

SERVED: December 24, 2009

NTSB Order No. EA-5494

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 23rd day of December, 2009

<hr/>)	
J. RANDOLPH BABBITT,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-18355RM
v.)	
)	
DONALD H. KRIVITSKY and)	
JOSEPH S. JABLECKI,)	
)	
Respondents.)	
)	
<hr/>)	

OPINION AND ORDER

Respondents, proceeding pro se, have appealed from the second oral initial decision of Administrative Law Judge William R. Mullins, issued on June 25, 2009, following a hearing.¹ The law judge denied respondents' appeal of the Administrator's

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

order, which suspended the standard airworthiness certificate for respondents' imported Aerospatiale Alouette II helicopter (hereinafter "N225RW"), pending compliance with 49 U.S.C. § 44704(d)² and 14 C.F.R. §§ 21.183(c) and (d).³ We deny

² The relevant portion of 49 U.S.C. § 44704(d)(1) 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

respondents' appeal.

On April 29, 2009, we issued an order remanding this case to the law judge for further clarification and analysis. NTSB Order No. EA-5444. Our opinion remanding this case provided a basic summary of the Administrator's allegations and respondents' arguments, and directed the law judge to consider cases concerning 14 C.F.R. § 91.7, which prohibits operation of an unairworthy aircraft, as instructive.⁴ After our order remanding the case, the law judge ordered a hearing, at which he accepted the testimony of several witnesses and allowed both parties to provide exhibits and arguments.

In the order suspending the standard airworthiness certificate for N225RW, the Administrator alleged that respondents' Alouette II Model SE 3130 helicopter is not currently eligible for an airworthiness certificate under 49 U.S.C. § 44704(d) or 14 C.F.R. §§ 21.183(c) and (d). The

(..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 We noted in our opinion that the case law regarding 14 C.F.R. § 91.7 was not binding, as it concerned operation of an unairworthy aircraft, but nevertheless recommended that the law judge consider our jurisprudence in resolving cases concerning § 91.7.

Administrator's emergency order⁵ stated that the helicopter was manufactured in 1959 in France, that the FAA issued Type Certificate No. 7H1 for it, and that one of the requirements for the issuance of such a type certificate was certification from the state of manufacture indicating that the aircraft was examined, tested, and found to meet the applicable airworthiness requirements of the Federal Aviation Regulations. 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 the 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). The order alleged that, at the time that Mr. Marrs and DAR 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 design, and that the aircraft was therefore ineligible for the standard airworthiness certificate under 14 C.F.R.

⁵ Respondents subsequently waived the expedited procedures normally applicable to emergency proceedings.

§ 21.183(d). The order lists numerous reasons why the aircraft was ineligible for certification at the time DAR Cernuda issued the certificate. 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 N225RW's standard airworthiness certificate.⁶

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 revision 14 to Type Certificate 7H1 became effective on May 12, 2004, it was not distributed until September 2004. 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 erred with regard to numerous aspects of their oversight of Alouette IIs.

Subsequent to respondents' answer, the Administrator filed a motion for summary judgment, which respondents opposed. The law judge ordered a hearing, at which he granted the

⁶ As noted above, and as we stated in our opinion remanding this case, 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 the aircraft itself.

Administrator's motion for summary judgment, but did not explain his reasoning. We remanded the case for further clarification and analysis.

Upon remand, the law judge ordered a hearing, at which the Administrator called Robert Loomis, an aviation safety inspector from the Dallas Flight Standards District Office (FSDO). Inspector Loomis identified several documents depicting the history of N225RW.⁷ During the Administrator's counsel's questioning of Inspector Loomis at the hearing, the Administrator's counsel clarified that reexamination of N225RW was no longer an issue in the Administrator's case, and respondents agreed. Tr. at 80-82.⁸ Inspector Loomis opined that N225RW was not eligible for a standard airworthiness

⁷ Inspector Loomis identified: Exhibit G-2, e-mail correspondence and data from Eurocopter indicating that Alouette IIs were used for military purposes; Exhibit G-3, a certified copy of airworthiness files and registration documents from the FAA, including Form 8130-8, which is the application for N225RW's airworthiness certificate in the Normal category, a copy of the airworthiness certificate at issue, and records in support of the certification, such as bills of sale and a statement from Mr. Marrs that the aircraft conformed to its type design.

⁸ Both parties agreed at the hearing that respondents may now operate N225RW under an experimental airworthiness certificate, for which it recently underwent an inspection. Unlike a standard airworthiness certificate, such experimental certificates generally do not allow for operation of an aircraft in commercial service. We remind the Administrator that, where the FAA no longer pursues an allegation listed in the complaint, such as the issue in this case concerning reexamination, the Board's Rules of Practice allow for the Administrator to submit an amended complaint. 49 C.F.R. § 821.12(a); see also 49 U.S.C. §§ 44709(c) and 44710(c).

certificate, Normal category, because it does not fulfill the requirements in its type certificate data sheet (TCDS); in particular, Inspector Loomis testified that respondents do not have a Certificate de Navigability from France, which the TCDS requires.⁹ As such, Inspector Loomis concluded that N225RW should have never received a standard airworthiness certificate.

