I think -- I have been
14 told that they have, on telephone conference, admitted that there
15 is no such document that they have in their possession, nor can they
16 provide any kind of an airworthiness certificate, standard
17 airworthiness certificate that was issued by any other entity,
18 including the FAA, other than the one at issue in this case.
19 So I don't see those -- or the Administrator doesn't see
20 those as genuine facts where we even need to go through the hearing
21 that is scheduled for today, and we would move that you would reconsider
22 your denial and grant our motion for summary judgment on those bases.
23 ADMINISTRATIVE LAW JUDGE MULLINS: Want to respond,
24 Dr. Jablecki?
25 DR. JABLECKI: Yes, sir. In regard to his first statement,
26 to mark this as an exhibit, I write this number one and say Defendant

1 Exhibit 1. Would that -- okay.

2 ADMINISTRATIVE LAW JUDGE MULLINS: Just put R-1,

3 Respondent --

4 DR. JABLECKI: R-1, and put that SE number?

5 ADMINISTRATIVE LAW JUDGE MULLINS: Yes, please.

6 DR. JABLECKI: I have it for both --

7 ADMINISTRATIVE LAW JUDGE MULLINS: You have copies for --

8 DR. JABLECKI: Yes, sir.

9 ADMINISTRATIVE LAW JUDGE MULLINS: Okay.

10 (Whereupon, the document referred to

11 as Respondent's Exhibit 1 was

12 marked for identification.)

13 DR. JABLECKI: This is an e-mail from Mr. Steven Saunders,

14 who's one of the DARs that certified these types of aircraft, not

15 ours. Ours was certified by Mr. Robert Cernuda.

16 In addition to those two DARs, there were several other

17 DARs that certified the same types of aircraft in the same periods

18 of time. As I understand it, there's about 70 of these machines that

19 received airworthiness certificates, which now the FAA is trying to

20 revoke.

21 We purchased this aircraft for a specific purpose, that

22 being a business opportunity. We spent a tremendous amount of money

23 on it, relying on the government, specifically the FAA to have done

24 their job properly, because when we bought it, it had the certificate.

25 Now --

26 ADMINISTRATIVE LAW JUDGE MULLINS: Well, let me stop you

1 there. All right. You're going to have -- hopefully you will have
2 an opportunity to make an opening statement. Right now I need for
3 you to --
4 DR. JABLECKI: Respond to him?
5 ADMINISTRATIVE LAW JUDGE MULLINS: -- address your response
6 to --
7 DR. JABLECKI: Yes, sir. Okay. In regard to that Revision
8 14 effective date, as you'll note there by Mr. Saunders, he says that
9 anyone whose aircraft was certified prior to November of that year,
10 as opposed to May, should be, you know, upset.
11 Basically, even though the date on the -- effective date
12 on the revision was May, they didn't have it in the field to use.
13 Granted it may have been printed, granted it may -- but they did not
14 receive it, so they were not aware of it when they made these
15 certifications.
16 The difference between 13 and 14 is prior military history.
17 And I would point out that, as the attorney for the Administrator
18 said, that originally they wanted the certificate of export, and that
19 was their main concern. Now it has evolved into the fact that the
20 aircraft had a prior military history, and that's the thrust of their
21 argument, as opposed to the fact that it did not have the certificate
22 of export from France.
23 It doesn't -- we would argue, if you'll allow us, or I will
24 argue, if you'll allow me, that it didn't need it because it's under
25 a bilateral agreement with France that it meets all the standards
26 necessary for import into the United States.

