PB98-950101

medicare

Outpatient Physical Therapy, Comprehensive Outpatient Rehabilitation Facility and Community Mental Health Center Manual

Department of Health and Human Services

Health Care Financing Administration

Transmittal No. 2 **Date JUNE 1998**

Change Request #409

REVISED MATERIAL	REVISED PAGES	REPLACED PAGES
Secs. 414 - 415 (Cont.)	4-31 - 4-34 (5 pp.)	4-31 - 4-34 (4 pp.)

NEW PROCEDURES--EFFECTIVE DATE: For claims with dates of service on or after October 1, 1998

Section 414, Billing Instructions for Partial Hospitalization Services Provided in Community Mental Health Centers (CMHCs), has been updated based on §4523 of the Balanced Budget Act (BBA) (P.L. 105-33) which requires payment to be made under a prospective payment system for hospital outpatient department services (including partial hospitalization services provided in a hospital outpatient department), as well as application of this prospective payment system to partial hospitalization services furnished by a CMHC. As a result, you must report HCPCS codes when billing for partial hospitalization services. In addition, the definition of Form Locator 46 "Service Units" has been redefined. Report the number of times a particular service or procedure based on the HCPCS was performed instead of the total number of visits for the billing period. These reporting requirements are needed to assure proper payment under the outpatient prospective payment system.

Also, revenue code 942 "Education Training" has been removed from the list of reportable revenue codes. Report education training under one of the remaining partial hospitalization revenue codes based on the nature of the services provided.

NEW PROCEDURES--EFFECTIVE DATE: For claims with dates of service on or after July 1, 1999

Section 414, Billing Instructions for Partial Hospitalization Services Provided in Community Mental Health Centers (CMHCs), has been updated to require you to report line item dates of service when billing for partial hospitalization services.

NEW PROCEDURES--EFFECTIVE DATE: January 1, 1998

Section 415, Pneumococcal Pneumonia, Influenza Virus and Hepatitis B Vaccines, is updated to include a new Hepatitis B vaccine HCPCS code.

Claims need not be reopened for the above instruction. However, process claims brought to your attention in accordance with this instruction.

DISCLAIMER: The revision date and transmittal number only apply to the redlined material. All other material was previously published in the manual and is only being reprinted.

Partial Hospitalization Services

414. BILLING INSTRUCTIONS FOR PARTIAL HOSPITALIZATION SERVICES PROVIDED IN COMMUNITY MENTAL HEALTH CENTERS (CMHCs)

A. General.--Medicare Part B coverage for partial hospitalization services provided by CMHCs is available effective for services provided on or after October 1, 1991, as described in §260.

B. Special Requirements.--Section 1866(e)(2) of the Act recognizes CMHCs as "providers of services" but only for furnishing partial hospitalization services.

C. Billing Requirements.--Bill for partial hospitalization services on Form HCFA-1450 under bill type 76X. Follow bill completion instructions in §416 except for those listed below:

The acceptable revenue codes are as follows:

Code	Description
250	Drugs and Biologicals
43X	Occupational Therapy
904	Activity Therapy
910	Psychiatric/Psychological Services
914	Individual Therapy
915	Group Therapy
916	Family Therapy
918	Testing

NOTE: Revenue code 942 "Education Training" has been deleted from the list of reportable revenue codes for partial hospitalization. Report charges for patient training and education under one of the remaining revenue codes above based on the nature of the services provided.

You are also required to report appropriate HCPCS codes and service units as follows:

Revenue Codes	Description	HCPCS Code	Service Units
43X	Occupational Therapy (Partial Hospitalization)	*G0129	No. of days
904	Activity Therapy	**Q0082	No. of days
910	Psychiatric General Services	90801, 90802, 90875, 90876, 90899, or 97770	CPT definition
914	Individual Psychotherapy	90816, 90818, 90821, 90823, 90826, or 90828	CPT definition
915	Group Psychotherapy	90849, 90853, or 90857	CPT definition
916	Family Psychotherapy	90846, 90847, or 90849	CPT definition
918	Psychiatric Testing	96100, 96115, or 96117	CPT definition

*The definition and short descriptor of code G0129 is as follows:

"Occupational therapy services requiring skills of a qualified occupational therapist, furnished as a component of a partial hospitalization treatment program, per day", (PART. HOSP. PROG. OCCUPA TX.).

**The definition of code Q0082 has been changed. The new definition is as follows:

> "Activity therapy furnished as a component of a partial hospitalization treatment program, (e.g., music, dance, art or play therapies that are not primarily recreational), per day."

Revenue code 250 does not require HCPCS coding. However, drugs that can be self-administered are not covered by Medicare.

HCPCS includes CPT-4 codes. Report HCPCS codes in FL44, "HCPCS/Rates." HCPCS code reporting is effective for claims with dates of service on or after July 1, 1998.

Follow general bill completion instructions in §416 except those in §414.C.

The professional services listed below are separately covered and are paid as the professional services of physicians and other practitioners. These professional services are unbundled and these practitioners (other than physician assistants) bill the Medicare Part B carrier directly for the professional services furnished to your partial hospitalization patients. You can also serve as a billing agent for these professionals by billing the Part B carrier on their behalf for their professional services. The professional services of a physician assistant can be billed to the carrier only by the physician assistant's employer. The following professional services are unbundled and not paid as partial hospitalization services:

- Physician services that meet the criteria of 42 CFR 415.102, for payment on a fee schedule basis;
- Physician assistant services, as defined in §1861(s)(2)(K)(i) of the Act;
- Nurse practitioner and clinical nurse specialist services, as defined in §1861(s)(2)(K)(ii) of the Act; and
- Clinical psychologist services, as defined in §1861(ii) of the Act.

The services of other practitioners, (including clinical social workers) are bundled when furnished to your patients. You must bill your intermediary for such nonphysician practitioner services as partial hospitalization services. Payment is made to you for these services.

D. Reporting of Service Units.--CMHCs report in Form Locator (FL) 46, "Service Units," the number of times the service or procedure as defined by the HCPCS code was performed when billing for the following partial hospitalization services:

Occupational Therapy - Revenue Code 43X
Activity Therapy - Revenue Code 904
Psychiatric/Psychological Services - Revenue Code 910
Individual Therapy - Revenue Code 914
Group Therapy - Revenue Code 915
Family Therapy - Revenue Code 916
Testing - Revenue Code 918

When reporting service units for HCPCS codes where the procedure is not defined by a specific time frame, report "1" in FL 46. Visits should no longer be reported as units for these services.

EXAMPLE: A beneficiary received psychological testing (HCPCS code 96100 which is defined in one hour intervals) for a total of 3 hours during one day. Report revenue code 918 in FL 42, HCPCS code 96100 in FL 44, and "three" units in FL 46.

Your intermediary will edit to ensure that service units are completed on partial hospitalization claims reflecting the above revenue codes.

NOTE: Service units are not required to be reported for drugs and biologicals (Revenue Code 250)

E. Line Item Date of Service Reporting.--You are required to report line item dates of service per revenue code line for partial hospitalization claims that span two or more dates. This means each service (revenue code) provided must be repeated on a separate line item along with the specific date the service was provided for every occurrence. Line item dates of service are reported in FL 45 "Service Date" (MMDDYY). See example below of reporting line item dates of service. This example is for group therapy services provided twice during a billing period.

For the UB-92 flat file, report as follows:

Record Type	Revenue Code	HCPCS	Dates of Service	Units	Total Charges
61	915	90849	05-05-98	1	$80.00
61	915	90849	05-29-98	2	$160.00

For the hard copy UB-92 (HCFA-1450), report as follows:

FL 42	FL 44	FL 45	FL 46	FL 47
915	90849	05-05-98	1	$80.00
915	90849	05-29-98	2	$160.00

Your intermediary will reject claims that span two or more dates if a line item date of service is not entered for each HCPCS code reported. Line item date of service reporting is effective for claims with dates of service on or after July 1, 1999.

F. Payment.--Section 1833(a)(2)(B) of the Act provides the statutory authority governing payment for partial hospitalization services provided by a you.

415. PNEUMOCOCCAL PNEUMONIA, INFLUENZA VIRUS AND HEPATITIS B VACCINES

Part B of Medicare pays 100 percent for pneumococcal pneumonia vaccines (PPV) and influenza virus vaccines and their administration. Payment is on a reasonable cost basis. Deductible and coinsurance do not apply. Part B of Medicare also covers the reasonable cost for hepatitis B vaccine and its administration. Deductible and coinsurance apply.

A. Coverage Requirements.--Effective for services furnished on or after July 1, 1981, PPV and its administration is covered for patients if it is ordered by a physician who is a doctor of medicine or osteopathy.

Effective for services furnished on or after September 1, 1984, hepatitis B vaccine and its administration is covered if it is ordered by a doctor of medicine or osteopathy and is available to Medicare beneficiaries who are at high or intermediate risk of contracting hepatitis B.

Effective for services furnished on or after May 1, 1993, influenza virus vaccine and its administration is covered when furnished in compliance with any applicable State law by any provider of services or any entity or individual with a supplier number. Typically, this vaccine is administered once a year in the fall or winter. Medicare does not require for coverage purposes that the vaccine must be ordered by a doctor of medicine or osteopathy. Therefore, the beneficiary may receive the vaccine upon request without a physician's order and without physician supervision.

B. General Billing Requirements.--Bill for the PPV, influenza virus vaccine and hepatitis B vaccines on Form HCFA-1450 using bill type 74X (OPTs), and 75X, (CORFs).

Bill for the vaccines and their administration on the same claim. There is no requirement for a separate bill for the vaccines and their administration. However, you may be required to bill separately if your intermediary requires it.

C. HCPCS Coding.--Bill for the PPV using HCPCS code 90732, influenza virus using HCPCS code 90724. HCPCS codes for reporting hepatitis B vaccine are stated below:

90744	Immunization, Active, Hepatitis B Vaccine; Newborn to 11 years
90745	Immunization, Active, Hepatitis B Vaccine; 11 to 19 years
90746	Immunization, Active, Hepatitis B Vaccine; 20 years and above
90747	Immunization, Active, Hepatitis B Vaccine; Dialysis or Immunosuppressed Patient, Any Age.
90748	Immunization, Active, Hepatitis B and Hemophilos Influenza B (HIB) vaccine

These codes are for the vaccines only. Bill for the administration of the vaccines using HCPCS code G0008 for the influenza virus vaccine, G0009 for the PPV, and G0010 for the hepatitis B vaccine.

D. Applicable Revenue Codes.--Bill for the vaccines using revenue code 636. Bill for the administration of the vaccines using revenue code 771.

E. Other Coding Requirements.--You must report a diagnosis code for each vaccine if the sole purpose for the visit is to receive the vaccines or if the vaccines are the only service billed on a claim. Report code V04.8 for the influenza virus vaccine code V03.82 for PPV and V05.3 for the hepatitis B vaccine. In addition, for the influenza virus vaccine, report UPIN code SLF000 if the vaccine is not ordered by a doctor of medicine or osteopathy.

F. Simplified Billing of Influenza Virus Vaccine by Mass Immunizers.-Some potential "mass immunizers," have expressed concern about the complexity of billing for the influenza virus vaccine and its administration. Consequently, to increase the number of beneficiaries who obtain needed preventive immunizations, simplified (roster) billing procedures are available to mass immunizers. A mass immunizer is defined as any entity that gives the influenza virus vaccine to a group of beneficiaries, e.g., at Public Health Clinics, shopping malls, grocery stores, senior citizen homes, and health fairs. To qualify for roster billing, immunizations of at least five beneficiaries on the same date is required.

The simplified process involves use of the HCFA-1450 with preprinted standardized information relative to you and the benefit. When conducting mass immunizations, attach a standard roster to a single pre-printed HCFA-1450 which will contain the variable claim information regarding the service provider and individual beneficiaries.

The roster must contain, at a minimum, the following information:

- o Provider name and number;
- o Date of service;
- o Patient name and address;
- o Patient date of birth;
- o Patient sex;
- o Patient health insurance claim number; and
- o Beneficiary signature or stamped "signature on file".

NOTE: A stamped "signature on file" can be used in place of the beneficiary's actual signature provided you have a signed authorization on file to bill Medicare for services rendered. In this situation, you are not required to obtain the patient signature on the roster. However, you have the option of reporting "signature on file" in lieu of obtaining the patient's actual signature.

The modified HCFA-1450 shows the following preprinted information in the specific FLs:

- o The words "See Attached Roster" in FL 12, (Patient Name);
- o Patient Status code 01 in FL 22 (Patient Status);
- o Condition code M1 in FLs 24-30 (Condition Code); (See NOTE: below)
- o Condition code A6 in FLs 24-30 (Condition Code);
- o Revenue code 636 in FL 42 (Revenue Code), along with HCPCS code 90724 in FL 44 (HCPCS Code);
- o Revenue code 771 in FL 42 (Revenue Code), along with HCPCS code G0008 FL 44 (HCPCS Code);
- o "Medicare" on line A of FL 50 (Payer);

SERVED: May 12, 1998

NTSB Order No. EA-4662

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Issued under delegated authority (49 C.F.R. 800.24)
on the 12th day of May, 1998

JANE F. GARVEY, Administrator, Federal Aviation Administration, Complainant, v. ROBERT C. PEACON, Respondent.	Docket SE-13828

ORDER GRANTING STAY

Respondent by counsel has requested a stay of NTSB Order EA-4607, served November 21, 1997, pending disposition of a petition for review of that order[1] to be filed in the United States Court of Appeals pursuant to Section 1006 of the Federal Aviation Act (49 U.S.C. 46110) and the NTSB Rules (49 C.F.R. 821.64).[2] It appears that good cause exists for granting the stay.

