

SERVED: October 23, 2015

NTSB Order No. EA- 5758

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 22nd day of October, 2015

_____	)	
MICHAEL P. HUERTA,	)	
Administrator,	)	
Federal Aviation Administration,	)	
	)	
Complainant,	)	
	)	Docket SE-19290RM
v.	)	
	)	
JODY DUCOTE,	)	
	)	
Respondent.	)	
_____	)	

**OPINION AND ORDER**

**1. Background**

On remand from the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit), we revisit the Administrator’s appeal of the oral initial decision of Administrative Law Judge William R. Mullins, issued July 17, 2012.<sup>1</sup> By that decision, the law judge

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

determined the Administrator failed to prove violations of 14 C.F.R. §§ 43.12(a)(1),<sup>2</sup> 61.55(a)(3),<sup>3</sup> 61.59(a)(2),<sup>4</sup> and 91.13(a),<sup>5</sup> for respondent's failure to maintain correct pilot logbook entries, as alleged. The D.C. Circuit issued an opinion on June 30, 2015 that reversed the Board's decision in Administrator v. Ducote<sup>6</sup> and remanded the case to the Board for disposition in accordance with the Court's opinion.<sup>7</sup> Consistent with the Court's direction, we remand this case to the law judge for additional findings.

*A. The Board's Opinion and Order*

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<sup>2</sup> Section 43.12(a)(1), titled "[m]aintenance records: [f]alsification, reproduction, or alteration," states as follows:

(a) No person may make or cause to be made:

(1) Any fraudulent or intentionally false entry in any record or report that is required to be made, kept, or used to show compliance with any requirement under this part.

<sup>3</sup> Section 61.55(a)(3), titled "[s]econd-in-command qualifications," provides as follows:

A person may serve as a second-in-command of an aircraft type certificated for more than one required pilot flight crewmember or in operations requiring a second-in-command pilot flight crewmember only if that person holds:

\* \* \* \* \*

(3) The appropriate pilot type rating for the aircraft unless the flight will be conducted as domestic flight operations within United States airspace.

<sup>4</sup> Section 61.59(a)(2), titled "[f]alsification, reproduction, or alteration of applications, certificates, logbooks, reports, or records," provides as follows:

(a) No person may make or cause to be made:

\* \* \* \* \*

(2) Any fraudulent or intentionally false entry in any logbook, record, or report that is required to be kept, made, or used to show compliance with any requirement for the issuance or exercise of the privileges of any certificate, rating, or authorization under this part.

<sup>5</sup> Section 91.13(a) prohibits careless or reckless aircraft operations so as to endanger the life or property of another.

<sup>6</sup> NTSB Order No. EA-5664 (2013).

<sup>7</sup> Huerta v. Ducote and NTSB, 792 F.3d 144 (D.C. Cir. 2015).

### 1. *Procedural History and Facts*

In Administrator v. Ducote, the Administrator alleged respondent falsified certain pilot logbook entries concerning his operation of a Cessna S550 (N999HC). The respondent appealed the charges and the case proceeded to hearing before the law judge, who organized the complaint into four distinct counts: falsification of a logbook by including an entry showing respondent performed three night landings in Picayune, Mississippi, on March 25, 2010 (Count 1); falsification of five logbook entries by inserting inaccurate times and engine cycles, based on incorrect readings on the aircraft's Hobbs meter (Count 2); falsification of a logbook entry concerning a June 10, 2010 flight between Jackson and Picayune, Mississippi (Count 3); and respondent's alleged operation of passenger-carrying flights to and from an airport in the Bahamas on June 6 and 10, 2010 when he lacked the appropriate type rating for the aircraft (Count 4).

The law judge granted respondent's appeal, finding the Administrator failed to produce sufficient evidence to establish the truth of three of the counts on the complaint, which alleged falsification of logbook entries. The law judge determined some of the alleged charges arose from flights that occurred over two years before the Administrator advised the respondent of the proposed certificate action. As a result, the law judge dismissed some counts as stale under the Board's stale complaint rule, which is codified at 49 C.F.R. § 821.33.<sup>8</sup>

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<sup>8</sup>The stale complaint rule provides a respondent may move to dismiss a complaint when the allegations of offenses occurred more than six months prior to the Administrator's advising the respondent as to the reasons for proposed actions. However, the rule also states the six-month rule of limitations does not apply to cases in which the Administrator alleges the respondent's conduct reflects a lack of qualifications necessary to hold a certificate. In cases where the Administrator alleges a respondent intentionally falsified a document, Board jurisprudence makes clear that such conduct shows, *per se*, that the respondent lacks the qualifications necessary to hold a certificate. As a result, the stale complaint rule would not preclude the Administrator from pursuing action against the respondent's certificate when the Administrator