At the hearing, Inspector Loomis reviewed an attestation from the French Aviation Civile,¹⁰ stating that N225RW was manufactured according to its French and U.S. TCDS. On cross-examination, respondents' representative, while questioning Inspector Loomis, asserted that an attestation was sufficient to meet the requirements of the TCDS, even though it was not a Certificate de Navigability. Tr. at 111. The Administrator's

⁹ The Administrator introduced the TCDS into the record, and it provides as follows:

A U.S. Airworthiness Certificate may be issued on the basis of a Certificate of Airworthiness for Export signed by a representative of the Secretariat General a l'Aviation Civile containing the following statement: "The helicopter covered by this certificate has been examined and found to comply with U.S. Civil Air Regulation Part 6, dated January 15, 1951, including Amendments 6-1 through 6-8, and with the Special Requirements notified to the Government of France by the Government of the United States of America and conforms to T.C. 7H1.["]

Exh. G-8 at 5. The Administrator refers to this requirement as a Certificate de Navigability.

¹⁰ The attestation appears to be on letterhead from the "Aviation Civile." The agency that oversees flight safety and certification in France is known as the Direction Générale de l'Aviation Civile (DGAC).

counsel responded that the Administrator does not emphasize form over substance in such cases, but that the attestation was not sufficient. Inspector Loomis stated that the attestation is not satisfactory because it clearly states that the French authorities had not inspected N225RW, when the TCDS requires inspection.

In addition, the Administrator called Rand Foster, who is an FAA employee on the Special Emphasis Investigations Team in Fort Worth, to testify. Mr. Foster stated that he had reexamined N225RW in April 2009, in an effort to "standardize the process" concerning the evaluation of the airworthiness of Alouette II helicopters. Tr. at 130. Mr. Foster identified an FAA notice to inspectors and the public that stated that, since 2004, the FAA has had concerns with military surplus helicopters. Exh. G-7. Mr. Foster also identified the TCDS applicable to N225RW. Exh. G-8 (TCDS 7H1, Revision 14, dated May 12, 2004). Mr. Foster testified that the TCDS requires that the French government provide "a certificate of airworthiness ... for each individual helicopter for which application for certification is made" (Tr. at 135), and that the TCDS sets forth a two-step process for the FAA in providing the certificate: examination of the helicopter by the French, and a finding concerning airworthiness based on the examination (Tr. at 137).

The Administrator also called Mark Schilling, the FAA manager of the rotorcraft directorate in Fort Worth who has authority over all rotorcraft. Tr. at 145. Mr. Schilling provided detailed testimony concerning airworthiness standards and FAA requirements with regard to issuing certificates of airworthiness for imported rotorcraft. Mr. Schilling stated that, to obtain an eligible serial number for an aircraft that an owner seeks to bring to the United States, he or she must have an export certificate of airworthiness. Mr. Schilling testified that examination of the aircraft is an important requirement in this regard; France has export authority over Alouette IIs, and Mr. Schilling stated that the DGAC, the French Civil Aviation Authority, must examine the aircraft to determine its airworthiness, and then provide the certificate of airworthiness. Mr. Schilling stated that the certificate from France is critical to this case because the FAA does not have the type design data for any aircraft issued under 14 C.F.R. § 21.29, and that such aircraft could undergo modifications that could render it unairworthy. Mr. Schilling testified repeatedly that the TCDS takes priority over advisory circulars and FAA orders,¹¹ and corroborated Mr. Foster's testimony that the TCDS

¹¹ On cross-examination, respondents' representative introduced Advisory Circular 21-23A, which states that the FAA "will accept various types of certifications ... attesting conformity to the U.S. type design and condition for safe operation ... and are

applicable to Alouette IIs requires examination of the helicopter.

Mr. Schilling stated that § 21.183 requires compliance with the TCDS in this case, as follows:

[T]he type certificate data sheet, which is part of the limitations and conditions of the type certificate and was issued in accordance with the appropriate regulations, states how an import aircraft is supposed to be approved. It requires an export [certificate of airworthiness] to first identify an eligible serial number, and, secondly, the export [certificate of airworthiness] must have the certifying statement by the authority, which is the country of manufacture, that says they have examined [it] and found it meets the type certificate and is in a condition for safe operation.