ACCORDINGLY, IT IS ORDERED THAT:

The effective date of NTSB Order EA-4607 is stayed until the expiration of the 60-day period within which a petition for review may be filed with the Court of Appeals; however, if such a petition is filed, the stay will continue in effect until the court enters judgment on the petition.

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[1] The Board in Order EA-4607 imposed a 90-day suspension of respondent's ATP certificate.
[2] The Board in Order EA-4651 (served April 15, 1998) denied reconsideration of Order EA-4607.

(7)

Daniel D. Campbell
General Counsel

8

SERVED: May 15, 1998

NTSB Order No. EA-4661

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 1st day of May, 1998

JANE F. GARVEY, Administrator, Federal Aviation Administration, Complainant, v. MICHAEL TRUPEI, Respondent.	Docket SE-14801

OPINION AND ORDER

The respondent, pro se, has appealed from the June 24, 1997 order of Administrative Law Judge William E. Fowler, Jr., denying respondent's motion to dismiss the complaint as stale and granting the Administrator's motion for judgment on the pleadings in this proceeding.[1] By that order, the law judge affirmed the Administrator's order revoking respondent's commercial pilot certificate upon finding that respondent violated section

[1]The law judge's order is attached.

61.15(a) of the Federal Aviation Regulations (FARs), 14 C.F.R. § 61.15(a).[2] As discussed below, we deny the appeal.

The Administrator's revocation order (complaint), dated January 16, 1997, alleged that, on or about August 31, 1990, respondent was convicted in the United States District Court, Southern District of Florida, of conspiracy to possess with intent to distribute P2P and conspiracy to manufacture and distribute methamphetamine, in violation of 21 U.S.C. § 846.

Respondent's appeal of the Revocation Order, received by the NTSB's Office of Law Judges on February 18, 1997, included a statement of fact in which respondent stated that,

> [o]n June 7th, 1989[,] Trupei was arrested by the DEA for an alleged dry-conspiracy with no overt act committed to distribute P2P (phenylacetone).... On April 17th, 1990[,] Trupei was found guilty by jury in the U.S. District Court for the Southern District of Florida of one count of manufactured dry-conspiracy with no overt act committed. On August 31st, 1990[,] Trupei was sentenced in the U.S. District Court for the Southern District of Florida to 23 years in federal prison.

Based on respondent's admission that he was convicted of a drug-related offense, namely, conspiracy to distribute P2P, the

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[2]FAR section 61.15(a) provides, in pertinent part:

§ 61.15 **Offenses involving alcohol or drugs.**

(a) A conviction for the violation of any Federal or state statute relating to the growing, processing, manufacture, sale, disposition, possession, transportation, or importation of narcotic drugs, marihuana, or depressant or stimulant drugs or substances is grounds for--

* * * *

(2) Suspension or revocation of any certificate or rating issued under this part.

Administrator sought, and the law judge properly granted, judgment on the pleadings.[3] Respondent admitted to the key allegation in the complaint and has identified no error in the law judge's decision. As the law judge noted, an airman who has been convicted of participation in a commercial drug enterprise lacks the care, judgment, and responsibility required of a certificate holder. June 24, 1997 Order at 3, citing Administrator v. Nave, NTSB Order No. EA-4257 at 2-3 (1994); Administrator v. Piro, NTSB Order No. EA-4049 at 3-4 (1993), aff'd, 66 F.3d 335 (9th Cir. 1995).[4] As such, a hearing to determine whether respondent's conduct warranted revocation was unnecessary.

Respondent argues that since section 61.15(a) does not include "conspiracy" in the list of convictions for which suspension or revocation of an airman's certificate is authorized, and since he was not convicted of one of the "overt" drug-related offenses listed, then his certificate revocation

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[3]We would strongly encourage the Administrator, however, in such cases to make the judgment of conviction part of the record.

[4]As we stated in Piro at 3-4,

> [i]n our judgment, any drug conviction establishing or supporting a conclusion that the airman possessed a controlled substance for profit or commercial purposes is a flagrant one warranting revocation under the regulation. An individual who knowingly participates in a criminal drug enterprise for economic gain thereby demonstrates such a disregard for the rights and lives of others that he may reasonably be viewed as lacking the capacity to conform his conduct to the obligations created by rules designed to ensure and promote aviation safety.

cannot be upheld. We disagree. A conviction for conspiracy to distribute a controlled substance clearly is a conviction for a drug-related offense. See, e.g., Administrator v. Crawford, NTSB Order No. EA-4553 (1997).

Finally, respondent's argument that the complaint against him should be dismissed as stale is unavailing. A complaint that legitimately alleges issues of lack of qualification is not stale. 49 C.F.R. § 821.33. We have consistently stated that a case involving an airman's conviction for participating in a commercial drug activity involves an issue of lack of qualification, as such a conviction demonstrates that the airman lacks the care, judgment, and responsibility required of a certificate holder. See Crawford at 3; Piro, supra.

As the respondent has identified no reason to disturb the decision of the law judge, the appeal is denied.[5]

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied; and

2. The revocation of respondent's airman certificate shall begin 30 days from the date of service of this order.[6]

HALL, Chairman, FRANCIS, Vice Chairman, HAMMERSCHMIDT, GOGLIA, and BLACK, Members of the Board, concurred in the above opinion and order.

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[5]Given our disposition of the matter, we need not rule on respondent's motion for an order to take depositions.

[6]For the purposes of this order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to 14 C.F.R. § 61.19(f).

12

SERVED: June 24, 1997

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

BARRY L. VALENTINE, Acting Administrator, Federal Aviation Administration, Complainant, v. MICHAEL TRUPEI, Respondent.	Docket SE-14801

ORDER DENYING RESPONDENT'S MOTION TO DISMISS COMPLAINT AND ENTERING JUDGMENT ON THE PLEADINGS IN FAVOR OF ADMINISTRATOR

SERVICE: Michael Trupei
Coleman Correctional Facility
Unit B-1
Post Office Box 819
Coleman, Florida 33521

(BY CERTIFIED MAIL)

Keith S. May, Esq.
Federal Aviation Administration
Southern Region
Suite 510
5950 Hazeltine National Dr.
Orlando, Florida 32822

(BY FAX)

Respondent, acting pro se, has appealed to the National Transportation Safety Board from a January 16, 1997 order, by which the Administrator of the Federal Aviation Administration revoked his commercial pilot certificate pursuant to § 61.15(a) of the Federal Aviation Regulations ("FAR," codified at 14 C.F.R.), based on his conviction of a narcotics offense.[1]

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[1]FAR § 61.15(a) provides in relevant part:

"§ 61.15 Offenses involving alcohol or drugs.
(a) A conviction for the violation of any Federal or state
(continued...)

13

After respondent filed his appeal, the Administrator reissued the revocation order as his complaint in this proceeding. Respondent subsequently submitted a motion to dismiss the complaint as stale under Rule 33 of the Board's Rules of Practice in Air Safety Proceedings (codified at 49 C.F.R. § 821.33). Thereafter, the Administrator filed both a reply to that motion and a motion for the entry of judgment on the pleadings and/or summary judgment in his behalf. Those filings were submitted by the Administrator on March 24, 1997. As of this date, no reply to the Administrator's motion for judgment on the pleadings and/or summary judgment has been received from respondent. Consideration of that motion will, therefore, be undertaken without the benefit of such a reply. Upon a thorough review of the aforesaid filings by the parties and the record in this proceeding as a whole, and for the reasons set forth below, the undersigned will deny respondent's motion to dismiss the complaint, enter judgment on the pleadings in favor of the Administrator, and terminate this proceeding.

I.

The Administrator's complaint contains the following factual allegations:

1. At all times material herein you were and are now the holder of Commercial Pilot Certificate No. 2060240.
2. On or about August 31, 1990, you were convicted in the United States District Court, Southern District of Florida, of the offense of conspiracy to possess with intent to distribute P2P and conspiracy to manufacture and distribute methamphetamine, in violation of Title 21 USC Section 846.

Respondent, in his appeal, which contains sufficient information to also serve as his answer, admitted that he was convicted in 1990 of conspiracy to distribute P2P, but averred that "[t]his [was] a dry-conspiracy with no overt act committed [which] was willingly, knowingly, and deliberately manufactured by [the] DEA and Fort Lauderdale Police Department."[2] Respondent

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[1](...continued)
statute relating to the growing, processing, manufacture, sale, disposition, possession, transportation, or importation of narcotic drugs, marihuana, or depressant or stimulant drugs or substances is grounds for --

* * * * *

(2) Suspension or revocation of any certificate or rating issued under this part."

[2]Respondent's Appeal at 1.

also noted in his appeal that he has filed in United States District Court a motion to set aside, vacate and/or correct the sentence imposed upon him by that court.[3]

II.

Under Rule 33 of the Board's Rules, a complaint is subject to dismissal if it sets forth allegations of offenses which occurred more than six months before the airman in question received notice that an action had been proposed against his certificate -- typically through the issuance of a notice of proposed certificate action -- unless the Administrator either establishes good cause for the delay furnishing such notification or presents in the complaint an issue of lack of qualification on the part of that airman. In moving to dismiss the complaint in this proceeding pursuant to Rule 33, respondent asserts that the factual allegations of the complaint cannot establish a lack of qualification on his part because the "dry-conspiracy with no overt act" of which he was convicted does not fall within the purview of FAR § 61.15(a). However, it appears to the undersigned that the language of that regulation, which permits the Administrator to revoke a pilot's certificate upon a conviction of a violation of "<u>any</u> . . . statute <u>relating to</u> the growing, processing, manufacture, sale, disposition, possession, transportation, or importation of narcotic drugs, marihuana, or depressant or stimulant drugs or substances," covers persons convicted of involvement in conspiracies to distribute narcotics. It must, therefore, be found that the complaint in this matter alleges conduct which, if established, would warrant the revocation of respondent's certificate. As a result, the complaint raises a legitimate issue with respect to respondent's qualifications to be the holder of an airman certificate. Dismissal of the Administrator's complaint under Rule 33 is, thus, not warranted herein.

III.

Turning to the Administrator's motion, it must be noted that respondent has admitted in his appeal that he was convicted of conspiracy to distribute P2P, as was alleged in the complaint. He has, thus, pled that he was convicted of involvement in a commercial drug enterprise. The Board has previously opined, in <u>Administrator v. Piro</u>, NTSB Order EA-4049 at 3-4 (1993) and <u>Administrator v. Nave</u>, NTSB Order EA-4257 at 2-3 (1994), that an airman who has participated in commercial drug activity has thereby demonstrated that he lacks the degree of care, judgment and responsibility required of a certificate holder, and that revocation is the proper sanction to be imposed in such cases.

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[3]<u>Id.</u> at 1, and Ex. A attached thereto.

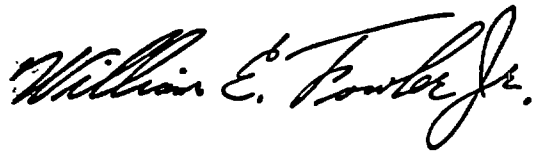
15

More recently, in Administrator v. Poole, NTSB Order EA-4425 (1996), the Board held that, where an airman's conviction of involvement in a commercial drug enterprise is undisputed, the entry of summary judgment -- which is akin to a judgment on the pleadings -- sustaining an order of revocation is appropriate. In view of respondent's admitted drug conviction and the Board's holding in Poole, the entry of judgment on the pleadings in favor of the Administrator is warranted here. Although respondent appears to challenge the legality of the conviction upon which the Administrator's certificate action is based, it must be noted that the Board has held that it is without authority to consider such a collateral attack on a criminal conviction which provides the basis for a certificate action under FAR § 61.15(a).[4] The Board has also held that the fact there is a pending appeal or motion to set aside or vacate the conviction upon which the Administrator relies does not prevent him from proceeding with a certificate action during the pendency of such an appeal or motion.[5]

For the aforesaid reasons, the undersigned believes that the Administrator is entitled to judgment on the pleadings in this matter. Accordingly, such a judgment will be entered.

THEREFORE, IT IS ORDERED that respondent's motion to dismiss the Administrator's complaint in this matter is DENIED, that the Administrator's motion for judgment on the pleadings is GRANTED, and that this proceeding is hereby TERMINATED.

Entered this 24th day of June, 1997, at Washington, D.C.



WILLIAM E. FOWLER, JR.
Chief Administrative Law Judge

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[4]Administrator v. Manning, NTSB Order EA-4363 at 4 & n.6, affirmed sub nom., Manning v. Fed. Aviation Admin., No. 96-70022, slip op. at 2 (9th Cir. April 25, 1997).

[5]Id. NTSB Order EA-4363 at 4; 9th Cir. opinion at 2-3.

APPEAL

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 has been served. An original and 3 copies of the notice of appeal must be filed with the:

National Transportation Safety Board
Office of Administrative Law Judges
Room 5531
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 3 copies 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

The Board may dismiss appeals on its own motion, or the motion of the other 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 the other party within 30 days after that party was served with the appeal brief. An original and 3 copies 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 the other party.

An original and 3 copies 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 party.

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

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

INITIAL DECISONS AND ORDERS

FOR THE MONTH OF

MAY 1998

BEFORE THE
NATIONAL TRANSPORTATION SAFETY BOARD

In the Matter of:	
JANE F. GARVEY Administrator Federal Aviation Administration	
Complainant,	
v.	Docket No. SE-15089
JAMES E. MCCRACKEN	
Respondent.	

