SERVED: June 20, 2014

NTSB Order No. EA-5722

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 day 18th of June, 2014

MICHAEL P. HUERTA, Administrator, Federal Aviation Administration, Complainant, v. TRE AVIATION CORPORATION and ROBERT C. MACE, Respondents.	Docket SE-19109RM

OPINION AND ORDER

1. *Background*

Respondents and the Administrator appeal the written initial decision of Administrative Law Judge Stephen R. Woody, issued August 28, 2013.[1] By that decision, the law judge

[1] A copy of the law judge's written initial decision is attached.

determined the Administrator proved respondents violated 14 C.F.R. §§ 43.3[2] and 45.13(e)[3] when they arranged for the data plate from one Bell 206B to be removed and placed on another Bell 206B, which bore a different serial number. We deny both appeals.

A. *Facts*

In 2003, Respondent Mace, as Vice President of TRE Aviation Corporation, purchased a Bell 206B (serial number 3570). At the time of the purchase, the helicopter lacked a data plate and therefore was ineligible for operation. Respondent Mace attempted to obtain a data plate for the aircraft from Bell, but was unsuccessful. As a result, Respondent Mace decided to use the helicopter for its parts. In 2004, on behalf of TRE Aviation, Respondent Mace purchased another Bell 206B (serial number 3282), which did not have an engine and lacked many other parts. Respondent Mace purchased 3282 with the intention of repairing it, but subsequently determined the fuselage of 3282 was corroded beyond repair and required replacement.

Ultimately, based on the condition of both aircraft, Respondent Mace replaced the corroded fuselage and tailboom on 3282 with the fuselage and tailboom from 3570.[4] Respondent Mace also painted "N61PH," the registration number for 3282, on the tailboom of 3570. In

[2] Section 43.3, titled "Persons authorized to perform maintenance, preventative maintenance, rebuilding, and alterations," sets forth requirements governing the maintenance, rebuilding, repair, alteration, and preventative maintenance on an aircraft, airframe, aircraft engine, propeller, appliance, or component part. The Administrator's order alleged respondents did not have the authority to remove the data plate from one aircraft and place it on the fuselage of another.

[3] Section 45.13(e), titled "Identification data," prohibits any person from installing "an identification plate … on any aircraft, aircraft engine, propeller, propeller blade, or propeller hub other than the one from which it was removed."

[4] Tr. 307 (Respondent Mace's testimony that he removed the data plate from the center console of the fuselage in 3282 and affixed it to the center console of the fuselage of 3570).

replacing the fuselage, Respondent Mace used only the upper right and left engine cowlings and the particle separator, as well as other "small" parts from 3282.[5]

Respondent TRE Aviation applied for and received a standard airworthiness certificate for N61PH from a Federal Aviation Administration (FAA) designated airworthiness representative (DAR). Shortly thereafter, in November 2005, Respondent Mace approved the aircraft for return to service.[6] In 2010, aviation safety inspectors Kenton Fenning and Raymond Adams from the FAA Flight Standards District Office (FSDO) in Scottsdale, Arizona, visited the repair facility in which Respondent Mace was performing work on N61PH. At that time, the aircraft was only partially assembled and contained no data plate. Respondent Mace informed the inspectors he had two aircraft: 3570 and 3282. Inspector Fenning photographed 3282 and noticed "N61PH" appeared on the tailboom, but someone had painted over it.[7] Inspector Fenning testified other items identified as 3570, such as the doors, wind screens, windows, entrance steps, flight control mounts, portions of the instrument panel, engine firewalls, and the wiring harness, became part of the new N61PH.

In 2012, Inspector Adams again visited the facility and photographed the aircraft and its data plate, which was installed in the fuselage and bore serial number 3282. However, Inspector Adams understood the original serial number the manufacturer assigned to the aircraft was 3570. Respondent Mace told him 3282 was "beyond repair due to corrosion, so [Respondent Mace] took the data plate off that one and put it on [3570]."[8]

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[5] Tr. 305. Respondent Mace could not recall precisely which small parts he used.

[6] Tr. 301; Exhs. A-4 and R-17. Respondent Mace holds a mechanic certificate, with airframe and powerplant ratings, as well as an inspection authorization. Tr. 289.

[7] Exh. A-2 at 3 and 4 (photographs of aircraft showing inconsistent paint).

[8] Tr. 35.

At the hearing, respondents presented the testimony of mechanic Ernest Breeden and David Cann,[9] who described the work on N61PH as "parting out" an aircraft. The witnesses both believed respondents repaired but did not rebuild 3282. In addition, they surmised 3570 ceased to exist as an aircraft once its data plate was removed. With regard to removal of the fuselage, Mr. Breeden stated he had replaced the fuselage on three Bell 206Bs in accordance with the Bell 206 Maintenance Manual and the Bell Structural Repair Manual; once he completed each replacement, he affixed the original data plates in the same location on the center console of each new fuselage. In his experience, the appropriate representatives and ASIs approved of this process. Similarly, Mr. Cann opined respondents' actions in removing the data plate and placing it on the non-corroded fuselage was permissible, because 3570 did not exist as an aircraft, but was simply a collection of parts, given its lack of a data plate. Mr. Cann acknowledged, however, the display of serial number 3282 appeared on an aircraft that had been replaced almost in its entirety.[10]

B. *Procedural Background*

On May 20, 2011, the Administrator issued the order revoking the standard airworthiness certificate of N61PH. Respondents appealed. NTSB Administrative Law Judge Patrick G. Geraghty conducted a hearing, at which the parties presented evidence. Administrative Law Judge Geraghty affirmed the Administrator's order, which respondents appealed. Following our

[9] Mr. Cann, who is now the president of his own aviation consulting company, began his career at the FAA as an ASI in maintenance, served in several other positions, and worked in the position of Division Manager of the Aircraft Maintenance Division (AFS-300) at FAA headquarters. Tr. 210-212. Mr. Cann assisted with the development of policy and the drafting of regulations and guidance concerning 14 C.F.R. part 43 while he was at the FAA.

[10] Tr. 286. Mr. Cann also stated he did not know how many parts on the subject aircraft were from 3282. Id.

analysis of the record, we issued an Opinion and Order remanding the case for a new hearing.[11] The NTSB Chief Administrative Law Judge reassigned the case to Administrative Law Judge Stephen R. Woody, who held a new hearing on June 18-19, 2013.

C. *Law Judge's Initial Decision*

In his written initial decision, issued August 28, 2013, the law judge determined respondents violated 14 C.F.R. §§ 43.3 and 45.13(e), and affirmed the order of revocation. The law judge summarized the undisputed facts and stated Inspector Fenning testified that many original parts from the fuselage assembly of 3282 remained intact. The law judge further summarized Inspector Fenning's testimony stating Respondent Mace simply removed the data plate from 3282 and affixed it to the fuselage of 3570. He stated, "it is clear from the testimony … that the aircraft currently identified as serial number 3282 has very few parts from the aircraft originally identified as serial number 3282."[12] He further stated the "overwhelming majority" of parts now on the aircraft identified as 3282 came from 3570 or another aircraft.[13]

In his decision, the law judge summarized the reasons why aircraft identification plates, as described in §§ 45.11 and 45.13, are necessary. For example, certain Advisory Circulars or other binding FAA guidance documents identify particular models of aircraft based on a range of serial numbers, which are displayed on data plates. The law judge also referenced three previous

[11] NTSB Order No. EA-5652 (2013).

[12] Initial Decision at 3.

[13] Id.