Tr. at 162-63. Mr. Schilling testified that, although respondents acquired an attestation from Inspector Y. Prouvenc at "Groupement Pour la Securite Aviation Civile,"¹² dated March 5, 2003, the attestation does not fulfill the requirements of the TCDS applicable to N225RW, because it does not indicate

(..continued)
appropriately endorsed by the exporting [civil aviation agency] or a duly authorized designee." Tr. at 219; see also Exh. R-5. Respondents' representative also identified portions of FAA Order 8130.2E, which state a non-U.S. manufactured aircraft must be accompanied by a certifying statement of the country of manufacture. Tr. at 214; Exh. G-11 at 213. Mr. Schilling testified that the TCDS requires a certificate of airworthiness from France, and that the requirements of a TCDS supersede FAA guidance.

¹² Groupement Pour la Securite Aviation Civile appears to be a French organization separate from the DGAC, but involved in promoting aviation safety by conducting inspections.

that the French inspected the aircraft.¹³ Moreover, Mr. Schilling stated that the document did not appear to be from the French DGAC. Mr. Schilling also described the requirements of § 21.183(d), and stated that, for subsection (d), it is the applicant's responsibility to present evidence with an application for airworthiness that substantiates conformity with the FAA-approved type design, after which the FAA will make a finding concerning whether the aircraft conforms to its type design. Tr. at 171. Mr. Schilling stated that the FAA does not typically issue a U.S. certificate of airworthiness for an aircraft manufactured outside the United States when no export certification is available. Tr. at 175-76.

With regard to the fact that the FAA had issued a certificate of airworthiness following DAR Cernuda's and Mr. Marrs's evaluation of the aircraft, Mr. Schilling stated that anyone issuing an airworthiness certificate must review the TCDS. Tr. at 166. Mr. Schilling described the statement of

¹³ The attestation provides as follows:

Although we have not inspected ourselves [helicopter SE 3130 - Alouette II S/N 1312], we can certify ... on the basis of the information listed on the individual record inspection log book at Eurocopter's [sic], that ... the basis [sic] design of the above mentioned helicopter ... was at the time of manufacture ... compliant with DGAC Type Certificate No. 1 and with the FAA Type Certificate No. 7H1.

Exh. R-1.

conformity, which DAR Cernuda provided, as "inaccurate," because N225RW does not comply with its TCDS. Mr. Schilling further testified that no FAA field office or FAA representative has authority to waive regulatory requirements. Mr. Schilling concluded his testimony on direct examination by opining that N225RW is not currently eligible for a standard airworthiness certificate, and, on cross-examination, acknowledged that he had instructed FAA offices to stop issuing certificates based on attestations that do not satisfy the requirements of the TCDS.

In response to the Administrator's case-in-chief, Respondent Jablecki, who co-owns the aircraft with Respondent Krivitsky, testified that he believed he and Respondent Krivitsky adequately checked the records for N225RW when they decided to purchase it, and trusted the FAA and "believed that they did their job" when they issued a standard certificate of airworthiness for N225RW. Tr. at 250. Respondent Jablecki described their purchase of N225RW, which they selected from among three Alouette IIs, all of which had standard airworthiness certificates. Respondent Jablecki testified that at least 70 such aircraft received standard airworthiness certificates from the FAA. Respondent Jablecki also stated that N225RW was safe and should be permitted to retain its standard airworthiness certificate. Respondents did not provide any other witness testimony at the hearing.

At the conclusion of the hearing, the law judge issued an oral decision, in which he summarized the evidence and concluded that the Administrator proved that N225RW did not fulfill the requirements of its TCDS.¹⁴ The law judge stated that, "there's not a safety of flight issue with these helicopters," and therefore focused on whether N225RW fulfilled the requirements of its TCDS. Initial Decision at 287. The law judge stated, "[i]f there's anybody that didn't do their due diligence, it was the representatives of the Administrator," because the Administrator issued the standard certificate of airworthiness for N225RW. Id. at 293. The law judge stated that the TCDS required that N225RW be examined to determine its airworthiness, and, because no one had examined it, it was therefore not eligible for a standard certificate of airworthiness. The law judge again stated that the Administrator had wrongfully issued the original certificate, but nevertheless sustained the Administrator's order.

On appeal, respondents essentially reargue the same points that they presented at the June 25, 2009 hearing. Respondents' brief quotes 14 C.F.R. § 21.183, 49 U.S.C. § 44704(c), FAA Order

¹⁴ The law judge acknowledged that this case is an in rem action concerning the certification of the aircraft, even though Respondents Krivitsky and Jablecki were named as respondents. The law judge also stated that this case does not involve respondents' failure to allow for FAA inspection of the aircraft, even though the Administrator's complaint alleged that respondents had not allowed the FAA to inspect the aircraft.

8310.2F, Advisory Circular 21-23A, and training materials for FAA inspectors concerning airworthiness,¹⁵ and the bilateral agreement between the FAA and the French civil aviation agency, in an effort to show that the attestation they obtained from the French government is sufficient to render N225RW eligible for a standard certificate of airworthiness, Normal category.