Room 338
Building 2-900
Elmendorf AFB
Anchorage, Alaska

Friday,
May 8, 1998

The above-entitled matter continued in hearing, pursuant to notice, at 9:18 a.m.,

BEFORE: HONORABLE WILLIAM A. POPE
Administrative Law Judge

APPEARANCES:

On behalf of the Complainant:

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On behalf of the Respondent:

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

JANE F. GARVEY Administrator Federal Aviation Administration, Complainant, v. JAMES E. McCRACKEN, Respondent.	Docket No. SE-15200

Elmendorf Air Force Base
Office of Judge Advocate
Building 2900, 9th Street
Suite 330, 3rd Floor
Anchorage, Alaska

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

BEFORE: HONORABLE WILLIAM A. POPE, II
Administrative Judge

23

1 ORAL INITIAL DECISION

2 This is a proceeding under the provisions of
3 Section 609 of the Federal Aviation act, recodified at
4 49 U.S.C. Section 44709 and the provisions of the Rules
5 of Practice in air safety proceedings of the National
6 Transportation and Safety Board.

7 James E. McCracken, the Respondent, has
8 appealed an emergency order of revocation issued by the
9 Administrator revoking any airworthiness certificate
10 associated with or issued to civil aircraft N1062F
11 because civil aircraft N1062F is not airworthy and is
12 not eligible for an airworthiness certificate.

13 Unless requested to do so, I will not read
14 the Administrator's emergency order of revocation nor
15 will I cover the answer of the Complainant (sic).

16 Is there any request that I do so?

17 MR. BROWN: No, Your Honor.

18 MR. SUTLIFF: No, Your Honor.

19 JUDGE POPE: The Administrator is charged by
20 the Federal Aviation Act with the responsibility for
21 the issuance of airworthiness certificates. And under
22 Section 609 of the Act, the Administrator is given the
23 authority to reinspect any civil aircraft. And if as a
24 result of that inspection he determines that safety in

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1 air commerce or air transportation requires it, he may
2 issue an order suspending or revoking the certificate,
3 as appropriate, until a showing has been made that
4 defects have been corrected.
5 Section 609 gives the Administrator the
6 further authority to issue an order or an emergency
7 basis. See Administrator v. Anderson Aviation
8 Corporation, 3 NTSB 3252, a 1981 case.
9 To be airworthy, an aircraft must conform to
10 a type design approved under a type certificate or a
11 supplemental type certificate, and to applicative
12 airworthiness directives and be in condition for safe
13 operation. Administrator v. Doppes, 5 NTSB 50, 52, a
14 1985 case.
15 Section 43.13(a) of the Federal Aviation
16 Regulations requires each person performing
17 maintenance, alteration or preventive maintenance on an
18 aircraft to use methods, techniques and practices
19 prescribed in the current manufacturer's maintenance
20 manual or instructions for continued airworthiness
21 prepared by the manufacturer or other methods,
22 techniques and practices acceptable to the
23 Administrator.
24 Section 41.13(b) requires that each person
25 maintaining or altering an aircraft engine, propeller

1 or appliance shall do the work in such a manner and use
2 such materials of such a quality that the condition of
3 the aircraft airframe, aircraft engine, propeller or
4 appliance worked on will be at least equal to the
5 original or properly altered condition with regard to
6 aerodynamic function, structural strength, resistance
7 to vibration and deterioration and other qualities
8 affecting airworthiness.
9 Section 65.95 authorizes an inspection
10 authorization holder to return an aircraft to service
11 after a major alteration if the work was done in
12 accordance with the technical data approved by the
13 Administrator.
14 Section 43.9(a)(1) requires that each person
15 who maintains, performs preventive maintenance,
16 rebuilds or alters an aircraft, airframe, aircraft
17 engine, propeller, or component part shall make an
18 entry in the maintenance record of that equipment
19 containing the following information: 1. a description
20 or a reference to data acceptable to the Administrator
21 of the worked performed.
22 Section 43.9(a) further provides that in
23 addition to the entry required by this paragraph, major
24 repairs and major alterations shall be entered on a
25 form, the form disposed of in the manner prescribed in

26

1 Appendix B by the person performing the work.

2 Appendix B requires the execution of a FAA

3 form 337 for major repairs or alterations.

4 Under Appendix A to Part 43, paragraph

5 (a)(1). Airframe major alterations include alterations

6 to the wings, fuselage when not listed in the aircraft

7 specifications issued by the FAA.

8 Paragraph (b)(1), Airframe major repairs,

9 states repairs to the following parts of an airframe

10 and repairs to the following types involving the

11 strengthening, reinforcing, splicing and manufacturing

12 of primary structural members or their replacement when

13 replacement is by fabrication such as riveting or

14 welding or airframe major repairs.

15 Work which changes the basic design of a part

16 is considered to be a major alteration which must be

17 approved by either the manufacturer or the FAA.

18 Administrator v. Aero Lectrics, Inc., 6 NTSB 1085,

19 1088, a 1989 case.

20 In the same case, the Board said that a

21 repair station is permitted to do maintenance work

22 based on technical data submitted by the operators,

23 usually in the form of maintenance or overhaul manual.

24 5 NTSB at 1080.

25 Sections 45.11 and 45.13 require that

1 aircraft be identified by the manufacturer with a
2 fireproof plate secured to the aircraft's exterior
3 fuselage and that the information on the plate include
4 such things as the builder's name, model designation,
5 builder's serial number, type certificate number and
6 production certificate number, if any.
7 Section 45.13(e) provides that no person may
8 install an identification plate removed when necessary
9 during maintenance operations on an aircraft other than
10 the one from which it was removed.
11 In Administrator v. Lott, 5 NTSB 2394, 2397,
12 a 1987 case, reconsideration denied, NTSB Order Number
13 EA-2663, a 1988 order, a case involving installation of
14 a data plate from a wrecked aircraft on a salvage
15 aircraft which had been sold without identification
16 data plate as parts, the Board said the true identity
17 of an aircraft is highly material since it is essential
18 in determining the maintenance, repair and alteration
19 history of the aircraft and its conformity to its type
20 design and applicable airworthiness directives.
21 A case which has some factual similarities to
22 the issues in the instant case is Administrator v.
23 Potamaco, EA-3937, a 1993 case. In that case, the
24 respondent repaired a Cessna 150F, registration number
25 N6737F, which had sustained heavy damage to its wings,

38

1 fuselage, gear and interior by combining it with usable
2 parts from a Cessna 150G, N6248S, which had an intact
3 frame but no engine or propeller.
4 From the Cessna 150G he used the fuselage,
5 wings, horizontal stabilizer, landing gear and
6 instrument panel. From the Cessna 150F he salvaged the
7 engine, elevator, vertical stabilizer and rudder,
8 propeller, seats and most of the instruments and
9 control, as well as certain other parts.
10 After the reconstruction was completed, the
11 respondent removed the identification plate from the
12 wrecked fuselage of the Cessna 150F, N6737F and
13 attached it to the fuselage of the repaired aircraft.
14 The Administrator argued that the respondent had not
15 repaired N6737F but instead had added parts from that
16 aircraft to N6248S in order to create one intact
17 aircraft.
18 There was no evidence submitted regarding
19 whether respondent completed FAA form 337 for the
20 repairs.
21 The respondent argued that the data plate and
22 log books follow the engine, not the fuselage. And his
23 substitution of parts form 48S in no way changed the
24 identity of the aircraft. The Board held that affixing
25 the data plate from 37F to the fuselage of 48S was an

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1 action that is prohibited under FAR Section 45.13(e).

2 The Board went on to cite Administrator v.

3 Lott for its holding that the true identity of an

4 aircraft is essential in determining the maintenance,

5 repair and alteration history of the aircraft and its

6 conformity to its type design and applicable

7 airworthiness directives.

8 The Board concluded that the respondent's

9 actions created an inaccurate history for the resultant

10 aircraft and found he had violated Sections 45.13(e),

11 45.21(d) and 91.31(c).

12 The Administrator here charges that the

13 aircraft which currently bears the data plate

14 identifying it as a Cessna model A185F, serial number

15 18502718 with the registration number N1062F is not the

16 aircraft to which the manufacturer attached that data

17 plates, and in fact is not a model A185F Cessna

18 aircraft. The Administrator charges that instead, it is

19 an amalgamation of various mismatched parts from divers

20 aircraft.

21 The critical issue that is in dispute here is

22 whether or not the fuselage of the aircraft bearing

23 registration number N1062F to which the data plate for

24 a Cessna model A185F aircraft, serial number 18502718

25 is the fuselage of the aircraft bearing that serial

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1 number built by Cessna in 1975.

2 The Administrator's contention that it is not

3 the same fuselage is vigorously opposed by the

4 Respondent, who is the present owner of N1062F.

5 Resolution of this issue has far-reaching consequences.

6 If the Administrator is able to meet its

7 burden of proof by showing by a preponderance of the

8 evidence that the present fuselage is not the original

9 fuselage, then revocation of the airworthiness

10 certificate of N1062F is appropriate.

11 There is ample evidence in the record to

12 support a finding that in a number of important

13 respects, which I will discuss as I go along, the

14 aircraft currently bearing the registration N1062F and

15 the data plate for a Cessna model A185F, serial number

16 18502718, does not conform to the type design of an

17 A185F model Cessna and is not in condition for safe

18 operation. That makes it unairworthy.

19 Therefore, at the very minimum, this

20 aircraft's airworthiness certificate must be suspended

21 indefinitely until the Administrator is satisfied that

22 it does meet the definition of airworthiness. The case

23 presented by the Administrator on the issue of the

24 identify of the aircraft and its airworthiness is

25 strong.

31

1 Considered in the aggregate, the testimony
2 presented by the Administrator and the Respondent, who
3 is the owner of N1062F, demonstrates that the aircraft
4 currently bearing the registration number N1062F and
5 the data plate for a Cessna model A185F aircraft with
6 the serial number 18502718 does not have much in common
7 with the aircraft of that serial number built by Cessna
8 in 1975.
9 Viewed in the light most favorable to the
10 Respondent, about the only component of N1062F as it
11 now stands that came from the original model A185F
12 aircraft with serial number 18502718 built by Cessna in
13 1975 is the almost bare hull of the fuselage. The
14 Administrator has presented strong circumstantial
15 evidence that the fuselage may actually be the fuselage
16 of another otherwise unidentifiable earlier model 185
17 Cessna built prior to 1972.
18 The wings are of uncertain origin but most
19 certainly were never attached to the fuselage which
20 originally bore the data plate of the model A185F
21 Cessna, serial number 18502718.
22 The elevators do not match each other and
23 were never installed on the original Cessna, whose
24 serial number 18502718. The engine is not the original
25 engine. The use of in-flight controls do not come from

1 the original N1062F. Much of the wiring, many of the
2 structural components of the fuselage, much of the skin
3 of the fuselage, the landing gear and structure to
4 which it is attached and the seaplane kit are not
5 original parts.
6 Aviation safety inspector, airworthiness,
7 John B. Ally, whom I find to be very knowledgeable
8 about Cessna model 185 aircraft and to be an entirely
9 credible witness, performed an conforming inspection on
10 the present aircraft bearing the registration N1062F on
11 March 11 and 12, 1998, and inspected the aircraft again
12 on May 5th, 1998. It is his opinion based on his
13 observation, as corroborated by photographs and
14 pertinent parts catalogue excerpts, that the current
15 fuselage of N1062F is not the original A185F model
16 fuselage with the serial number 18502718 built by
17 Cessna in 1975.
18 He found that the rear wing spars have been
19 modified by rather crudely grinding and cutting them to
20 accommodate fitting them to the rear carry through spar
21 which has otherwise been rather crudely cut and notched
22 to accept the modified wing spar. As built in 1975,
23 the wings of model A185F aircraft have a doubler plate
24 which fits into the carry through spar. On the present
25 1062F aircraft, the doubler plate has been mostly cut

1 and ground away and a crudely cut V notch has been cut
2 into the carry through spar to permit attaching the
3 wing spar, even after grinding away most of the doubler
4 plate.
5 In addition to all else, the wing spars are
6 too close for safety in the current modified
7 installation. The rear carry through spar which is
8 part of the fuselage, in Inspector Ally's opinion, has
9 never been removed from the fuselage in which it is
10 installed shows the obvious manufacturing design
11 characteristics of carry through spars installed in
12 fuselages built in the 1960s.
13 The carry through spar of that vintage
14 differs from the carry through spar designed for and
15 installed in the model A185F Cessnas built in 1975, as
16 was the A185F model with serial number 18502718, and
17 thus can be seen in the original design of the ends of
18 the carry through spars currently installed on N1062F
19 before they were modified by cutting notches or V
20 grooves in them to identify them as similar in design
21 to rear carry through spars from a 1961 Cessna 185
22 bearing registration number N432X.
23 The carry through spar design was changed in
24 1971 to accommodate the doubler plate that was being
25 installed on wing spars to prevent gravity.

