

SERVED: June 19, 2014

NTSB Order No. EA-5721

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 18th day of June, 2014

_____	)	
MICHAEL P. HUERTA,	)	
Administrator,	)	
Federal Aviation Administration,	)	
	)	
Complainant,	)	
	)	Docket SE-19414
v.	)	
	)	
JOHN W. BAKER,	)	
	)	
Respondent.	)	
	)	
_____	)	

**OPINION AND ORDER**

**1. Background**

Respondent and the Administrator appeal the oral initial decision of Administrative Law Judge William R. Mullins, issued August 20, 2013.<sup>1</sup> By that decision, the law judge affirmed the Administrator’s order in part, finding respondent violated 14 C.F.R. § 91.7(a)<sup>2</sup> when he operated

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

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

a Bombardier CL600 aircraft while it was in unairworthy condition due to damage to the louvered vents under the number 1 engine of the aircraft. The law judge did not affirm the Administrator's charge that respondent violated 14 C.F.R. § 91.13(a).<sup>3</sup> The law judge imposed suspension of respondent's airline transport pilot (ATP) for a period of 30 days. We deny respondent's appeal and grant the Administrator's appeal.

A. *Facts*

On December 1, 2011, respondent operated the CL600 (hereinafter, "N453AW") as pilot-in-command of a passenger-carrying flight, under part 121 of the Federal Aviation Regulations, from Rochester, New York to Philadelphia, Pennsylvania. The flight was one of five legs of flight in which respondent operated N453AW that day.<sup>4</sup> Prior to taking off in Rochester, First Officer Michael Brestensky performed a preflight inspection of the aircraft. While walking around the aircraft, a baggage handler informed Mr. Brestensky of observed damage to the louver panel on the pneumatic drive unit (PDU) access door.<sup>5</sup> Mr. Brestensky returned to the cockpit and informed respondent of the damage. Respondent then viewed the damage. He placed his hand on the louver panel, and "gave it a nice yank."<sup>6</sup> Respondent believed it was damaged, but the metal was solid. He also stated he happened to know "that panel doesn't even

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<sup>3</sup> 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."

<sup>4</sup> Tr. 102.

<sup>5</sup> Tr. 53 (testimony of Federal Aviation Administration assistant principal aviation inspector Raymond Hansen, who oversees the Air Wisconsin certificate from the Chicago Flight Standards District Office). Inspector Hansen stated the PDU is for the aircraft's thrust reverser, as "the PDU turns the pneumatic air into physical energy or mechanical energy, which operates, opens and closes, the thrust reversers." *Id.*

<sup>6</sup> Tr. 103.

have to be there for the aircraft to be airworthy.”<sup>7</sup> Respondent returned to the cockpit and discussed the damage with Mr. Brestensky. They discussed calling maintenance control in Rochester, but decided doing so was unnecessary because they believed the damage merely was cosmetic. Respondent took off and landed in Philadelphia.

Once in Philadelphia, respondent parked the aircraft “close to the maintenance hangar, pulled out the logbook, wrote it up.”<sup>8</sup> Maintenance personnel replaced the access panel in approximately 20 minutes, and respondent continued flying the rest of the day. Notwithstanding the action he immediately took once in Philadelphia, respondent testified he believed the aircraft was airworthy at all times, including on his flight from Rochester to Philadelphia.

The Administrator issued an order, dated December 17, 2012, suspending respondent’s ATP and any other certificates, for a period of 45 days, for alleged violation of 14 C.F.R. §§ 91.7(a) and 91.13(a).

*B. Law Judge Oral Initial Decision*

The law judge determined respondent operated N453AW while it was in an unairworthy condition, due to the damage to the louver panel on the PDU access panel. In this regard, the law judge cited the two-part standard by which the Board assesses all § 91.7(a) allegations, stating, “there’s two aspects of airworthiness: one, safety of flight; and another one, whether it meets its type design. And it was pretty clear here that this damage was not the way the aircraft was designed.”<sup>9</sup> Later in the decision, the law judge cited Inspector Hansen’s testimony and concluded the aircraft’s failure to fulfill its type design rendered it unairworthy.