Respondents also contend that the Aircraft Control Certificate from the French Bureau Veritas¹⁶ provides the same information as that which would appear in an export certificate of airworthiness. Appeal Br. at 12 (stating that the control certificate provides that the aircraft met the requirements of French airworthiness certification, and that the aircraft, when newly manufactured, was in a condition for safe operation); Exh. R-4. Respondents further assert that the Administrator abused his authority in pursuing this case on an emergency basis, and that the Administrator does not have authority to suspend the aircraft's certificate, because N225RW is a safe aircraft.¹⁷ The

¹⁵ Although respondents' brief references training materials, respondents did not submit such items into evidence at the hearing.

¹⁶ Bureau Veritas is an international organization that provides technical services concerning product testing and certification, regulatory compliance, conformity assessment, consulting, and training. Bureau Veritas is not part of the French government.

¹⁷ We note that, after submitting their appeal brief, respondents sent a letter and several pages of documents to the law judge regarding a request they made of the FAA for records under the Freedom of Information Act (FOIA), 5 U.S.C. § 552. We do not

Administrator opposes each of respondents' arguments, and urges us to affirm the law judge's decision.¹⁸

Based on the plain language of the TCDS, N225RW is not eligible for a standard certificate of airworthiness, Normal category, because it did not receive a certificate of airworthiness from France. In lieu of a certificate of airworthiness from France, respondents provided an attestation from the French government. This attestation, however, does not fulfill the terms of the TCDS because the TCDS requires examination of the aircraft, and the attestation clearly states that the French government did not inspect the aircraft. This lack of inspection indicates that N225RW does not fulfill the requirements of its type certificate. Accordingly, the FAA's evidence demonstrates that respondents have not satisfactorily shown that N225RW meets the requirements of its type certificate, as required in order to be issued a standard

(..continued)

have jurisdiction to evaluate the FAA's response to respondents' FOIA request, and note that our Rules of Practice provide that a party may file a motion when resolution of a discovery issue is necessary.

¹⁸ We note that this opinion does not address respondents' contention that the Administrator abused his authority in issuing the emergency order in this case, because our Rules of Practice provide that one may challenge the Administrator's determination that an emergency in aviation safety exists by filing a petition with the law judge. See 49 C.F.R. § 821.54. Respondents did not do so, and such a petition at this juncture would therefore not be timely.

airworthiness certificate.

An aircraft's compliance with its type certificate is a critical component for airworthiness. We have long recognized 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.¹⁹ In previous cases, we have emphasized the importance of the first prong of this test.²⁰

We recognize that the language of 14 C.F.R. § 21.183 is technical and complex. In particular, § 21.183(c), which addresses import aircraft, appears to subsume § 21.183(d), which involves other aircraft. The Administrator ostensibly alleges that N225RW did not fulfill the requirements of either of these subsections, because both require that aircraft conform to their type designs, and the TCDS that is applicable to N225RW requires

¹⁹ 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 note that we have also articulated this two-prong standard for airworthiness in cases that have not charged a violation of 14 C.F.R. § 91.7. Administrator v. Bailey and Avila, NTSB Order No. EA-4294 at 11 (1994) (reviewing airworthiness standard where respondents were mechanics who approved a Piper PA-32 when the aircraft did not comply with its type certificate in several ways); see also Administrator v. Morton, 2 NTSB 1321 (1975).

²⁰ See generally Administrator v. Opat, NTSB Order No. EA-5290 (2007).

a certification of airworthiness from the country of manufacture, which respondents do not have. In reviewing the testimony in the record for this case, we note that Mr. Schilling provided a detailed summary of the requirements of § 21.183, and explained the FAA's reasoning for including such requirements. We further note that the Board is required to defer to the Administrator's interpretation of the Federal Aviation Regulations, provided that such interpretation is reasonable and not arbitrary and capricious. 49 U.S.C. § 44709(d)(3); see also Garvey v. NTSB, 190 F.3d 571, 576-79 (D.C. Cir. 1999). We consider Mr. Schilling's interpretation of the requirements of § 21.183, therefore, to be entitled to deference.

The law judge acknowledged that DAR Cernuda and Mr. Marrs had erred when initially evaluating N225RW and determining that it was airworthy. At the hearing, Mr. Schilling stated that the FAA has the responsibility for ensuring that aircraft meet their type design and are in a condition for safe operation. The parties agree that DAR Cernuda erred in issuing the standard certificate of airworthiness, Normal category, for N225RW, because he did not notice that the TCDS requires an inspection and certificate of airworthiness from France.