1 After Inspector Ally inspected N1062F on
2 March 11 and 12, 1998, the rough edges of the cuts were
3 ground off and made more symmetrical. However, the
4 depth of the cut in the carry through spar is still
5 1/16th inch deeper than allowed by Cessna.
6 Although the rear carry through spar can be
7 removed from a model 185 Cessna fuselage, it is a
8 difficult and expensive task. Logically, there seems
9 to be no good reason to remove a model A185F rear carry
10 through spar from a Cessna 185 aircraft and substitute
11 in its place an earlier model of the carry through spar
12 which requires extensive modification of both the carry
13 through spar and the wing spar in order to make the
14 wings of a model A185F Cessna fit through the carry
15 through spar.
16 Not only is the logic for such an action
17 illusive, there is nothing in the maintenance records
18 of N1062F recording that its rear carry through spar
19 was ever replaced or repaired.
20 I find this to be strong circumstantial
21 evidence that the fuselage of the present N1062F
22 bearing the data plate of a model A185F, serial number
23 18502718 is in fact the fuselage of an earlier model
24 Cessna 185 most certainly built before 1971 or '72 and
25 probably around 1961.

1 Gordon Mandell, an aerospace engineer
2 employed by the Aircraft Certification Division of the
3 FAA who was accepted as an expert in aerospace
4 engineering and structural analysis of aircraft
5 testified credibly that N1062F does not meet its type
6 design and is unsafe to fly because the rear carry
7 through spar and the wing spar may have been weakened
8 and damaged by overheating of the metal during rapid
9 machine cutting and grinding to cut away metal, leaving
10 ragged and sharp edges.
11 He said the sharp edges can accelerate metal
12 fatigue, cause cracks and lead to failure of the parts.
13 He said there was no way short of destructive testing
14 to assess the damage. The only recourse is to splice
15 new ends onto the carry through spars and wing spars.
16 The rudder trim system installed on and in
17 the tunnel between the pilot and co-pilot seats of the
18 present 1062F aircraft is for a 1975 model A185F but it
19 does not appear to be the rudder trim system originally
20 installed in the tunnel which is part of the present
21 fuselage.
22 The tunnel which is part of the fuselage but
23 can be removed with some difficulty has been modified
24 apparently to accept the 1975 rudder trim system by
25 drilling holes for the bracket and shaft which is part

1 of the 1975 system but was not part of the predecessor
2 model system.
3 The other holes in the tunnel were made at
4 the time of its manufacture by Cessna and appear to
5 have been stamped through the metal, not drilled. The
6 holes for the rudder trim system appear to have been
7 cut with a hole saw after the tunnel was manufactured.
8 The inside edges of the other holes are painted with
9 primer but the holes for the rudder trim system now in
10 N1062F are unpainted.
11 This is evidence that the present rudder trim
12 system and the tunnel now found in N1062F were not
13 installed by the factory when the aircraft was built.
14 The testimony of Inspector Ally, corroborated
15 by the March 1998 photograph he presented support the
16 conclusion that the fire wall installed in N1062F is
17 not the fire wall for model A185F Cessna built in 1975
18 but rather is an earlier vintage fire wall which
19 appears to have been modified to accommodate the larger
20 engine used in the F model 185 by installing a recessed
21 pan in the fire wall, giving it the appearance of a
22 fire wall for a 1975 F model Cessna 185.
23 The workmanship in installing the pan is
24 poor, with uneven vent, irregularly spaced rivets,
25 larger rivets eclipsing smaller rivets and some

37

1 aluminum rivets instead of the steel rivets used by
2 Cessna. When Inspector Ally again looked at N1062F on
3 May 5, 1998 the aluminum rivets had been replaced by
4 steel rivets. The overall poor quality of the
5 workmanship is consistent with an after manufacture
6 hand modification rather than with the higher quality
7 workmanship of original manufacture by Cessna.
8 Although N1062F was manufactured as a
9 seaplane with floats which requires a kit including a
10 different engine mount with three and not two tubes,
11 the third tubes on the engine mount on the present
12 N1062F appeared to Inspector Ally to have welds which
13 are not up to factory manufacturing standards of
14 Cessna. The welds are much too large, uneven, and they
15 have cratering and pits. In his opinion, the engine
16 mounts were manufactured after manufacture by adding
17 the third tube.
18 The Cessna service manual allows for
19 replacement only and not repair of engine mounts.
20 There is no maintenance record of modification of the
21 engine mounts. As N1062F as manufactured by Cessna
22 already had the float kit with the engine mounts for
23 marine use installed, there should have been no need to
24 modify the original engine mounts for the present
25 N1062F as it should have the same engine mounts as the

1 original.

2 It can be inferred from the evidence

3 presented by the Administrator that the data plate

4 currently attached to the fuselage on the door frame

5 has been removed and reinstalled. The rivets holding

6 it in place, as testified to by Inspector Ally, are not

7 Cessna factory installed rivets.

8 Further, the inner door frame of the fuselage

9 has four holes in a rectangular pattern in a location

10 where the data plate of model 185 Cessna aircraft built

11 after 1966 were attached.

12 The battery system installed on the present

13 N1062F aircraft is a 24 volt system but when the

14 aircraft with that registration number was built in

15 1975, it had a 12 volt system. The battery case

16 appears to be the original battery case but the top

17 appears to have been modified to accommodate a 24 volt

18 battery.

19 There is nothing in the maintenance records

20 of N1062F indicating that a 24 volt system had been

21 installed in it. The lead of the selenoid is mounted

22 too close to the outside of the battery case, which may

23 lead to sparking, causing fire and failure of the

24 electrical system.

25 The rear two bulkheads fore and aft of the

1 horizontal stabilizer where the attachments for the
2 vertical and horizontal stabilizer and tail stringer or
3 tail wheel are located have been replaced. This is
4 confirmed by a form 337. It appears that the rear
5 bulkhead was installed crooked, causing uneven gaps on
6 either side of the stabilizer.
7 The saddle of the tail stringer assembly is
8 larger than the part specified for the A185F model,
9 causing a mismatch between the size of the stringer
10 tube and the hole of the saddle to which it is
11 inserted.
12 A shim has been inserted in the hole in the
13 saddle to make it match the diameter of the tube. For
14 such an installation a form 337 would be required but
15 that has not been done. In the opinion of Inspector
16 Ally, there is too much rust on the stringer tube which
17 could weaken it at the bend, leading to failure. He
18 states that replacement is required by the service
19 manual.
20 Inspector Ally found poor riveting inside the
21 interior of the wings. Rivets did not full holes
22 completely and were not bucked or flattened. In some
23 instances, rivets missed holes drilled in the metal,
24 which weakens the wing structure. He saw riveting
25 problems in the fuselage, underneath the door, along

1 the floor towards the belly skin and in the baggage
2 store area. A crack under the battery box was not
3 riveted correctly.
4 Inspector Ally observed a strip of metal
5 between the trailing edges of upper and lower skins of
6 the ailerons. He said this is a modification not
7 called for by Cessna. The strip was removed between
8 March 11th and May 5, 1998.
9 He found evidence of Bondo in dents and seams
10 and covering rivets in the skin of the ailerons. He
11 said that these are primary flight surfaces which
12 cannot be repaired except as specified by Cessna. He
13 said that ailerons were out of balance and must be
14 rebalanced to avoid possibly destructive flutter and
15 shimmy.
16 The control yolk has been spliced or welded.
17 The Cessna service manual, however, allows only
18 replacement.
19 Bondo was used to repair rivet holes in the
20 lip strut running from the fuselage to the wing. This
21 is a replacement only item which cannot be repaired.
22 That strut which was observed during the March 1998
23 inspection was not on the aircraft at the time of the
24 May 5, 1998 inspection.
25 The windshield was improperly installed too

1 high above the edge of the wing so that the faring over
2 the wing does not fit properly. Inspector Ally said
3 the windshield should be lowered. He acknowledged that
4 this is largely an esthetics problem and there is no
5 Cessna standard.
6 Inspector Ally identified the unapproved
7 hardware he found on N1062F as cotter pins in the
8 stinger and the tail which is not an allowable use, and
9 riveting on the fire wall using aluminum rivets rather
10 than the required steel rivets. The aluminum rivets
11 may have been removed from the fire wall after
12 March 11-12, 1998 conformity inspection, however.
13 The major maintenance, or repair or
14 alterations which should have been covered by approved
15 form 337's but were not include the switch of the
16 electrical system to a 24 volt system; repair of the
17 yolk assembly; modification of the fire wall;
18 installation of a ground receptacle door where there
19 was none before; modification of the wing and spar
20 carry through spar.
21 The evidence presented by the Administrator
22 including the reasonable inferences that can be drawn
23 from the evidence is sufficient to establish a prima
24 facie case that the fuselage currently installed on
25 N1062F to which the data plate with the serial number

42

1 18502718 is attached is not the fuselage of the 1975
2 Cessna model A185F to which it was attached by the
3 manufacturer.
4 In an effort to rebut the Administrator's
5 evidence, the respondent has presented testimony from
6 the pilot who crashed N1062F in 1985, the owner of the
7 repair shop which rebuilt it in 1996 and 1997, a number
8 of employees who worked on the project, and a former
9 Judge of the Circuit Court for Alaska.
10 Donald R. Lee operated Talkeetna Air Taxi
11 with Lowell Thomas, Jr. in 1985. One of their aircraft
12 was N1062F which was used to support mountain climbers
13 on Mt. McKinley. In May 1985 at a mountain location
14 while Lee was the pilot, the gear of the aircraft
15 collapsed on takeoff and went over on its nose in deep
16 snow. He said he aborted the takeoff in deep snow when
17 the right gear failed. The aircraft rocked wing tip to
18 wing tip, came to an abrupt stop, went over on its nose
19 and propeller.
20 The left gear was torn from its box; the
21 right wing was wrinkled; the left wing was damaged.
22 There was a large dent past the far bulkhead which was
23 cracked when the aircraft was lifted out by helicopter.
24 The aircraft was sold to George at Air Parts by
25 Talkeetna Air Taxi without being repaired.

1 The color of the aircraft was red and white
2 and it had a retractable hydraulically operated skis.
3 Lee saw holes in the current fuselage of N1062F which
4 matched the configuration of the holes needed to
5 install the ski system. He said he saw hydraulic
6 points where hoses used to be and plugged holes where
7 the reservoir used to be.
8 He said that a 24 volt battery had been
9 installed in N1062F and the battery box he saw on the
10 present N1062F appears to be the same one as was on the
11 N1062F wrecked in 1985.
12 He saw traces on the dash of the current
13 N1062F of a fire suppressing chemical he had used to
14 put out an electrical fire in the aircraft before it
15 was wrecked in 1985. The N1062F in 1985 had a Sorenson
16 belly tank installed on it and the current N1062F has
17 nut plates where the straps holding the tank had been
18 installed.
19 Lee said that N1062F had been involved in an
20 earlier accident. Water which damaged its wings could
21 have damaged the rear carry through spar.
22 Bradley S. Bartlett, an aircraft painter who
23 worked for Air Parts as a subcontractor on the project
24 to rebuild N1062F was started in June 1996. He cleaned
25 out the fuselage in which animals had been living and

1 stripped the paint from it. It was a red and white
2 Cessna. The instrument panel with the interior fabric
3 were still in it. The data tag was attached to the
4 door jamb. He painted around it.
5 He said there was damage to the top of the
6 cabin, one of the gear legs, and to the right side of
7 the aircraft. He did not observe any work performed on
8 the fire wall.
9 When the repairs were completed, he painted
10 the aircraft. He looked at N1062F last week and
11 identified it as the same aircraft he had painted.
12 Paul Polinski who holds an A&P and an IA
13 oversaw the rebuilding of N1062F at Air Parts. He
14 stated that the wings came from another aircraft and
15 were rebuilt before the fuselage. He denied that the
16 data plate had been removed from the fuselage. He
17 denied that the fire wall was cut at Air Parts or that
18 a pan was installed in it at Air Parts. It was,
19 however, removed from N1062F for repair to its bottom.
20 According to Polinski, he contacted Cessna
21 and was told that Cessna could have used aluminum
22 rivets in the fire wall in 1975. The yolk was not part
23 of N1062F. It was a spare part on hand at Air Parts.
24 He examined it and determined that it was usable. He
25 said the welds appeared to be sound.

1 Polinski said that in his opinion, the
2 corrosion on the tail stinger was acceptable. He said
3 he used the larger saddle because the bushing for it
4 did a better job of dampening vibration than the saddle
5 intended for use on a model A185F Cessna. He welded a
6 shim in the saddle to make the stinger fit. He said
7 Charles Pate at Cessna thought it was a good idea.
8 He did not believe the form 337 was necessary.
9 Polinski said that in a meeting with FAA
10 representatives on April 2, 1998, use of the 28 volt
11 electrical system in N1062F was approved. He said he
12 prepared and form 337 and submitted it to the FAA but
13 has received no response. He said a Cessna
14 representative said the 28 volt system which uses a 24
15 volt battery was an option in 1975.
16 Polinski said that when he and other
17 employees tried to install a left wing, it would not
18 fit into the carry through spar. He said that normally
19 F model Cessna 185's have a slot in the carry through
20 spar but he had to cut a slot in N1062F. The wings
21 still did not clear so he cut away the doubler plate.
22 He also cut out a small part of the webb.
23 He admitted that this craftsmanship was not
24 good. He cut the doubler plate on the right wing but
25 before discovering that there was already a notch on

1 the right side of the carry through spar. He said that
2 after the FAA complained about this work he contacted
3 Mr. Pate at Cessna, who said the carry through spar
4 should have a notch in it and the notch only needed to
5 be smooth.
6 He said that he had the notches on both sides
7 cleaned up by removing jagged edges, rounded the ends
8 and increased and checked the radius of the cuts. He
9 said that Pate said the 1/16th inch by which the notch
10 exceeded the maximum permitted length was all right as
11 long as it did not pass the bolts. He said he thinks
12 the rear carry through spar is airworthy.
13 He said it did not occur to him to question
14 why the rear carry through spar looked like one that
15 came from an earlier model.
16 Polinski said that N1062F had bolt holes
17 showing a ski system had been installed. He admitted
18 that certain work performed on N1062F was not recorded
19 in the aircraft's maintenance records or on form 337's.
20 He said the door sills are the same for all Cessna
21 185's. He said that sometimes parts vary slightly even
22 though they are the right parts and they have to be
23 trimmed or drilled to make them align properly.
24 Polinski said he does not know if the engine
25 mount now in N1062F is the original engine mount for

1 that aircraft. He said the welds in it are airworthy
2 but they were not done carefully. He said that does not
3 affect the strength of the part.
4 He said that someone got an engine mount from
5 Air Services's (sic) supply of parts. He inspected it
6 and approved its use without doing any further work on
7 it.
8 Polinski said he does not know if the
9 elevators now installed on N1062F are the original
10 elevators. They, too, came from Air Service's (sic)
11 collection of parts.
12 He said the instrument panel is the original
13 instrument panel but the instruments and radios have
14 been removed and were replaced when the rebuild took
15 place.
16 Polinski said it would not be economically
17 viable to try to change everything in the fuselage to
18 make it into another model fuselage. He said
19 everything in N1062F's fuselage except the rear carry
20 through spar is for a model A185F or later.
21 He admitted that he did not rebuild the wings
22 himself but said he prepared a form 337 for the work
23 and signed it as though he had done the repair. He
24 admitted that he did not prepare a form 337 covering
25 installation of the later model saddle.