The Administrator appealed the case. In addition to disputing the law judge's credibility findings, which were favorable to respondent, the Administrator argued if the Administrator proved respondent violated 14 C.F.R. §§ 43.12(a)(1), 61.55(a)(3), or 61.59(a)(2), then the stale complaint rule would not apply, because the Administrator would have established respondent lacked the qualifications to hold an airman certificate. The Administrator also presented the alternative argument that the law judge was compelled to assess the Administrator's complaint in its entirety to determine if it raised an issue of a lack of qualifications. The Administrator urged the Board to overturn its holding in Administrator v. Armstrong,<sup>9</sup> wherein the Board stated that when a law judge concludes no lack of qualifications exists as alleged in the complaint, the analysis of the stale complaint rule requires the Administrator to establish good cause existed for the delay in charging the respondent.

## *2. The Board's Opinion*

The Board rejected the Administrator's arguments and affirmed the law judge's decision. The Board stated the Administrator's complaint did not include specific allegations concerning respondent's conduct; in particular, the complaint was silent as to which aspects of the March 25, 2010 logbook entries were false. Consistent with Board jurisprudence, the Board also deferred to the law judge's credibility determinations concerning respondent's testimony.

With regard to the stale complaint rule, the Board declined to provide the parties the opportunity to renew arguments concerning the outcome of Armstrong. The Board noted the Administrator presented no explanation for its delay of more than two years between the time the

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(..continued)

includes a charge of intentional falsification, regardless of the length of time between the alleged offenses and the Administrator's advising the respondent of the proposed certificate action.

<sup>9</sup> NTSB Order No. EA-5629 (2012), pet. for recon. denied, NTSB Order No. EA-5660 (2013).

Administrator learned of the potential violations and the time the Administrator notified the respondent that it intended to investigate and pursue action based on respondent's conduct. The Board stated the Administrator failed to make a sufficient showing to establish the complaint was exempt from application of the stale complaint rule.

The Administrator argued the agency demonstrated respondent's lack of qualifications and suggested the agency could proceed with the charges. The Board disagreed, finding such a suggested reading is contrary to the plain language of the rule. The Board acknowledged in the vast majority of cases, an allegation that the respondent falsified a document "would appear to indicate the respondent lacked the qualification to hold a certificate."<sup>10</sup> However, the Board stated even a plain reading of the Administrator's complaint in this case indicated the Administrator did not have the evidence to pursue most of the charges therein. The Board noted the Administrator's complaint did not specifically state the factual basis for the allegations. As a result, the Board believed the Administrator was inappropriately taking advantage of the lack-of-qualifications exemption to the stale complaint rule.

#### *B. The D.C. Circuit's Order Vacating and Remanding the Opinion and Order*

The Administrator appealed the Board's Opinion and Order. The D.C. Circuit held oral argument on November 13, 2014. Counsel for the Aircraft Owners and Pilots Association (AOPA) filed an *amicus* brief. The D.C. Circuit granted the Administrator's appeal by issuing an opinion vacating the Board's Opinion and Order and remanding the case to the Board for further proceedings and analysis.

##### *1. Jurisdiction*

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<sup>10</sup> Supra note 6 at 20.

In its opinion, the D.C. Circuit first rejected AOPA's argument that the Administrator erred in asserting that the Board's application of the stale complaint rule would result in the Administrator fulfilling its burden of showing it endured a "significant adverse impact." AOPA's contention in this regard was relevant to whether the Court needed to concur with the Administrator's "significant adverse impact" argument in order to determine that jurisdiction was proper. The Court disposed of this argument because "neither party pressed that argument," and found "neither the statutory text nor structure provides the type of 'sweeping and direct' congressional command needed to attach jurisdictional consequence to the Administrator's 'significant adverse impact' determination."<sup>11</sup> As a result, the Court could review the Administrator's appeal of the Board's Opinion and Order because the question of whether the Administrator suffered a significant adverse impact as a result of the Board's ruling did not affect the Court's jurisdiction.<sup>12</sup>

## *2. Stale Complaint Rule*

The Court then addressed the Board's analysis of the stale complaint rule issue, and found the Board's failure to apply the lack-of-qualifications exception to the rule to count 4 of the complaint was arbitrary and capricious. The Court found the Board's requirement that the Administrator specifically plead facts that would unequivocally establish a lack of qualifications was improper, because it placed upon the Administrator an unacceptably heightened pleading standard that departed from Board precedent. The Court interpreted the rule's lack-of-qualifications exception as one that "does not require the Administrator to 'show' anything; the

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<sup>11</sup> Huerta v. Ducote and NTSB, 792 F.3d 144, 152 (D.C. Cir. 2015).

