SERVED: February 21, 2013

NTSB Order No. EA-5652

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 20th day of February, 2013

MICHAEL P. HUERTA, Administrator, Federal Aviation Administration, Complainant, v. TRE AVIATION CORPORATION (N61PH), ROBERT C. MACE Respondent.	Docket SE-19109

OPINION AND ORDER

1. ***Background***

Respondent[1] appeals the oral initial decision of Administrative Law Judge Patrick G. Geraghty, issued March 21, 2012.[2] By that decision, the law judge determined respondent

[1] The Administrator served both Tre Aviation Corporation and Robert C. Mace with the order revoking airworthiness certificate of civil aircraft N61PH.

[2] A copy of the law judge's initial decision, an excerpt from the hearing transcript, is attached.

violated 14 C.F.R. §§ 43.3(j),[3] and 45.13(c) and (e)[4] by removing the data plate from one Bell 206B helicopter and placing it on another Bell 206B. The law judge ordered revocation of the airworthiness certificate for N61PH, the helicopter bearing the allegedly incorrect serial number on its data plate. We remand the case for a new hearing, on the basis the law judge's evidentiary rulings prejudiced respondent's defense.

A. *Facts*

In 2002, Robert Mace, Vice President of Tre Aviation Corporation, purchased a Bell 206B (serial number 3570), for its parts. At the time of the purchase, the aircraft did not have a data plate; as a result, it was ineligible for operation. Mr. Mace determined Bell Helicopter

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[3] Section 43.3(j) states as follows:

> (j) A manufacturer may—
> (1) Rebuild or alter any aircraft, aircraft engine, propeller, or appliance manufactured by him under a type or production certificate;
> (2) Rebuild or alter any appliance or part of aircraft, aircraft engines, propellers, or appliances manufactured by him under a Technical Standard Order Authorization, an FAA–Parts Manufacturer Approval, or Product and Process Specification issued by the Administrator; and
> (3) Perform any inspection required by part 91 or part 125 of this chapter on aircraft it manufactured under a type certificate, or currently manufactures under a production certificate.

[4] Paragraphs (c) and (e) of § 45.13 provide as follows:

> (c) Except as provided in paragraph (d)(2) of this section, no person may remove or install any identification plate required by § 45.11, without the approval of the FAA.
> * * * * *
> (e) No person may install an identification plate removed in accordance with paragraph (d)(2) of this section on any aircraft, aircraft engine, propeller, propeller blade, or propeller hub other than the one from which it was removed.

Paragraph (d)(2) of § 45.13 states persons providing work under the provisions of Part 43 [Maintenance, Preventive Maintenance, Rebuilding, and Alteration] may (in accordance with methods, techniques, and practices acceptable to the FAA) remove an identification plate required by § 45.11 "when necessary during maintenance operations."

Textron had obtained the data plate in 1993 and destroyed it. In 2003, Mr. Mace attempted to get a data plate for the aircraft from Bell, but the company denied his request. As a result, Mr. Mace decided to use the helicopter for its parts. Also in 2003, on behalf of Tre Aviation, Mr. Mace purchased another Bell 206B (serial number 3282),[5] which had severe corrosion on its fuselage, as well as on other parts. Mr. Mace removed the data plate and parts from 3282 and placed them on aircraft 3570.[6]

Mr. Mace believed using aircraft for parts, and moving the data plate as described above, was permissible under the Federal Aviation Regulations (FARs). Mr. Mace had the resulting aircraft inspected, and the Federal Aviation Administration (FAA) Designated Airworthiness Representative (DAR) Ernest W. Breeden[7] determined the aircraft was airworthy. Mr. Breeden believed the aircraft was repaired in accordance with the Bell Structural Repair Manual, and that it was permissible to use a data plate from a "donor helicopter."[8] Mr. Breeden also believed Mr. Mace's actions consisted of repairing 3570, not rebuilding it, and that "building an aircraft around a data plate" was permissible.[9]

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[5] The initial decision erroneously states aircraft 3570 was purchased after aircraft 3282. Initial Decision at 186. As stated above, Mr. Mace testified he purchased aircraft 3570 first.

[6] The current record is unclear as to which parts from 3282 were placed on 3570, in part because the law judge excluded so much evidence, as discussed infra.

[7] 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).

[8] Tr. 88.

[9] Tr. 100.

B. *Procedural Background*

As a result of the foregoing, the Administrator issued an order, dated May 20, 2011, revoking the airworthiness certificate Mr. Breeden issued for N61PH. The Administrator's order, which serves as the complaint in this case, alleged respondent violated 14 C.F.R. §§ 45.13(e) and 43.3.[10]

The case subsequently proceeded to hearing on March 21, 2012, at which the Administrator offered the testimony of two aviation safety inspectors, both of whom identified photographs of both aircraft—3570 and 3282. Inspector Kenton P. Fenning stated accurate data plates are critical in determining compliance with applicable Airworthiness Directives (ADs), because ADs may specify a series of serial numbers to which they apply.[11] Concerning Bell 206Bs, Inspector Fenning testified a Bell service instruction regarding an impact-resistant fuel system would have applied to 3570, but not 3282.[12] In addition, Inspector Fenning stated the total airframe time listed on a maintenance record for 3282 was lower (6906.5 hours) than the time listed for 3570 (8812.2 hours).[13] This discrepancy, Inspector Fenning opined, was another reason why the FARs do not allow for removal of a data plate from one aircraft and placing the data plate on another aircraft.