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<sup>7</sup> Id.

<sup>8</sup> Id.

<sup>9</sup> Initial Decision at 119.

Regarding the alleged violation of § 91.13(a), the law judge stated, even though respondent operated the aircraft while it was in an unairworthy condition, “if the aircraft’s safe to fly ... I think that would preclude any finding on my part of a careless and reckless operation.”<sup>10</sup> The law judge reduced the sanction to a 30-day suspension, based on his determination respondent did not violate § 91.13(a).

*C. Issues on Appeal*

*1. Respondent’s Appeal*

Respondent contends the law judge erred in determining the evidence proved he violated 14 C.F.R. § 91.7(a). Respondent asserts the law judge’s determination the aircraft did not meet its type design was “based solely on conjecture.”<sup>11</sup> Respondent emphasizes the Texas Air Composites report, which was based on analysis of the damaged louver panel after maintenance personnel removed it, showed no repairs to the panel was required, and returned them to service.<sup>12</sup> In addition, respondent disputes the fact that the configuration deviation list (CDL) did not indicate the aircraft would be airworthy while it had a damaged louver panel.<sup>13</sup> With regard to the other part of the airworthiness test, respondent argues the Administrator failed to introduce any evidence showing the damage to the louver panel had an adverse effect on safety. Based on these arguments, respondent urges us to grant his appeal.

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<sup>10</sup> Id. at 122.

<sup>11</sup> Resp. Appeal Br. at 4.

<sup>12</sup> See Exh. A-7 (Texas Air Composites report).

<sup>13</sup> Testimony at the hearing established the CDL is similar to a minimum equipment list (MEL), in that it allows certain items to be missing from an aircraft, yet still remain airworthy. Tr. 21; see also Tr. 69.

## 2. *The Administrator's Appeal*

The Administrator appeals the law judge's disposition of the 14 C.F.R. § 91.13(a) charge. The Administrator contends the law judge disregarded the Board's long-held precedent concerning such charges, because numerous prior cases state "the finding of a violation of an operational [Federal Aviation Regulations] provision ... without more is sufficient to support a finding of a 'residual' or 'derivative' [§ 91.13(a)] violation."<sup>14</sup> Based on the law judge's determination N453AW did not fulfill the requirements of its type certificate and the aircraft was therefore in an unairworthy condition, the Administrator argues he proved the § 91.13(a) allegation. The Administrator urges us to reinstate the 45-day sanction.

### 2. *Decision*

On appeal, we review the law judge's decision *de novo*, as our precedent requires.<sup>15</sup>

#### A. *Respondent's Appeal*

Title 14 C.F.R. § 91.7(a) prohibits operation of an aircraft unless it is in an airworthy condition. Board jurisprudence consistently has utilized a two-part standard for analyzing alleged violations of § 91.7(a). In order to prove a respondent operated an aircraft while it was in an unairworthy condition, the Administrator must prove either (1) the aircraft did not conform to its type certificate and applicable Airworthiness Directives; or (2) the aircraft was not in a condition

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<sup>14</sup> Administrator v. Seyb, NTSB Order No. EA-5024 at 4 (2003) (quoting Administrator v. Thompson, 7 NTSB 714, 716 n.7 (1991)); see also Administrator v. Bozarth, NTSB Order No. EA-5375 at 4-5 (2008); Administrator v. Nix, NTSB Order No. EA-5000 at 3 (2002); Administrator v. Richard, NTSB Order No. EA-4223 (1994).

<sup>15</sup> Administrator v. Smith, NTSB Order No. EA-5646 at 8 (2013); Administrator v. Frohmuth and Dworak, NTSB Order No. EA-3816 at 2 n.5 (1993); Administrator v. Wolf, NTSB Order No. EA-3450 (1991).

for safe operation.<sup>16</sup> The Board has also stated, “the term ‘airworthiness’ is not synonymous with flyability.”<sup>17</sup>