Board opinions, in which the Board affirmed the Administrator's orders based on the respondents' removal of a data plate from an aircraft.[14]

The law judge did not find persuasive respondents' affirmative defenses of the doctrine of *laches* and the FAA's failure to comply with the Board's stale complaint rule. Respondents asserted the "fuselage exchange" occurred in 2005, yet the Administrator's order was dated May 20, 2011. Therefore, under the stale complaint rule (codified at 49 C.F.R. § 821.33), which requires the Administrator to issue a notice of proposed certificate action within six months of learning of the alleged violation, respondents asserted the Administrator's order was not timely. Respondents also stated they suffered prejudice as a result of the delay, because they were unable to obtain the testimony of James Pendergast, the DAR who reviewed the aircraft's records and issued the standard airworthiness certificate, because of his declining health. The law judge disposed of the timeliness issues by determining N61PH was not identified properly; therefore, it lacked the qualification to hold a standard airworthiness certificate. Concerning the doctrine of *laches*, the law judge determined respondents had not presented evidence of prejudice, and therefore could not use the doctrine as an affirmative defense.

Finally, the law judge denied the Administrator's petition to reconsider his disposition of the Administrator's motion to amend the complaint to consider the case on an emergency basis.[15] The law judge explained the Administrator did not seek to amend the order to deem the case an emergency until after two hearings in the case had occurred, and the only event prompting the

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[14] Initial Decision at 6-7 (citing Administrator v. Dan's Aircraft Repair, NTSB Order No. EA-4787 (1999); Administrator v. Potanko, NTSB Order No. EA-3937 (1993); Administrator v. Lott, 5 NTSB 2394 (1987)).

[15] Cases the Administrator initiates pursuant to the authority to issue immediately effective orders under 49 U.S.C. §§ 44709(e) and 46105(c), and in accordance with the Board's Rules of Practice, codified at 49 C.F.R. §§ 821.52-821.57, proceed on an expedited basis.

Administrator to pursue the case as an emergency was the fact respondents demanded the return of the airworthiness certificate for N61PH. The law judge indicated the Board's Rules of Practice concerning emergency cases could not equitably apply to respondents in this case.

D. *Issues on Appeal*

1. *Respondents' Appeal*

Respondents assert the law judge erred in determining respondents violated 14 C.F.R. § 45.13(e) and in affirming the Administrator's sanction. Respondents articulate several arguments concerning the appropriate terminology to describe the fuselage replacement, such as whether the airframe or the fuselage can be considered the "aircraft" and whether respondents "rebuilt" N61PH. Respondents contend the law judge erred in allowing Mr. Fenning to provide opinion testimony at the hearing, in failing to consider the testimony of respondents' two expert witnesses, and in considering the Administrator's description of § 45.13(a) in its 1979 preamble accompanying the Final Rule in the *Federal Register* as "regulatory."[16] Respondents also request oral argument under our Rules of Practice.

2. *The Administrator's Appeal*

The Administrator argues the law judge erred in finding the Administrator did not "legally preserve the ability to require immediate surrender and continued forfeiture" of the standard airworthiness certificate for N61PH.[17] The Administrator contends Congress provided the FAA with the authority to issue immediately effective orders, and states the agency is entitled to deference in such determinations. The Administrator asserts an emergency now exists,

[16] Resp. Appeal Br. at 21.

[17] Admin. Appeal Br. at 8.

because N61PH should not maintain an airworthiness certificate during the duration of this appeal.[18]

The Administrator's brief includes the following explanation in this regard: on March 29, 2011, the Administrator issued an emergency order, revoking the standard airworthiness certificate of N61PH. The Administrator withdrew the emergency order and issued a notice of proposed certificate action on April 1, 2011, upon finding an emergency action was not warranted because Respondent TRE Aviation no longer possessed the standard airworthiness certificate, and therefore was unable to exercise the privileges of the certificate. Over two years later, on June 10, 2013, respondents requested the Administrator return the standard airworthiness certificate. The Administrator then sought to revoke the certificate as an emergency, on the basis that respondents' preservation of an airworthiness certificate for N61PH compromised aviation safety.

2. *Decision*

We review this case, as a whole, under *de novo* review.[19]

Respondents' Appeal

A. *Application of 14 C.F.R. §§ 45.13(e) and 43.3*

1. *Section 45.13(e)*

Title 14 C.F.R. § 45.13(e) prohibits the removal or installation of an aircraft's data plate without approval from the FAA, except in certain circumstances. Specifically, § 45.13(e) states, "[n]o person may install an identification plate removed in accordance with paragraph (d)(2) of

[18] The Administrator's appeal brief also requests expedited consideration of the appeal.

[19] 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).

this section on any aircraft, aircraft engine, propeller, propeller blade, or propeller hub other than the one from which it was removed." Respondent Mace does not dispute he removed the data plate from its location on the center console of 3282's fuselage and affixed it to the center console of the fuselage of 3570.[20] Respondent Mace also does not deny he had "N61PH" painted on the tailboom of the aircraft originally known as 3570; previously, 3570 displayed N3889W as its registration number.[21]

The airframe times recorded for the two aircraft differed.[22] In addition, the Administrator's attorney provided evidence establishing the applicability of some Airworthiness Directives depends on the serial number the data plate displays.[23] Inspector Fenning explained if he needed to ascertain the serial number of a Bell 206B, he would view the data plate affixed to the center console of the fuselage. Overall, the Administrator proved the importance of an aircraft maintaining an accurate data plate.

a. *Terminology Describing Respondents' Conduct*

Respondents contend the law judge erred in determining mechanics cannot "repair" aircraft in the manner in which Respondent Mace did in the case *sub judice*. Respondents also

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[20] Tr. 307; Exh. A-1.

[21] Exh. A-1; see also Tr. 61 (Inspector Fenning's recollection he saw the aircraft and noted its registration number appeared to have been painted over).

[22] The maintenance records introduced into evidence at the hearing show the airframe total time for N61PH was 6906.5 hours, which was the airframe total time for the aircraft originally identified as 3282. Exhs. A-5 ("Helicopter Log" with entries dated November 1, 2005, describing the fuselage replacement), R-17 (same). The fuselage and tailboom of N61PH, however, came from 3570, which has an airframe with a total time of 8812.2 hours. Tr. 66-67. The maintenance records following the fuselage replacement listed 6906.5 hours as the airframe total time. Exhs. A-5, R-17.

[23] Tr. 80; Exh. A-11 at 3 (Airworthiness Directive 92-09-07, which applies to Bell Model 206A and 206B helicopters that display serial numbers 4 through 1163).

argue the law judge erred in determining the "replacement fuselage" in N61PH was an "aircraft" rather than a component. We find neither of these arguments persuasive, as they ignore the plain language of § 45.13(e).

Respondents did more than simply "repair" an aircraft; they do not deny the aircraft formerly identified as 3570, which now displays a data plate with the number 3282 and has N61PH painted on its tailboom, contains very few parts from 3282. At the hearing, Respondent Mace stated the only parts he used from 3282 in his replacement of the fuselage were the upper right and left engine cowlings and the particle separator.[24] TRE Aviation applied for, and received, a replacement standard airworthiness certificate for N61PH. In this regard, § 45.13(e) specifically addresses the instant situation in its prohibition of the replacement of a data plate.