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[10] Supra notes 3 and 4. Although the law judge determined respondent violated 14 C.F.R. § 45.13(c) and (e), the Administrator's order only charged a violation of 14 C.F.R. § 45.13(e). Subject to certain exceptions, section 43.3 generally provides "no person may maintain, rebuild, alter, or perform preventive maintenance on an aircraft, airframe, aircraft engine, propeller, appliance, or component part …."

[11] Tr. 48-49.

[12] Tr. 40.

[13] Tr. 40-43; Exhs. A-4, A-5.

In response to the Administrator's case, Mr. Mace and two witnesses testified. In addition, respondent's attorney attempted to admit several exhibits into the record, many of which were Canadian documents, as described below. Mr. Mace believed he could legitimately purchase 3282 for parts, and make it into an operable aircraft. Mr. Breeden, the FAA DAR with a background in both manufacturing and maintenance, testified it was appropriate for Mr. Mace to build an aircraft "around the data tag."[14] Similarly, Kenneth Hibler, an instructor for FAA DARs, testified any part listed in the illustrated parts catalog (IPC) is a replaceable part within the aircraft. Mr. Hibler identified both the fuselage and tail boom as assemblies listed in the applicable IPC. Mr. Hibler also stated when an aircraft is "parted out" and does not have a data plate, it is "no longer an aircraft," because "the parts lose their identity."[15]

C. *Law Judge's Oral Initial Decision*

The law judge determined the Administrator proved Mr. Mace's placement of the data plate from 3282 onto 3570 was a violation of 14 C.F.R. § 45.13. The law judge discussed the evidence and stated, under § 43.3(j), "the only person authorized to rebuild an aircraft is the person who manufactured it."[16] The law judge cited dictionaries and previous Board cases for the definitions of "manufacture" and "rebuilding" and determined Mr. Mace impermissibly manufactured the aircraft at issue. The law judge discussed two prior Board cases to support his holding.[17]

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[14] Tr. 88.

[15] Tr. 108.

[16] Initial Decision at 192.

[17] Initial Decision at 202 (citing Administrator v. Potanko, NTSB Order No. EA-3990 (1993) and Administrator v. Dan's Aircraft Repair, NTSB Order No. EA-4787 (1999)).

D. *Issues on Appeal*

On appeal, respondent contends his actions were permissible, because he merely replaced the fuselage on the aircraft. In his appeal brief, respondent states, "[t]he aircraft that used to be designated with the serial number 3570 no longer exists as an aircraft, and it no longer had a data plate; rather, it was a collection of parts to be used on aircraft in need of serviceable parts."[18] Respondent also contends, "the aircraft in question is and has always been Bell Helicopter Textron 206B, Civil Registration N61PH with serial number 3282. That is the aircraft upon which the data plate was removed and installed in accordance with [14 C.F.R. § 45.13(e)]."[19]

Regarding procedural aspects of the case, respondent argues the law judge abused his discretion in excluding certain testimony and exhibits. In particular, respondent contends the law judge impermissibly curtailed his cross-examination of the Administrator's witnesses, and erred in excluding several exhibits. Respondent acknowledges the Board typically affords wide latitude to law judges in overseeing discovery and hearings, but argues the law judge's rulings in this case prejudiced him. Respondent cites Administrator v. Ferguson[20] in support of his position.[21]

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[18] Appeal Br. at 17-18.

[19] Id. at 18.

[20] NTSB Order No. 5590 (2011); Ferguson v. FAA, 352 Fed.Appx. 192, 2009 WL 3747426 (9th Cir. 2009) (remanding case to Board based on finding the law judge's halting of cross-examination of an FAA witness was prejudicial to the respondent).

[21] We note respondent's appeal brief includes a request for oral argument. We conclude oral argument is not necessary, given our disposition of the appeal via remand. See 49 C.F.R. § 821.48(e).

2. *Decision*

A. *Evidentiary Rulings*

1. *Description of Excluded Evidence*

The law judge curtailed respondent's cross-examination of the Administrator's witnesses. The law judge also excluded several documents respondent offered as exhibits, and curtailed questioning of respondent's own witnesses during respondent's case-in-chief. Specifically:

1. The law judge excluded respondent's attorney's question of FAA Inspector Raymond D. Adams, concerning whether Inspector Adams believed it permissible to "part out" an aircraft;[22]
2. The law judge excluded respondent's attorney's question of FAA Inspector Fenning as to:
    - whether every part on a Bell 206 could be replaced;
    - whether it was permissible to replace the fuselage;
    - and whether the fuselage assembly from 3570 was eligible for installation on 3282;[23]
3. The law judge excluded additional questions concerning whether Inspector Fenning considered the work Mr. Mace performed as safe;[24]
4. The law judge excluded a question concerning whether Inspector Fenning knew of a definition of "rebuild" in the FARs;[25]
5. The law judge excluded a question concerning whether the work Mr. Mace performed was "maintenance";[26]
6. The law judge excluded the question of whether Inspector Fenning reviewed the aircraft's records or knew whether Mr. Mace had decided to "part [the aircraft] out";[27]
7. The law judge denied questions of Mr. Breeden concerning:
    - whether FAA representatives were aware of the process of using aircraft for parts,[28]

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[22] Tr. 19-20.

[23] Tr. 56-58, 60.

[24] Tr. 58.

[25] Tr. 59.

[26] Tr. 63, 66.

[27] Tr. 67.

[28] Tr. 84-85, 89.