1 He said he did not inspect the 28 volt
2 electrical system after the FAA told him it would be
3 approved. He prepared a form 337 and submitted it to
4 the FAA. He said he prepared a form 337 for
5 installation of the float kit because lots of parts had
6 been removed and had to be replaced.
7 Polinski said that basically the only
8 original part of N1062F left is the fuselage and a lot
9 of it was gone. The fire wall is the original fire
10 wall but the lower portion of it had been damaged and
11 was repaired.
12 Jonathan Hayden, an A&P mechanic formerly
13 employed by Air Parts worked on the repair of N1062F.
14 He worked on the engine assembly, installed the fire
15 wall floor boards, rebuilt the left and right landing
16 gear boxes, installed door sills and removed and
17 replaced belly skin.
18 He said he understood that it was the
19 original fire wall. He said the data tag was always on
20 the fuselage. He said the door sill he installed was
21 from an earlier model 185 and had a place showing where
22 the data tag had been installed on that aircraft. He
23 said the door jamb he installed had been on another
24 aircraft.
25 Hayden remembered having seen the aircraft

1 stored outside Air Parts' building before the
2 rebuilding project began. He said that when it was
3 brought in the shop the gear boxes were damaged as was
4 the lower part of the fire wall. There were places
5 where the skin was wrinkled and broken around the area
6 of the gear boxes.
7 He said the belly skin was replaced, as were
8 the skins between the two door jambs because of
9 extensive damage. He also replaced the cabin top and
10 floor assembly. He said that skins, casts and
11 bulkheads in the area of the gear boxes were damaged.
12 George Grant, age 74-1/2, is half owner of
13 Air Parts. He has had health problems requiring
14 hospitalization recently. He said he bought N1062F
15 from Lowell Thomas, Jr., the owner of Talkeetna Air
16 Taxi after it had been wrecked. The wings and the rest
17 of the aircraft were not economically rebuidable at
18 that time.
19 In 1996 he had a set of wings rebuilt for
20 N1062F, then had the fuselage rebuilt by employees in
21 his shop. It was the same fuselage he had purchased
22 from Lowell Thomas, Jr. He said the data plate was
23 never switched.
24 He said N1062F had sat for years in an
25 isolated area outside his shop. He said a number of

50

1 parts had been removed. He said the left landing gear
2 had been torn out in the accident. The lower skin,
3 door jamb, tail cone and electrical wiring were a mess,
4 and the windshield was broken. A section under the
5 roof panel needed to be replaced.
6 He said there was damage all over the
7 aircraft. He said the tail section had been removed
8 and he did not know what had become of it. After it
9 was rebuilt, the aircraft had a different stabilizer.
10 Grant said when he bought the wrecked
11 aircraft he intended to salvage parts and sell enough
12 to recover the purchase price.
13 Alfred E. Fleener has worked in aviation for
14 48 years and has held an A&P certificate since 1950.
15 He went to work for the FAA as an A&P mechanic in 1959
16 and in 1970 became an aviation safety inspector. He
17 retired after 25 years. He acknowledged that he is a
18 long time friend of George Grant.
19 In his opinion, the welds on the engine mount
20 are safe, although their appearance is not of the best
21 quality. He found no evidence of undercutting or
22 overheating. He said that the fact that it does not
23 look good does not affect its strength.
24 He said the engine mount was originally a
25 land plane engine mount but was modified to be a

51

1 seaplane mount by welding in a third part. He said
2 that FAA approval for this major alteration is
3 required.
4 Mr. Fleener said he understood that the
5 engine fire wall had been removed for maintenance of
6 items behind the fire wall. He said the Cessna service
7 manual does not say anything about requiring the use of
8 steel and not aluminum rivets in the fire wall. In
9 fact, some sections may be repaired with aluminum
10 rivets according to the service manual.
11 He said that the fire wall is put in place at
12 the factory and drilled to fit. He identified the fire
13 wall on N1062F as a drilled to fit fire wall.
14 Mr. Fleener said that the hole for the rudder
15 trim assembly cut into the tunnel on N1062F was cut at
16 the factory with a hole saw because it is similar in
17 appearance to Exhibit C-61 which is a tunnel with
18 factory drilled holes with a hole saw. He saw burrs
19 around the hole in the photograph marked as Exhibit C-
20 25 and C-61. He said that the tunnels shown in both C-
21 26 and C-21 were sprayed with corrosion proofing in the
22 factory, although the color is different.
23 In Mr. Fleener's opinion, the data plate on
24 N1062F has never been removed. He noted an absence of
25 damage to it from removal, overspray from painting the

1 interior of the aircraft and the use of the same pop
2 rivet method of attachment as used by Cessna on other
3 aircraft. He identified photographs of data plate on
4 other Cessna fuselages attached by pop rivets.
5 Mr. Fleener said he had talked to Charles
6 Pate, a Cessna representative, who said it was possible
7 that an earlier model carry through spar could have
8 been installed on the model A185F aircraft at issue
9 here. Pate said that would have been done to use up
10 excess parts from earlier production runs.
11 Mr. Fleener said that the cut in the left
12 carry through spar was relatively new while the cut in
13 the right carry through spar was done some time ago.
14 He said it is possible that the right carry through
15 spar in N1062F was changed after manufacture and if it
16 had been replaced by an earlier model spar, a slot
17 would have had to have been cut to accommodate the
18 wing.
19 He saw no evidence of overheating in the cuts
20 in the rear carry through and wing spars. He said that
21 Charles Pate had sent a fax saying that the depth of
22 the cuts in the carry through spar were not important,
23 as long as they did not go past the bolt hole.
24 He said that the photograph marked as C-52
25 exaggerates the distance the windshield is higher than

53

1 the wing, but the gap is covered by a metal faring. If
2 the windshield does not fit right, it is only an
3 appearance item.
4 He said that metal has been cut away from the
5 area of the positive lead from the battery so that
6 there is now adequate clearance. He acknowledged that
7 a form 337 is needed to show installation of a 24 volt
8 system.
9 He said that the amount of corrosion on the
10 tail stringer is negligible and does not exceed the
11 limits in an advisory circular.
12 He said that the strip installed between the
13 upper and lower skins of the ailerons was a good idea
14 as long as it meets the balance requirements.
15 He said that the use of the more recent model
16 saddle on the tail stinger did a better job of
17 dampening vibration than the saddle required by the
18 parts manual. He said a form 337 might be needed.
19 He said he found no parts on the aircraft
20 which were not acceptable for a model A185F Cessna. He
21 said that the height of the rivets shown in photographs
22 C-61 on the tunnel around the hole for the rudder trim
23 appeared to be even to him but the rivets in the tunnel
24 of N1062F around the same hole appear to vary in
25 height.

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1 James C. McCracken purchase N1062F from
2 George Grant in 1997 for $90,000. He said delivery of
3 the completed aircraft was on August 8, 1997.
4 Also called as a witness was Karl Johnstone,
5 a retired Alaska Superior Court Judge who has had a
6 long time interest in aviation which includes ownership
7 of 50 aircraft at one time or another, including four
8 Cessna 185's.
9 Judge Johnstone has been a pilot since 1967
10 and has known George Grant, the owner of Air Parts,
11 Inc. since the 1970s. Judge Johnstone has used Air
12 Parts for service and maintenance of aircraft and he is
13 a friend and social acquaintance of George Grant.
14 Judge Johnstone is familiar with the wrecked
15 Cessna 185 aircraft that George Grant purchased from
16 Lowell Thomas, Jr. and was there when it was delivered
17 to Air Parts by trailer in the mid to late 1980s. It
18 was white with red trim. It was parked in the back lot
19 of Air Parts next to the fence on the east side.
20 Judge Johnstone parked helicopters he owned
21 adjacent to it until about 1990. He said the wrecked
22 aircraft was pretty well stripped. Everything forward
23 of the fire wall was missing. The fuselage rested on
24 its right landing gear but the left landing gear was
25 gone and the fuselage on that side rested on a pallet.

1 The control surfaces were gone, as were the
2 seats, instruments and door. There was damage aft
3 toward the rear of the left side. The horizontal
4 stabilizer, rudder and elevators were gone but the
5 vertical stabilizer may have still been attached to the
6 fuselage.
7 Judge Johnstone stated that Grant decided to
8 rebuild the aircraft out of his back pocket, which
9 meant that he intended to rebuild it at his own expense
10 then sell the rebuilt aircraft. Judge Johnstone
11 retired in the Fall of 1996 and went to Arizona for the
12 Winter. The fuselage was brought into Air Parts'
13 building before he left and a rear tunnel extending
14 back to the tail cone had been installed.
15 He came back to Alaska at Christmas time and
16 saw that the work on the aircraft had advanced. When
17 he returned to Alaska after the Winter season, the
18 aluminum skin before the tail cone had been replaced,
19 new stringers installed and the tail cone had been
20 installed.
21 Testifying in rebuttal, Aviation Safety
22 Inspector-Airworthiness Scott Norman, who has an
23 extensive background in aviation maintenance and holds
24 and A&P certificate and an IA and a commercial pilot
25 certificate said that he had inspected N1062F three

51

1 time; once in February of 1998, in Seward, Alaska, and
2 again at Alaska Air Sales in March 1998 and last week.
3 He identified Exhibits C-69 and C-70 as
4 excerpts form Cessna illustrated parts manuals for
5 Cessna 185 aircraft from 1961 to 1973 which was Exhibit
6 C-69, and from 1974 on, which is Exhibit C-70. The
7 parts number for the rear carry through spar is
8 1210029. The particular spar for aircraft in the 185
9 series are identified by dash 1 through dash 6. The
10 dash 6 part is the part specified for serial number
11 aircraft 18502311 through 1850265.
12 It differs from earlier spars because it has
13 as nut plate in the middle. The doubler required for
14 the wing spar was added beginning at the end of the
15 1971 model year for A185E models, beginning with serial
16 number 18501931. He admitted that he has not seen the
17 engineering drawings for the carry through spars.
18 He said that the fastener attaching the rear
19 carry through spar to the door post on N1062F appear to
20 be factory installed because there is rust and
21 corrosion indicating they had been there for some time
22 and there are no marks around them, indicating that
23 they have never been removed.
24 He said that lacking the special tool
25 required for that type of fastener he would use high

57

1 locks with screw on collars or bolts.

2 He found nothing in the aircraft records

3 about redoing wiring under the dash nor showing removal

4 of the fire wall, gear box repair, doubler removal,

5 belly or top skin replacement, repair or replacement of

6 the engine mount or alteration of the battery box or

7 the tunnel. He said cuts and scrapes indicated the

8 rudder trim assembly was installed after the tunnel was

9 manufactured.

10 He said the battery box was not safe when he

11 first saw it and he is not sure if it is safe now. It

12 is not in accordance with the manual in that the

13 battery is reversed and the selenoids are not attached

14 as the Cessna manual shows. He said it was not

15 airworthy when he saw it last week.

16 Inspector Norman said several fasteners as

17 still missing and there are no maintenance records

18 showing items that were repaired or replaced, including

19 the fire wall, the belly skin, top skin and the gear

20 box. He said recently submitted form 337's have not

21 yet been approved.

22 He said Polinski submitted a form 337 showing

23 he rebuilt the wings but the work orders reflect that

24 somebody else did the work.

