

SERVED: August 6, 2012

NTSB Order No. EA-5635

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 6th day of August, 2012

_____)	
MICHAEL P. HUERTA,)	
Acting Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-18805RM
v.)	
)	
WAYNE ALLEN CARR,)	
)	
Respondent.)	
_____)	

OPINION AND ORDER

1. Background

Respondent appeals the oral initial decision of Administrative Law Judge Patrick G. Geraghty, issued October 26, 2011.¹ By that decision, the law judge reaffirmed his original order granting summary judgment in favor of the Administrator, made prior to our remand of this

¹ A copy of the law judge’s initial decision, an excerpt from the hearing transcript, is attached.

case, finding respondent violated 14 C.F.R. §§ 91.7(a),² 91.9(a),³ and 91.13(a).⁴ The law judge also reaffirmed his order suspending respondent's airline transport pilot (ATP) certificate for a period of 55 days. We set aside the law judge's original order granting summary judgment as well as his oral initial decision in their entireties and remand this case for a full and complete hearing.

A. *Facts*

As discussed in our previous order remanding this case to the law judge for hearing and fact-gathering,⁵ the Administrator charged respondent with operating an aircraft when it was not in an airworthy condition, based on violating the terms of the special flight permit (SFP). In February 2009, a Cessna CE-550 turbo-jet transport category aircraft certificated under 14 C.F.R. part 25 underwent an inspection, during which inspectors discovered numerous maintenance discrepancies. Among the discrepancies was installation of an unapproved global positioning system (GPS) wide area augmentation system (WAAS). The GPS WAAS was installed in May 2008 pursuant to a supplemental type certificate that was inapplicable to an aircraft operated under part 25. In addition, the GPS WAAS was improperly interfaced with the autopilot system.

Respondent applied for a SFP to reposition the aircraft to Punta Gorda, Florida (the maintenance base for the aircraft) to undergo repairs. On March 11, 2009, the Tampa Flight

² Section 91.7(a) provides, “[n]o person may operate a civil aircraft unless it is in an airworthy condition.”

³ Section 91.9(a) provides, “no person may operate a civil aircraft without complying with the operating limitations specified in the approved Airplane or Rotorcraft Flight Manual, markings, and placards, or as otherwise prescribed by the certificating authority of the country of registry.”

⁴ Section 91.13(a) provides, “No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.”

⁵ NTSB Order No. EA-5573 (2011).

Standards District Office (FSDO) issued field approval for the GPS WAAS installation in the aircraft for visual flight rules (VFR) use only. Exh. R-7. Inspector Laura Lynn Delewski also issued the SFP to allow for repositioning of the aircraft. On March 30, 2009, respondent flew the aircraft to Punta Gorda, immediately after which he executed a copy of FAA Form 337 (Major Repair and Alteration (Airframe, Powerplant, Propellor, or Appliance)), certifying performance of various instrument flight rules (IFR) procedures. Based on the performance of certain IFR procedures, the FAA charged respondent with the violations cited above, because the GPS WAAS unit installation was approved for VFR use only.

B. Procedural Background

The Administrator issued an order, dated February 3, 2010, suspending respondent's ATP and mechanic certificates for a period of 60 days. The Administrator's order, which serves as the complaint in this case, alleged respondent violated 14 C.F.R. §§ 91.7(a), and 91.9(a), and 91.13(a).⁶ Specifically, the Administrator alleged the aircraft was not airworthy at the time respondent operated it, in violation of § 91.7(a), because the aircraft had numerous maintenance discrepancies, including the GPS WAAS unit's improper installation pursuant to an inapplicable supplemental type certificate. The Administrator also contended respondent violated § 91.9(a) by operating the aircraft in violation of the limitation indicated on the placard on the GPS WAAS unit, which stated the unit was approved for VFR use only. As a result of these violations, the Administrator alleged respondent's operation was careless or reckless, in violation of § 91.13(a). Respondent answered the complaint with admissions to several of the allegations and raised