### 1. *Type Certificate*

The evidence clearly establishes N453AW did not fulfill the requirements of its type certificate, because the louvers on a PDU access panel were damaged. As well, the CDL, which was onboard the aircraft as Appendix 1 to the Canadair Regional Jet Flight Manual, stated, “one or both [thrust reverser actuator access doors] may be missing provided the performance and structurally limited weights” are reduced in accordance with a chart on the CDL.<sup>18</sup> The CDL also contained a diagram of the PDU access panel, and permitted *one flight* of the aircraft when one or both panels were removed. The flight must be “to an airport where necessary repairs or replacements can be made. The flight must not be carried out in known, forecast, or anticipated lightning conditions.”<sup>19</sup> However, respondent does not contend, on the flight from Rochester to Philadelphia, he met the criteria of the CDL. He did not remove the panel, nor did he present evidence to show he adjusted the weight on the aircraft or conducted the flight in known, forecast, or anticipated lightning conditions. Therefore, the Administrator met his burden of establishing a 91.7(a) violation.

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<sup>16</sup> Administrator v. Opat, NTSB Order No. EA-5290 (2007) (citing Administrator v. Doppes, 5 NTSB 50, 52 n.6 (1985); 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, NTSB Order No. EA-3448 (1991)); see also, e.g., Administrator v. Haddock, NTSB Order No. EA-5539 (2010), aff’d Haddock v. Babbitt, 488 Fed.Appx. 686 (4<sup>th</sup> Cir. 2012).

<sup>17</sup> Doppes supra note 16, at 52 n.6.

<sup>18</sup> Exh. A-6 at 2.

<sup>19</sup> Id.

## 2. Condition for Safe Operation

The evidence also established the aircraft was not in a condition for safe operation. The Administrator introduced photographs of the damage, which showed “deformed louvers” that were torn, cracked, and incorrectly positioned.<sup>20</sup> Inspector Hansen testified the louvers “release the hot exhaust from the 14-stage area.”<sup>21</sup> Inspector Hansen’s testimony, as well as the testimony of Michael Jankowski, who inspected the PDU access panel upon respondent’s arrival in Philadelphia, indicated such damage was not merely cosmetic, but was substantial.<sup>22</sup> Overall, the evidence in the record established the Administrator fulfilled the second part of the airworthiness test, in addition to the first part.

### B. *The Administrator’s Appeal*

We find the law judge erred in determining respondent did not act in a careless or reckless manner when he operated N453AW while it was in an unairworthy condition. Under our jurisprudence, when the Administrator has proven an operational violation of the Federal Aviation Regulations, the Administrator has also established a violation of § 91.13(a), because the action of violating an operational regulation is unequivocally careless or reckless. As the Board stated in Seyb, “[t]he cases that have established this policy are too numerous to list.”<sup>23</sup> The fact respondent’s flight from Rochester to Philadelphia was uneventful does not obviate the determination that the aircraft was unairworthy. Therefore, we find respondent also violated § 91.13(a).

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<sup>20</sup> Tr. 35; Exh. A-2.

<sup>21</sup> Tr. 57.

<sup>22</sup> Tr. 24, 72-73.

<sup>23</sup> NTSB Order No. EA-5024 at 4 (2003).

*C. Sanction*

We find the Administrator's imposition of a 45-day suspension of respondent's certificates appropriate under the circumstances. While the finding of an additional violation of § 91.13(a) does not function to amend the sanction period automatically, we consider all factors in determining the appropriate sanction. In the case *sub judice*, respondent was aware of the damage and discussed it with Mr. Brestensky. He walked around the aircraft and pulled on the louver, and then, rather than checking the CDL or calling the appropriate maintenance personnel, he took off on a passenger-carrying flight. The Air Wisconsin Airlines Corporation General Maintenance Manual prohibited handling a discrepancy in this manner.<sup>24</sup> A 45-day suspension period is appropriate for the holder of an ATP certificate who exercises such a failure in judgment.

**ACCORDINGLY, IT IS ORDERED THAT:**

1. Respondent's appeal is denied;
2. The Administrator's appeal is granted; and
3. The 45-day suspension of respondent's ATP certificate, and any other certificates respondent holds, shall begin 30 days after the service date indicated on this opinion and order.<sup>25</sup>

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

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<sup>24</sup> Exh. A-5 at ¶ 2.1 (stating, "[w]hen a known or suspected unsatisfactory condition occurs during flight operations, the Captain or maintenance personnel will ensure that the Maintenance Controller is notified immediately.")