We note that DAR Cernuda's and Mr. Marrs's mistakes are troubling, and we sympathize with respondents' position that

they relied upon the FAA to issue a standard certificate of airworthiness for N225RW only if the aircraft was airworthy. However, we have previously held that such errors do not prohibit the FAA from taking action against a certificate. For example, in Morton, supra note 19, we stated that the FAA maintenance inspector who issued a replacement certificate of airworthiness for the respondent's Bell helicopter, which the respondent had substantially rebuilt with military parts, had erred in issuing the certificate because he had not even inspected the aircraft; we concluded, however, that the Administrator was not estopped from reexamining the aircraft because, "the doctrine of estoppel does not apply where the public interest and safety in air commerce are at stake and when the Administrator's powers of reexamination are so clearly granted by statute." Id. at 1326. In addition, we have held in other cases that the erroneous acquiescence of a FSDO does not prevent the entire agency from taking action against a certificate-holder.²¹

We are bound by the plain language of 14 C.F.R. § 21.183 and 49 U.S.C. § 44704(d), which, as Mr. Schilling established,

²¹ Administrator v. Darby Aviation, NTSB Order No. EA-5159 at 24-25 (2005) (stating that the Birmingham FSDO's acquiescence to the respondent's operation of certain flights when respondent did not have the appropriate operating certificate did not preclude the FAA from suspending the organization's air carrier certificate pending compliance).

provide that an aircraft must conform to its type design before the Administrator will consider it eligible for a standard airworthiness certificate. Furthermore, the Administrator has provided evidence to establish that the TCDS applicable to Allouette IIs requires a certificate of airworthiness from the French civil aviation authority. These requirements appear in the statute and regulation cited above, and in the TCDS; because N225RW did not meet these requirements, the Administrator was justified in moving to suspend N225RW's airworthiness certificate.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondents' appeal is denied;
2. The law judge's decision is affirmed; and
3. The Administrator's emergency suspension of the standard certificate of airworthiness, Normal category, for N225RW, pending respondents' fulfillment of the requirements of 14 C.F.R. § 21.183 and 49 U.S.C. § 44704, is affirmed.

HERSMAN, Chairman, HART, Vice Chairman, and SUMWALT, Member of the Board, concurred in the above opinion and order.

APPEARANCES:

On behalf of the Administrator:

STEVE C. HAROLD, ESQ.
Federal Aviation Administration
Southwest Region
2601 Meacham Boulevard
Fort Worth, Texas 76137
817-222-5079

On behalf of the Respondent:

STEVEN K. SAUNDERS
7242 Woodville Crescent
Orlando, Florida 32819

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

ORAL INITIAL DECISION

This has been a proceeding before the National
Transportation Safety Board, held under the provisions of Section

1 44709 of the Federal Aviation Act of 1958 as amended, on the appeal
2 of Don Krivitsky and Joseph Jablecki, from an Emergency Order of
3 Suspension that has suspended the airworthiness certificate of a
4 particular imported Aerospatiale Alouette II helicopter, model
5 SE-3130, serial number 1312, and the November number is N225RW.

6 The Emergency Order of Suspension was issued by the
7 Administrator through Regional Counsel of the Southwest Region. The
8 matter has been heard before me, William R. Mullins. I'm an
9 Administrative Law Judge for the National Transportation Safety Board,
10 and as is provided by the Board's rules, I will issue a bench decision
11 at this time.

12 The matter came for hearing here in Arlington this 25th day
13 of June of 2009. The Administrator was present throughout these
14 proceedings and represented by senior staff counsel, Mr. Steve Harold,
15 Esquire, of the Southwest Region, and Respondent, Dr. Joseph Jablecki
16 was present, and both he and Mr. Krivitsky were represented by
17 Mr. Steve Saunders who has some apparently extensive background as a
18 designated airworthiness representative for the Administrator or
19 designee of the Administrator. And Mr. Krivitsky was having some
20 health problems and was unable to attend.

21 The parties were afforded a full opportunity to offer
22 evidence, to call and examine and cross-examine witnesses. In addition,
23 the parties were afforded an opportunity to make argument in support
24 of their respective positions.

25 Let me say in general about this and then I'll talk about

1 the witnesses. This is a case where the facts are that the
2 Administrator, through a designated airworthiness representative and
3 an aviation safety inspector who was his principal maintenance
4 inspector, and that's the way they operate, and there was some
5 testimony about that being approved, and the Administrator issued a
6 standard airworthiness certificate for this particular helicopter.

7 The helicopter was operated for some period of time, and
8 although this may be a case of first impression, apparently there are
9 a number of these helicopters that came from, Europe. This is a 1959
10 model, built in I think, one of the exhibits said it came out of the
11 factory about the first of September of 1959 and went directly to the
12 German military or department of defense.

13 There was some conversation and testimony about it went to
14 the Department of Defense, not to the military, but Exhibit G-2 shows
15 that it came out listed as military, and I think somewhere in here
16 there's an exhibit or some testimony that it was actually flown by the
17 German air force for a number of years.

18 Then it was decertified by them, apparently shipped to the
19 United States, and well, it ultimately received this airworthiness
20 certificate, and as I said, this is not just a lone case. Apparently
21 there are some 70 of these helicopters that have been certified by the
22 Administrator, and now the Charter Quest Special Emphasis group in
23 Southwest Region, actually they're housed out at Alliance Airport, is
24 investigating this, and there may be many more of these to come.