In addition, we reject respondent's assertion the law judge erred in determining the "fuselage" equates to "aircraft." A fuselage is a substantial aspect of any rotorcraft. The difference in definitions of "fuselage" and "aircraft" does not excuse respondent's conduct because § 45.13(e) includes the list, "any aircraft, aircraft engine, propeller, propeller blade, or propeller hub." Under the plain language of this regulatory provision, we conclude the absence of the terms "fuselage" and "airframe" indicates a data plate's installation on an airframe or fuselage or any other component designed to exist permanently on an aircraft is the same as the data plate's installation on an *aircraft* for purposes of § 45.13(e). If the Administrator intended to treat a fuselage's identification differently than an aircraft's identification, then the listing specifically would include the term "fuselage." Secondly, respondents cannot deny N61PH is an

[24] Tr. 305.

aircraft, as defined at 14 C.F.R. § 1.1, which provides, "[a]ircraft means a device that is used or intended to be used for flight in the air."[25]

Section 45.13(e) unequivocally applies to the data plate installation at issue here. As the law judge noted, in Administrator v. Dan's Aircraft Repair and Hollingsworth,[26] the Board stated although almost any part of an aircraft can be repaired or replaced as required by routine maintenance or repair, "there is no ascertainable prohibition [on] 'replacing,' concurrently, virtually all parts and components of a wrecked aircraft and then attaching the wrecked aircraft's data plate to this assemblage of parts and components."[27] Respondents attempt to distinguish Dan's Aircraft Repair, as well as other cases the law judge cited in his initial decision, from the case at issue on the basis N61PH was not "wrecked." We do not find the distinction between the terms "wrecked" and "corroded beyond repair" significant for the purpose of applying § 45.13(e) to respondents' conduct. Respondent Mace admitted 3570 lacked a data plate, while 3282 was significantly damaged, but had a data plate. Respondents' action of combining the working parts from both aircraft and affixing the data plate from 3282 to the resultant aircraft is strikingly similar to the actions the Board analyzed in Dan's Aircraft Repair.

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[25] Tr. 307 (Respondent Mace's testimony, on cross-examination, that he intended to use N61PH for flight).

[26] NTSB Order No. EA-4787 (1999), *pet. for review denied*, 17 Fed.App'x 729 (9th Cir. 2001) (stating, "[e]xcept when necessary during general maintenance procedures, 14 C.F.R. § 45.13(c) unambiguously prohibits the removal or installation of a plane's identification plate without prior approval from the Administrator. We agree with the NTSB and the FAA that Petitioner's "overhaul" of NI590R, which included the wholesale replacement of the engine, wings, and fuselage, cannot be characterized as a maintenance procedure").

[27] Id. at 10.

b. *Witnesses' Testimonies*

Respondents contend the law judge erred in not considering the testimonies of Messrs. Breeden and Cann dispositive of the issue concerning the appropriate interpretation of 14 C.F.R. § 45.13(e). In particular, respondents assert the law judge disregarded the testimonies and, in doing so, "only" stated respondents' witnesses were not called as experts and their testimonies were not consistent with the "1979 comments to the Final Rule concerning amendments to 14 CFR 45.13."[28] Respondents request we consider "the entirety of the testimony of both witnesses, especially since there was no *bona fide* adverse credibility finding concerning either witness."[29]

We carefully have reviewed the record in this case, which establishes Mr. Breeden has significant experience in repairs and maintenance of Bell 206B helicopters and Mr. Cann comes from an extensive background of developing the Administrator's policy concerning maintenance. However, Mr. Breeden's experience in removing the data plate and affixing it to a new fuselage in prior Bell 206Bs differs from the facts of the case *sub judice*, because the aircraft in which he replaced the fuselages still contained mostly original parts. Mr. Breeden stated, "a complete fuselage is the nose piece, the cabin section, and the tail end of it. Not the tailboom."[30] In the case at issue, Mr. Breeden opined the fuselage and tailboom assembly was not an "aircraft," so respondents therefore could not have violated § 45.13(e). Mr. Breeden stated a mechanic could permissibly take an aircraft apart "piece by piece," rebuild it with new parts, and it would

[28] Resp. Appeal Br. at 31.

[29] Id.

[30] Tr. 150.

become an aircraft once it meets its type design and has a data plate.[31] Mr. Cann testified the ultimate issue in the case is whether the aircraft conformed to its type design, rather than how many parts respondents replaced. Mr. Cann stated 3570 was no longer an aircraft, but was simply a collection of parts, because it had no data plate. As a result, respondents could affix the data plate containing the number 3282 to it. We find the opinions of Messrs. Breeden and Cann contrary to the plain language of § 45.13(e) and our cases interpreting the regulation such as Dan's Aircraft Repair, discussed above.

Respondents also urge us to disregard the opinion testimony of Inspector Fenning. Federal Rule of Evidence (FRE) 701 governs opinion testimony from a lay witness.[32] Respondents assert Inspector Fenning could not have offered any opinions except for those based on scientific, technical, or other specialized knowledge because he did not view N61PH until five years after the destruction of the aircraft. We do not believe the law judge erred in considering Inspector Fenning's testimony. Inspector Fenning's testimony on direct examination was not opinion testimony. While respondents worked on N61PH prior to Inspector Fenning viewing the aircraft, Inspector Fenning visited the facility at which Respondent Mace was working on the aircraft; reviewed the relevant maintenance records, service instructions and Airworthiness Directives; took photographs; and spoke with Respondent Mace and his son. Inspector Fenning's recollection of these observations did not consist of opinion testimony. During the discussion of various objections to Inspector Fenning's testimony, the

[31] Tr. 191-94. At the hearing, respondent's attorney refrained from using the term "rebuild," because the Federal Aviation Regulations require a "build log" for home-built aircraft. Tr. 206-07. Respondents, therefore, contend Respondent Mace only "repaired" the aircraft.

[32] Respondents correctly contend Federal Rule of Evidence (FRE) 701 governs opinion testimony offered from a lay witness. FRE 701(c) states opinion testimony may not be based on scientific, technical, or other specialized knowledge within the scope of FRE 702 (which addresses expert testimony).

Administrator's attorney—not Inspector Fenning—articulated the Administrator's position concerning the definitions of aircraft, airframe, and fuselage.[33] In this regard, the transcript from the hearing shows respondents' attorney asked for Inspector Fenning's opinion on several issues during cross-examination, such as how the Federal Aviation Regulations define aircraft and airframe, what § 45.13(d) and (e) require, and whether 3570 could have existed as an aircraft when it lacked a data plate.[34]

c. *Federal Register Notice of Final Rule Describing 14 C.F.R. § 45.13(e)*

At the hearing, the law judge admitted into the record a copy of 44 *Federal Register* 45378 (August 2, 1979), which was the Final Rule enacting § 45.13. In Dan's Aircraft Repair, both the Board and the Court of Appeals for the Ninth Circuit, referenced this *Federal Register* publication, because the preamble contains the FAA's interpretation of the regulation. The preamble states, in part, as follows:

> The FAA believes that the practice of rebuilding a wrecked aircraft by replacing almost the entire aircraft and affixing the identification plate which was recovered from the wreckage 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 the person who manufactured it under a type or production certificate.[35]

Respondents assert the law judge erred in considering the preamble language, and attempt to distinguish the conduct in the case *sub judice* from that which the preamble describes, because the preamble uses the word "wrecked." We do not find this argument persuasive. As noted above, the distinction between a "wrecked" aircraft and one corroded beyond repair is inconsequential for purposes of applying § 45.13(e), given the plain language of the regulation.

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[33] Tr. 59, 69.

[34] Tr. 84, 86, 89, 93, 95-96, 103.

[35] Exh. A-8 at 2.

In addition, while we agree the text of a preamble is not binding regulatory text, it is useful in understanding an agency's rationale and interpretation of a regulation. For this reason, we previously have cited preambles in interpreting regulations,[36] as have the Supreme Court[37] and the Court of Appeals for the District of Columbia Circuit, [38] which regularly review agencies' regulations.[39] The portion of the preamble quoted above supports the law judge's conclusion, and we do not find his consideration of it improper.