<sup>25</sup> For the purpose of this order, respondent must physically surrender his ATP certificate to a representative of the Federal Aviation Administration pursuant to 14 C.F.R. § 61.19(g).

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

\* \* \* \* \*

In the matter of: \*

MICHAEL P. HUERTA, \*  
ADMINISTRATOR, \*  
FEDERAL AVIATION ADMINISTRATION, \*

Complainant, \*

v. \*

Docket No.: SE-19414

JUDGE MULLINS

JOHN W. BAKER, \*

Respondent. \*

\* \* \* \* \*

Kluczynski Federal Building  
230 South Dearborn Street  
Courtroom 3908  
Chicago, Illinois 60604

Tuesday,  
August 20, 2013

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

BEFORE: WILLIAM R. MULLINS,  
Administrative Law Judge

## APPEARANCES:

On behalf of the Administrator:

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## ORAL INITIAL DECISION AND ORDER

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ADMINISTRATIVE LAW JUDGE MULLINS: This has been a proceeding before the National Transportation Safety Board under the provisions of Section 44709 of the Federal Aviation Act of 1958, as amended, on the appeal of John William Baker from an Order of Suspension that seeks to suspend his airline transport pilot certificate for a period of 45 days. I will refer to Mr. Baker as the Respondent.

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The Order of Suspension serves as the complaint in these proceedings and was filed on behalf of the Administrator of the Federal Aviation Administration through the regional counsel's office of the Great Lakes Region here in the Chicago area. The matter has been heard before me, William R. Mullins. I'm an Administrative Law Judge for the National Transportation Safety Board. As provided by the Board's Rules, I will issue a bench decision at this time.

20

The matter came on for hearing, pursuant to notice that was given to each of the parties, and the matter was called for trial here in Chicago this 20th day of August of 2013. We commenced the trial at 9:00, and it's now about 1:45 in the afternoon.

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The Administrator was present throughout these

1 proceedings and was represented by counsel, Mr. Brian Khan,  
2 Esquire and Mr. Chris Zurales, Esquire of the regional counsel's  
3 office. The Respondent was present throughout these proceedings,  
4 and was represented by Mr. Paul Borth and Mr. Charles R. Barnett,  
5 Esquires, of the Chicago area. The parties were afforded a full  
6 opportunity to offer evidence, to call, examine, and cross-examine  
7 witnesses. And, in addition, the parties were afforded an  
8 opportunity to make argument in support of their respective  
9 positions.

10 DISCUSSION

11 The case is a pretty simple case. The Order of  
12 Suspension, I'll go over just briefly. But the first four  
13 paragraphs were admitted by the Respondent, and they are:

14 1. You now hold and at all times relevant hereto held  
15 Airline Transport Pilot Certificate No. (omitted).

16 2. At all times relevant hereto you were employed as a  
17 pilot for Air Wisconsin Airlines operating passenger-carrying  
18 aircraft under Part 121 of the Federal Aviation Regulations.

19 3. On December 1, 2011, you acted as pilot in command  
20 of a Bombardier CL-600 aircraft registered as N453AW on a  
21 passenger-carrying flight from Rochester, New York to  
22 Philadelphia, Pennsylvania, as Air Wisconsin Flight Number 3684.

23 4. Prior to departing Rochester, ROC, on that flight,  
24 you were made aware of damage to the louvered vents under the  
25 number one engine of N453AW.

1           Those are the first four paragraphs, and they were all  
2 admitted in the pleadings. Paragraphs 5 and 6 and 7 were denied.

3           5. The condition described in paragraph 4 rendered  
4 N453AW unairworthy.

5           6. Rather than reject the aircraft and enter the  
6 discrepancy in the aircraft log, you, without consulting Air  
7 Wisconsin maintenance, flew N453AW with passengers to  
8 Philadelphia.

9           7. Your operation of N453AW, as described above, was  
10 careless and endangered the lives and property of others.