<sup>12</sup> Judge Henderson filed a concurring opinion, in which she asserted the Administrative Procedure Act did not require the Court to review the *substance* of the Administrator's certification that the FAA had suffered a significant adverse impact. Judge Henderson's concurring opinion did not discuss any other part of the panel's decision. Id. at 157.

complaint must simply ‘allege’ the lack of qualification.”<sup>13</sup> The Court reviewed the allegations of the complaint and determined the document “facially and plausibly alleges all of the key elements of an offense that bears directly on a pilot’s qualification to hold a license.”<sup>14</sup> The Court also noted allegations of intentional falsification amount to an automatic presumption that the person who falsified lacks the qualifications to hold a certificate; therefore, the time limitations of the stale complaint rule do not apply.

The Court distinguished Administrator v. Armstrong<sup>15</sup> by stating the complaint in Armstrong was vague, and Board jurisprudence did not require revocation. In Armstrong, the Administrator had charged the respondent with a violation of 14 C.F.R. § 61.15(d), which allows the Administrator to seek suspension or revocation of a certificate when the pilot has had two “motor vehicle action[s]” within the same 3 year period. Based on the fact the sanction was not automatically a revocation, the Court agreed with the Board’s holding in Armstrong that the alleged violations did not indicate a lack of qualifications.

### 3. *Credibility*

The Court also vacated the Board’s holding concerning counts based on credibility findings. Count 1 of the complaint alleged respondent falsified records concerning three night landings on March 25, 2010; count 2 alleged falsification of inaccurate times and engine cycles in a logbook; and count 3 involved falsification of a logbook entry concerning a June 10, 2010 flight between Jackson and Picayune, Mississippi. The Court found the Board’s application of the law judge’s credibility finding to these counts was improper. In particular, the Court discussed count 3, about which the law judge commented he did not know if respondent had

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<sup>13</sup> Huerta v. Ducote and NTSB, 792 F.3d 144, 154 (D.C. Cir. 2015).

<sup>14</sup> Id.

<sup>15</sup> Supra note 9.

intentionally falsified the logbook entry concerning the June 10 flight. The Court vacated the Board's disposition of the allegations in Count 3 and remanded the case for resolution of the issue of whether the Administrator fulfilled the burden of proof concerning the counts that involved credibility. To ensure our analysis on remand is accurate and sufficiently comprehensive, we request the law judge evaluate witnesses' credibility and expressly apply the three-part test to these counts, as discussed below.

## ***2. Decision***

With regard to intentional falsification cases, we apply the three-part test established in Hart v. McLucas. Specifically, the Administrator must prove the respondent made (1) a false representation, (2) in reference to a material fact, and (3) had knowledge of its falsity.<sup>16</sup> Given the Court's determination that the Administrator's complaint adequately alleged a lack of qualifications, thereby exempting the complaint from the deadline imposed by the stale complaint rule, we must apply the three-part test to the allegations in the complaint.

### *A. Counts 1, 2, and 3 (Intentional Falsification)*

Respondent does not dispute his logbook records contained incomplete or inaccurate information; therefore, the parties do not contest the first prong of the Hart v. McLucas test. Because we determined respondent's omissions in some logs were material,<sup>17</sup> and the Court did not disturb this conclusion, the Administrator also has fulfilled the second prong of the Hart v. McLucas test.

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<sup>16</sup> Hart v. McLucas, 535 F.2d 516, 520 (9<sup>th</sup> Cir. 1976); Administrator v. Dillmon, NTSB Order No. EA-5528 at 3 (2010).

<sup>17</sup> Our Opinion and Order and the Court's opinion discussed the aircraft's CESCO log. CESCO is a widely used maintenance tracking provider for Cessna aircraft. Inspector White stated several flights were omitted from the CESCO aircraft log, as it appeared the CESCO aircraft log only included passenger-carrying flights. We determined the alleged omissions were material in the Hart v. McLucas analysis.