25 Inspector Norman said that earlier model

1 Cessna 185's had a different rudder trim system and
2 that the rudder pedal linkage and the actuation
3 assembly were different from those on the A185F model.
4 A form 337 shows that before 1985 the right
5 wing was rebuilt, new top and bottom skins were
6 installed and the wings inboard rear spar was repaired.
7 The Administrator contends that the present
8 N1062F is an amalgamation of mismatched parts that have
9 been cobbled together, and there are so many parts of
10 unknown origin installed on it that it cannot be
11 determined if it is still the aircraft with serial
12 number 18502718 as the data plate indicates.
13 The Administrator contends that the fuselage
14 is not the fuselage of the original aircraft built by
15 Cessna to which the data plate for serial number
16 18502718 was attached. Therefore, the Administrator
17 contends the aircraft now bearing registration N1062F
18 is unairworthy and its airworthiness certificate must
19 be revoked.
20 First, I find that the evidence presented by
21 the Administrator conclusively shows that the rear
22 carry through spar and the rear spar of the wing do not
23 meet the type design of an A185F model Cessna aircraft.
24 That model Cessna aircraft which N1062F purports to be
25 requires the installation of a doubler to the rear wing

1 spar and a corresponding slot in the rear carry through
2 spar into which the rear wing spar with the doubler
3 attached fits and is bolted.
4 I find the testimony of Inspectors Ally and
5 Norman to be entirely reliable that the doubler has
6 been cut away from the rear wing spar and that a slot
7 has been cut into the rear carry through spar to allow
8 installation of the wing. Even with the doubler cut
9 away, the rear carry through spar is clearly an earlier
10 model carry through spar used by Cessna on 185 model
11 aircraft manufactured prior to 1971.
12 I further find to be entirely credible the
13 testimony of Gordon Mandell, an FAA aerospace engineer
14 that the removal of the doubler which causes the wing
15 spar not to meet its type design makes its assembly not
16 safe. Exhibit R-5 which was prepared by Cessna makes
17 it quite clear that the double is required for an A185F
18 model Cessna and gives instructions on how to repair
19 the wing spar. That repair has not been done.
20 I further credit the testimony of Gordon
21 Mandell that the rear carry through spar and the wing
22 spar are unsafe and do not meet the type design with
23 the grooves that have been cut in the rear carry
24 through spar, because it cannot be determined without
25 destructive testing whether the metal in either the

1 carry through spar or the wing spar was overheated and
2 weakened by rapid machine cutting and grinding which
3 left ragged and sharp edges.
4 I find his opinion that sharp edges can
5 accelerate metal fatigue, cause cracks and lead to
6 failure of the parts is reliable. I further accept his
7 opinion that the spar is unsafe and the only way to
8 make it safe is to splice on new ends, both to the
9 carry through spar itself as well as to the wing spar.
10 Thus, regardless of whether the fuselage is
11 the original fuselage of N1062F, the rear wing spar and
12 the rear carry through spar do not meet the type design
13 and are unsafe. Therefore, on that basis alone, N1062F
14 is unairworthy.
15 I find the evidence to be overwhelming that
16 the rear carry through spar presently installed in
17 N1062F is not the rear carry through spar of the type
18 design for model A185F Cessna aircraft. If it was the
19 spar required by the type design it would have a slot
20 cut in it during the manufacturing process to
21 accommodate the wing spar with the doubler. It clearly
22 did not.
23 The Administrator contends with considerable
24 justification that this shows that the fuselage to
25 which the data plate for the model A185F Cessna with

1 serial number 18502718 is not the fuselage to which the
2 data plate is now established.
3 As the Respondent pointed out in closing
4 argument, however, there are three possibilities with
5 respect to the question of the identity of the
6 fuselage.
7 First, the data plate has been switched as
8 the Administrator contends. Second, Cessna
9 manufactured the aircraft with a different rear carry
10 through spar than required by the type design. And
11 third -- or third, the rear carry through spar was
12 changed sometime after manufacture and replaced with an
13 earlier model.
14 The Respondent vehemently denies that the
15 fuselage and data plate have been switched and contends
16 that the explanation must lie with one of the two
17 remaining alternatives but cannot tell which.
18 The Administrator contention that the
19 fuselage and data plate were switched is buttressed by
20 the apparent lack of any corroborating evidence, such
21 as scratches in the underlying metal that the fasteners
22 attaching the rear carry through spar are not the
23 original fasteners put in place by the manufacturer.
24 The Administrator's position is also
25 buttressed by what appears to be the strong possibility

1 that the tunnel was modified after manufacture to
2 accommodate the rudder trim system used in the model
3 A185F because of differences between the way the holes
4 were cut in the tunnel by the manufacturer using a
5 stamp and the way the holes for the rudder trim were
6 cut using a hole saw.
7 Another modification pointed out by the
8 Administrator in showing that the fuselages have been
9 switched with an earlier model substituted is the
10 manner in which the pan in the fire wall was installed.
11 That work appears in fact to be sloppy and I find that
12 the Administrator's contention that it does not meet
13 the standards for deepness of the manufacturer has
14 considerable apparent weight.
15 However, all of this is circumstantial and
16 none of it is conclusive. Further, both the tunnel and
17 the fire wall are removable and different tunnels and
18 fire walls could have been substituted at some point.
19 Another point cited by the Administrator to
20 support the theory that the fuselage and data plates
21 have been switched is the Administrator's contention
22 that the data plate has been removed from the fuselage
23 at some point and reinstalled. The Administrator
24 contends that evidence of this is found in the type of
25 rivets used in the present N1062F to attach the data

1 plate to the door posts. The rivets, the
2 Administrator's inspectors stated, are not the type of
3 rivets used for this purpose by the manufacturer.
4 The Respondent, however, produced pictures of
5 other data plates attached to other aircraft which
6 appear to use the same type of rivet. I find this
7 evidence on switching of the data plates to be
8 equivocal.
9 Against the rather strong circumstantial case
10 that the fuselage and data plates have been switched
11 must be weighed the testimony of the witnesses who
12 testified on behalf of the Respondent. In particular,
13 having had the opportunity to view and hear them
14 testify and observe their demeanor and weigh their
15 interest in the outcome of the case, I find the
16 testimony of Donald R. Lee, Bradley S. Bartlett,
17 Jonathan Hayden, George Grant and Karl Johnstone to be
18 credible.
19 Their testimony, which I have already
20 summarized, when taken together convinces me that the
21 fuselage and the data plate have not been switched.
22 Their testimony establishes a continuity between the
23 damage sustained in the 1985 crash of N1062F and the
24 damage to the fuselage purporting to be that of the
25 aircraft that was repaired in 1996 when N1062F was

64

1 rebuilt by Air Parts, Inc.

2 The fuselage of the original N1062F and the

3 rest of the aircraft were purchased by George Grant

4 after the 1985 crash and the parts were delivered to

5 his place of business where the fuselage was stored

6 until 1996 when it was used in a rebuilding project.

7 In the meantime, it appears that practically

8 everything that was removable from the fuselage was

9 removed and what became of those parts is unknown.

10 Thus when the rebuild began, practically the only thing

11 left of the original aircraft was its practically bare

12 hull fuselage. But I find that it was the same

13 fuselage.

14 I particularly credit the testimony of George

15 Grant who I find to be a credible witness, and Karl

16 Johnstone, whose testimony I also find entirely

17 credible to support this conclusion. The damage they

18 described is consistent with damage sustained by the

19 original N1062F in 1985.

20 The others whose testimony I find credible

21 were the pilot of the aircraft at the time of the crash

22 and the mechanics who worked on the aircraft as it was

23 being rebuilt, all of whom described damage consistent

24 with the damage the aircraft had sustained in 1985.

25 I find nothing in the testimony or demeanor

1 of either Alfred E. Fleener or Paul Polinski which
2 suggests to me that they may have fabricated any of
3 their testimony concerning the identify of the fuselage
4 used in the rebuild of N1062F.
5 Although I find as a matter of credibility of
6 the Respondent's witnesses that their testimony
7 outweighs the inferences that can be drawn from the
8 circumstantial evidence presented by the Administrator,
9 I do not find that the record adequately explains how
10 the obviously incorrect rear carry through spar wound
11 up in that fuselage. An explanation as to how that
12 could have happened, whether it was something that
13 occurred when the aircraft was manufactured or after it
14 was manufactured appears to something that could best
15 be determined by the manufacturer, Cessna, but no
16 testimony from a representative of Cessna has been
17 presented.
18 I further find, however, that as the
19 Administrator contends, aside from the bare cold
20 fuselage of the original N1062F with serial number
21 18502718 the present aircraft bearing that registration
22 number and data plate with that serial number is
23 essentially an amalgamation of parts of unknown origin
24 which have been cobbled together, as the Administrator
25 contends. Most of the parts, including the engine

1 mount, steering yolk, the electrical wiring, the wings,
2 the control surfaces, including the elevators,
3 ailerons, horizontal stabilizer and vertical
4 stabilizer, much of the aircraft skin, the rear landing
5 gear system, the rear bulkheads are of unknown origin
6 and their use has not been documented in the aircraft's
7 maintenance records.
8 For N1062F to be airworthy the rebuilder must
9 document in the aircraft's maintenance records that
10 each part he repaired, replaced or altered is proper
11 for use on a model A185F Cessna aircraft with the
12 serial number 18502718. I fully credit the testimony
13 of Aviation Safety Inspectors Ally and Norman as to the
14 unairworthy parts of N1062F which they found in their
15 inspection of the aircraft, and will not repeat them
16 hear, but I do adopt them into my conclusion.
17 Upon consideration of all the substantial,
18 reliable and probative evidence of record, I find that
19 the Administrator had proven by a preponderance of the
20 evidence that the Cessna model A185 aircraft with the
21 data plate bearing the serial number 18502718 and the
22 identification number N1062F is not airworthy and
23 therefore its airworthiness certificate must be
24 suspended until such time as Respondent, James E.
25 McCracken, the aircraft's owner, can demonstrate to the

1 satisfaction of the Administrator that N1062F is in an
2 airworthy condition.
3 Inasmuch as I have found that the
4 Administrator has not proven by a preponderance of the
5 evidence that the fuselage of N1062F is not the
6 fuselage to which the data plate with serial number
7 18502718 was attached by the manufacturer of the
8 aircraft, I do not find it necessary or appropriate to
9 revoke the airworthiness certificate of N1062F. There
10 does not appear to be much in the way of guidance and
11 Board precedent concerning when revocation as opposed
12 to suspension of an airworthiness certificate is
13 appropriate.
14 In Administrator v. Zeus Enterprises, Inc.,
15 EA-4586, a 1997 case, the Administrator sought
16 suspensions of the airworthiness certificate of an
17 aircraft on which the data plate from the fuselage of
18 one aircraft was attached to a fuselage which was
19 originally identified with another serial number and
20 another data plate until such time as the owner
21 demonstrated that the aircraft is in an airworthy
22 condition.
23 In Administrator v. Morton, 2 NTSB 1321, A
24 1975 case, the Board affirmed revocation of an
25 airworthiness certificate in a case in which a data

1 plate from a helicopter which was almost totally
2 destroyed in an accident was attached to a helicopter
3 which was almost entirely rebuilt utilizing to a
4 considerable extent surplus parts from military
5 aircraft.
6 The basis for the revocation was that the
7 helicopter did not conform to an applicable type
8 certificate and therefore was not qualified for a
9 standard airworthiness certificate. The Board said it
10 appeared that the degree of nonconformity had been
11 considerably lessened by recent modification and that
12 it hoped that if the respondent applied for an
13 airworthiness certificate the Administrator's
14 representatives could work closely with him in defining
15 the remaining modifications which must be completed if
16 the application is to be granted.
17 Here it appears that N1062F bears a closer
18 resemblance to the aircraft involved in the Zeus case,
19 for which the Administrator sought an indefinite
20 suspension. It appears that an indefinite suspension
21 of the airworthiness certificate of N1062F until the
22 owner demonstrates that it conforms to its type design
23 as properly modified will serve the public interest in
24 safety and air commerce.
25 Accordingly, IT IS ORDERED, THAT:

1 1. The Respondent's appeal is granted in
2 part and denied in part;
3 2. The Administrator's order shall be
4 modified to provide that the airworthiness certificate
5 of aircraft N1062F shall be suspended indefinitely
6 until such time as the owner, James E. McCracken, the
7 Respondent here, can demonstrate to the satisfaction of
8 the Administrator that N1062F is in an airworthy
9 condition;
10 3. The order is effective immediately.
11 I will now read the emergency appeals
12 procedures which are applicable in this case, unless
13 requested not to do so. I have reduced the appeals
14 procedures to writing. I will give both counsel a copy
15 thereof.
16 If that is satisfactory in lieu of reading
17 the procedures into the record, then I will not read
18 the procedures into the record.
19 MR. SUTLIFF: That's perfectly satisfactory,
20 Your Honor.
21 MR. BROWN: Satisfactory with us, Your Honor.
22 JUDGE POPE: All right. If you'll give me
23 just a minute here.
24 Let me go off the record for minute.
25 (Off the record.)

1 JUDGE POPE: Back on the record.
2 I will now mark a copy of the written
3 emergency appeals procedures as ALJ Exhibit 1 and give
4 it to the Reporter for inclusion into the record.
5 Gentlemen if you come forward, I'll give each
6 of you a copy that I have just inserted in the record.
7 (Document above referred to
8 was marked for identification
9 as ALJ Exhibit 1 and received
10 in evidence.)
11 JUDGE POPE: Is there anything further to
12 come before me in connection with this case?
13 MR. BROWN: No, Your Honor.
14 MR. SUTLIFF: My only question is, Your
15 Honor, do the exhibits go back to washington, D.C. with
16 you or does the Court Reporter keep them pending
17 preparation of the transcript?
18 JUDGE POPE: No. The exhibits go with the
19 transcript. Each side is provided with a copy of the
20 transcript. However if you will note from the time
21 frame that is involved in an appeal if either side
22 elects to take an appeal, or both sides, that will have
23 to be done before the transcript is provided.
24 MR. SUTLIFF: I just wanted to know if she's
25 got copies of the exhibits and I need access to them, I

1 can get them from her while she's preparing the
2 transcript?
3 JUDGE POPE: Do you need to copy some of the
4 exhibits?
5 MR. SUTLIFF: I may. I don't know. But I'm
6 just concerned that if Mr. Brown files an appeal I may
7 need to have access to some of the exhibits.
8 JUDGE POPE: Well, she's going to send the
9 tapes and the exhibits to Washington almost
10 immediately. In fact, she may do it this afternoon. So
11 if there's anything that you need to copy, you need to
12 do it now.
13 MR. SUTLIFF: I'll work that out with either
14 Washington, D.C. or Mr. Brown then. I thought she was
15 going to do it here.
16 JUDGE POPE: No, no. She will forward the
17 tape that has been made to Washington and to the
18 company that has the contract to provide the reporter,
19 and that company will have the transcript prepared.
20 But the whole thing will leave her -- leave today. Is
21 that right?
22 THE REPORTER: Correct.
23 MR. SUTLIFF: Okay. That's all, Your Honor.
24 Thank you.
25 JUDGE POPE: All right. Is there anything

1 further?