11           And those three paragraphs, 5, 6 and 7, have been denied  
12 by the Respondent.

13           And as a result of those pleadings, the Administrator  
14 has alleged regulatory violation of:

15           (a) FAR 91.7(a), which states that no person may operate  
16 a civil aircraft unless it is in an airworthy condition; and

17           (b) Section 91.13(a), which states that no person may  
18 operate an aircraft in a careless or reckless manner so as to  
19 endanger the life or property of another.

20           The Administrator had two witnesses: Mr. Raymond  
21 Hansen, who's the Deputy Principal Operations Inspector of  
22 airworthiness for Air Wisconsin, employed by the Federal Aviation  
23 Administration here at the Chicago FSDO. He's been in that job, I  
24 think, 13 years, and he was the inspector who did the  
25 investigation involving this incident. He identified -- well,

1 there was stipulated -- there was offered at the outset of the  
2 trial and stipulated that Exhibits A-1 and 2 had been admitted.  
3 A-1 is the aircraft maintenance log and A-2 was a photograph of  
4 this damaged area.

5           Also, Mr. Hansen identified, and there was admitted,  
6 Exhibit A-4, which is the component access manual from Bombardier,  
7 Exhibit A-5 which is the Air Wisconsin General Maintenance Manual  
8 for unscheduled maintenance. Exhibit A-6 is the airplane flight  
9 manual and a specific page out of that which is the configuration  
10 deviation list, CDL, for the aircraft involving this particular  
11 access panel that was damaged. And then A-7 was admitted, which  
12 is the Texas Air Composites disposition report from the company  
13 down in Ft. Worth, I guess, that did this repair.

14           Let me say a little bit about that. It occurred to me  
15 as I was reviewing my notes and thinking about this case, that  
16 that whole Exhibit A-7 seemed to be a red herring. It really  
17 doesn't have anything to do with the case today. There were some  
18 issues involved with the way they wrote it up, I suppose. At  
19 least they seemed to me, and I sort of got hung up on them, about  
20 how they could take something and not say they repaired it, and  
21 then put it back together and paint it. And at one point they  
22 said the discrepancy was something, and then they took it apart  
23 and they did an inspection and they didn't find any hidden damage,  
24 so they put it back together and painted it. Anyway, but that, as  
25 I said, as I looked at that later, that didn't have anything to do

1 with this case. It's what the pilot saw and what the mechanic  
2 took off the airplane and what happened to it after he took it off  
3 the airplane really doesn't have anything to do, I don't think,  
4 with why I'm here today. So I'll just say that in passing and I  
5 won't come back to that.

6           Anyway, Mr. Hansen testified that he did not see this  
7 panel. He saw this picture. There was introduced then, again,  
8 and I'll say this in passing -- I'm not sure that it has any  
9 impact, except it's part of the evidence that I saw, but it  
10 wouldn't be part of the evidence in the transcript. But there was  
11 another picture identical to it that was marked A-2-1, and on  
12 A-2-1 Mr. Hansen drew a circle around where he said the crack was.  
13 And then, Mr. Jankowski, when he was testifying was handed this  
14 picture, and he pointed to an area on this access panel and these  
15 louvers where he said the crack was, which is totally opposite of  
16 where Mr. Hansen said it was. Mr. Hansen said it was on top.  
17 Mr. Jankowski said it was down here on the bottom. But it wasn't  
18 in the transcript that he pointed that out. I was sitting here  
19 and I saw him point to that and he held it up. And I don't think  
20 -- you know, where the crack was I don't believe is important so  
21 much as there was a crack, I guess.

22           But in any event, Mr. Hansen never saw the aircraft,  
23 never saw this access panel, saw the picture, and he introduced  
24 these maintenance manuals. And, of course, the maintenance  
25 manuals, pilots don't have access to that and I don't think

1 they're responsible for knowledge of what the maintenance manuals  
2 say.

3           But Mr. Hansen did say, on cross-examination, that he  
4 didn't know whether there was a safety of flight issue, but he  
5 said that wasn't the way it was designed. And I think, really,  
6 for the purposes of these kind of cases, that was probably the  
7 turning point in this case. But there's two aspects of  
8 airworthiness: one, safety of flight; and another one, whether it  
9 meets its type design. And it was pretty clear here that this  
10 damage was not the way the aircraft was designed, and Mr. Hansen  
11 testified about that.