- and whether the FAA issues airworthiness certificates after this type of maintenance has occurred;[29]

8. The law judge excluded questions of Mr. Breeden concerning whether Mr. Breeden ever used a data plate from another helicopter;[30]
9. The law judge excluded Mr. Breeden's report of his examination of the aircraft,[31] as well as how many parts were on the aircraft;[32]
10. The law judge excluded the question, "the fact that the fuselage from 3570 now is in 3282 doesn't mean the entire aircraft is 3570, does it?"[33]
11. The law judge excluded the question of Kenneth Hibler concerning whether he believed what Mr. Mace did was "product improvement";[34]
12. The law judge denied Mr. Mace the opportunity to answer why Bell Helicopter Textron would not provide the data plate for 3570 to him; and[35]
13. The law judge did not allow testimony from Mr. Mace concerning his explanation of the maintenance records for the aircraft.[36]

In addition, the law judge excluded the following exhibits respondent attempted to submit into evidence:

1. Copy of the check Mr. Mace paid for 3570;
2. Evaluation Mr. Mace drafted concerning 3570 after he inspected it;
3. FAA Advisory Circular 21-18, which includes a bilateral agreement between the United States and Canada allegedly applicable to the aircraft at issue;
4. A video recording from the FAA allegedly indicating parts taken from one aircraft can be reused on a different aircraft;
5. A letter from Bell product support in Canada, indicating parts within their aircraft are replaceable;
6. Canadian Advisory Circular 57-005 (July 14, 2011), stating one can replace all parts on aircraft, including fuselage, as long as appropriate documents are maintained;
7. "Advisory materials" allegedly attempting to harmonize the regulatory systems of Canada with the FAA;

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[29] Tr. 86.

[30] Tr. 88.

[31] Tr. 94.

[32] Tr. 95.

[33] Tr. 95.

[34] Tr. 109.

[35] Tr. 126.

[36] Tr. 146.

8. Airworthiness notice by Transport Canada, recognizing replacement of entire fuselages in aircraft and requirement to maintain technical records and information;
9. Pages from the Bell 206 IPC discussing serial number groupings, which Mr. Mace utilized in undertaking his work on the aircraft;
10. Information concerning impact-resistant fuel system;
11. A letter from Tim Pendergast, a DAR, concerning replacement of airworthiness certificate of N61PH;
12. A copy of FAA Form 337 and 8110-3 for modifications 3282 underwent after Mr. Mace purchased it; and
13. A copy of the return to service and installation form concerning 3282, showing the Administrator had possession of the aircraft and records for 22 months before bringing the case at issue.

2. *Standard of Review*

Under our jurisprudence, law judges have significant discretion in overseeing testimony and evidence at hearings. The Board reviews a law judge's evidentiary rulings under an abuse of discretion standard, after a party has shown that such a ruling prejudiced him or her.[37] We carefully have reviewed the record for this case, and determined the law judge's numerous exclusions prejudiced respondent. We set forth our rationale in reaching this conclusion below.

3. *Analysis*

In the case at issue, the law judge significantly limited the presentation of respondent's case. The prejudice to respondent far exceeded that presented in the Ferguson case. We believe the law judge's rulings precluded respondent from fully articulating his defense. For example, the law judge excluded exhibits respondent argues would have shown his conduct was permissible, such as an agreement between Canada and the United States that indicates the

[37] See Administrator v. Morrison, NTSB Order No. EA-5619 (2012); Administrator v. Ledwell, NTSB Order No. EA-5582 (2011); Administrator v. Ochionne, NTSB Order No. EA-5537 at 11 (2010); Administrator v. Giffin, NTSB Order No. EA-5390 at 12 (2008) (citing Administrator v. Bennett, NTSB Order No. EA-5258 (2006)) (we will not overturn a law judge's evidentiary ruling unless we determine the ruling was an abuse of discretion). Cf. Administrator v. Ferguson, 352 Fed.Appx. 192, 2009 WL 3747426 (9th Cir. 2009) (holding law judge erred in curtailing the cross-examination of FAA witness because the witness was central to the Administrator's case and the ruling was therefore prejudicial).

rebuilding of aircraft and movement of a data plate are allowed. Also in this regard, the law judge refused to allow an FAA video recording that allegedly would indicate taking parts from different aircraft to result in one airworthy aircraft was permissible.[38] In addition, the law judge denied respondent's attorney the opportunity to ask, on cross-examination, whether the FAA allowed for removal of a data plate when an aircraft is "parted out." The law judge also did not allow respondent to explore fully the reasons for the DAR's determination the aircraft was airworthy, even with the data plate. This foregoing list of examples is not exhaustive; we merely include these instances to show respondent was prejudiced in forwarding his defense.

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[38] The law judge first refused to view the recording when respondent's attorney offered it. Later in the hearing, the law judge again refused, stating as follows:

> Respondent's counsel: I did have a lot on the maintenance that I think would be pertinent, but I understand the record. And the Court will not hear the video; is that correct?
> FAA counsel: If you want to listen to it and determine whether it's relevant or not—
> Law Judge: It did not—from the discussion, it did not sound like it was doing anything about the data plates from one aircraft to another. It does not appear to be relevant.
> Respondent's counsel: I'll have it transcribed and—with the reporter and made as an offer of proof then if the Court won't hear this.
> Law Judge: I accepted it.
> Respondent's counsel: But I do think that it is really relevant. I do—I want to offer it.
> Law Judge: I don't want to argue it, counsel.
> Respondent's counsel: I understand.
> Law Judge: I've already ruled on it.
> Respondent's counsel: I understand that.
> FAA counsel: And, Your Honor, I would—I'd object to a transcription. If he wants to have the actual video, because that's what I saw, put in—like offered as an offer of proof, that—
> Law Judge: It's—I've accepted the disk as a proffer and that's all I'm going to receive. If the Board wants to look at it, the Board can look at it.