⁶ In addition, the order referenced 14 C.F.R. §§ 65.85(a), 65.87(a), and 183.29(h). Sections 65.85 and 65.87 discuss the authority of a certificated mechanic to return aircraft to service after certain maintenance or alterations. Section 183.29(h) states a flight test pilot representative may make flight tests, and prepare and approve flight test information, within the limits prescribed by and under the general supervision of the Administrator.

several affirmative defenses. The parties engaged in discovery, after which the Administrator filed a motion for partial summary judgment, and respondent filed a cross-motion for summary judgment. The law judge originally disposed of the case without a hearing, by granting summary judgment in favor of the Administrator with regard to 14 C.F.R. §§ 91.7(a), 91.9(a), and 91.13(a).⁷

Respondent appealed the law judge's order, arguing genuine issues of material fact existed. We granted respondent's appeal and ordered the law judge to hold a hearing to take evidence and resolve four main issues: (1) whether conducting operational checks on the GPS WAAS at issue exceeded the authority of the special flight permit; (2) whether 14 C.F.R. § 21.191 (concerning a major alteration or major design change) applied to respondent's March 30, 2009 flight; (3) whether respondent provided evidence concerning his affirmative defenses, such as his defense that he reasonably relied on someone in presuming his operation of the aircraft during the flight at issue was permissible; and (4) whether respondent rebutted FAA test pilot Joe Brownlee's statement in a declaration that flight testing was not permissible pursuant to the SFP.⁸ Following issuance of our opinion and order, the Administrator amended the complaint to withdraw the paragraph concerning § 21.191.

C. Law Judge Oral Initial Decision

The law judge held a brief hearing on October 26, 2011, in which he informed the parties that issues concerning § 21.191 were moot, given the Administrator's amendment to the complaint. Tr. 8. The law judge then stated he did not believe an issue existed for resolution

⁷ The law judge also, however, narrowed the scope of the case by finding the Administrator did not present evidence concerning sections 65.85(a), 65.87(a), and 183.29(h).

⁸ NTSB Order EA-5573 at 9-10.

concerning flight checks or flight testing. In this regard, prior to accepting evidence at the hearing, the law judge stated:

There's no reason to be checking equipment that is not approved for use in the aircraft or that has not—that has a unit that has part of its function not approved. There's no reason to be approving unapproved equipment. What purpose? A flight check of unapproved equipment does not accomplish anything. You can't thereafter use the unapproved equipment. You need to have approved equipment.

The Board did not reject that determination. Therefore, as far as I am concerned, this record is complete on the issue of question of flight checks. Flight checks could be done by the Respondent on his flight as to any of the equipment that was approved for use in that aircraft at the time of the flight. It was not applicable to any unapproved equipment. The Board did not modify that, did not reject it, and therefore, it stands. And I will not hear any testimony with respect to flight checks or operational checks because essentially they are the same thing.

Also, the Board did not reject my conclusion that flight testing was, in fact, performed on this flight, nor did they in any way vacate or modify my decision as to credibility findings. Therefore, those are extant and I will not hear any testimony with respect to those matters.

Tr. 30-31. The law judge cited Administrator v. Ferguson, NTSB Order No. EA-5590 (2011), in furtherance of his contention that he could significantly limit the scope of the hearing in this case (Tr. 31); the law judge ultimately allowed limited evidence only on the issues of respondent's affirmative defenses and challenges to Mr. Brownlee's statement that the SFP did not permit flight testing.