12           But then Mr. Jankowski testified, and he was the A&P-  
13 certified individual with Air Wisconsin who, when the aircraft  
14 arrived in Philadelphia, went out and replaced this door, which  
15 the little panel with the louvers is located on, is pretty much  
16 all of A-2, what's in that picture. And he replaced that on that  
17 same day, but after the aircraft returned from Rochester.

18           And I thought it was interesting, and I don't know how  
19 these things should get surfaced to Bombardier, but Mr. Jankowski  
20 said this wasn't unusual damage at all because this louver vent  
21 sits right above the cargo door, and it wasn't unusual for large  
22 pieces of cargo, as they're going up the ramp or being lifted into  
23 this door, they hit that thing and bend those louvers and then  
24 they'd have to replace them. And that almost suggested that  
25 somebody wasn't looking at that when the aircraft was type

1 designed, because they could either move the cargo door or those  
2 vents, you'd think. Or do something to keep that sort of damage  
3 from reoccurring.

4           But, in any event, that was Mr. Jankowski's testimony,  
5 and he said it did need to be replaced, that according to the  
6 maintenance manual, the cracks required a replacement of those  
7 louvers. But again, the maintenance manual is not something that  
8 the pilots would have access to.

9           All right, those were the witnesses for the  
10 Administrator.

11           Respondent called, by deposition, Michael Brestensky --  
12 I still haven't got that name right -- Michael Brestensky. And  
13 Mr. Brestensky was the first officer on this flight. He  
14 testified, and there was talk about it during the rest of the  
15 case, but he testified that when he was doing his walk-around one  
16 of the cargo handlers brought to his attention that this louver  
17 was bent, as indicated in A-2. He said he looked at it, completed  
18 his walk-around, went back in the cockpit, discussed it with the  
19 captain.

20           The captain got out, the Respondent. He came back and  
21 looked at this. They then got together and they discussed it.  
22 They did not believe it was a safety of flight issue. They agreed  
23 that the captain would report this when they returned to  
24 Philadelphia, and they did. They got in the aircraft and the  
25 flight was uneventful then back to Philadelphia, where the report

1 was made about this louver vent.

2           Mr. Brestensky's deposition, there were five exhibits.  
3 R-10 was his certificate, details about his certificates. 11 was  
4 his response, Mr. Brestensky's response to the letter of  
5 investigation. Exhibits 12, 13, 14, and 15 are photographs of  
6 this area of the aircraft. And they give a different viewpoint.  
7 Certainly 12 and 15 give a different aspect and probably is more  
8 likely what the pilots could see without crawling up on a ladder  
9 or getting up on this thing. But the damage, you can see the  
10 damage in all of those photographs. So those were the only  
11 exhibits that came in via this deposition that the Respondent had.

12           Then the Respondent, Captain Baker, took the stand. He  
13 lives in Raleigh, North Carolina, has been flying since he was 15,  
14 and has been with Air Wisconsin for 10 years. Has over 6,000  
15 hours, and he said during that period of time he'd probably done  
16 4,500 walk- arounds of aircraft. And he believed that the  
17 aircraft looked safe to fly, was airworthy, and he also confirmed  
18 that he discussed it with the first officer and they made the  
19 decision to go back to Philadelphia and turn it in there, and  
20 that's what they did.

21           In looking at the evidence, and it was a little -- not  
22 disconcerting, but the Administrator took the position that this  
23 was a "hip-pocket write-up." And the hip-pocket write-up almost  
24 sounds like, particularly where both pilots are involved, sounds  
25 like some conspiracy to conceal a problem until a later time or

1 something. And I think if the Administrator really believed that,  
2 there would probably be some reason that both pilots wouldn't be  
3 in here today, instead of just the captain.