Tr. 162-63.

The law judge's evidentiary rulings indicate he viewed the case so narrowly that he was unwilling to consider *any* defense respondent sought to articulate. As the Ninth Circuit held in Ferguson, our Rules of Practice prohibit such conduct by a law judge.

ACCORDINGLY, IT IS ORDERED THAT:

This case is remanded for a new hearing.[39]

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

[39] 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); see also Administrator v. Carr, NTSB Order No. EA-5635 at 9 n.12 (2012). In this regard, we invite the Chief Law Judge to consider whether reassignment of this case would be prudent.

UNITED STATES OF AMERICA

NATIONAL TRANSPORTATION SAFETY BOARD

OFFICE OF ADMINISTRATIVE LAW JUDGES

In the matter of:	*	
	*	
MICHAEL P. HUERTA,	*	
ACTING ADMINISTRATOR,	*	
FEDERAL AVIATION ADMINISTRATION,	*	
	*	
Complainant,	*	
	*	
v.	*	Docket No.: SE-19109
	*	JUDGE GERAGHTY
TRE AVIATION CORPORATION (N61PH)	*	
ROBERT C. MACE,	*	
	*	
Respondents.	*	

U.S. Tax Court
Courtroom 406
401 West Washington Street
Phoenix, Arizona

Wednesday,
March 21, 2012

The above-entitled matter came on for hearing, pursuant to Notice, at 9:00 a.m.

BEFORE: PATRICK G. GERAGHTY,
Administrative Law Judge

APPEARANCES:

On behalf of the Administrator:

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On behalf of the Respondent:

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ORAL INITIAL DECISION AND ORDER

ADMINISTRATIVE LAW JUDGE GERAGHTY: This has been a proceeding before the National Transportation Safety Board on the appeal of Tre Aviation Corporation (N61PH), also known as Robert C. Mace, Respondent herein, from an Order of Revocation which seeks to revoke the airworthiness certificate issued to the aircraft identified as N61PH. The matter has been heard before this Law Judge and, as provided by the Board's Rules of Practice, I am issuing a decision in the proceeding from the bench.

The Complainant was represented by one of his staff counsel, Adam Runkel, Esquire, of the Federal Aviation Administration, Western Pacific Region. The Respondent, through the presence of Mr. Robert C. Mace, was present at all times and was represented by his counsel, Mr. Edward McConwell, Esquire, of Mission, Kansas.

Parties have been afforded the opportunity to call, examine and cross-examine witnesses and make to argument in support of their respective positions.

DISCUSSION

In discussing the case I will not reference the paragraphs of the complaint, which is the Order of Revocation,

which have been admitted by the answer submitted by the Respondent. However, of course, those paragraphs and the allegations contained therein as admitted are taken as having been established for purposes of this decision.

And as observed previously, I will of course take judicial notice of the provisions of the pertinent sections of the Code of Federal Aviation Regulations, CFRs, as they are pertinent in this situation.

The facts in this case are really fairly straightforward and are not in dispute as to the basic facts, that is, that there were two Bell 206 helicopters: one having the serial number of 3282 and another one identified with a data plate serial number of 3570. The Respondent purchased the aircraft identified as 3282, apparently from someplace in Florida so it was substantially corroded, apparently beyond the point where feasible repairs could have been made to that particular aircraft. Subsequently, however, the Respondent came into possession of another Bell helicopter, the one with serial number 3570, which was in acceptable condition. And therefore what was done by the Respondent, according to the maintenance records which he prepared, is that he took the cabin section and the tail boom section of the aircraft with the serial number 3570 and replaced it on those portions of the aircraft identified as 3282. He then took the data plate, which was in the original aircraft as it was obtained from Florida, the data plate bearing the serial number

3282, and affixed that in the appropriate place on the console in the cabin section which he had taken from 3570. That was done because apparently the aircraft 3570, the data plate there had been removed for some reason, returned to Bell Helicopter Corporation, and they had destroyed that data plate. And although requested by the Respondent to reissue, Bell helicopter declined to do that for whatever reason. But in any event, Respondent was not able to obtain a new data plate with a serial number 3570, so therefore after he replaced the cabin section from 3570 to the corroded one of 3282, he took the data plate that was in 3282 and placed it in the new replaced cabin section now having an aircraft identified with data plate 3282 in a cabin section and also, according to the testimony, having painted on it the identification number November-61-Papa-Charlie. That's the basic facts in this case.

Turning then to the testimony and the exhibits offered in the case. I have reviewed all of the exhibits and, as I've indicated, I took the lunch hour also to go over these exhibits and testimony.

Testimony offered through the Complainant is through two witnesses, the first of which was Raymond Adams. He is an aviation safety inspector with the FAA in the Scottsdale Flight Standards District Office, FSDO. He testified that he had seen the aircraft back in September of 2010 and then again as recently as last week. That would be March 14 of this year, 2012.