2 MR. SUTLIFF: No, Your Honor.

3 JUDGE POPE: All right. Then the record is

4 closed.

5 (Whereupon, the proceedings were concluded at

6 4:29 p.m.)

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Edited
6/30/98
Judge

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2 REPORTER'S CERTIFICATE

3 This is to certify that the attached

4 proceedings before: NTSB

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7 In the Matter of: FAA V. MCCRACKEN

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12 were held as herein appears and that this is the

13 original transcript thereof for the file of the

14 Department, Commission, Administrative Law Judge

15 or the Agency.

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18 Official Reporter

19 Dated: 5-13-93

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

JANE F. GARVEY Administrator Federal Aviation Administration, Complainant, v. CHRIS M. HARVILL, Respondent.	Docket Number SE-15099

Elmendorf Air Force Base
Office of Judge Advocate
Building 2900 9th Street Suite 330
Anchorage, Alaska 99506

Monday
May 11, 1998

The above-entitled matter came on for hearing, pursuant to notice, at 1:20 p.m.

BEFORE: HONORABLE WILLIAM A. POPE, II
Administrative Law Judge

APPEARANCES:

On behalf of the Complainant:

HOWARD L. MARTIN, ESQUIRE
FAA Alaskan Region
222 W. 7th Avenue Box 14
Anchorage, Alaska 99513

On behalf of the Respondent:

ERIN B. MARSTEN, ESQUIRE
Marsten & Cole, P.C.
745 W. Fourth Avenue Suite 502
Anchorage, Alaska 99513

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NATIONAL TRANSPORTATION SAFETY BOARD
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Elmendorf Air Force Base
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Monday
May 11, 1998

ORAL INITIAL DECISION AND ORDER

Following is my oral initial decision in the case of The Administrator, Federal Aviation Administration, v. Chris M. Harvill, Docket Nº SE-15099.

This is a proceeding under the provisions of Section 609 of the Federal Aviation Act, recodified at 49 U.S.C. 44709, and the provisions of the rules of practice in air safety proceedings of the National Transportation Safety Board. Chris M. Harvill, the Respondent, has appealed an order of suspension, dated

77

November 28, 1997, as amended at the hearing, by the Administrator, suspending any airman pilot certificate held by him, including Airline Transport Pilot Certificate № 535962060, for a period of 90 days, because of an alleged violation of Section 135.203(A)(1) of the Federal Aviation Regulations.

Unless requested to do so, I will not read the order of suspension, nor the text of the section of the Federal Aviation Regulations allegedly violated. I hear no such request.

Discussion and Conclusions

The Respondent admits that, on June 9, 1997, he was pilot-in-command of a Beech 99 aircraft which departed from Prudhoe Bay, Alaska, on a sightseeing flight with a group of Alaska state legislators on board, and that, during that flight, he operated N995SR at an altitude of below 500 feet, in violation of Section 135.203(A)(1) of the Federal Aviation Regulations. It is undisputed that a timely NASA report was filed, and the only issue in dispute is whether the Respondent is entitled to a waiver of sanction under the provisions of the Aviation Safety Reporting Program.

The actual weather report for Prudhoe Bay at

the time of takeoff was six miles visibility, overcast 700 feet, temperature one degree, dew point minus one. The flight took off under special VFR clearance. The flight lasted about two hours. The purpose of the flight was for the state legislators to view the footprint left by oil exploration activities. Testimony by an aviation safety inspector who was on board the flight, but not in an official capacity, is that the aircraft took off to the east, turned to a course of 010, maintained 300 feet, turned to 045, went over Endicott Causeway over the ocean at 200 feet, entered instrument meteorological conditions without the ground underneath being visible for three to five minutes, broke out, descended to 100 feet, and proceeded another five minutes, at 100 feet.

The Respondent, an experienced Part 135 pilot who has 2600 hours of flight time on the North Slope of Alaska, and 1800 hours in the Beech 99, testified he was the pilot-in-command. He got several weather briefings, and pilot weather reports, before the flight, and was told by other pilots that the weather was good enough to go, and the weather at Barter Island and Dead Horse were about the same as at Prudhoe Bay.

He said he maintained the required flight visibility in the control zone, but when he went out

over the arctic ice, visibility began to decrease to the point that he could not distinguish between the white ice and the overcast area. At that point, he descended below 500 feet, because there was more light at the lower altitude. He turned back and made an arc towards the tundra, because he felt that they would have a hard time seeing anything, even at that low altitude, over the ice, and he headed toward an area where he thought the visibility would improve.

He said he made a deliberate decision to go on, to go in the direction that he went. He said he felt that, if he climbed in altitude on his own, he would be heading into possible conflicts with other aircraft, and a 180-degree turn would take him back into an area of possible obstructions. He said that, by then, he was out of the control zone. He said he could have gone south, towards the tundra, where he believed the weather was better. He said that, after he descended below 500 feet, his intent was to salvage the flight, and to get to a better area for sightseeing.

The Respondent primarily relies on two recent Board cases as authority for his argument that he is entitled to the benefit of the waiver provisions of the Aviation Safety Reporting Program, because he neither

acted deliberately nor recklessly. The two cases are Administrator v. Meecham, NTSB Order EA-4633 (a 1998 case), and Administrator v. Halbert, NTSB Order EA-3628 (a 1992 case).

In the Meecham case, the Board said waiver is available if the violation was inadvertent, and not deliberate. Inadvertence is not merely the result of any purposeful choice. Conduct for which waiver of sanction will not be granted is that which approaches deliberate or intentional conduct, in the sense of reflecting a wanton disregard for the safety of others. In that case, the pilot's failure to check his fuel supply before taking off, with the result that he ran out of fuel in the air, was held to be a mistake, rather than a purposeful, deliberate operation of an aircraft in reckless disregard of safety concerns, and the NASA waiver was held to apply.

In the Halbert, a pilot who experienced an in-flight emergency elected not to head for the closest landing field, but to another landing field, which was longer, and he thought to be safer. The Board said that, although the Respondent did violate Federal Aviation Regulations, it did not believe he acted deliberately or recklessly. He was mistaken in his belief, but he did not seek to circumvent the FAR's.

Even assuming, for sake of argument, that the Respondent was forced here to descend below 500 feet, because he unexpectedly encountered a condition where he could not distinguish between white ice and a white overcast, he chose to exercise no option other than to fly on, at an altitude of less than 500 feet, seeking an area where sightseeing visibility would be better. Thus, this was not a case in which he was forced by weather conditions, even unanticipated weather conditions, to drop momentarily below 500 feet, until he could take reasonable steps to extricate himself from the situation.

There were, in fact, a number of options which the Respondent could have attempted, but did not. Instead, the option he chose was to continue flying until he found better sightseeing visibility for his passengers.

Perhaps the most logical thing for him to have done at that point would have been to establish radio contact with the air traffic control, and filed an instrument flight plan, which would have made it legal for him to operate in clouds, and to have climbed to an altitude above the overcast, where he could look for an area which was not covered by clouds, which would obstruct the view of his passengers. He chose

not to exercise that option, nor did he choose to make a 180-degree turn. He climbed through the clouds without an IFR clearance, or head for an area on the tundra where the ceiling might be better. By his own admission, his intent was to continue the flight until he found an area of better visibility for his passengers, and he continued on below 500 feet in the direction he thought might offer better visibility.

In short, I find that his continuation of the flight, including descending again to 100 feet after he broke out of IMC conditions, without taking any other action to ameliorate the situation, was deliberate or intentional conduct, which, in the Board's words, in Meecham, reflected a wanton disregard for the safety of others. It was a purposeful, deliberate operation of his aircraft, in violation of FAR Section 135.203(A)(1), in reckless disregard of safety concerns. He was a rated IFR pilot, flying an IFR-equipped aircraft. There was no excuse for him to continue flying below 500 feet, with clouds above him, then in the clouds, where the ground was no longer visible, and then to continue in IMC conditions for three to five minutes, while carrying passengers for hire, without making any attempt to file an IFR plan, and to ascend above the overcast.

I find his actions to have been at least a reckless disregard of safety, and to have been deliberate, and not unintentional. Therefore, he is not entitled to waiver of sanction under the Aviation Safety Reporting Program.

No evidence having been introduced by Respondent that the 90-day suspension imposed by the Administrator is otherwise inappropriate, and a suspension of 90 days for a violation such as this appearing to be at least within the range of sanctions imposed by the Board in other cases, although at the upper limit, I must affirm the Administrator's order.

Upon consideration of all the substantial, reliable, and probative evidence of record, I find the Administrator has proven by a preponderance of the evidence that the Respondent violated FAR Section 135.203(A)(1), and that Respondent is not entitled to waiver of sanction under the Aviation Safety Reporting Program.

Findings and Order

Accordingly, it is hereby ordered:

1. The Administrator's order is affirmed.

2. Any and all airman pilot's certificates held by the Respondent, including his Airline Transport

Pilot Certificate Nº 535962060, shall be suspended for a period of 90 days.

3. The suspension of Respondent's airman pilot certificate shall take effect eleven days from this date, unless stayed by the timely filing of an appeal.

4. The Respondent's appeal is denied.

Dated at _____, _____, this __th day of _____, 19__.

_____
HONORABLE WILLIAM A. POPE, II
Administrative Law Judge

JUDGE POPE: I will, if requested, read the appellate procedures which are applicable in this case. However, I have reduced them to writing, and I will give both attorneys a copy. I will now mark one copy as ALJ Exhibit 1, to be included with the record, and give it to the Reporter. And if Counsel will come forward, I will give each of them a written copy of the same thing.

Do either of you gentlemen want me to read the appellate provisions into the record?

MR. MARTIN: No, Your Honor, we don't.

MR. MARSTEN: No, Your Honor.

JUDGE POPE: All right. Is there anything

35

further to come before me in connection with this case?

MR. MARTIN: We have nothing, Your Honor.

MR. MARSTEN: No, Your Honor.

JUDGE POPE: All right. The record is closed. Thank you, gentlemen.

(Whereupon, at 5:54 p.m., the hearing was closed.)

Edited,
William K. Pope
Judge
6/30/98

REPORTER'S CERTIFICATE

This is to certify that the attached proceedings before: NATIONAL TRANSPORTATION SAFETY BOARD

In the Matter of: CHRIS M. HARVILL
DOCKET NO. SE-15099

were held as herein appears and that this is the original transcript thereof for the file of the Department, Commission, Administrative Law Judge or the Agency.

[illegible]
Official Reporter

Dated: MAY 1[illegible], 19[illegible]

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

JANE F. GARVEY Administrator Federal Aviation Administration, Complainant, v. CHESTER A. PITTMAN III, Respondent.	Docket Number SE-15201

U.S. Court of Claims
Courtroom 9
717 Madison Place NW
Washington, D.C. 20005

Wednesday
MAY ~~March~~ 27, 1998

The above-entitled matter came on for hearing, pursuant to notice, at 10:00 a.m.

BEFORE: HONORABLE WILLIAM E. FOWLER, JR.
Administrative Law Judge

APPEARANCES:

ORIGINAL

On behalf of the Complainant:

JAMES A. BARRY, ESQUIRE
DAVID M. HERNANDEZ, ESQUIRE
FAA/OCC/Enforcement Division AGC-300 Rm 912
800 Independence Avenue SW
Washington, D.C. 20591

On behalf of the Respondent:

PETER J. WIERNICKI, ESQUIRE
Joseph, McDermott & Reiner, P.C.
1300 Nineteenth Street NW Suite 400
Washington, D.C. 20036

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

JANE F. GARVEY Administrator Federal Aviation Administration, Complainant, v. CHESTER A. PITTMAN III, Respondent.	Docket Number SE-15201

U.S. Court of Claims
Courtroom 9
717 Madison Place NW
Washington, D.C. 20005

Wednesday
March 27, 1998

ORAL INITIAL DECISION AND ORDER

This is an emergency proceeding. It is mandatory that the judge, at the conclusion of an emergency proceeding as we have here, issue a bench decision. It is not like the usual air safety enforcement case, where the judge would have the option of either issuing an oral initial decision forthwith, or subsequently issuing a written decision.

The Reporter will caption this Initial Decision and Order.

Initial Decision and Order

This has been a proceeding before the National Transportation Safety Board, held pursuant to the provisions of the Federal Aviation Act of 1958, as that act was subsequently amended, on the appeal of Chester A. Pittman from an amended Emergency Order of Revocation, issued by the Administrator of the Federal Aviation Administration. This amended Emergency Order of Revocation serves herein as the complaint in this proceeding, and was filed on behalf of the Administrator here~~and~~ IN the Complainant, through his Enforcement Division of the General Counsel's office of the Federal Aviation Administration.