4 But the captain did testify that they discussed it, as  
5 did the first officer, and they believed that the aircraft was  
6 good to go, and they returned back. It was repaired or that door  
7 was replaced within 20 minutes and they continued to fly the  
8 airplane throughout that day. They used the word cosmetic damage,  
9 but as I said earlier, there are two aspects to airworthiness:  
10 one, whether it's safe for flight; and whether it meets its type  
11 design. And the testimony I've had today from Mr. Hansen is that  
12 it didn't meet its type design. It wasn't designed that way. And  
13 so, therefore, it would fall under that category of unairworthy.

14 However, having said that, if the aircraft's safe to  
15 fly, I feel that the Administrator has not -- and the only  
16 evidence I've heard for both pilots is that they believed it was  
17 safe to fly; that, in fact, it was safe to fly because they flew  
18 it that way, and they probably -- and the testimony was that they  
19 probably flew it into Rochester with this damage back there. So I  
20 think that would preclude any finding on my part of a careless and  
21 reckless operation. However, I do find that there has been  
22 established by a preponderance of the evidence the unairworthy  
23 aspect in that this aircraft didn't meet its type design. And I  
24 think, under those circumstances, an appropriate sanction would be  
25 a 30-day suspension of the captain's airline transport pilot

1 certificate.

2 ORDER

3 IT IS THEREFORE ORDERED that safety in air commerce and  
4 safety in air transportation does not require an affirmation of  
5 the Administrator's Order of Suspension as issued. And,  
6 specifically, I've found and I have discussed that I believe there  
7 was established by a preponderance of the evidence regulatory  
8 violation of FAR 91.7(a), in that the aircraft was operated in an  
9 unairworthy condition.

10 However, in that same vein, I found that that  
11 unairworthy condition was a type design defect, as opposed to a  
12 safety of flight defect. But given that finding and the evidence  
13 here today, I found that the Administrator has not established by  
14 a preponderance of the evidence the regulatory violation of FAR  
15 91.13(a), the careless and reckless operation. And that portion  
16 of the Order of Suspension will not be affirmed.

17 And based on those findings, I find that an appropriate  
18 sanction herein would be a 30-day suspension of Captain Baker's  
19 airline transport pilot certificate, and it will be so ordered.

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24 EDITED ON

25 SEPTEMBER 18, 2013



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WILLIAM R. MULLINS

Administrative Law Judge

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## APPEAL

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Captain Baker, you have the right to appeal this Order today, and you may do so by filing your Notice of Appeal within 10 days of this date. If you file a Notice of Appeal within that 10 day period, then the appeal would go the National Transportation Safety Board Office of Administrative Law Judges at Room 4704, at 490 L'Enfant Plaza East, S.W., Washington, D.C. - zip code 20594.

And if you do appeal within that 10-day period, then within 50 days of this date you must file a brief in support of that appeal. And the brief would go to that same street address, but to Room 6401, which is the Office of General Counsel of the NTSB.

And, Mr. Barnett, you're closest, so if you'd step up here, I'll hand you and your client a copy of this right to appeal. But I would say this for both of you and Captain Baker, that the timeliness of the 10 days and the 50 days for the appeal is critical and if you miss that, then you have missed your appeal.

Now, the Administrator's entitled to appeal my Order today and you have all those same rights. And you can file your Notice of Appeal within 10 days and then your brief within 50 days of this date. And I have a copy of this for you, Mr. Khan, if you'd like. I suspect you have a whole file of these back at your

1 office, but I'll hand you another one.

2 Now, does the Respondent have any question about the  
3 Order?

4 MR. BARNETT: No, Your Honor.

5 ADMINISTRATIVE LAW JUDGE MULLINS: Any questions from  
6 the Administrator?

7 MR. KHAN: No, Your Honor.

8 ADMINISTRATIVE LAW JUDGE MULLINS: All right. Thank  
9 you, folks. This will conclude the hearing. We're in recess.

10 (Whereupon, at 2:06 p.m., the hearing in the above-  
11 entitled matter was adjourned.)

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CERTIFICATE

This is to certify that the attached proceeding before the

NATIONAL TRANSPORTATION SAFETY BOARD

IN THE MATTER OF: John W. Baker

DOCKET NUMBER: SE-19414

PLACE: Chicago, Illinois

DATE: August 20, 2013

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.

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John Allen  
Official Reporter