He identified the exhibits A-1 and indicated that the photographs in A-1 reflect in the first pages, 1, 2 and 3, the aircraft as seen him in September of 2010, and last week the aircraft appeared with a different color. Page 4 of that exhibit shows where the data plate on the aircraft as seen in the pages 1 through 3, and you can see this in the crew or cabin compartment on the console section on the right-hand side, and on the exhibits you can actually see an outline, rectangular, where a data plate would normally be.

The witness also indicated that in September 2010 he had another aviation safety inspector with him who was at that point the lead inspector. Mr. Adams indicated he had conversations with Mr. Mace, the Respondent, and that the Respondent had described to him, Mr. Adams, a lot about the fuselage changeout, that is, the change of the fuselage and the crew compartment from one aircraft to this newer aircraft, indicating therefore that when looking at Exhibit A-1, we're looking at the fuselage of an aircraft identified with a serial number 3570, and this is in accordance with, according to Mr. Adams' testimony, what was given to him by the Respondent in those conversations.

Mr. Fenning is also an aviation safety inspector with the Federal Aviation Administration and both of these individuals are certificated maintenance individuals. Mr. Fenning also has an inspection authorization.

He testified also with respect to Exhibit A-1,

indicating the aircraft depicted as it appeared in September of 2010. Referring to page 4 of that exhibit, he indicates that is the data plate that he observed at the time that he looked at that aircraft. And you can look at the aircraft and see the data plate clearly depicted on page 4 of Exhibit A-1.

Mr. Fenning indicated he also spoke with Mr. Mace and that Mr. Mace described to him the interaction between the two Bell helicopters, as I've already discussed, that is, 3282 and 3570, indicating as I've already stated and not really disputed, that the aircraft 3282 as originally purchased by the Respondent was corroded in the fuselage area. Therefore, he removed the fuselage from the aircraft identified with serial number 3570, installed that on the removed sections of 3282, and then installed the data plate 3282 into the new cabin console section of what was taken from 3570.

Exhibit A-2 shows on pages 1 and 2, thereof the photographs, partially disassembled aircraft, which is essentially 3282 as it appeared in December of 2010. And on page 5 thereof, you can see what I previously refer to as a center console essentially disassembled, but one can make out the rectangular indication on the lower right-hand side of the center console where a data plate would be located.

Mr. Fenning also identified on photographs 3 and 4 of Exhibit A-2, a close-up of the painted-over sections of the tail boom of the aircraft, indicating that the identification number on

the tail boom at the time that he saw it being more clearly depicted than in the photograph, was in fact November-61-Papa-Hotel.

With respect to the two aircraft, then, we have two serial numbers, 3570 and 3282. Mr. Fenning indicated based upon his observations and on what the Respondent had told him, that it was because of the corrosion on the cabin and general corrosion on 3282 as it was purchased that he, the Respondent, removed the cabin and tail boom components and the data plate from 3282 and took the cabin fuselage and tail boom from 3570, installed the data plate from 3282 in this reconstructed helicopter and then identified it as November-61-Papa-Charlie.

The witness also testified to various other exhibits: A-3, A-4, and A-5, which I have also considered. I mention specifically, however, Exhibit A-5. And as testified by this witness and not contradicted, that with respect to the FAA following over and giving credence to any actions by the Canadian Civil Aeronautics authority, that the only agreement as pointed out in A-5, with respect to service bulletins. It doesn't have anything to do with anything else than the FAA recognizing the applicability of service bulletins, but service bulletins are not at issue in this case.

Witness, in summary, therefore, simply indicated that with the removal of the cabin section and tail boom from 3570, putting it into this reconstructed aircraft and putting in the

data plate from the corroded aircraft where the fuselage and tail boom had been removed, that individuals would -- subsequent owners or subsequent mechanics dealing with this aircraft could misidentify the aircraft either as the total time on the cabin sections or other portions of the aircraft, or misidentify the applicability of any airworthiness directives which would apply to 3570 because now it's identified as 3282. And the witness also stated, and it was never contradicted, that the general practice for a mechanic would be to simply look at the data plate to determine the serial number of the aircraft that he's dealing with. It would be, and I would agree, unlikely that a mechanic would take the time to go back through historical records of 15 or 20 years, however many hundred of pages that might be, when he could simply look at the data plate on the console and determine whether or not a particular service bulletin, airworthiness directive would apply to that particular series of aircraft. So I accept that testimony.

The Complainant also offered into evidence and judicial notice was taken of the provisions of the *Federal Register* which was *Federal Register*, Volume 44, Number 150, dated Thursday, August 2nd, 1979, Rules and Regulation, and as I've indicated, the *Federal Register* does include comments that are received on a proposed change of regulations to be made by the Federal Aviation Administration, but it also then goes on to discuss those and then give its justification for either accepting in whole or in part

the comments or rejecting them, and then giving their rationale for the adopted changed. So, that rationale underlies what the adopted change is, and the changes here are to Section 45.13, and I will discuss those in detail. But in the *Federal Register*, the pertinent section is that, and I'm quoting, "The FAA believes that the practice of rebuilding of wrecked aircraft by replacing almost the entire aircraft and affixing the identification plate, data plate, which was recovered from the wreckage" -- and in this case, it's not a wreckage, it's simply a badly corroded aircraft, but it's the same thing. It's taking a data plate from one aircraft and putting it in another one. This practice is not in the public interest. This practice has been justified as "maintenance" or "repair" when it is in fact a rebuilding of the aircraft. The only person authorized to rebuild an aircraft is a person who manufactured it under a type or production certificate, and that in fact is what the regulations provide. If one looks at Section 43.3(j), it provides only that the manufacturer may rebuild or alter an aircraft engine, propeller or appliance manufactured by him under a type or production certificate. So that is clearly an applicable provision of the Federal Aviation Regulations.