At the conclusion of the hearing, the law judge issued an oral initial decision in which he stated he misspoke in his August 27, 2010 order when he stated the GPS installation was unapproved. He clarified the GPS WAAS unit installation was approved for VFR use only, but unapproved for IFR use. Initial Decision at 140-41, 143. With regard to respondent's affirmative defenses, the law judge stated respondent did not establish he reasonably relied upon anyone when he performed flight testing of the IFR features during the repositioning flight. As a result, the law judge determined respondent did not fulfill his burden of establishing a reasonable

reliance defense.⁹ The law judge also determined respondent did not rebut Mr. Brownlee's statement that respondent's flight testing was impermissible under the SFP. The law judge stated the SFP was sufficiently clear in its prohibition of flight testing, and respondent therefore, was not authorized to perform such testing and certify the accuracy of the unit for IFR use. Based on these findings, the law judge reaffirmed his determination that respondent violated 14 C.F.R. §§ 91.7(a), 91.9(a), and 91.13(a), and ordered the suspension of respondent's ATP certificate for 55 days.

D. Issues on Appeal

Respondent presents several arguments on appeal primarily focused on his contention that his operation of the aircraft on March 30, 2009, did not exceed the scope of the SFP. In particular, respondent asserts the law judge erred in: (1) determining respondent performed flight testing of the GPS unit during the flight that was outside the scope of the SFP; (2) concluding the GPS unit was limited to VFR functions only; (3) failing to consider respondent conducted "an operational flight check" of the GPS pursuant to FAA Orders 8130.29A and 8300.10; (4) determining respondent's performance of a lateral precision vertical (LPV) approach during the flight exceeded the scope of the SFP; (5) finding the LPV approach was only possible with a GPS unit approved for IFR operations; (6) committing prejudicial errors by excluding certain evidence; and (7) issuing findings contrary to Board precedent and policy.

⁹ A respondent may assert he or she reasonably relied upon the actions of another, and that such reliance excuses the alleged violation. In asserting this affirmative defense, the respondent must fulfill the following test:

If ... a particular task is the responsibility of another, if the pilot-in-command [PIC] has no independent obligation (e.g., based on the operating procedures or manuals) or ability to ascertain the information, and if the captain has no reason to question the other's performance, then and only then will no violation be found.

Administrator v. Fay & Takacs, NTSB Order No. EA-3501 at 4 (1992).

2. Decision

A. Law Judge's Misapplication of Administrator v. Ferguson

The law judge erred in failing to hold a full and complete hearing in this case after our remand. In this case, the law judge attempted to piece together a decision based, in part, on his original order granting summary judgment and, in part, on the very limited evidence he permitted at the hearing. The law judge contends our decision in Administrator v. Ferguson¹⁰ supports his refusal to accept evidence in the case at issue. The law judge's contention in this regard is incorrect. Ferguson, unlike the case *sub judice*, did not involve an order granting summary judgment, but instead involved a case which went to a full hearing. After the Court of Appeals for the Ninth Circuit held the law judge improperly curtailed cross-examination of one witness,¹¹ we remanded the case to the law judge with the instruction to reconvene the hearing for the purpose of cross-examination. The case at issue is distinguishable, as the law judge originally disposed of this case without a hearing.

Furthermore, the law judge incorrectly interpreted Ferguson as standing for the proposition he need only hold a hearing to collect evidence concerning conclusions we explicitly reversed. This conclusion is incorrect. By remanding the case for a hearing, when a hearing was not previously held, we effectively set aside the law judge's order on summary judgment. Therefore, the law judge's reliance on Ferguson in deciding not to hold a full hearing was improper.

¹⁰ NTSB Order No. EA-5590 at 10 (2011).

¹¹ Ferguson v. FAA, 352 Fed.Appx. 192 (9th Cir. 2009).

B. Prejudicial Errors

In our original decision in this case, we also instructed the law judge to allow respondent to challenge Mr. Brownlee's opinion that the SFP did not permit IFR operation. However, the law judge did not allow respondent's witness, David Shelton, to provide expert testimony concerning whether respondent's LPV approach was possible in VFR conditions. Tr. 52. Mr. Shelton began to opine on this issue, but the law judge curtailed his testimony before even receiving an objection by the Administrator's counsel. Tr. 70-71. Such testimony, if accepted, may have refuted Mr. Brownlee's opinion that respondent's performance of the LPV approach automatically meant respondent operated the aircraft outside the limitations of the SFP.