As a result, the determination of whether the Administrator proved by a preponderance of the evidence that respondent falsified the logbook entries, as alleged, will turn on whether respondent intentionally omitted or otherwise falsified flight records he gave to the FAA. Board jurisprudence establishes credibility determinations are critical to discerning whether the Administrator proved the third prong of the intentional falsification test.<sup>18</sup> On this point, the Board believed the law judge found respondent's testimony, in which he stated he did not intentionally falsify any CESCO log entries, credible. In addition, in his initial decision, the law judge summarized Inspector White's testimony, in which Inspector White stated he could not definitively identify which, if any, of the CESCO log entries respondent completed were false. The Court determined the Board's opinion incorrectly presumed the law judge had made a credibility finding to establish the Administrator could not prove respondent intentionally falsified the logbooks. The Court also determined the law judge's summary of Inspector White's testimony did not suffice as a credibility finding to fulfill the third prong of the three-part intentional falsification test. As a result, we remand this case to the law judge for such a determination. As the Court confirmed in Administrator v. Porco,<sup>19</sup> for cases in which a party challenges a law judge's credibility findings, the Board will defer to the findings because the law judge is in the best position to observe the demeanor of witnesses. We instruct the law judge to make specific credibility findings concerning whether respondent intended to falsify the logbook entries as alleged.

*B. Count 4 (Lack of Required Type Rating)*

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<sup>18</sup> Dillmon v. NTSB, 588 F.3d 1085 (D.C. Cir. 2009); NTSB Order No. EA-5528 (2010).

<sup>19</sup> NTSB Order No. EA-5591 at 13-20 (2011), aff'd, Porco v. Huerta, 472 Fed.Appx. 2 (D.C. Cir. 2012) (per curiam).

Regarding the allegations in the complaint based on respondent's lack of appropriate type rating to operate the Cessna S550, the law judge dismissed the allegations on the basis they were stale. The law judge's statements concerning this dismissal are brief; in particular, the law judge stated, "since the Administrator has not sustained the burden on the intentional falsification, these allegations about careless and reckless are stale, and as such, will be dismissed under the stale complaint rule."<sup>20</sup> The law judge went on to acknowledge the Administrator issued the order over two years after the disputed June 2010 flights.

As described above, the Court disagreed with this conclusion and found the stale complaint rule did not apply to prohibit the Administrator from proceeding with the allegations that respondent did not maintain the appropriate type rating to operate the Cessna S550 on passenger-carrying flights to and from an airport in the Bahamas. Respondent does not deny he lacked the type rating.<sup>21</sup> As a result, the law judge need not consider parties' arguments concerning Count 4. Resolution of the appeal as it relates to Count 4 does not require the law judge assess witnesses' credibility or articulate factual findings.

**ACCORDINGLY, IT IS ORDERED THAT:**

This case is remanded to the law judge for proceedings and findings consistent with this Opinion and Order.

HART, Chairman, DINH-ZARR, Vice Chairman, and SUMWALT AND WEENER, Members of the Board, concurred in the above opinion and order.

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<sup>20</sup> Initial Decision at 279.

<sup>21</sup> Supra note 6 at 9 (quoting hearing transcript, in which respondent's attorney acknowledged the charge that respondent did not have the appropriate type-rating to carry passengers on the Cessna was "[p]robably the only thing the Administrator had in this case," and acknowledging respondent admitted he lacked the type rating early in his appeal).

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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, and the hearing was held in New Orleans this 17th day of July of 2012, on the appeal of Jody Ducote, who I'll refer to as Respondent, from an Emergency Order of Revocation that has revoked his airman's certificates.

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The order of revocation serves as the complaint in these proceedings and was filed on behalf of the Administrator of the Federal Aviation Administration through the Southern Region. The Administrator was present throughout these proceedings, represented by counsel, Mr. Christopher R. Stevenson, Esquire, of the Regional Counsel's Office. And Respondent was present throughout and represented by his counsel, Mr. Gregory S. Winton, Esquire, of Rockville, Maryland.

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The matter has been heard before me, William R. Mullins. I'm the Administrative Law Judge for the National Transportation Safety Board, and as is provided by the Board's rules, I will issue a bench decision in this proceeding.

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As I said, the matter came on for hearing here in New Orleans, and it's been kind of a long day. We started at 9:00 this morning, and it's 5:35, and we're supposed to be out of the building by 6:00, and so I'll try to be as brief as possible.

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The parties were afforded a full opportunity to offer

1 evidence, to call, examine, and cross-examine witnesses. In  
2 addition, the parties were afforded an opportunity to make  
3 argument in support of their respective positions.

4 DISCUSSION

5 First, I'm going to read the order of revocation in the  
6 record, because I think it's important. We talked about through  
7 the day three counts, but really there were four counts. There  
8 were three counts of intentional falsification, and then the  
9 operational violation about operating outside of the U.S. without  
10 being type-rated in that particular aircraft. But the Emergency  
11 Order of Revocation provides as follows:

12 1. At all times material herein, you were and are now  
13 the holder of an airline transport pilot certificate, number  
14 (omitted). And that was admitted.