Lastly, I would note also that there was a request made that deference be given to the Administrator's choice of sanction, and under the provisions of the statute, unless the sanction is shown to be arbitrary, capricious or not in accord with precedent, deference is required to be shown. And I'll discuss that

subsequently.

Turning then to the Respondent's case. The Respondent called two witnesses on his behalf and testified on his own behalf. First of the witnesses called was a Mr. Ernest Breeden. He testified he had been a DAR. He holds an A&P certificate and an inspection authorization. He stated he had experience replacing fuselages on Bell 206 helicopters, indicating that he had done three such exchanges. However, then he indicated that he had built an aircraft around a data plate and it was his understanding that he was, as he stated, allowed to rebuild the helicopter around a data plate.

He then went on to testify that he also had inspected this aircraft, and in the Respondent's exhibit there is a list of what Mr. Breeden did with this aircraft and the details of his inspection. And he stated that he had determined upon his inspection made in February 2009 that the aircraft was in fact a complete aircraft. And he did this knowing or being aware of the fuselage exchange. He stated that in his opinion the repair that the Respondent had made was in accordance with the provisions of Bell Textron helicopters. However, the provisions of Bell Textron helicopters is not what is governing in this case. This Respondent made no reference to the Federal Aviation Regulations and what the provisions of those regulations are, and those are the governing regulations, not what Bell Helicopter does, unless the FAA specifically approves it, and that's not showing here.

On cross-examination he indicated he had inspected the aircraft which is currently identified by the data plate and by the markings as 61-Papa-Hotel. A-1, the Exhibit A-1 is the aircraft that he inspected. That is the one with the replacement tail boom and fuselage from 3570 and, A-2, as he agreed, is the aircraft originally identified by its data plate as 3282, as identified by the manufacturer, Bell. In his opinion, he felt that the fuselage exchange was merely a repair. Quite frankly, listening to his testimony and his failure to cite to any authority other than his own opinion, I don't attach any significant weight to his testimony.

The next witness called was Mr. Kenneth Hibler. He also hold and A&P certificate and inspection authorization. He says he familiar with the Federal Aviation Administration. He worked as a mechanic in the United States Army, apparently 1968. He indicated he is familiar with the rules and regulations governing replacements of data plates, but conceded that he had never done a Bell 206 fuselage replacement, put one back together and taken it from one aircraft to another aircraft. He stated, however, that it happens all the time, that a data plate from one aircraft would be placed on another aircraft, such as we're dealing with here, the fuselage and tail boom taken from the aircraft originally identified as 3570 and then putting everything back together and taking the data plate that was originally in 3282 and putting it into this reconstructed aircraft.

On cross-examination he averred that the Federal Aviation [Regulation]'s allow for the taking of a data plate from one aircraft and placing it in another aircraft. That is a statement directly contradictory to the Federal Aviation Regulations. 45.13(e) specifically prohibits that. This is an error which in my view renders the testimony of Mr. Hibler useless.

Respondent testified on his own behalf. He is the owner and vice president, apparently, of Tre Aviation. He testified with respect to the obtaining of the original 3282 identified aircraft, corrosion, the amount of money and the bill of sale applied to obtaining that aircraft, parts being in the hangar at Elkin Field, 3570, the argument being that it was only parts, it was never an actual aircraft. However, conceding that after obtaining 3570 from someplace in Colorado, he observed that the data plate had been removed. There were efforts made to get the renewed data plate from Bell Helicopter Company, which I've already discussed. They did not do that. That data plate had been destroyed apparently. He indicated having bought the aircraft for parts, that he then substantiated by the records, that he took the cabin section from the aircraft with the data plate of 3570, tail boom and cabin section, which are the major sections of the aircraft. That's where everybody is carried, seated, the pilot, the co-pilot; all the controls are in the cabin section. And the tail boom, of course, through the rotor, which

is going to keep you from gyroscopic spinning around, another substantial component of the aircraft. So we're talking about the major section of the helicopter except for the rotor column itself. In any event, it is not disputed that in what is now identified as November-61-Papa-Hotel there is a data plate in it that says it is serial number 3282, when in fact the cabin section and the tail boom are really those parts that were originally identified as helicopter 3570.

On cross-examination he was asked as to how he installed 3570 and his answer was that installed 3570 around the data plate of 3282. There was also a reference made to the Respondent's Exhibit 32, which is Advisory Circular 43-17. And a quotation was cited from it by the Respondent. However, it was failed to be pointed out that in paragraph four there's a discussion and the discussion reads as follows: "The FAA is aware that" -- and I'm quoting -- "The FAA is aware that the identification information and ID plates have been altered and switched from one aircraft to another in an apparent effort to avoid the time and expense of establishing that an aircraft conforms to the FAA approved type design. An example would be the removing of an ID plate from an aircraft destroyed in an accident" -- in this case not destroyed, just severely corroded, for all practical purposes unusable; so it's destroyed as unusable, corroded to the point of unusability -- "in an accident and installed on a similar type aircraft of unknown origin and then applying for an airworthiness certificate

on the basis of the data contained in the ID plate. The practice of, 'building' or 'rebuilding' an aircraft and affixing an ID plate which was previously affixed to another aircraft is clearly not in the public interest.