25 That's generally the background. We had a hearing back in

1 December, and at that time, based on information and argument, I issued
2 a summary judgment motion in favor of the Administrator, based on what
3 I thought were the supporting documents, and the Board remanded the
4 case for further fact-finding on my behalf, and so that's what we've
5 been doing today. We've been finding the facts.

6 And I'll come back, just make a brief comment about the
7 Board's remand decision in just a minute, although I will tell you folks,
8 I have suspected for a long time, and this confirmed it, that you should
9 never grant a summary judgment on the record.

10 If you've got everybody in the courtroom, you might as well
11 get all the evidence on and go from there, and if I had done a summary
12 judgment, and if I'd had the time, I might have done one; in fact, as
13 I recall the facts of this case, that I had denied it at one point,
14 and then decided after argument of counsel that it probably was
15 appropriate, and so here we are today on remand.

16 The Administrator had three witnesses: Mr. John Loomis and
17 Mr. Rand Foster with the Charter Quest Team, and Mr. Loomis started
18 the investigation. Mr. Foster sort of concluded it. And then we had
19 Mr. Schilling, who is the manager of the rotorcraft directorate, and
20 I, in 20 years of hearing these cases, I've never had one of the
21 directorate managers testify in a hearing, and I think it would be sort
22 of like the Federal Air Surgeon of the Federal Aviation Administration
23 testifying in a medical case.

24 This is just rare, but I understand that this is a particular
25 emphasis item for them, all of these Alouette helicopters that have

1 been issued standard airworthiness certificates by the Administrator
2 and now they're in the process of having to change their minds.

3 The Respondent had one witness, Dr. Jablecki. Although
4 Mr. Saunders was never sworn in, he presented a lot of information by
5 way of his comments, and that was helpful. It certainly has given me
6 and the record some perspective on the problems that the different
7 owners and these particular owners have faced in this continued
8 litigation that's been going on.

9 And let me say that the evidence was clear that there's not
10 a safety of flight issue with these helicopters. The helicopters have
11 been operated up until this issuance of this order, and then recently,
12 subsequently, the Administrator has issued an experimental
13 certificate for this particular aircraft, and in that regard, I would
14 suggest to you, Dr. Jablecki, that may be a blessing in disguise,
15 because you can do all kind of neat things to an experimental aircraft,
16 which I have one, for about a third the price or less than it would
17 cost if it was a certified airplane, so there may be some advantages
18 to that.

19 Let me go through the exhibits. The first exhibit,
20 Government's Exhibit 1, was the compliance and enforcement program,
21 and I'm not sure -- still not sure why that was presented to me. I
22 would say this before I go through this. I think Mr. Harold alluded
23 to it, and I think both sides did an excellent job of making
24 presentation today.

25 I was involved a few years back in a school down in the San

1 Antonio area that had been giving A&P licenses, students coming and
2 going to the school for a year and paying some large money to the school,
3 and then people were tested and they were given their A&P license, and
4 then several years afterward, the Administrator went back, and they
5 revoked the school's certificate and went back and revoked all of these
6 A&P certificates, because they felt like the school hadn't been doing
7 right.

8 And all the evidence I heard was that these kids had gone
9 to school and they did all the things they were supposed to do, and
10 they took the test, but after ruling in their favor, I was reversed
11 by the Board, and then there was another school down in Florida just
12 three or four years ago that there were a huge number. I had a couple
13 of those cases.

14 One of them, the gentleman was a senior manager or
15 maintenance manager for Northwest Airlines up in Minneapolis, and all
16 of a sudden, he gets a letter one day that his A&P certificate had been
17 revoked on an emergency basis, and fortunately, I think, he wasn't even
18 using it. He had reached a point in management that he didn't have
19 to have his day-to-day license, and I thought we were going to try it
20 several times.

21 But there's really in those areas, once the Administrator
22 takes that action, it's extremely unfair to the folks that it's
23 directed to, but at the same time, you can't help but step back and
24 say, well, what other choice did the Administrator have under the
25 circumstances. So those cases remind me a little bit of this one.

1 The second exhibit that the Administrator has was a letter
2 from Eurocopter that shows the date of the manufacture of this airplane
3 and the fact that it was designated on a military thing. One of the
4 exhibits I saw today, and I just mention it in passing, because it was
5 talking about some of the evidence was about whether there was some
6 evidence that the production line for the civilian and the military
7 helicopters were the same, but there was another document in there that
8 indicated they had shut down, all they were building were the military.
9 I don't know whether it was just for Germany or maybe several militaries,
10 but at the time this helicopter was built, their entire production line
11 was all military, so I don't know. Whatever that's worth.