2. *Section 43.3*

The Administrator's complaint alleges Respondent Mace did not have the authority under § 43.3 to rebuild N61PH. The Administrator contends Respondent Mace rebuilt the aircraft and did not manufacture it under "an FAA type or production certificate."[40] We affirm the law judge's determination that Respondent Mace rebuilt the aircraft. Respondent combined parts from both 3282 and 3570 to create a new aircraft, and affixed the data plate from 3282 to it.[41] Notwithstanding this finding, the Administrator's order only revokes the airworthiness certificate

[36] See, e.g., Administrator v. King, NTSB Order No. EA-4997 at 6-7 (2002).

[37] See generally Martin v. Occupational Safety and Health Review Comm'n, 499 U.S. 144 (1991); cf. Wyeth v. Levine, 555 U.S. 555, 577-578 (2009) (finding Food and Drug Administration's interpretation of a proposed regulation in a preamble was not entitled to deference because interpretation was contrary to precedent concerning preemption).

[38] See, e.g., City of Dania Beach v. FAA, 628 F.3d 581, 593-94 (D.C. Cir. 2010) (analyzing preamble the Administrator published concerning an FAA Order).

[39] Consistent with the Supreme Court's views of the role of the Occupational Safety and Health Review Commission in reviewing the Secretary of Labor's regulations, the adjudicative role of the NTSB in reviewing the Administrator's regulations and interpretations as a "neutral arbiter." Martin, 499 U.S. at 154-55 (citations omitted).

[40] Compl. at ¶ 14.

[41] Our prior cases do not contain an authoritative definition of "rebuild." However, an initial decision from an NTSB administrative law judge in a 1989 case recognizes the terms "rebuild" and "maintenance" are distinct.

Administrator v. Tooker, Docket SE-9236, 1989 WL 268466 at *3 (Sept. 29, 1989).

for N61PH. It does not revoke Respondent Mace's mechanic certificate or any certificates Respondent TRE Aviation holds.

B. *Stale Complaint Rule and Doctrine of Laches*

Respondents contend the stale complaint rule and the doctrine of *laches* preclude the Administrator's action against the airworthiness certificate for N61PH. Respondents assert the "repair about which the Administrator complains" occurred in 2004 and 2005, and the Government seized the aircraft in 2006 in a criminal action.[42] Respondents argue their defense was prejudiced because James Pendergast, who reviewed the maintenance records in October 2005 and issued the replacement standard airworthiness certificate for N61PH, was unable to testify due to declining health.

In relevant part, the stale complaint rule provides as follows:

> § 821.33 Motion to dismiss stale complaint.
>
> Where the complaint states allegations of offenses which occurred more than 6 months prior to the Administrator's advising the respondent as to reasons for proposed action under 49 U.S.C. 44709(c), the respondent may move to dismiss such allegations as stale pursuant to the following provisions:
>
> (b) In those cases where the complaint alleges lack of qualification of the respondent, the law judge shall first determine whether an issue of lack of qualification would be presented if all of the allegations, stale and timely, are assumed to be true. If so, the law judge shall deny the respondent's motion.

Respondents' argument regarding the stale complaint rule fails because FAA included in its complaint allegations sufficient to assert N61PH lacks the qualifications to hold a certificate. Specifically, it alleged the aircraft does not have a data plate accurately displaying the necessary information.

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[42] Resp. Appeal Br. at 31 (citing United States v. Robert C. Mace, CR-08-096-HE, (W.D. Okla. 2009)). Respondent's appeal brief contains very little information concerning the criminal case, but mentions respondent was "acquitted on all counts." Id.

The doctrine of *laches* is an equitable doctrine "by which a court denies relief to a claimant who has unreasonably delayed in asserting the claim, when that delay has prejudiced the party against whom relief is sought."[43] The United States Court of Appeals for the District of Columbia Circuit has defined the doctrine as "an equitable defense that applies where there is (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense."[44] We find respondents' assertion of prejudice unpersuasive. Mr. Pendergast issued a replacement standard airworthiness certificate for N61PH, but his determination was not dispositive of the issue of whether respondents violated § 45.13(e). In addition, respondents, who made a proffer concerning Mr. Pendergast's anticipated testimony at the hearing, failed to explain how Mr. Pendergast's testimony could form the basis of an affirmative defense. Therefore, respondents have not fulfilled the prejudice prong of the *laches* argument.[45]

The Administrator's Appeal

The Administrator contends the law judge erred in not making a post-hearing determination that an emergency existed, and the case could proceed in accordance with our rules applicable to emergency cases. We disagree. Several problems exist with the Administrator's argument. First, the Administrator chose to reinstate the case as a non-emergency proceeding. If an emergency existed to the extent described at 49 U.S.C. § 44709(e), then the Administrator should have taken steps to ensure N61PH did not maintain an

[43] Black's Law Dictionary 891 (8th ed. 2004).

[44] Manin v. Nat'l Transp. Safety Bd., 627 F.3d 1239, 1241 (D.C. Cir. 2011) (quoting Pro Football, Inc. v. Harjo, 565 F.3d 880, 882 (D.C. Cir. 2009)).

[45] As noted above, respondents request we provide them an opportunity for oral argument under 49 C.F.R. § 821.48(c). Having found the parties have exhaustively briefed these issues on appeal, we find no oral argument is necessary in this case

airworthiness certificate throughout the duration of the appeal. Instead, the Administrator agreed informally to hold the certificate while pursuing a non-emergency action against respondents. The Administrator should have anticipated the need to enforce such an informal agreement.

Furthermore, the law judge correctly noted nothing changed concerning the Administrator's allegations. The Administrator failed to amend any factual allegations in the complaint; in particular, the Administrator did not amend the complaint to include a new allegation concerning a lack of airworthiness or falsification of maintenance records. The only aspect of the case that changed was the fact that the Administrator, having withdrawn the initial emergency action and reinstated it as a non-emergency case, had to respond to respondents' demand for return of the certificate.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondents' appeal is denied;

2. The Administrator's appeal is denied; and

3. The law judge's order is affirmed.[46]

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

[46] For the purpose of this order, respondents must physically surrender the standard airworthiness certificate for N61PH to a representative of the FAA pursuant to 14 C.F.R. § 21.181(c).

Served: August 28, 2013

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

* *

MICHAEL P. HUERTA,
ADMINISTRATOR,
FEDERAL AVIATION ADMINISTRATION,

Complainant,

v. Docket SE-19109RM

TRE AVIATION CORPORATION (N61PH)
and ROBERT C. MACE,

Respondent.

* *

WRITTEN INITIAL DECISION AND ORDER

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(FAX Only)

Stephen R. Woody, Administrative Law Judge: This is a proceeding before the National Transportation Safety Board on the appeal of TRE Aviation and Robert Mace, Respondent,[1]

[1] During the hearing, Respondent's counsel suggested that Robert Mace should be removed as a named respondent in this matter. He argued that the certificate action is related to the airworthiness of the aircraft (N61PH) and the ownership entity (TRE Aviation) of that aircraft, and that while Mr. Mace is an officer in TRE Aviation he does not own the aircraft individually. Respondent's counsel cited no authority in support of his argument, or supporting the fact that I would have the authority to direct removal of any named respondent in this action. Additionally, no evidence beyond counsel's oral assertions was submitted or considered by me that definitively establishes the identity of the certificate holder. Nor does it appear that this issue was raised by counsel during the previous hearing in this case, as neither the prior oral initial decision nor the Board's Opinion and Order on

from an Order of Revocation which seeks to revoke the airworthiness certificate issued to the aircraft identified as N61PH. Pursuant to notice this matter came on for hearing on June 18-19, 2013, in Phoenix, Arizona. The Administrator was represented by one of his staff counsel, Adam Runkel, Esq., of the Federal Aviation Administration (FAA), Western Pacific Region. Respondent was represented by Mr. Edward McConwell, Esq.