That is a statement made by the FAA in its advisory circular, which is entitled, Guidance Material of Techniques, Methods and Practices Acceptable to the Administrator Governing the Installation, Removal or Change of ID, data and ID plates.

And in paragraph 5 under Guidelines, the last sentence thereof is also instructive herein, and I'm quoting, "An ID plate removed during maintenance operations" and in the maintenance operations examples given in the regulations and in the data available, the FAA is referring to your scrubbing or grinding, polishing. You might have to remove a data plate so that you can get to the component that you're working on, but that data plate has to be place back on that original piece of equipment and that is what this sentence says, an ID plate removed during maintenance operations must be -- must, mandatory -- be reinstalled in the original location from which it was removed prior to releasing the product to service. And if it has to be installed in the original location, it can't be installed in a different cabin and tail boom. The original location of the data plate 3282 was in the original aircraft 3282, not in the cabin section of 3570.

There was discussion made and it is true that in Part 1 of the CFRs there is no definition of the term manufacture or

rebuilding. However, as I've already indicated and quoted, the FAA does use that terminology in its information, in its advisory circular and also uses that terminology in the *Federal Register* when they're justifying the changes that they were making to Section 43.13. However, in the absence of a definition of itself, the Courts normally look to what is the commonly accepted meaning of a word in general usage, and I have done the same. In looking at *Black's Law Dictionary*, the Fifth Edition, 1979, there is a definition of manufacture with a citation to case law, which says, "manufacture is the production for use of prepared materials by giving such materials new forms, qualities, properties or combinations, whether by hand, labor or machine."

Well, that's what we've done here. We're giving a new a form to what was originally 3282 by taking the cabin section and the tail boom from 3570 and melding the two together. So we have a new form, a new combination. That's a manufacture. It's a process by which a new combination or product is made or fashioned. And I think that is an acceptable definition. And I find here that what the Respondent did in fact was attempt to manufacture a new aircraft using components from two separate Bell helicopters and then taking the data plate from one and placing it into his new combination and identifying it as November-61-Papa-Hotel.

Similarly, in *Webster's Dictionary of Synonyms*, 1968 edition, the word manufacture is defined as forming or shaping or

fashioning, which is certainly what was done here. It was forming a new helicopter using 3570 to replace the corroded sections of 3282.

And lastly, I would note with respect to the term rebuilding, that in the *American Heritage Dictionary*, Second College Edition, 1976, rebuild is defined as making structural repairs on or to remodel or make extensive changes. That was what was done here. Replacing the entire cabin section and tail boom is an extensive change. When you look at the helicopter, that's what you see. You see the cabin section and the tail boom.

Similarly, in *Roget's Thesaurus*, which is the Fourth Edition, under a definition of changes or change, a definition of change means to modify as to rebuild or reconstruct or reconstruction an item. That's rebuilding it. That's certainly what was done here. There was a change; there was a restructure or reconstruction, taking parts from two different aircraft. And it goes on in the definitions in subpart (9), it's transformed, altered or modified, it is then rebuilt.

So based the commonly accepted definitions of those terms, in this instance I would find that the Respondent in fact did engage and unauthorized attempted to manufacture a new product, a completed helicopter, transferring the data plate from one to the other and the cabin section and tail boom from one to the other. And that is clearly prohibited by the Federal Regulations, as I've already cited, 43.3(j), only the

manufacturer, in this case, Bell helicopter, could do that.

It was also a rebuilding. It was not simply an exchange of some minor component, magnetos, the collective, the seats. This was a rebuilding of the major part of the helicopter. The regulations clearly state what has to be on an identification plate and also what can be done with maintenance of an aircraft and its identification or type data plates. In subpart (c) of 45.13, it states, "Except as provided in paragraph (d)(2) of this section, no person may remove or install any identification plate required by 45.11" -- and the identification plate in this aircraft is required under 45.11 and the information called out in 45.11 must be on that data plate -- "without the approval of the Administrator." There's no indication here that any approval was ever obtained or given by the Administrator for any of the switching of data plates or work with the data plates done by the Respondent.

And it says that except in paragraph (d)(2). And if we look at (d)(2), (d) says, "persons performing work under the provisions of Part 43", and that is general maintenance. It's not manufacturing. Part 43 doesn't provide for an A&P mechanic to manufacture an aircraft. It must be done in accordance with the methods, techniques and practices acceptable to the Administrator. Provides in subparagraph (1) you can remove, change, replace identification information required by paragraph (a) of 45.13 or (2) remove an identification plate required by 45.11 when

necessary during maintenance operations. And I've already discussed that.

As clearly pointed out in the exhibits furnished here what the FAA is talking about in (d)(2) is you're taking a component and you're either rehabbing it, polishing it, returning it to serviceability, you can remove that data plate. But as the advisory circular clearly indicates, whatever data plate you remove from that particular component or part needs to be placed back on that specific part. You can't take the data plate off, say, a magneto and you have another magneto over here and then take the data plate from magneto A and stick it on magneto B. When you took it off A to work on this, you've got to put it back on. You took it off this engine and you've done something with the camshaft or whatever, you've got to put that data plate back that was on that engine back on that rehabbed engine. You can't put it on a new engine.