The law judge also excluded testimony that may have indicated a different interpretation of the SFP was reasonable. Tr. 61-62, 66, 72-73 (Shelton's testimony). The law judge further halted the testimony of both Carmine Colaluca, III, a chief inspector of a repair station, and respondent concerning potential factual discrepancies in Mr. Brownlee's declaration. Tr. 80-83, 91-92. As explained above, in our original decision, we specifically identified examples—not intended to be an exhaustive list—of factual issues that precluded disposition of this case via summary judgment. The law judge nevertheless improperly decided he could significantly narrow the scope of the hearing, and the overall case, by re-adopting his original order granting summary judgment despite our order remanding the case for a hearing. In an effort to be abundantly clear, we herein state we do not believe this case lends itself to disposition by way of summary judgment and set aside the law judge's prior order granting summary judgment in its entirety.

C. Direction to Hold a Full and Complete New Hearing

We hereby order a full and complete new hearing,¹² at which the law judge must accept evidence and testimony on: the Administrator's case-in-chief, respondent's case-in-chief along with any affirmative defenses, and the Administrator's rebuttal case. Both the Administrator and respondent must introduce their exhibits in the record.¹³ The Administrator has the burden of proving the allegations set forth in the amended complaint with his exhibits and witnesses.¹⁴ Following the Administrator's presentation of the case-in-chief, respondent may put on his case-in-chief. Respondent also has the burden of proving his affirmative defenses.¹⁵ Finally, the Administrator should have an opportunity to rebut respondent's case-in-chief and affirmative defenses.

ACCORDINGLY, IT IS ORDERED THAT:

1. The law judge's decisional order granting summary judgment and oral initial decision from hearing are set aside entirely;
2. The prior hearing proceedings are set aside entirely; and
3. This case is remanded for a full and complete new hearing.

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

¹² The Board's Rules of Practice do not prohibit the Chief Law Judge from reassigning the case to another law judge. See 49 C.F.R. § 821.35(c). In this regard, we invite the Chief Law Judge to consider whether reassignment of this case would be prudent.

¹³ See Administrator v. Mashadov, NTSB Order No. EA-5627 (2012).

¹⁴ Administrator v. Schwandt, NTSB Order No. EA-5226 at 2 (2006) (stating that the Board's role is to determine, after reviewing evidence the Administrator presents, whether the Administrator fulfilled the burden of proof); see also, e.g., Administrator v. Opat, NTSB Order No. EA-5290 at 2 (2007); Administrator v. Van Der Horst, NTSB Order No. EA-5179 at 3 (2005).

¹⁵ Administrator v. Kalberg, NTSB Order No. EA-5240 at 7 (2006) (citing Administrator v. Tsegaye, NTSB Order No. EA-4205 at n.7 (1994)).

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
OFFICE OF ADMINISTRATIVE LAW JUDGES

* * * * *

In the matter of: *

J. RANDOLPH BABBITT, *
ADMINISTRATOR, *
Federal Aviation Administration, *

Complainant, *

v. * Docket No.: SE-18805RM

JUDGE GERAGHTY

WAYNE ALLEN CARR, *

Respondent. *

* * * * *

Claude Pepper Federal Building
United States Tax Court
Courtroom 1524
51 S.W. First Avenue
Miami, Florida 33131

Wednesday,
October 26, 2011

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

BEFORE: PATRICK G. GERAGHTY,
Administrative Law Judge

APPEARANCES:

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ORAL INITIAL DECISION AND ORDER

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ADMINISTRATIVE LAW JUDGE GERAGHTY: This has been a proceeding before the National Transportation Safety Board held pursuant to the Board's Order EA-5573, which remanded this proceeding for further proceedings consistent with the opinions expressed in that Board Opinion and Order and, therefore, this matter has been held before this Administrative Law Judge, pursuant to the Notice of Hearing issued August 2nd, 2011, which set this matter down for the remand proceeding in Miami, Florida. The case itself has been captioned J. Randolph Babbitt, Administrator, Federal Aviation Administration, Complainant,

1 Complainant, the perceived gap or remand for purposes of
2 interpretation of Section 21.191 and major alteration/minor
3 alteration were rendered moot and, therefore, no evidence has been
4 taken with respect to that.