This case is before me on remand, pursuant to a decision issued by the Board on February 20, 2013. There was an earlier hearing in this matter conducted in March 2012, and presided over by a different administrative law judge. The Board's decision directed that a new hearing be conducted. I informed the parties that, consistent with the Board's order, this hearing would proceed *de novo*; that I would not be considering evidence presented at the prior hearing or matters from the record of that proceeding. The parties were to present any testimony or other evidence they wished me to consider in issuing a decision in this matter.

The parties were afforded a full opportunity to offer evidence, to call, examine and cross-examine witnesses and to make arguments in support of their respective positions. I will not discuss all of the evidence in detail. I have, however, considered all of the evidence, both oral and documentary. That which I do not specifically mention is viewed by me as being corroborative or as not materially affecting the outcome of the decision.

The Respondent appealed the Administrator's Order of Revocation dated May 20, 2011. Pursuant to the Board's rules, the Administrator filed a copy of that Order on June 10, 2011, which serves as the Complaint in this case. The Administrator ordered the revocation of the standard airworthiness certificate issued to the aircraft identified as N61PH, based on Respondent's alleged violation of Title 14, Code of Federal Regulations (14 CFR) §§ 43.3 and 45.13(e).

In the Answer to the Administrator's Complaint, Respondent admitted paragraphs 1 and 16. As Respondent has admitted those allegations they are deemed as established for the purposes of this decision. Respondent has denied in whole or in part the remaining paragraphs of the Complaint.

Administrator's Exhibits A-1 through A-9, and A-11, were admitted into evidence. Respondent's Exhibits R-1 though R-10, R-13 through R-23, R-25 through R-28, R-30, R-33, R-

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remand specifically address the matter. In light of all this, I decline to make any substantive decision regarding the request or direct any particular action with respect to removal of Mr. Mace as a named respondent. Accordingly, for purposes of simplicity, TRE Aviation and Mr. Mace will be jointly referred to as 'Respondent' throughout this decision. I would note that, if the assertions made are accurate, Respondent's argument appears to have some merit. Mr. Mace may well be an officer of the corporation that owns the aircraft whose airworthiness certificate is the subject of this action, but that would seem not to make him individually any more appropriate as a named respondent than any other officer of the corporation.

35, R-38 and R-40, were admitted into evidence. Exhibits R-9, R-10 and R-30 were admitted for limited purposes. Exhibits A-10 and R-31 were offered but not admitted into evidence.

DISCUSSION

The basic facts in this case are largely not in dispute. TRE Aviation purchased two Bell 206B helicopters – one bearing serial number 3282 (hereinafter "3282") and another with serial number 3570 (hereinafter "3570"). The original aircraft 3282 was corroded beyond economical repair. 3570 had no aircraft identification plate (data plate) when purchased. Respondent initially attempted to obtain a replacement or duplicate data plate for 3570. After being unsuccessful in obtaining a replacement data plate for 3570, Respondent then used the fuselage and tail boom section, along with various other components from 3570, and replaced the fuselage and tail boom for 3282. The aircraft data plate for the original 3282 was removed from the fuselage of that aircraft and affixed to the replacement fuselage from 3570. The aircraft registration number (N61PH) on the tail boom section was also painted over and the replacement tail boom section from 3570 marked as N61PH. Precisely how the fuselage and tail boom replacement was accomplished is not entirely clear from the evidence. FAA Aviation Safety Inspector (ASI) Kenton Fenning testified that it appeared many original parts from the fuselage assembly of the original 3282 remained intact, such as the wind screens, doors, windows, electrical harness, flight control mounts, and other components, and opined that it appeared Respondent simply removed the data plate from that aircraft and affixed it to the fuselage of 3570. Mr. Mace testified that both helicopters were disassembled to some degree before the replacement was undertaken. However, what is clear from the testimony is that the aircraft currently identified as serial number 3282 has very few parts from the aircraft originally identified as serial number 3282. The overwhelming majority of parts on the aircraft now identified as serial number 3282 came from 3570 or other aircraft. For reasons discussed more fully below, I conclude that precisely how the replacement of components and reconstruction of the aircraft currently identified as serial number 3282 was undertaken is not critical to my determination in this matter.

The Administrator contends that Respondent's actions in removing the data plate from the fuselage of one helicopter and affixing it to the fuselage from another helicopter misidentified the aircraft, thereby rendering it ineligible for and lacking qualifications to hold a standard airworthiness certificate. Respondent contends that his actions constituted a permissible maintenance function, that the aircraft is not misidentified and thus is entitled to a standard airworthiness certificate.

The Administrator called two witnesses, Raymond Adams and Mr. Fenning. Both Mr. Adams and Mr. Fenning are ASI's in the Scottsdale, Arizona Flight Standards District Office (FSDO).

Mr. Adams is currently an ASI for avionics, but was previously an ASI for airworthiness. Mr. Adams holds a mechanic certificate, with an Airframe and Powerplant (A&P) rating. Mr. Adams testified that he first spoke with Mr. Mace in September 2010. At that time, Mr. Mace

informed Mr. Adams that aircraft number 3282 was corroded beyond repair, so Mr. Mace took the data plate off that aircraft and placed it on the fuselage for aircraft 3570. Mr. Adams understood Mr. Mace to have suggested he was repairing aircraft 3570. Mr. Adams stated that on a later visit in March 2012, Mr. Mace suggested he had replaced the corroded fuselage from 3282 with the fuselage from 3570.

Mr. Fenning is an A&P mechanic, who also holds an Inspection Authorization (IA). Mr. Fenning also indicated that Mr. Mace informed him that aircraft 3282 was corroded beyond repair, and that Mr. Mace had replaced the fuselage and tail boom from that aircraft with the fuselage and tail boom from serial number 3570. According to Mr. Fenning, Mr. Mace informed him the data plate had been removed from the corroded fuselage of serial number 3282 and placed into the fuselage from serial number 3570. Mr. Fenning also testified that the registration numbers (N61PH) on the tail boom from the original serial number 3282 had been painted over, as depicted in Exhibit A-1, pages 3-4, and those registration numbers had been transferred to the tail boom from helicopter serial number 3570.

Mr. Fenning testified that airworthiness directives (AD's) are made applicable to aircraft based upon serial numbers, and that owners or mechanics rely on the serial number on the data plate to determine the applicability of AD's or service bulletins. An example of such an airworthiness directive is Exhibit A-11. Mr. Fenning also testified regarding maintenance documents at Exhibits A-4 and A-5, which indicate that the airframe total time for the tail boom and fuselage for aircraft serial number 3282 was 6906.5 hours, and for serial number 3570 was 8812.2 hours. Yet after the swap out of the fuselage and tail boom section the total time brought forward for the aircraft now identified as serial number 3282 was the lower number of hours associated with the corroded original 3282 fuselage and tail boom section, which could cause confusion or misinformation as to the total time for those portions of the aircraft.

The Respondent presented the testimony of Ernest Breeden, David Cann, and Mr. Mace.