15 Paragraph 2: At all times material herein, civil  
16 aircraft November-999HC was a Cessna S550, the property of  
17 another. And that was admitted.

18 Paragraph 3: In your pilot logbook you made entries  
19 dated March 25, 2010, indicating that you had made three ILS and  
20 night landings to a full stop in November-999HC on flights  
21 originating and terminating at MJD. And that was denied.

22 Paragraph 4: You did not make three night landings to a  
23 full stop in November-999HC on March 25, 2010. Denied.

24 Paragraph 5: The pilot logbook entries referenced in  
25 paragraph 3 were fraudulent or intentionally false.

1           And that was Count 1.

2           Paragraph 6: You operated November-999HC on the  
3 following flights on or about the following dates on the following  
4 times. And there's a little bracket there. April 22 from GPT to  
5 MJD; April 28, 2010 from TPA to 7FL6; April 28, 2010, 7FL6 to TPA;  
6 May 25, 2010 MJD to GPT; May 25, 2010 GPT to MJD. And then it was  
7 set out that GPT is the Gulfport-Biloxi International Airport.  
8 MJD is the Picayune Municipal Airport. TPA is the Tampa  
9 International Airport. And 7FL6 was the Spruce Creek Airport.

10           Paragraph 7(a): You made entries into the aircraft  
11 flight log for November-999HC on dates after the flights listed in  
12 paragraph 6, including entries on April 22, 26, 27, 28 and May 25,  
13 2010. And that was denied.

14           Paragraph 7(b): Each of these entries included  
15 statements about the Hobbs time, aircraft total time, landings,  
16 engine time, and engine cycles for November-999HC. That was  
17 denied.

18           Paragraph 7(c): The information recorded about the  
19 Hobbs time, aircraft total time, landings, engine time, and engine  
20 cycles for November-999HC did not include the additional time or  
21 cycles for the flights listed in paragraph 6. And that was  
22 denied.

23           And paragraph 8: The aircraft flight log entries listed  
24 in paragraph 7 were fraudulent or intentionally false. And this  
25 concluded what we have called Count 2.

1           Then paragraph 9: You operated as second in command of  
2 November-999HC on the following flights on or about the following  
3 dates on the following routes: June 6, 2010, GPT to JAN; June 6,  
4 2010, JAN to MYNN; June 10, 2010, to MYNN to PBI; June 10, 2010,  
5 PBI to JAN; and June 10, 2010, JAN to MJD.

6           JAN is Jackson-Evers International Airport. MYNN is the  
7 Lynden Pindling International Airport in the Bahamas. And PBI is  
8 the Palm Beach International Airport. That was denied.

9           Paragraph 10: You made an entry in your pilot logbook,  
10 stating that on June 10, 2010, you operated November-999HC from  
11 MJD to JAN to MJD. That was denied.

12           And Paragraph 11: The logbook entry listed in paragraph  
13 10 was fraudulent or intentionally false, in that the actual dates  
14 and routes of the flights in question were different from those  
15 presented in your logbook. That was denied.

16           And that concluded the third count, that we referred to  
17 as the third count.

18           And then paragraph 12: At the time of the flights  
19 listed in paragraph 9, you did not hold the appropriate type  
20 rating for November-999HC, which is admitted.

21           Paragraph 13: The flights to and from MYNN listed in  
22 paragraph 9 were passenger-carrying flights. And that's admitted.

23           And paragraph 14: Above-referenced operations were  
24 careless and reckless, so as to endanger the life or property of  
25 another. And that's been denied.

1           Then paragraph 15: As a result, you violated the  
2 following sections of the Federal Aviation Regulations:

3           (a) Section 43.12(a)(1), in that no person may make or  
4 cause to be made any fraudulent or intentionally false entry in  
5 any record or report that is required to be made, kept or used to  
6 show compliance with any requirement under this part.

7           15(b): Section 61.55(a)(3) in that, except as provided  
8 in paragraph (3) of this section, no person may serve as a second  
9 in command of an aircraft type certificated for more than one  
10 required pilot flight crew member or an operations requiring a  
11 second in command, unless that person holds an appropriate pilot  
12 type rating for the aircraft, unless the flight will be conducted  
13 as a domestic flight operation within the United States airspace.

14           Paragraph 15(b): Section 61.59(a)(2) in that no person  
15 may make or cause to be made any fraudulent or intentionally false  
16 entry in a logbook record or report that is required to be kept,  
17 made or used to show compliance with any requirement for the  
18 issuance or exercise of the privilege of any certificate rating or  
19 authorization under this part.