5 The only comment with respect to 21.191, as I did
6 earlier in this proceeding on the record, was to clarify that in
7 my view that section of the regulations, on its face, does not
8 apply only to experimental aircraft, but applies to any aircraft
9 that is wanting to complete the activities or the actions that are
10 enumerated or stated in that regulation. You then must apply for
11 and obtain experimental airworthiness certificate until you've
12 accomplished that and then you go back to your amended
13 airworthiness certificate. But anyway that is no longer an issue
14 here.

15 The second item was whether the approval status of the
16 GPS unit itself, the 530 WAAS in the aircraft November-744AT on
17 the evidence submitted by the parties in mini motions and the
18 evidence at the final motion, which led to my decisional order,
19 there is really no dispute as to the status. And I discussed that
20 again this morning and I simply reaffirm that.

21 The unit itself, that is, the box, the black box was an
22 approved unit. It was not a new unit that had just been put in
23 the airplane on March 11th. It had been in there for several
24 months, at least back into, I believe, 2008. It had, however, at
25 first been approved under the incorrect STC. That was discovered

1 and, therefore, instead of removing the unit, as I've already
2 discussed, the unit was allowed to remain in the aircraft and it
3 was placarded and limited also in the 337, which corrected the
4 error of referring to the wrong STC by limiting the use of the
5 unit to VFR purposes only.

6 And I went through that in great detail this morning and
7 it doesn't need to be repeated here other than to note that that
8 no longer really was an issue that needed to be addressed during
9 the course of this remand proceeding.

10 That left only two of the perceived gaps. One was the
11 second chance given to the Respondent to present his affirmative
12 defenses and particularly the defense of reasonable reliance.
13 However, as I indicated, I would not limit, in light of the
14 Board's decision on remand, that the Respondent could have
15 addressed any or all of the affirmative defenses that he set forth
16 in his original answer in this proceeding.

17 Lastly, the other issue as presented by the Board in its
18 Opinion and Order on Remand was the opportunity to be given to the
19 Respondent to contest the declaration of test pilot Joe Brownlee
20 in which he asserted, and this is the only portion of that
21 declaration which I referenced that is pertinent herein, that is,
22 paragraph 9, subparagraph (c), that according to Mr. Brownlee the
23 Respondent's flight testing was not permissible under the terms of
24 the special flight permit under which the Respondent was operating
25 the aircraft on March 30, 2009.

1 As to the question of flight testing, as I stated
2 earlier, and for those reasons which I simply incorporate herein
3 by reference, there is no issue as to the fact that Respondent, as
4 a matter of fact, is found to have conducted flight testing during
5 his operation of taking the aircraft from its point of origin to
6 Punta Gorda in Florida. And he filled out a Form 337 in which he
7 indicated that he had, in fact, performed flight testing of this
8 GPS unit, that he has stated on page 2, accepting the language by
9 his signature and attesting that the aircraft was test flown and
10 found to meet IFR requirements for en route terminal and approach
11 navigation in accordance with the advisory circular.

12 And that, of course, then refers to the paragraphs in
13 the advisory circular which are specifically directed to advice as
14 to how to certify for approval of the IFR functions of the GPS
15 unit. And we have to distinguish again, as I've earlier
16 discussed, between VFR functions and the IFR functions. And the
17 IFR functions are particular to the unit. It has nothing to do
18 with VFR functions although there are some VFR functions that
19 could carry over into an IFR operation such as I discussed,
20 calling up nearest airports, going direct from one waypoint or VOR
21 to another, one could do that.