1 And also, we do have statements of conformity from Mr. Marrs
2 and Mr. Cernuda, and you've seen this also, that they say it does
3 meet all the requirements for a standard airworthiness certificate
4 at the time that it was certified.
5 ADMINISTRATIVE LAW JUDGE MULLINS: Mr. Marrs was the DAR
6 that --
7 DR. JABLECKI: He was the IA, the --
8 ADMINISTRATIVE LAW JUDGE MULLINS: Who's the DAR that
9 certified --
10 DR. JABLECKI: The DAR was Mr. Cernuda.
11 ADMINISTRATIVE LAW JUDGE MULLINS: Cernuda?
12 DR. JABLECKI: Yes, sir.
13 ADMINISTRATIVE LAW JUDGE MULLINS: Is Mr. Cernuda here?
14 MR. HAROLD: We didn't call him, Your Honor.
15 ADMINISTRATIVE LAW JUDGE MULLINS: Okay.
16 MR. HAROLD: I would point -- maybe it'll help the Court,
17 if you'll look also at Exhibit 4 to our motion for summary judgment,
18 it's an application for airworthiness certificate. It's an FAA Form
19 8130-6.
20 ADMINISTRATIVE LAW JUDGE MULLINS: Let me find it.
21 MR. HAROLD: Okay. And on that application just referred
22 to by Mr. Jablecki, the owner, Mr. Williford, at that time, in the
23 owner certification block, indicated that the type certificate data
24 sheet was at Rev 14 at that time. And the date is 7/21/04.
25 So someone, whoever filled out that form at that time, dated
26 it 7/21/04, knew about Rev 14, otherwise, why would they put it on

1 the form?

2 ADMINISTRATIVE LAW JUDGE MULLINS: But that's not signed

3 by the DAR.

4 MR. HAROLD: It is at the bottom, Your Honor. You'll have

5 Mr. Williford signed it in the owner certification, then you'll have

6 the inspection signed by Mr. Marrs, then you'll have down at the bottom

7 where DAR Cernuda actually issued the airworthiness certificate.

8 Number 4, are you looking at Exhibit 4?

9 ADMINISTRATIVE LAW JUDGE MULLINS: Yes.

10 MR. HAROLD: Okay. Do you see where I'm referring to?

11 DR. JABLECKI: My response to that, Your Honor, would be

12 none of these people are here, of course, to testify as to why that's

13 there, but maybe because that was an effective date of May for that

14 revision, that was the applicable revision, but I'm saying that they

15 did not have that in the field to actually go by. That was the revision

16 in force at the time of the certification, but they did not have it

17 physically in their hands to go by.

18 ADMINISTRATIVE LAW JUDGE MULLINS: My concern is what -- the

19 Administrator's position is that their representative, DAR Mr. Cernuda,

20 erred in granting this airworthiness certificate. And what you're

21 saying is that he erred by not having the right document.

22 DR. JABLECKI: An error is an error.

23 ADMINISTRATIVE LAW JUDGE MULLINS: But it is still a DAR

24 error.

25 DR. JABLECKI: It's interesting, Your Honor, though that

26 the error occurred not only with Mr. Cernuda, but with Mr. Saunders

1 and some aircraft that were certified in Utah, some aircraft that
2 were certified in Washington state, some aircraft that were certified
3 in West Virginia. It's curious as to how all these people made that
4 same mistake, if, in fact, that particular document was in their hands.
5 ADMINISTRATIVE LAW JUDGE MULLINS: But, I understand that,
6 and I understand your concern about that. The Administrator has
7 admitted, I think, basically, that their representative screwed up.
8 How does the fact that these other representatives screwed
9 up even have an impact on this hearing and this particular helicopter?
10 I mean it's like if there's 40 or 50 people speeding out there, and
11 you have to catch all of them instead of one. And I understand that
12 the Administrator's taken action against -- or starting to take action
13 against all of these helicopters.
14 MR. HAROLD: Your Honor, yes, indeed. As a matter of fact,
15 Your Honor has heard the first case.
16 ADMINISTRATIVE LAW JUDGE MULLINS: Well, yes, I know I've
17 heard one previously.
18 DR. JABLECKI: Yes, sir. I guess that if the Administrator's
19 admitting that our peril, our agony, is the result of their error,
20 then I can accept that. And they can buy the helicopter from us and
21 pay for all our pain and suffering, and we'll walk away.
22 ADMINISTRATIVE LAW JUDGE MULLINS: Well, that may
23 be -- that's probably an over-simplification. That's not going to
24 happen in these proceedings because the Safety Board has no
25 jurisdiction or authority to go there, and I don't know why your
26 ramifications are in other courts of law.