Mr. Breeden is an aircraft mechanic with an A&P certificate since 1976, as well as an IA. In 1996, he was certified as an FAA Designated Airworthiness Representative (DAR) for both manufacturing and maintenance. He remains a DAR for manufacturing, but no longer is for maintenance. His experience includes involvement in replacing all or parts of three fuselages in Bell 206B or 206L model helicopters. The aircraft data plate was removed from each of these aircraft during the replacement process, and put back in the replaced fuselage assembly on the console. He indicated he worked closely with the DAR, Designated Engineering Representative (DER) and FAA ASI in accomplishing these replacements. Mr. Breeden opined that the work completed by Mr. Mace on the aircraft currently identified as serial number 3282 was a permissible maintenance or repair function, and not rebuilding or manufacturing. He further opined that essentially every part on an aircraft could be replaced and that an aircraft could permissibly be repaired around only a data plate. He also opined that the aircraft with serial number 3570 ceased to be an aircraft when the data plate for that aircraft was lost or destroyed, and simply became a collection of parts.

Mr. Cann next testified that he is the former Division Manager of Flight Standards Service - Aircraft Maintenance Division for the FAA (AFS-300). He held that position from November 2001 to January 2008. Mr. Cann provided similar opinions to those of Mr. Breeden: that the work done by Mr. Mace was maintenance or repair, and not rebuilding or manufacturing; that an aircraft can be restored, refurbished or repaired completely around only a data plate; and that the helicopter with serial number 3570 ceased to be an aircraft when it no longer had a data plate. Mr. Cann also indicated that he believed the language in the preamble to 14 CFR Section 45.13 was intended only to address the taking of a data plate from a wrecked aircraft and thereafter installing that data plate into an aircraft built from parts of other aircraft.

Mr. Mace testified next. He is the Vice-President of TRE Aviation. He stated that after buying 3570, and unsuccessfully attempting to obtain a duplicate data plate for it, he decided to use the helicopter for parts. He subsequently bought 3282 intending to repair it. Mr. Mace indicated that the aircraft now identified with serial number 3282 was assembled utilizing the airframe from 3570, including the tail boom and fuselage. There were other parts utilized from 3570, as well as another aircraft. He testified that the data plate was removed from the fuselage of the original 3282 and installed in the fuselage from 3570. Mr. Mace confirmed that the only parts utilized from the original 3282 were the left and right engine cowlings, and the particle separator cowling. He added that there were other smaller parts from the original 3282, but he could not identify what or how many parts there were, nor did he identify other parts in his response to earlier interrogatories.

The key issue to be determined is whether the actions undertaken by Respondent with respect to aircraft serial number 3282 (N61PH) were permissible maintenance functions, or whether those actions were impermissible and resulted in misidentification of the aircraft.

The pertinent regulatory guidance can be found within 14 CFR, Parts 21, 43 and 45. Under Section 21.182, each applicant for an airworthiness certificate must show the aircraft is identified as prescribed by section 45.11. Section 45.11 directs use of a fireproof identification plate as specified in section 45.13. Under section 45.13(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." Under paragraph (d)(2), "Persons performing work under the provision of Part 43 of this chapter may, in accordance with methods, techniques, and practices acceptable to the FAA – remove an identification plate required under §45.11 when necessary during maintenance operations." Section 45.13(e) provides, "No person may install an identification plate removed in accordance with paragraph (d)(2) of this section on any aircraft...other than the one from which it was removed."

With respect to section 45.13(c) through (e), the Administrator offered into evidence at Exhibit A-8, Federal Register, Volume 44, Number 150, dated August 2, 1979, which states in pertinent part, "The FAA believes that the practice of rebuilding a wrecked aircraft by replacing almost the entire aircraft and affixing the identification plate which was recovered from the wreckage 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 the aircraft under a type or production certificate."

The Board has considered these regulatory provisions under similar circumstances in a number of prior cases.

In *Administrator v. Lott*, 5 NTSB 2394 (1987), the Board considered a case involving removal of an identification plate from a wrecked aircraft and affixing it to an aircraft bought for salvage (i.e., one sold for parts, with no identification plate or records). The Board noted that "The true identity of an aircraft is highly material, since it is essential in determining the maintenance, repair and alteration history of that aircraft and its conformity to its type design and applicable airworthiness directives." The Board concluded that the aircraft in question was not properly identified since it did not display the appropriate data plate, and that the airworthiness and registration certificates for the aircraft were invalid since both were based on a misidentified aircraft.

Administrator v. Potanko, NTSB Order No. EA-3937 (1993), involved assembling an aircraft using the data plate and various parts from one aircraft damaged in an accident (37F), together with the fuselage and various parts from a second aircraft (48S) which had no engine or propeller and was intended to be used for parts. In that case, as here, respondent asserted that he was using the parts from 48S to repair the damaged aircraft 37F. Respondent removed the data plate from the damaged fuselage of 37F and affixed it to the fuselage of the reconstructed aircraft. He also changed the registration marks on the tail cone to be consistent with those of 37F. The Board rejected respondent's argument that he removed and replaced the data plate from 37F for the purpose of repairing the aircraft, finding his action in affixing the data plate from 37F to the fuselage of 48S, "an action that is prohibited under section 45.13(e)." Contrary to the opinions expressed by Mr. Breeden and Mr. Cann that it is permissible to refurbish an entire aircraft around only a data plate, the Board found the practice of assembling an aircraft from assorted parts from two aircraft, and then affixing the data plate from the damaged fuselage of one aircraft to be prohibited, stating, "Surely [respondent] cannot be considered to have rebuilt an aircraft around an engine, pulleys, ailerons, a data plate and other disjointed parts." Respondent has done the same here, taking the data plate from the damaged fuselage of one helicopter and affixing it to the fuselage of the reconstructed aircraft; then changing the registration markings on the tail boom section from 3570 to make those consistent with aircraft 3282. It matters not whether the aircraft was damaged by an accident or by corrosion. In either case, the fuselage from which the data plate was removed was not usable. Nor were the tail boom section and almost all other parts or components from the original 3282 usable.

Another case factually similar to this one is *Administrator v. Dan's Aircraft Repair, Inc., et al.*, NTSB Order No. EA-4787 (1999). In that case, the respondents rebuilt an aircraft using primarily parts from another aircraft that did not have a data plate. The data plate for the rebuilt aircraft was removed from the wreckage of the salvaged original aircraft (N1590R) and affixed

to the fuselage of the rebuilt aircraft. Aside from the data plate, very few parts from or components of the rebuilt N1590R came from the original, salvaged N1590R. The Board noted that the central issue, as here, was whether the respondents legitimately repaired N1590R or impermissibly transferred N1590R's data plate to an aircraft assembled from new and used parts. The Board found that the decision turned on the above-noted language published in the Federal Register on August 2, 1979. In addressing the respondents' argument, the Board further noted, "Although the respondents correctly point out that almost any part of an aircraft can be repaired or replaced, they are simply incorrect to then argue – contrary to explicit language in the Federal Register – that there is no ascertainable prohibition to "replacing" concurrently, virtually all parts and components of a wrecked aircraft and then attaching the wrecked aircraft's data plate to this assemblage of parts and components." Respondent here relies upon the same argument – that any part of an aircraft can be repaired or replaced, with Mr. Cann and Mr. Breeden opining that virtually all parts and components can be replaced simultaneously "around a data plate." The Board's findings in *Dan's Aircraft Repair* hold otherwise.

Nor do I find compelling Respondent's' argument, consistent with Mr. Cann's testimony, that the language in the Federal Register was intended only to address the practice of taking a data plate from a wrecked aircraft, as opposed to an otherwise-damaged or unusable one, and placing it into an aircraft assembled using parts from various aircraft. Mr. Cann cited no written policy or regulatory provision supporting such a distinction. And I can see no reason consistent with flight safety for any such distinction. There is no substantive difference between an aircraft damaged in an accident and one that is damaged by corrosion or neglect, as here; and the clear thrust of the Federal Register's language is to reject the practice of replacing a substantially damaged aircraft and affixing its identification plate onto an amalgamation of parts taken from one or more other aircraft, in the name of "maintenance" or "repair," and, instead, to identify that practice as a rebuilding of the aircraft. Here, the evidence, including statements made by Mr. Mace to the investigators and the testimony of Respondent's witnesses, indicates that the aircraft originally identified as serial number 3282 was damaged by corrosion beyond repair, to the point of being unusable, which was the impetus for using the cabin and tail boom sections from 3570. The end result here was the same as in *Potanko* and *Dan's Aircraft Repair* – the aircraft now identified as serial number 3282 has minimal parts or components from the original aircraft, aside from the data plate.