22 It is also certified here that the repair station
23 representative, which would be Mr. Carr, since he signed this, is
24 certifying by this 337 the IFR accuracy requirements, and that is
25 all the requirements under the advisory circular and for the

1 purpose of removing the placard limiting the unit to VFR use only.

2 So that is clear, there is no issue as to flight
3 testing, so Mr. Brownlee's statement that flight testing is
4 established in my view by a preponderance of the reliable
5 evidence, which I discussed in my original decisional order,
6 perhaps inarticulately, but that is the clear meaning and intent
7 therein with the acknowledgment that I misstated using system in
8 more than one sense when I should have said functions and should
9 have said unit to be absolutely clear. I knew what I was
10 intending, but I may not have conveyed that clearly. However, I
11 think that has been rectified. Nonetheless, that is my conclusion
12 and determination herein.

13 The purpose of the remand was for the Respondent to
14 offer rebuttal to Mr. Brownlee's declaration, which I accepted in
15 my decisional order, in which I found on page 4, that the flight
16 testing conducted by the Respondent was an unauthorized operation
17 beyond the scope of the authority extended by the terms of the
18 special flight permit. And I conclude that the evidence herein
19 supports that.

20 And I cited to the Complainant's motion, Exhibit 2 of
21 the Complainant's response in Exhibit 6 and the Brownlee
22 declaration on page 9, which I've already clarified. So the issue
23 here then is whether or not it has been rebutted that, the
24 position of Mr. Brownlee, that the flight testing was not
25 authorized under the terms of the special flight permit.

1 The special flight permit is clear on its face. It says
2 Limitations Special Flight Permit. And it says the airworthiness
3 certificate authorized the flight specified for the following
4 aircraft for the purpose of maintenance. So this is a maintenance
5 special flight permit and that is the only reason given for the
6 issuance of this special flight permit. It's being moved from A
7 to B so that maintenance can be performed, not for flight testing,
8 not for operational checks, nothing else, for maintenance and it
9 details that out through eight paragraphs.

10 There are additional limitations where it authorized two
11 other things. One, it authorized fuel stops. Obviously, if
12 you're running low on fuel because flight conditions have changed
13 -- they don't want you to crash -- you can stop and get additional
14 fuel. And you can use the GPS to call up the nearest airport, as
15 I've already discussed. That would be perfectly permissible. It
16 is not a specific IFR function.

17 Two, and it was just abbreviatedly stated and I've
18 already discussed that and I don't need to do it again, IFR was
19 authorized and IFR was authorized because there was other
20 equipment in this aircraft by which the aircraft could be flown in
21 IMC or under instrument flight rules in VFR conditions, either
22 way. But that is the only authorization for IFR operation.

23 And the evidence in front of me, as offered today on the
24 Order of Remand, as far as I was concerned, was to allow to show
25 that the special flight permit allowed for the statements made by

1 the Respondent in his Form 337, in which he indicates that the
2 aircraft was test flown to test the accuracy of the IFR functions
3 of the aircraft, that is, the IFR Procedures function of this unit
4 where you could call up approaches, SIDS, STARS, you know, the
5 whole thing. Nothing in the special flight permit, the SFP allows
6 for that.

7 None of the evidence in front of me today establishes
8 that the Respondent was authorized to perform the flight testing
9 of this unit and to certify under the provisions of the advisory
10 circular the accuracy of the unit for IFR utilization. The
11 special flight permit was issued for one thing only, to move the
12 aircraft from Point A to Point B for the purpose of maintenance.

13 And clearly, on the application for the airworthiness
14 certificate made to the FAA and approved by the inspector, a Ms.
15 Delewski, on March 30, 2009 was, as indicated on here, an
16 application for a special flight permit for the purpose of
17 repairs, alterations and maintenance or storage. It was not for
18 the purpose of flight testing.