12 Exhibit 3 was a blue-ribbon copy of the FAA records on this
13 particular aircraft, and I thought it was interesting and there was
14 some reference to it, but this attestation, which was Respondent's
15 Exhibit 1, and I'll talk about that in a minute, was not included in
16 that document, so it would show that not only did the Administrator's
17 designee and principal maintenance person that was involved in that
18 wrongly issue it. They may not have even had even this document, or
19 maybe they knew when they issued it that the document might not be
20 sufficient, and they kept it out. I don't know. But I thought that
21 was interesting.

22 Government's Exhibit 4 was the letter of investigation and
23 other correspondence that went on with the owners and the FAA.

24 G-6 was a letter, sort of a general information thing, for
25 owners of helicopters, and it talked about airworthiness certificates.

1 Government's Exhibit 7 was the FAA -- the national policy
2 letter that the FAA has sent out as a result of these cases involving
3 these particular helicopters.

4 Exhibit G-8 was a type certificate data sheet, 7H1, Revision
5 14, which applied to this particular helicopter.

6 And then Exhibit G-9 was a document that showed that that
7 was one of those revisions. It was done on May 12, 2004, and was posted
8 that same day.

9 Exhibit G-10 was FAA order 8110.4B, captioned, "Type
10 Certificates."

11 G-11, FAA order 8132E, this airworthiness certificate of
12 aircraft and related products.

13 G-12 is the statute or the law, United States Code Section
14 44704, which talks about the type certificates.

15 G-13 was FAR 21.29, the issue of type certificates.

16 G-14 was FAR 21.41, which involves type certificates.

17 G-15 was FAR 21.123, production under type certificate.

18 G-16 was FAR 21.183, was issuance of standard airworthiness
19 certificate. Subsection (c) there was for import aircraft.

20 And G-17 was a letter from Eurocopter re: military aircraft.

21 Respondent had nine exhibits. The only thing I'd say in
22 passing is that there wasn't a G-5, and sometimes I think that attorneys
23 do that just to confuse Judges, but I sat there for a long time, trying
24 to figure out where G-5 was, and then I remembered that there wasn't
25 one.

1 But in any event, be that as it may, Respondent had -- R-1
2 was the attestation. I'll talk about that a little bit. From the -- and
3 I don't speak French, so there's a Directorate Generale Aviation, and
4 this one had a caption on it that said, Aviation Civile, and I'll come
5 back and talk about that in a minute.

6 R-2 is a letter from the FAA to this Directorate of Generale
7 Aviation Civile over in France concerning these particular
8 helicopters.

9 Respondent's Exhibit 3 was a response from the Directorate
10 Generale, and it spoke of inability to provide a certificate of
11 airworthiness, only an attestation.

12 R-4 was a French document, Bureau of Verification, but I
13 wasn't sure what that document was for. I don't think it was important
14 in my decision today.

15 R-5 was Advisory Circular 21.23(a) from the Federal Aviation
16 Administration. It talks about the airworthiness certificate of civil
17 aircraft.

18 R-6 was Civil Air Regulation from the old Civil Aeronautics
19 Board, Part 10, which talked about certification of import aircraft.

20 R-7 was also from the CAB, the Civil Air Regulation, Part
21 1, which talked about type certificates.

22 And R-8 was a letter from Eurocopter saying that the military
23 and the civilian production was the same.

24 And R-9 was a letter to Mr. Saunders from the Directorate
25 of Generale Aviation Civile, and under the evidence I understand that

1 that's the civil aviation or civil aeronautics authority of France,
2 which would be like the FAA of France.

3 Okay. Those are the exhibits. Let me talk just very briefly
4 about the evidence -- the witnesses, and I'm going to do it a little
5 different than I usually do, but I want to talk about Dr. Jablecki's
6 testimony.

7 Counsel has appropriately referenced this as an in rem
8 action in that this is not against either Mr. Jablecki or Mr. Krivitsky.
9 It's an action taken against the certification of this airplane, and
10 there was some suggestion, I thought, trying to minimize this, but when
11 you go out there and the standard airworthiness certificate is no
12 longer with that aircraft, the aircraft's not going to turn \$165,000
13 over to Dr. Jablecki and say, Sorry about that.

14 Dr. Jablecki's testimony was clear, and it was suggested in
15 Mr. Schilling's testimony that it wasn't the FAA's fault. It was these
16 people not doing their due diligence or whatever. Well, Dr. Jablecki
17 put that to rest. He went out there with three of these helicopters.
18 They looked at the airworthiness certificate. They looked beyond the
19 airworthiness certificate. They looked at the logbooks and records,
20 and they believed that because it did have an airworthiness certificate
21 and these other records from the Administrator that it was a good buy,
22 and they paid \$165,000 for that aircraft.

23 And now with this emergency order of suspension, even though
24 it has an experimental certificate, it cannot be used for any of the
25 purposes they talked about and that they had used it for before, because

1 you can't use an experimental aircraft for commercial purposes. That
2 was Dr. Jablecki's testimony, and he is a retired doctor. He and
3 Mr. Krivitsky had invested their money in this aircraft, and now it's
4 an experimental aircraft.