1 DR. JABLECKI: I don't either.

2 ADMINISTRATIVE LAW JUDGE MULLINS: It's something that

3 you need to pursue. But I was concerned at the time the summary judgment

4 came in about -- to raise the issue about that.

5 DR. JABLECKI: Well, I still believe that to be the fact.

6 I don't know that I could prove it today, but --

7 ADMINISTRATIVE LAW JUDGE MULLINS: But their Exhibit 4

8 would show that they acknowledged at the time that that was a correct

9 one, whether they had it or not. Somebody knew and Mr. Cernuda signed

10 off on it.

11 DR. JABLECKI: And then the FAA signed off on that. I

12 understand. But it is also Mr. Cernuda is the DAR, but also Mr. Marrs

13 is the IA. It's interesting neither one of them caught, or acted

14 upon, that phrase that was added between 13 and 14, a simple phrase

15 about --

16 ADMINISTRATIVE LAW JUDGE MULLINS: Military --

17 DR. JABLECKI: -- prior military history, which is the

18 result of Mr. Loomis's investigation on BO 105s, if you want a little

19 history. Those were, in fact, military-produced helicopters, and

20 Mr. Loomis rightfully found that they were improperly certified.

21 So he took it upon himself to investigate other machines and found

22 the Alouette, some of them had prior military history, but the TC7-8

23 did not say anything about that being a problem in Revision 13.

24 Mr. Loomis went to Aerospatiale-Eurocopter America and

25 spoke with them about that, and he was told that they came off the

26 exact same assembly line. There was no difference in the manufacturing

1 of Alouette for military use versus Alouette for civilian use.
2 And as I mentioned before, the French government does have
3 a bilateral agreement with the United States for these aircraft, that
4 they are produced under the standards of the TC.
5 So he kind of went off on the wrong tangent in the beginning
6 of all of this, and as -- you know, it's evolved from now. As you
7 may recall in the last hearing, the big issue was the certificate
8 of export or import from France. Big deal.
9 Well, that's not the big issue anymore. Now they've
10 forgotten about that somehow and gone to this Revision 14, which is
11 hard to fight. It's just a matter of did they, in fact, really have
12 that in their hands when they certified the machine, or did they not
13 have it and used the old one and make a mistake. Either way, you're
14 right, they made an error.
15 And I guess we have to suffer for their errors. We have
16 to -- our machine goes down the toilet. We've not been able to use
17 it for two years. It's basically sitting around as a lawn ornament,
18 and, you know, you're talking a quarter of a million dollar machine.
19 This was my friend, Don's, you know, life savings. I
20 resigned my position as the director of tuberculosis for the State
21 of Alabama to go into this business, and literally, literally days
22 before we start our contract with the USS Battleship Alabama Park
23 we get the letter from Loomis and have not been able to use the machine
24 since.
25 ADMINISTRATIVE LAW JUDGE MULLINS: Well, Dr. Jablecki,
26 sometimes there are cases that are very difficult for me because,

1 you know, I've had this belief that we're supposed to be involved
2 in all things fair. This is not fair to you and Mr. Krivitsky, but
3 the Administrator has also an obligation to air safety, and whether
4 this is one of those obligations, it's one that they have chosen to
5 pursue as an obligation in air safety.
6 Now, as I said, I don't know what repercussions or -- not
7 repercussions, but I don't know --
8 DR. JABLECKI: Remedies?
9 ADMINISTRATIVE LAW JUDGE MULLINS: -- remedies you might
10 have in other courts. But I would just suggest to you that you need
11 to pursue those because this court is not going to be able to help
12 you.
13 I think Mr. Harold is particularly pointing out here that,
14 under Exhibit 4, that both -- that Mr. Cernuda was aware of this
15 revision about the military helicopter.
16
17
18 ORAL INITIAL DECISION
19 ADMINISTRATIVE LAW JUDGE MULLINS: Then I will have to
20 reconsider the motion for summary judgment, and I will grant the
21 Administrator's summary judgment on that issue, on the issue of the
22 airworthiness certificate.
23
24 ORDER
25 And therefore the Administrator's order will be affirmed
26 based on the motion.

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5 WILLIAM R. MULLINS

6 Administrative Law Judge