19 I find and conclude, therefore, on consideration of all
20 of the evidence that has been presented through the various
21 motions that have been made in front of you and have been
22 previously considered and the testimony today that, in fact, that
23 the special flight permit that the Respondent received on March
24 30, 2009 did not extend any authorization for the performance or
25 conducting of any flight testing of the GPS unit, the WAAS system

1 for installation of approval for IFR operation, and I reconfirm my
2 decision as I stated in my decisional order that the flight
3 testing -- and that is what it was; it was flight testing --
4 conducted by the Respondent was an unauthorized operation beyond
5 the scope of the authority extended by the terms of the special
6 flight permit and I believe that the evidence in its entirety,
7 both previously by written submissions and by testimony today, was
8 an unapproved operation and, therefore, a violation of the terms
9 of the special flight permit.

10 The other remand from the Board was for the purpose of
11 allowing the Respondent to re-litigate his affirmative defenses.
12 Those were not specifically discussed for the reasons as I stated
13 in my original Decision and Order. As far as I was concerned,
14 since there was no argument made to me as to the affirmative
15 defenses, they were waived. Stating them in your answer is not
16 the same because you need to sustain your burden of proof on an
17 affirmative defense and the burden of proof rests with the
18 Respondent.

19 Nevertheless, the Board remanded that. Today at this
20 hearing, the Respondent did not offer any evidence or testimony
21 with respect to his affirmative defenses, which were listed, I
22 believe, as affirmative defenses other than the reasonable
23 reliance. And therefore, again there is no evidence to support
24 any of those claims of affirmative defense. And as the burden of
25 proof rests with the Respondent to establish his affirmative

1 defenses, those are denied for failure of proof.

2 And I refer specifically to affirmative defenses as
3 they're listed in the Respondent's first amended answer:
4 paragraphs numbers 2, 3, 4, 5, and 6, since there was no evidence
5 offered either originally in the written submissions that led to
6 my original decisional order nor today, so it is again a failure
7 of proof or a complete absence of any proof.

8 One affirmative defense, which was raised today and was
9 actually referred to in apparently the appeals and that the Board
10 refers to in its remand, and there were only four items that the
11 Board was referring to in its Order on Remand and, therefore, as I
12 indicated early on in this proceeding, on remand those items which
13 were not specifically remanded to be reviewed are not ruled upon
14 as being erroneous or not items to be considered in this
15 proceeding.

16 What the Board referred back as one of the four items to
17 be covered on a remand was the doctrine of reasonable reliance and
18 that was what the Respondent addressed today. That arises, and I
19 think it's the seminal case, Administrator vs. Fay and Takacs,
20 which is EA-3501, and the language that's always cited appears at
21 page 9 of that decision, and it's a 1992 case.

22 And to restate generally what the reasonable reliance
23 doctrine under *Fay and Takacs* is, as the Board stated in that
24 opinion, and I'm quoting: "As a general rule, the pilot-in-
25 command is responsible for the overall safe operation of the

1 aircraft. If however, the particular task is the responsibility
2 of another, if the PIC, pilot-in-command, has no independent
3 obligation based on operating procedures or manuals, for example,
4 or an ability to ascertain the information and the captain has no
5 reason to question the other's performance, then and only then
6 will no violation be found."

7 And as the Board stated in its Opinion and Order
8 remanding this case, "The doctrine of reasonable reliance is one
9 of the narrow applicability," and that is in their Footnote 14 in
10 the Board's Opinion and Order remanding this case and it cites to
11 the *Fay and Takacs* case, which I've already indicated, and the
12 Board also lists as authority in this footnote additional case law
13 which the Board had decided. So that is the standard for a
14 reasonable reliance defense.