As a result, the aircraft now identified as 3282 (N61PH) bears little semblance to the original aircraft. As noted by the Board in *Lott*, the true identity of an aircraft is "essential in determining the maintenance, repair and alteration history of that aircraft and its conformity to its type design and applicable airworthiness directives." As Mr. Fenning testified, the general practice of a mechanic would be to simply look at the serial number of the aircraft to determine the applicability of airworthiness directives or service bulletins. The changed serial number could cause misidentification of the applicability of an airworthiness directive or service bulletin that applies to 3570 but not 3282. A mechanic is unlikely to take the time to examine the historical maintenance records if it appears the airworthiness directive or service bulletin does not apply to

the serial number of the aircraft reflected on the data plate. As further noted by Mr. Fenning, transferring the data plate from one aircraft to another can also result in misidentification of the total time for parts or components of an aircraft, as it did in this case with the carry-over of the lower total time from the corroded fuselage and tail boom sections of 3282 to the fuselage and tail boom sections of 3570.

Respondent also suggested a distinction, based on the opinions of Mr. Breeden and Mr. Cann, that 3570 was not an aircraft but merely a collection of parts, and that it ceased being an aircraft once the data plate was lost. Neither provided any authority supporting such a conclusion, but in any event, I find no great significance to the distinction even if true. All the cases cited above involved use of parts from salvage aircraft without data plates. In each of those cases, the Board found the actions of the respondents in transferring data plates from the damaged aircraft to a reconstructed aircraft to be in violation of section 45.13. Respondent also suggested that the video at Exhibit R-5 addresses the fact that an aircraft loses its identity when it loses its data plate. However, the video addresses re-use of parts from damaged aircraft, but does not specifically address proper identification of an aircraft, or when or how an aircraft ceases to be an aircraft. Thus, I afforded this video little weight.

Mr. Cann also suggested that the actions of Respondent could not constitute rebuilding or manufacturing because such terminology only applies to aircraft built to new, as opposed to "in service," tolerances. I find that argument unpersuasive as well. Again looking to the cases cited above, all dealt with rebuilding or reconstructing aircraft using parts from various salvaged aircraft. None involved or discussed rebuilding to new tolerances. The Board in *Potanko* and *Dan's Aircraft Repair* rejected respondents' argument that their actions constituted permissible repairs, with the Board in *Dan's Aircraft Repair* specifically citing to the language in the Federal Register which distinguishes the practice as "rebuilding," as opposed to "maintenance" or "repair."

In sum, although both Mr. Breeden and Mr. Cann opined that the Respondent's actions constituted permissible maintenance or repair of aircraft serial number 3282, I find those opinions are contrary to applicable regulatory guidance and Board precedent.[2]

Respondent asserted as affirmative defenses that the complaint should be barred by the stale complaint rule and/or the doctrine of laches. Since these were raised by Respondent as affirmative defenses, the burden is upon the respondent to establish the affirmative defense by a preponderance of evidence. The stale complaint rule is codified at 49 CFR Section 821.33.

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[2] With respect to Mr. Breeden and Mr. Cann, both were identified by Respondent in pre-hearing submissions as potential expert witnesses, and expert reports were submitted for both as required by the Federal Rules of Civil Procedure (FRCP) (Exhibits R-22 and R-24). However, during the hearing neither witness was offered by counsel as an expert witness, nor was any specific area of expertise identified for either witness. As a result, neither witness was qualified or recognized as an expert witness in accordance with Federal Rule of Evidence (FRE) 702. Both offered opinions, without objection by the Administrator, which were considered by me in reaching a decision in this matter; although those opinions were not considered by me to constitute "expert opinions." However, even if either or both witnesses had been qualified and recognized as an expert witness, I still would not have afforded their opinions any greater weight, given that those opinions are contrary to regulatory guidance and case precedent.

Under that provision, if the complaint alleges offenses which occurred more than 6 months prior to the Administrator's advising the respondent as to reasons for the proposed action, the complaint may be dismissed as stale, unless the complaint alleges a lack of qualifications, good cause existed for the delay, or the imposition of a sanction is warranted in the public interest notwithstanding the delay. In the case at hand, there has been no argument by the Administrator regarding good cause for the delay, or imposition of sanction in the public interest. The respondent argues that the complaint alleges no lack of qualifications and should be dismissed as stale. The Administrator argues that the complaint alleges a lack of qualifications, in that an aircraft must be properly identified in order to qualify for a standard airworthiness certificate. The Administrator cites to *Administrator v. Canfield Aviation, Inc.*, NTSB Order No. EA-2654 (1988), wherein the Board upheld the administrative law judge's finding that the respondent lacked the qualification to hold a certificate because he did not meet the eligibility requirements of pertinent Federal Aviation Regulation (FAR) sections. The Administrator argues here, and I agree, that in order to be eligible for a standard airworthiness certificate, the aircraft must be properly identified in accordance with the requirements of 14 CFR sections 21.182, 45.11 and 45.13. Since aircraft N61PH is not properly identified, it lacks the qualifications to hold a standard airworthiness certificate. This finding is also consistent with the Board's holding in *Lott, supra*, that the airworthiness and registration certificates for the aircraft in question were invalid, since they were based on a misidentified aircraft. Stated another way, the aircraft lacked the qualifications to hold a standard airworthiness certificate. Consistent with my finding that the complaint alleges a lack of qualifications, I find that the complaint is not barred as stale.

With respect to the doctrine of laches, Board and Court precedent has recognized the affirmative defense of laches "may be available even when the stale complaint rule is inapplicable." *Manin v. National Transportation Safety Board*, 627 F.3d 1239, 1241 (D.C. Circuit 2011); *Administrator v. Tinlin and White*, NTSB Order No, EA-5658 (2013). In *Manin*, the United States Court of Appeals for the D.C. Circuit defined the doctrine as "an equitable doctrine that applies where there is (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense." In *Manin*, the Court indicated consideration of the laches defense is required "if an airman could establish actual prejudice in his defense which is attributable to the Administrator's delay." Here, Respondent has presented no evidence, nor articulated any specific argument as to any actual prejudice suffered as a result of any delay. Respondent argues essentially that the complaint should be barred simply because it took the Administrator so long to initiate a certificate action. While the passage of time may arguably establish a lack of diligence on the part of the Administrator, the Respondent has failed to meet his burden of establishing that actual prejudice in the ability to defend against the Administrator's certificate action exists as a result of the delay. Thus, I find that the complaint is not barred by the doctrine of laches.[3]

[3] One might speculate that the assertion of prejudice may be related to the alleged unavailability of Mr. Pendergast – the Designated Airworthiness Representative who issued a standard airworthiness certificate for the reconstructed N61PH – to testify

Subsequent to the hearing, the Administrator, through counsel, submitted a Motion to Amend the Order Designated as the Complaint to be an Emergency Order. Respondent filed a Response in opposition to the motion. The Administrator cites to 49 CFR Section 821.52 as supporting the proposition that an order not issued as an emergency order may be later amended to be an emergency order. The Administrator asserts that initially an Emergency Order of Revocation was filed in this matter, but was withdrawn and re-filed as a non-emergency order in April 2011. This action was allegedly based on the fact that the standard airworthiness certificate for N61PH had been surrendered, and an understanding between the parties that if respondent requested return of the standard airworthiness certificate, the Administrator would seek to amend the revocation order to an Emergency Order. However, no written agreement or other documentation exists recording such an understanding between the parties. Based on Respondent's recent demand that the standard airworthiness certificate be returned pending a final decision in this matter, the Administrator now seeks to amend the order to be designated an Emergency Order.