And as determinative, really, in this case, section (e) of 45.13 states as follows: "No person may install an identification plate, data plate, removed in accordance with paragraph (d)(2) section on any aircraft, aircraft engine, propeller, propeller blade or propeller hub other than the one from which it was removed. That clearly prohibits the taking of a data plate from 3570 -- or the cabin section, rather, and tail boom and taking the data plate from 3282 and placing it on the console in the cabin section of what was originally identified as

3570. This regulation clearly prohibits that.

I'll just briefly discuss two cases that were argued by counsel in their closing arguments. In the case of *Administrator vs. Potanko*, which is Board Number EA-3937, the Board discusses a similar situation here. I'm quoting, "The respondent argues that logbooks and data plate follow the engine, not the fuselage and the substitution of parts from an aircraft identified as 48-Sierra in no way changed the identity of the aircraft." The Board said, "We find the argument unconvincing." And going on to, quote -- and this is the Board's language -- "surely he", the respondent therein, Mr. Potanko, "cannot be considered to have rebuilt an aircraft around an engine, pullies, ailerons, a data plate" -- and that's emphasized -- "and other disjointed parts. We do not adopt the interpretation advanced by the respondent that he removed and replaced the data plate from 37-Foxtrot for the purpose of repairing the aircraft, rather that he affixed the data plate from 37-Foxtrot to the fuselage at 48S, an action prohibited under section 45.13(a)", which is what we're dealing with here.

Similarly, in the case of *Administrator vs. Dan's Aircraft Repair*, which is EA-4787, there's language in that which is instructive, I believe. The Board pointing out that contrary to arguments that there's not sufficient guidance, the Board specifically found that -- and overturned the law judge's finding to the contrary, that the Administrator had established by a preponderance of the evidence that the respondents having attached

or being responsible for the attachment of a data plate from one wrecked aircraft to an aircraft rebuilt from new and used parts, was a violation of the applicable provisions of the Federal Aviation Regulations. Going on to state in a long paragraph that the language in the *Federal Register*, which I've already referenced, and prior Board decision clearly gave sufficient information to mechanics to know that the taking of a data plate from one aircraft and placing it into another aircraft is not permissible under the Federal Aviation Regulations.

I find, therefore, upon a consideration of all of the evidence in this case, both the oral and the documentary, and the provisions of the Federal Aviation Regulations that in fact that the Respondent in his actions undertook to rebuild what is essentially a new aircraft, new helicopter using portions of 3282. And we don't know exactly how much of that, but definitely the cabin section and tail boom of the original aircraft of 3570 and then taking the data plate that was in 3282 and placing it into what is now the cabin section and console and tail boom of 3570. This is a misidentification of the aircraft. As the FAA points out in its statements both in the advisory circular, which I referenced as Respondent's 32, and in the *Federal Register*, that is action which the FAA considers inimicable to the safe performance in air commerce and air transportation and safety of the general public.

I find, therefore, that the actions undertaken by the

Respondent were in fact beyond the scope of his authority since he could not manufacture a new aircraft. He's prohibited by FAR 43.3(j). And that he is also prohibited in his actions by the provisions of 45.13(c) since he had no authorization to do what he did, and also clearly by subsection (e) of 45.13 in that he took a data plate from one aircraft and placed it in an aircraft other than the one from which it had been removed.

I find, therefore, that on a preponderance of the credible evidence that the Respondent has shown that this aircraft, which is now identified as November-61-Papa-Hotel, is not eligible, being misidentified and being worked on by the Respondent in excess of his authorization, for a standard airworthiness certificate. I find, therefore, that the Administrator's complaint, the Order of Revocation, must be affirmed as issued.

Before I close, I will simply also note that there was a third affirmative defense raised in the Respondent's amended answer to the complaint, and that dealt with the doctrine of laches. As the Board has specifically enunciated in the decision in *Administrator vs. Manin*, which is Board case EA-5586, a 2011 case, it is an affirmative defense, the doctrine of laches, if it does apply in where the 6-month stale complaint rule does not apply, it is the burden upon the Respondent that they must establish the delay caused them actual prejudice. It is not sufficient to simply assert the defense where you only make

conclusionary allegations. The delay must be shown and the Respondent must have proven that he suffered actual prejudice. And he must show how the delay specifically harmed him and provide evidence indicating such harm. That has not been done here, therefore, I reject the defense of doctrine of laches. The complaint as issued was valid and effective.

ORDER

IT IS THEREFORE ORDERED THAT:

1. The Order of Revocation, the complaint herein, be, and the same hereby is, affirmed as issued.

2. The standard airworthiness certificate of N61PH is hereby revoked.

Entered this 21st day of March 2012 at Phoenix, Arizona.

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PATRICK G. GERAGHTY

Judge

(Off the record.)

(On the record.)

ADMINISTRATIVE LAW JUDGE GERAGHTY: I've inquired of counsel if they want the appeal provisions recited and they have both indicated no. Therefore, they are simply referred to the Board's Rules, the section dealing with appeals, for adequate information.

Anything else from the Complainant?

MR. RUNKEL: No, Your Honor.

ADMINISTRATIVE LAW JUDGE GERAGHTY: Respondent, nothing?

MR. McCONWELL: No, Your Honor.

ADMINISTRATIVE LAW JUDGE GERAGHTY: The proceeding is closed. Thank you, gentlemen.

(Whereupon, at 4:12 p.m., the hearing in the above-entitled matter was closed.)

CERTIFICATE

This is to certify that the attached proceeding before the

NATIONAL TRANSPORTATION SAFETY BOARD

IN THE MATTER OF: Tre Aviation, Robert C. Mace

DOCKET NUMBER: SE-19109

PLACE: Phoenix, Arizona

DATE: March 21, 2012

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.

_____

Vesta Knight
Official Reporter

_____

Karen Galvez
Transcriber