5 Mr. Loomis and Mr. Foster talked about the investigation
6 and how it started, and one of the things that was encouraging about
7 this, I thought, and I'm not going to go through the emergency order
8 of suspension. I think Mr. Harold did an excellent job of that, going
9 through the different 36 allegations, but there were several in there
10 about that Dr. Jablecki and Mr. Krivitsky had not provided the
11 aircraft for inspection.

12 Well, they're busy folks. They had some problems, but this
13 case does not involve failure of those folks to make that inspection
14 at all, provide it for inspection. In fact, it has been inspected now
15 for this experimental certificate.

16 All of these documents, Mr. Schilling may have identified
17 some, but certainly most of them, I believe, were identified by
18 Mr. Loomis and Mr. Foster. I want to talk a little bit about
19 Mr. Schilling's testimony in that he suggested a couple of things.

20 One of them, as I alluded to, was that these people didn't
21 do their due diligence, but they did. If there's anybody that didn't
22 do their due diligence, it was the representatives of the Administrator
23 in not following up on this.

24 The two key exhibits here are R-1 and G-8, and interestingly,
25 the Board, and Mr. Harold made reference to it in his argument, has

1 suggested that I really look at whether someone knew or should have
2 known about the airworthiness.

3 Well, the Board's going to have trouble with this,
4 because I specifically find under the evidence that the representative,
5 the designated airworthiness representative and the principal
6 inspector who were involved in the issuance of this standard
7 airworthiness certificate knew or should have known that this thing
8 did not have an appropriate foreign certificate of airworthiness as
9 required under the regulation.

10 Now, having said that, you know, that if a pilot goes out
11 and he knew or should have known that it was unairworthy and he flies
12 the airplane, he's in violation. Where the Administrator knew or
13 should have known that this didn't have an appropriate airworthiness
14 certificate, you can't hold that same standard to the Administrator,
15 and there's a reason for that.

16 It's aggravating and depressing in a case like this, but as
17 I said, just like the mechanics cases, if you step back and look at
18 the overall picture, the Administrator has an obligation to see that
19 these kind of aircraft are appropriately documented, and this probably
20 is just a paperwork thing.

21 But the type certificate data sheet under import
22 requirements specifically doesn't say that the statement should
23 contain this information. It says, the statement provided by the
24 foreign civil authority, in this particular case, would be
25 Aerospatiale because this type certificate data sheet only involves

1 this particular helicopter. But it specifies that they have to certify
2 that it has been examined and so forth.

3 But that's the key word for me, that the helicopter covered
4 by this certificate has been examined and found to comply with U.S.
5 Civil Air Regulations, Part 6, dated February 15, 1951. The
6 attestation starts out, "Although we have not inspected this
7 helicopter," and then it goes and says, but it's still a pretty good
8 helicopter. Well, the statement that is required for certificate of
9 airworthiness specifically says it has to be examined, and it was not
10 examined. It might have been examined years before, but there's no
11 certificate of that from the foreign authority.

12 Another concern I had about Mr. Schilling's testimony, he
13 just immediately said this Aviation Civile is not the people over there.
14 Well, I think it was brought up and brought to our attention that the
15 fifteenth revision to this type certificate data sheet identifies
16 these people as being the same as the DGAC of France or the civil
17 aviation authority over there.

18 It's been a long day. These are the kind of cases that are
19 difficult, because it's very clear that the Administrator has erred
20 in the issuance of this standard airworthiness certificate, but the
21 evidence is also clear that it shouldn't have been, and the
22 Administrator has appropriately, in this case, done an emergency order
23 of suspension.

24 And I do know and as stated by Mr. Harold, that if there's
25 a revocation, that sort of closes the door, but it's suspended, the

1 suspension goes on indefinitely, but there was some suggestion that
2 there may be something down the line or there may be something come
3 up after all of these cases are considered that might offer some
4 opportunity for these owners to come back and get that standard
5 airworthiness certificate back.

6 But under the facts of this case, the Administrator's
7 Emergency Order of Suspension will be sustained.

8 ORDER

9 IT IS THEREFORE ORDERED THAT safety in air commerce and
10 safety in air transportation requires an affirmation of the
11 Administrator's Emergency Order of Suspension, suspending the
12 standard airworthiness certificate of this helicopter, model number
13 SE-3130, serial number 1312, November number 225RW.

14 And, specifically, I find that there was established by a
15 preponderance of the evidence presented here today that the original
16 standard airworthiness certificate issued by the Administrator was
17 wrongfully issued, that it was not based on the appropriate
18 documentation from the French government under the agreement between
19 the United States and France; and that, therefore, the Emergency Order
20 of Suspension should be, and the same is hereby sustained.

21

22

23

24 EDITED ON

25 JULY 20, 2009

William R. Mullins

Administrative Law Judge