20           And then 15(c): Section 91.13(a) in that no person may  
21 operate an aircraft in a careless and reckless manner so as to  
22 endanger the life or property of another.

23           And then there's the prayer clause that, then based on  
24 those allegations and those regulatory violations alleged, the  
25 Administrator says that it's an emergency and has issued the order

1 of revocation.

2           The Administrator had two witnesses, Mr. White, Glenn  
3 White, who's an aviation safety inspector with the Southern  
4 Region, and then they also called Mr. DaSilva who was listed just  
5 recently, and he testified only to the issue about the number of  
6 landings within a half hour.

7           There were a number of witnesses called for the  
8 Respondent, including the Respondent himself. Mrs. Angie Ducote,  
9 the Respondent's wife; Bradley Ducote, brother to the Respondent,  
10 and they testified about the flight on the 25th, and basically  
11 they talked about a grandniece who they've raised and consider a  
12 granddaughter whose first birthday was coming on the 26th or 27th,  
13 and they were getting ready for that, and he ended up being gone  
14 because he had this opportunity to fly a jet for the first time,  
15 according to him, but in any event -- and then Mr. Payne was  
16 called, and he was there and saw the flight on the 25th. He lives  
17 in Picayune. And then the Respondent himself testified, as I  
18 said.

19           There were a number of exhibits, and I'm not going to go  
20 through all of them. I will mention them as I talk about the  
21 decision. A couple of things: On a personal level, I have a  
22 granddaughter who has a first birthday coming up in about 3 weeks,  
23 and I have been issued orders that I will be in Houston for the  
24 birthday party. And I've got a real big conflict, and I suspect  
25 the granddaughter's going to win. But anyway, I know how those

1 things go down.

2 But overall, this is a case where, just standing back  
3 and looking at it, we have a gentleman who, like most of us who  
4 are pilots, would love to get some multi-engine jet time, and he  
5 had an opportunity and he went over and did it, and probably could  
6 have been a little more observant about what was going on.

7 The pilot in command of all these flights was a  
8 Mr. Penton, who apparently there was an Emergency Order of  
9 Revocation against back in December by Judge Montaña, and he  
10 affirmed that order of revocation, and then on request of counsel,  
11 Respondent's counsel here, he recused himself in this case. But  
12 in any event, there was a lot of stuff going on with this  
13 Mr. Penton apparently, because after revocation there wasn't even  
14 an appeal apparently of that revocation. But in any event, it  
15 would appear that Mr. Ducote here just got caught up in all that  
16 was going on with that particular airplane.

17 But let me talk about the counts, and I'll talk a little  
18 bit about the evidence and exhibits that I think might be  
19 important to that. First of all, in the first count, basically  
20 the focus was on the alleged intentional falsification about the  
21 three takeoffs and landings to a full stop at Picayune on the  
22 evening of March 25, and in the records, it was clear that the  
23 Respondent listed himself as second in command.

24 Mr. DaSilva testified that he believed that it would  
25 have taken, I think he said, maybe 12 to 15 minutes, and it may

1 have been even a few more minutes than that, to make that,  
2 although he did say by abusing the airplane, you could probably do  
3 it in -- a pilot could do it in 8 minutes. And I thought that  
4 would draw some kind of cross-examination about or further  
5 examination about what does abusing an airplane mean. Every once  
6 in a while, if I'm in a hurry and I land and I want to turn off  
7 early in a taxiway, I abuse my brakes by getting on them, but that  
8 doesn't mean, I don't think, that I'm a bad pilot. And so I don't  
9 know what he meant by abusing the airplane, but he did say it  
10 could be done in 8 minutes.

11           The testimony of Respondent was that -- and shown on the  
12 chart, that they could probably go around in 8 minutes, at least  
13 in 10 minutes, and then the squat switch would not show -- the  
14 squat switch on a Hobbs meter would shut off when the wheels  
15 touched the ground so there wouldn't be any time shown on the  
16 Hobbs meter, which I assume this time came from, for the taxi time  
17 or any of the time until the aircraft broke ground or until it  
18 touched down.

19           In any event, I found it interesting here that the  
20 Administrator would pursue an order of revocation of fraudulent  
21 entry about maybe 2 or 3 minutes' difference on a logbook entry.  
22 It was clear and the testimony was clear that the flight was  
23 made -- that the three takeoffs and landings had been made, which  
24 is really the allegation here, paragraph 4: "You did not make  
25 three night landings to a full stop." Well, it was clear that

1 there were three night landings made to a full stop.