The designation of an order as an emergency order affords a respondent certain rights. Included among those is the right to challenge the emergency determination of the Administrator, consistent with 49 CFR §821.54. In addition, regardless of the outcome of such a challenge to the emergency determination, the respondent is entitled to an expedited hearing. Such an expedited hearing process is predicated on the fact that a respondent must immediately relinquish the affected certificate pending the outcome of the hearing and any appeal. In the case at hand, respondent was afforded no opportunity to challenge the Administrator's emergency determination and no expedited hearing process. Indeed, the motion to amend the order to be an Emergency Order was not filed until two separate hearings had been concluded in this matter. The facts and circumstances upon which the Administrator could have made a determination that an emergency existed have not changed since the complaint was filed. The only change is that the respondent now demands return of the standard airworthiness certificate. I do not find compelling the Administrator's argument, based on an alleged breach of an unwritten understanding between the parties, that an emergency now exists posing an unacceptable risk to safety in air transportation or air commerce and the public. Had such an unacceptable risk requiring the immediate effectiveness of the order existed at the time of the filing of the complaint, the Administrator had the opportunity at that point to designate the order as an

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at the hearing in this matter. Ignoring for the moment that this is speculation on my part since that argument was not articulated by counsel, it is worth noting that there were no steps undertaken by the Respondent to establish Mr. Pendergast's unavailability, aside from the unsupported assertions of counsel at the hearing. There was no request that a subpoena be issued to Mr. Pendergast, nor any presentation of medical records or other evidence that could support a finding of his unavailability as a witness. Nor was there any evidence or argument offered as to how Mr. Pendergast's unavailability, even if established, might have prejudiced respondent's defense. Indeed, the standard airworthiness certificate issued by Mr. Pendergast was admitted into evidence at Exhibit R-19, and Mr. Mace testified as to the inspection undertaken by Mr. Pendergast before issuing the certificate. It is unclear to me, and certainly there was no evidence or argument presented, what additional evidence may have been presented by Mr. Pendergast's testimony or what prejudice Respondent suffered by his absence.

emergency order, or at minimum to document the understanding of the parties in writing. His failure to do so at that time vitiates any claim for such drastic relief at this late stage in the proceeding, especially at the expense of the rights normally afforded to a certificate holder with respect to such immediately effective orders. Thus, I deny the Administrator's Motion to Amend the Order to be an Emergency Order.

FINDINGS

Based on the foregoing, I find that the Administrator has proven all the allegations in the Complaint by a preponderance of the reliable, probative and credible evidence. Thus, I find that Respondent's actions constituted a violation of 14 CFR Section 45.13(e), in that Respondent impermissibly removed the data plate from one aircraft and placed it into the fuselage of another, reconstructed aircraft; thereby misidentifying the aircraft. Further, Respondent violated 14 CFR Section 43.3, in that Respondent's actions constituted a rebuilding of aircraft N61PH without authority to do so. Under section 43.3(j), only a manufacturer may rebuild an aircraft it has manufactured under a type or production certificate.

SANCTION

Having found that the Administrator has proven all the allegations in the Administrator's Complaint by a preponderance of the reliable, probative, and credible evidence, I now turn to the sanction imposed by the Administrator in this matter.

In the case before me, the Administrator has argued that, despite the passage of the Pilot's Bill of Rights (*Public Law 112-153*), he is entitled to due deference to his choice of sanctions, consistent with the Supreme Court decision in *Martin v. Occupational Safety and Health Review Commission et al.*, 499 U.S. 144, 111 S. Ct. 1171 (1991). He further argues that Respondent's actions resulted in N61PH being improperly identified and therefore ineligible for a standard airworthiness certificate. Thus, the Administrator argues, revocation of the standard airworthiness certificate is the only appropriate sanction in this case.

The Respondent has argued that the complaint contains no allegations that the aircraft lacks qualifications or that the aircraft is unsafe or unairworthy. As such, Respondent argues that if some sanction is deemed appropriate, then something lesser than revocation should be imposed.

My findings regarding Respondent's assertion that the complaint alleges no lack of qualifications were discussed fully above, with regard to the applicability of the stale complaint rule. As noted, I find that, since aircraft N61PH is not properly identified, it does not meet the qualifications for a standard airworthiness certificate. In circumstances similarly involving a misidentified aircraft, the Board, in *Lott*, *supra*, found that the airworthiness and registration certificates for the aircraft in question were invalid, and that revocation of such certificates was the appropriate sanction. Given that Respondent's argument for reduced sanction is predicated largely on there being no issue regarding a lack of qualifications, my findings above to the contrary, and consistent with the Board's findings in *Lott* with respect to appropriate sanction, I find that the standard

airworthiness certificate for aircraft N61PH is invalid and that revocation of that certificate is the appropriate sanction in this case.

I find therefore that the sanction sought by the Administrator is appropriate and warranted in the public interest in air commerce and air safety. Accordingly, I find that the Order, the Complaint herein, must be and shall be affirmed as issued.

ORDER

It is HEREBY ORDERED that the Administrator's Order of Revocation, the Complaint herein, be and is hereby affirmed as issued. The standard airworthiness certificate for aircraft N61PH is therefore revoked.

ENTERED this 28th day of August 2013, at Washington, D.C.

STEPHEN R. WOODY
Administrative Law Judge

APPEAL (WRITTEN INITIAL DECISION)

Any party to this proceeding may appeal this order by filing a written notice of appeal within 10 days after the date on which it was served (the service date appears on the first page of this order). An original and 3 copies of the notice of appeal must be filed with the:

National Transportation Safety Board
Office of Administrative Law Judges
490 L'Enfant Plaza East, S.W.
Washington D.C. 20594
Telephone: (202) 314-6150 or (800) 854-8758

That party must also perfect the appeal by filing a brief in support of the appeal within 30 days after the date of service of this order. An original and one copy of the brief must be filed directly with the:

National Transportation Safety Board
Office of General Counsel
Room 6401
490 L'Enfant Plaza East, S.W.
Washington, D.C. 20594
Telephone: (202) 314-6080
FAX: (202) 314-6090

The Board may dismiss appeals on its own motion, or the motion of another party, when a party who has filed a notice of appeal fails to perfect the appeal by filing a timely appeal brief.

A brief in reply to the appeal brief may be filed by any other party within 30 days after that party was served with the appeal brief. An original and one copy of the reply brief must be filed directly with the Office of General Counsel in Room 6401.

NOTE: Copies of the notice of appeal and briefs must also be served on all other parties to this proceeding.

An original and one copy of all papers, including motions and replies, submitted thereafter should be filed directly with the Office of General Counsel in Room 6401. Copies of such documents must also be served on the other parties.

The Board directs your attention to Rules 7, 43, 47, 48 and 49 of its Rules of Practice in Air Safety Proceedings (codified at 49 C.F.R. §§ 821.7, 821.43, 821.47, 821.48 and 821.49) for further information regarding appeals.

ABSENT A SHOWING OF GOOD CAUSE, THE BOARD WILL NOT ACCEPT LATE APPEALS OR APPEAL BRIEFS.