15 Determining the parameters for the flight that the
16 Respondent conducted on the date in question is the responsibility
17 of the pilot-in-command. This unit was placarded for use in VFR
18 only. Could not, as I interpret this and I reaffirm that you
19 could not and was not authorized for performance of IFR functions
20 and particularly Procedures key on the unit, which are
21 specifically IFR procedures such as, as the case here, an
22 approach, but you could not also, in my view, call it up and
23 program in as part of a flight plan and execute it a SID, standard
24 instrument departure, or a STAR. You could not do any of that
25 because the unit was not approved for that usage.

1 It was the responsibility of the pilot-in-command to
2 operate the aircraft in accordance with the placard and the
3 authorization granted for the performance. It was also clearly
4 stated in the special flight permit, the ferry permit, that the
5 purpose of the special flight permit was to allow for legal
6 transportation of this aircraft from one point to another point
7 for the purpose of correcting maintenance discrepancies, which
8 were listed in Ms. Delewski's declaration.

9 That was the sole purpose. It was not for any sort of
10 flight testing. IFR was operating -- was authorized, rather,
11 however, matters, because as I've already indicated and that the
12 record does show, there was other equipment in the aircraft such
13 as VOR that the aircraft could operate on.

14 Does the pilot-in-command have an independent obligation
15 here? Yes, he has an independent obligation to determine what he
16 can do under the specific terms of the special flight permit, the
17 ferry permit as it was issued. The special flight permit was to
18 transport this aircraft from A to B so that the maintenance could
19 be performed at this particular base, not for any other purpose.

20 Contrary to that, by the Form 337 that the Respondent
21 executed, he performed test flight because he signs it that he
22 certifies that the aircraft was test flown and that the placard
23 could be removed on the basis of what he did and that it was
24 tested in accordance with the provisions of the advisory circular
25 and those provisions apply only to IFR operation of the GPS unit.

1 decisional order of August 27, 2010, that the period of
2 suspension, which was sought originally of 60 days of the
3 Respondent's airline transport pilot's certificate, should be and
4 was modified to a period of 55 days, is simply reaffirmed herein.

5 And therefore I do find that the Respondent's airline
6 transport pilot's certificate, by a preponderance of the reliable
7 and probative evidence offered during all of this proceeding, both
8 the written submissions and decisions entered therein and on this
9 hearing, should be affirmed, and it is hereby affirmed.

10 Entered this 26th day of October, 2011 at Miami,
11 Florida.

12
13 _____
14 PATRICK G. GERAGHTY

15 Administrative Law Judge
16

17 APPEAL

18 ADMINISTRATIVE LAW JUDGE GERAGHTY: Do either party wish
19 me to recite appeal provisions?

20 MR. WINTON: No, Your Honor. Thank you.

21 MR. BRICE: No, Your Honor.

22 ADMINISTRATIVE LAW JUDGE GERAGHTY: Counsel have waived
23 the recitation of the appeal provisions. They are, of course,
24 accessible to either party in the Board's Rules.

25 Anything further for the record?

1 MR. BRICE: Not on behalf of the Administrator. Thank
2 you.

3 ADMINISTRATIVE LAW JUDGE GERAGHTY: Nothing further?

4 MR. WINTON: Nothing further, Judge.

5 ADMINISTRATIVE LAW JUDGE GERAGHTY: Nothing further.

6 Thank you very much for the presentations gentlemen. It
7 was intellectually stimulating all the way through.

8 This proceeding is hereby closed. Thank you.

9 (Whereupon, at 3:15 p.m., the hearing in the above-
10 entitled matter was closed.)

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CERTIFICATE

This is to certify that the attached proceeding before the:

NATIONAL TRANSPORTATION SAFETY BOARD

IN THE MATTER OF: Wayne Allen Carr

DOCKET NUMBER: SE-18805RM

PLACE: Miami, Florida

DATE: October 26, 2011

was held according to the record, and that this is the original, complete, true and accurate transcript which has been compared to the recording accomplished at the hearing.

Edna Hollander
Official Reporter