2 Now, whether it was done in 30 minutes or 33 minutes, I  
3 don't think that's an intentional falsification issue, and the  
4 affidavit of a qualified Cessna pilot, Captain Wayne Carr, which  
5 is Exhibit R-30, suggests that you could do it in 30 minutes. But  
6 in any event, the Administrator has not met his burden of proof on  
7 the issues in Count 1.

8 Let me move on to Count 2, which -- and this was the  
9 entries in the aircraft log. Let me pull that right here. I've  
10 got it right here, A-13. And this was the CESCO aircraft flight  
11 log, which the Administrator alleges that it was required to be  
12 maintained to show compliance with the Cessna maintenance program,  
13 and then there was -- from the testimony of Mr. White, he  
14 identified this exhibit, and the entire exhibit, there are at  
15 least -- not the entire exhibit, but the entries from 4/12 through  
16 4/25 are in Respondent's handwriting.

17 And the Administrator states that the -- well, first of  
18 all, in paragraph 7(c): "The information recorded about the Hobbs  
19 time, aircraft total time, landing, engine time, and engine cycles  
20 for November-999HC did not include the additional time or cycles  
21 for the flight logs listed in paragraph 6." Well, that's an error  
22 of omission. That's not grounds for intentional falsification,  
23 and I think the Board precedent is clear on that issue. You can't  
24 leave something out and that be an act of intentional  
25 falsification.

1           But the testimony was that there was false -- although  
2 on cross-examination, Mr. White was asked, well, which one of  
3 these are false? Well, he said it was false to start out with,  
4 but these times -- and the Respondent testified that he was told  
5 by Mr. Penton that the only reason he was keeping this log was to  
6 show revenue flight times, and he used it to charge his clients or  
7 the people he was charging the revenue to.

8           Counsel argues that it was clear that the landings, and  
9 takeoffs and landings, or landing cycles was inaccurate on this,  
10 but if you're only using it to charge revenue clients, it wouldn't  
11 make any difference about the landings. But the Respondent  
12 testified that that was what he was told it was about, and I  
13 credit his testimony. I believe he was accurate. He's a newbie  
14 out there. He's sitting over there in the right seat. He's  
15 sitting in front of the Hobbs meter. This character, Mr. Penton,  
16 who apparently had all kinds of problems in the other case, said,  
17 "Here, fill this out; I keep this for my revenue passengers."

18           And apparently during this period of time, he's not even  
19 rated in this airplane. He's just flying in the right seat,  
20 trying to achieve a rating or get to a point where he can get that  
21 rating. I mean, this is not a person with a lot of time in this  
22 particular type of airplane or this particular type of operation,  
23 although Respondent does have -- and I'll give him that -- he's  
24 got a number of hours, I think 10- or 11,000 hours, but he got  
25 that in his business that he used to operate, and it was not an

1 aviation-related business.

2           But, again, I credit the testimony of the Respondent  
3 here. He said that he didn't know, and I think that those  
4 entries, again -- well, let me digress a minute. The *Hart vs.*  
5 *McLucas* case talks about to have an intentionally false statement.  
6 The statement must be false, it must be material and must be with  
7 knowledge of the falsity. But it has to be required by the  
8 Administrator for it to be actionable here.

9           Now, there's been a good argument, I think, that it  
10 couldn't have been a maintenance violation, because Mr. White  
11 testified that it wasn't required to be maintained under Part 43.  
12 Mr. White was the only witness for the Administrator on this  
13 issue. And whether it's a requirement by the Administrator, that  
14 is a material part of the allegation, and if there's no knowledge  
15 of the materiality by the Respondent, then even if he knew it was  
16 false, he didn't know it was material, so it doesn't rise to the  
17 level of a revocable offense. And I feel on the second count, the  
18 Administrator has not satisfied the burden of proof on that issue.

19           Moving on to the third count, and this is the one where  
20 there were flights listed on the pilot log, allegedly listed on  
21 the pilot flight log that -- I mean, there were flights made that  
22 were not listed on the pilot flight log, particularly several  
23 flights, including the one, I guess, down into the Bahamas.

24           This one is troubling for me because the testimony and  
25 the exhibits establish that there were four or five letters issued

1 to this Respondent. He responded to each one of them. He took  
2 his logbooks to the Administrator. He had his online log, which  
3 showed -- and it's clear, and the online log is, I think -- just a  
4 minute; I'll pull it up here for you. I think that's A-43. I  
5 believe that's A-43.

6 A-43 is the online log, and he took this online log, and  
7 his testimony was -- and it wasn't rebutted by the Administrator.  
8 He took this online log to the FAA and said -- and he also had his  
9 other logbook -- and he said, here it is. And a lady that was  
10 there said, well, I don't know what to do with that. So they  
11 called somebody, and I don't know whether it was Mr. White or the  
12 other inspector, but he was told all they wanted was just his  
13 Triple-Nine-Hotel-Charlie time.

14 So then he writes this out, and his testimony was that  
15 he writes out what is A-29 and A-30 at different times, and -- but  
16 that's not his logbook. That's not the document that he was  
17 maintaining to require compliance, to show compliance with the  
18 regulation. It was his online log. And just because an FAA  
19 inspector asks you to write something out here, that doesn't make  
20 it something required to show compliance.

21 Now, it was clear and I think Mr. White testified that  
22 he first saw this A-43 at the time of Mr. Penton's hearing, but he  
23 did see it long before this, and this was the way that the  
24 Respondent kept his time. We all know that you don't have to  
25 maintain a logbook of every flight. You just have to show enough

1 entries to show compliance with regulations. And that has created  
2 problems in a number of cases over the years.

3 But here, he kept an online log. It was much easier for  
4 him to do than this other log. He could make -- apparently make  
5 entries via his cell phone on this online log, and he had it. He  
6 brought it to the Administrator, and they said, no, that's not  
7 what we want; we want you to write out what you did in this  
8 particular airplane. So he did, and maybe he missed some or maybe  
9 even he intentionally falsified that document, but that is not a  
10 document that is required to be maintained by the Administrator.  
11 The one that he is required is the one that he kept his time in,  
12 which was the online log.

13 And I'm not finding at all that it was false. It was  
14 just inconsistent with his logbook time, his online log, and the  
15 Administrator is seeking to have the Court find that this log that  
16 was requested, this separate log requested by the inspectors, is  
17 intentional falsification, and I can't do that. I just find that  
18 the Administrator again has not met the burden of proof on the  
19 issue of Count 3.

20 The fourth count, which was the type rating, that was he  
21 didn't have the type rating but he went overseas. That's been  
22 admitted, but it's also -- since the Administrator has not  
23 sustained the burden on the intentional falsification, these  
24 allegations about careless and reckless are stale, and as such,  
25 will be dismissed under the stale complaint rule.



1 APPEAL

2 ADMINISTRATIVE LAW JUDGE MULLINS: Now, the  
3 Administrator has the right to appeal this order today, and you  
4 may do so by filing your notice of appeal within 10 days of this  
5 date. Now, since the time provisions have been waived, the normal  
6 appeal procedures would apply. In that case, you need to file  
7 your -- excuse me. Let's go off the record a minute.

8 (Off the record.)

9 (On the record.)

10 ADMINISTRATIVE LAW JUDGE MULLINS: The Administrator  
11 would need to file notice of appeal within 10 days of this date,  
12 and then within 50 days of this date, file a brief in support of  
13 that notice of appeal. The notice of appeal would go to -- notice  
14 would go to the Office of Administrative Law Judges, National  
15 Transportation Safety Board, Room 4704, at 490 L'Enfant Plaza E  
16 Southwest, Washington, D.C. 20594. And then the brief goes to  
17 that same street address, but to the Office of General Counsel at  
18 Room 6401.

19 Filing the notice is fairly time-specific, and if you  
20 miss those times, the Board will sort of summarily reject the  
21 appeal. I have a copy of those rights, which you may have a  
22 number of these in your office, but I'll gladly give you one,  
23 counsel.

24 MR. STEVENSON: I'll go ahead and take one.

25 ADMINISTRATIVE LAW JUDGE MULLINS: Okay.

1           And then, Mr. Winton, in case they appeal, do you need a  
2 copy, just --

3           MR. WINTON: I'm familiar with the rules. Thank you.

4           ADMINISTRATIVE LAW JUDGE MULLINS: Okay. All right.  
5 Any question about the appeal? First, from the Administrator?

6           MR. STEVENSON: No, Your Honor.

7           ADMINISTRATIVE LAW JUDGE MULLINS: Any question from the  
8 Respondent?

9           MR. WINTON: No question, Judge. Thank you.

10          ADMINISTRATIVE LAW JUDGE MULLINS: Okay. Folks, we need  
11 to be out of the building post haste. Thank you.

12          (Whereupon, at 6:05 p.m., the hearing in the above-  
13 entitled matter was concluded.)

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CERTIFICATE

This is to certify that the attached proceeding before the

NATIONAL TRANSPORTATION SAFETY BOARD

IN THE MATTER OF: Jody Ducote  
DOCKET NUMBER: SE-19290  
PLACE: New Orleans, Louisiana  
DATE: July 17, 2012

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

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Lonnie Helmer  
Official Reporter