This matter has been heard before this United States administrative law judge, and under Section 821.55 of the National Transportation Safety Board's rules of practice, I am going to issue an oral initial decision, which is mandated by the Board's rules of practice, as I previously alluded to, because this is an emergency proceeding.

Following notice ~~of~~ TO the parties, this matter came on for trial on May 27, 1998, in Washington, D.C. The Respondent was present at all times, and very ably represented by Peter J. Wiernicki, Esquire. The Complainant was VERY ABLY represented by James Barry, Esquire,

and David Hernandez, Esquire, of the Central Region of the Federal Aviation Administrator's office. Both parties have been afforded the opportunity to offer evidence, to call, examine, cross-examine witnesses. In addition, the parties were afforded the opportunity to make argument in support of their respective positions.

Now, as was stated, during the opening statements of this proceeding, this is a case of first impression. It appears that every case I have heard in the last four months was a case of first impression. This, of course, makes it very easy for the Judge to arrive at his decision, there being no prior precedent to look back upon.

I am not going to unduly belabor the factual situation, in this proceeding. We have been here, all day. I would have to concur and agree with Counsel for the Administrator, when he says there are three issues here, to be adjudicated, whether there was reasonable suspicion, which caused the Respondent, Mr. Pittman, to go to the laboratory for his breath-a-lyzer test, whether there was in essence a refusal to submit to such a test by the Respondent, and of course, the third issue, which is the, you might say, THE paramount, central, and overriding issue in this entire proceeding, is,

the sanction sought by the Administrator [redacted] of revocation of the Respondent's airline transport pilot certificate, is that sanction merited?

Now, I have said, before, and I will say again, and the Board has not always agreed with me, nevertheless, I will say, while I am a judge, I am FIRST [redacted] a human being, and I try to look at all of the facets of the case. We have a very unusual case here.

There is no question [redacted] that Mr. Francis Goggin, the chief test pilot for Strand Aviation, was given reason to have a reasonable suspicion that there had been some involvement of alcohol, when the Respondent, Mr. Chester Pittman, was concerned, here. In fact, he was given that reasonable suspicion, by the Respondent himself, when he was asked. The Respondent was asked, had he been drinking? The Respondent responded in the affirmative. Yes, he had. Whereupon, as you remember, Mr. Goggin, when he did reach the Respondent, telephonically informed the Respondent, when he arrived at Wilmington, North Carolina, to go to the lab, and submit to a test. As the Respondent testified, he did not know whether it was a drug or alcohol test, but he went to the lab. He complied with his immediate supervisor, Mr. Goggin's, request. Went to the lab, and began to take the test.

[redacted] while he was waiting, for the conclusion of the test, when he found out, [redacted], by Mrs. Whitman, who was giving him the test, that the test was positive, and he saw on the computer screen the reading that this test was positive, then the Respondent, in his own words, in his own testimony, under oath, the Respondent panicked. Why he panicked, he could not explain. The first thing he said was, it was stupid. Those were his words. It was stupid, but he panicked, took the form out of the computer, which stopped the test, and exited the area.

Now, certainly, there is no question in my mind, based on the review of the totality of the evidence, that this constitutes a refusal to submit to an alcoholic test. The test was not confirmed, it was not finished, so IT IS [redacted], my determination THIS [redacted] constitutes a refusal to submit to a complete and entire alcoholic test.

Now, that being established, I choose to look at all of the testimony. In other words, the entire case.

The utilization or the imbibing of alcohol is a very, very serious offense, where the Federal Aviation Administration is concerned. No question about that.

15

The Respondent's testimony is that he had two and a half glasses of drinks of beer, between 9:00 and 11:00 p.m, on May the 20th, 1997. Went to bed, about midnight, with his copilot, Mr. Norris. Overslept, and got up about 8:00 a.m. Certainly, that is beyond the eight-hour rule.

He was late, or they were late, I should say. Took the flight, made up the time, and arrived in Wilmington, North Carolina, just a few minutes off schedule.

Now, looking at both sides of this case, the FAA has an Alcohol Misuse Prevention Program, which is for the safety of the general public. ~~And~~ It is also for the safety of the pilots, but the protection of the public. And I cannot be unmindful of the fact that Mr. Pittman has no previous violations or infractions, where his flying career is concerned. A young man, 28 YEARS OLD, he has in excess of 3,000 hours. He has made remarkable progress. When you are an airline transport rated pilot, and 28 years of age, that is quite an achievement, and accomplishment.

I also have to take note of the nobody was threatened, here. There was no accident. There was no catastrophe. There was no crash. Nobody was injured or harmed. And I am not forgetting about the lab

96

attendants. I am talking about the actual flights, where Mr. Pittman was pilot-in-command. Both the morning flight, on the 21st, and the later flight, in the evening. In other words, he was in control of all of the faculties.

I have reason to believe that he may have had more than just two beers, and at 9:00 o'clock in the morning, the odor of alcohol was still emanating from him, as Mrs. Whitman testified to. I don't think only two drinks would bring that type of result, eight, nine, ten hours later, after the consumption of those drinks.

But be that as it may, I do not believe that the Administrator, on behalf of the Federal Aviation Administration, was arbitrary or capricious in bringing this action. I think they had reason to believe that it should be brought, because, as I said, it is my determination, even, that there was a refusal to take the complete test, and this is grounds, in and of itself, if it happens for any pilot, for suspension or revocation.

I don't wish to lecture the Respondent, but I think it is obvious here that one of the greatest enemies in the world, where he is concerned, is alcohol. Mr. Pittman is not a drinker. The worst

thing he can do -- if he is not aware of it now, let this case certainly serve as a wake-up call to him -- the worst thing he can do, is have more than one drink. At any time.

Even though, as I have said, the Administrator has proven his case, by a fair and reasonable preponderance of the material, relevant, and probative evidence, I am taking into account a complete totality of all of the evidence here, and I am sure that the Respondent's Counsel, and any other help or assistance he can get in the very immediate future, will possibly help the situation, where there will not be another episode of the Respondent losing control of himself and his faculties. As I have stressed, repeatedly, I am sure the alcohol contributed to this.

I think, basically, Mr. Pittman is a good pilot, and I am going to give him somewhat the benefit of the doubt, where this proceeding is concerned, because he is a young man, and he has got to turn his life around.

Having reviewed all of the evidence, and the documentary exhibits, ladies and gentlemen, I will proceed to make the following specific finding of facts and conclusions of law:

Findings of Fact and Conclusions of Law

1. The Respondent, Chester A. Pittman, is now and at all times mentioned herein the holder of Airline Transport Pilot's Certificate N° 245436457. Let the record indicate, before I go any further, that the Respondent has admitted that allegation, as set forth in the Administrator's order.

2. It is found that, at all times mentioned herein, the Respondent performed flight crew duties for Grand Strand Aviation, Inc., a Part 135 certificate holder.

3. It is found that, at all times mentioned herein, an employee that performs flight crew duties is performing a covered function, as prescribed in Appendix C, Section 2, Part 121.

4. It is found that, on or about May 21, 1997, the Respondent, Chester A. Pittman, was late reporting for flight crew duties at Raleigh-Durham Airport, North Carolina, for a flight to Wilmington, North Carolina.

5. It is found that on or about May 21, 1997, after completing the above-described flight, the Respondent spoke to Francis Goggin, chief pilot of Grand Strand Aviation, and told him that he, the Respondent, had overslept through two alarm clocks, and that the Respondent had consumed alcohol the night

before.

6. It is found that, based on the behavior described in paragraphs 4 and 5 above, Francis Goggin had a reasonable suspicion to believe that the Respondent had violated alcohol misuse prohibitions.

7. It is found that, on or about May 21, 1997, the Respondent was notified orally, by chief pilot Francis Goggin, that the Respondent was required to submit to a reasonable suspicion alcohol test, that the Respondent was to report to LabCorp for the test.

8. It is found that, at all times mentioned herein, a reasonable suspicion alcohol test is an alcohol test required by Part 121, Appendix J, Section 3, paragraph D.

9. It is found, at all times mentioned herein, engaging in conduct that clearly obstructs the testing process, is considered a refusal to submit to a required alcohol test, as set forth in Part 121, Appendix J, Section I.

10. It is found that, on or about May 21, 1997, the Respondent reported to LabCorp, signed a consent form, and took a breath alcohol screening test, which required a confirmation breath alcohol test.

11. It is found that, while waiting for the confirmation of the test described in paragraph 10

above, Respondent removed the test form from the computer printer, turned off the computer processing unit, and exited the collection facility.

12. It is found that the Respondent's conduct described in paragraph 11 above clearly obstructed the testing process, and it is found the Respondent thereby refused to submit to the required alcohol test.

13. It is found, by reason of the foregoing facts and circumstances, that the Respondent, Chester A. Pittman, violated 61.14(B) of the Federal Aviation Regulations, in that the Respondent refused to submit to an alcohol test, required under the provisions of Part 121, Appendix J, of the Federal Aviation Regulations.

14. This judge finds that safety in air commerce or air transportation and the public interest does apparently require the affirmation of the Administrator's amended Emergency Order of Revocation dated May 22, 1998, in view of the aforesaid violation of Section 61.14(B) of the Federal Aviation Regulations.

However, it is my determination, taking into account all of the peculiar, pertinent, and salient facts and circumstances encompassed in this proceeding, it is my determination that the Administrator's sought

sanction of revocation of the Respondent's airline pilot certificate be modified, to A PERIOD OF ~~appear at a~~ suspension, OF nine months, of the Respondent's airline transport pilot certificate.

Order

It is ordered, That the Administrator's amended order of revocation, dated May 22, 1998, be, and the same hereby is, modified, to A PERIOD OF ~~appear at a~~ suspension of nine months of the Respondent's airline transport certificate, such period of suspension to run from the date of the original surrender of the Respondent of his ATP certificate to the Administrator, and THE period of suspension to end, after nine months has expired, from the date of the original ~~suspension~~ SURRENDER BY RESPONDENT OF HIS ATP CERTIFICATE TO THE ADMINISTRATOR.

This order is issued by William E. Fowler, Jr., a United States Administrative Law Judge.

Dated at _____, _____, this __th day of _____, 19__.

HONORABLE WILLIAM E. FOWLER, JR.
CHIEF Administrative Law Judge

Edited 6-5-98 WEF Jr.

Appeal

Now, under the heading of appeal. Either party to this proceeding may appeal the Judge's oral initial decision, if the appellant has filed his notice of appeal within two days following the Judge's decision, which is issued on May 27, 1998, and the appellant must, within five days of the Judge's decision, file a brief in which he is to set forth his objections to the Judge's oral initial decision. THE ~~A~~ notice of appeal and the brief shall be filed with the Office of Judges, National Transportation Safety Board, 490 L'Enfant Plaza East, SW, Washington, D.C. 20594. If no appeal to the Board from either party is received, or if the Board, of its own volition, does not file a motion to review the Judge's oral initial within the time allowed, then the Judge's oral initial shall become final. ~~During~~ The filing of such an appeal, however, I shall stay the order, as set forth in the judge's oral initial decision.

And let the record indicate that, since this is an emergency proceeding, the Respondent's surrender of his certificate is still valid, and may be kept by the Administrator, who now has possession of such certificate, until such time as there is a final adjudication of this proceeding.

Off the record.

(Discussion was held off the record.)

JUDGE FOWLER: Let the record indicate that Counsel for the Administrator is undecided, as of this, at this time, as to whether or not the Administrator will file a decision from the Judge's oral initial decision. Counsel for the Respondent has indicated, while we were off the record, that the likelihood is very strong that the Respondent will not file a notice of appeal from the Judge's bench decision.

If there is nothing further at this time, I would declare the hearing closed, but before we go off the record, I would like to express my thanks to both Counsel, for their very diligent, erudite, and cogent efforts on behalf of their respective clients. I would also like to express my thanks to all of the witnesses, and all of those in attendance, for their help, cooperation, and assistance during the course of this proceeding.

Thank you all, very much. We stand adjourned.

(Whereupon, at 5:15 p.m., the hearing was closed.)

BEFORE THE

UNITED STATES OF AMERICA

NATIONAL TRANSPORTATION SAFETY BOARD

Offices of Administrative Law Judges

In the Matter of ADMINISTRATOR Federal Aviation Administration, complainant, v FRED MEAD TSOSIE, respondent.	VOLUME II DOCKET NO: SE-15216 EMERGENCY HEARING

United States Tax Court
Room 235
Federal Building and
United States Post Office
522 North Central Avenue
Phoenix, Arizona

Thursday,
May 28, 1998

The hearing in the above-entitled matter was convened, pursuant to Recess, at 8:30 a.m.

BEFORE:

WILLIAM R. MULLINS
Administrative Law Judge

ORIGINAL

1 APPEARANCES:

2 For the Complainant:

3 NAOMI TSUDA, ESQ.
Federal Aviation Administration
4 Western-Pacific Region
DOT/FAA AWP-7.10
5 P.O. Box 92007, WPC
Los Angeles, California 90009-2007
6 (310) 725-7119

7 For the Respondent:

8 KENT S. JACKSON, ESQ.
Jackson & Murphy, L.L.C.
9 6400 West 110th Street
Suite 200
10 Overland Park, Kansas 66211-1537
(913) 338-1700
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1 BEFORE THE

2 UNITED STATES OF AMERICA

3 NATIONAL TRANSPORTATION SAFETY BOARD

4 Offices of Administrative Law Judges

5 In the Matter of)
6 ADMINISTRATOR)
Federal Aviation Administration,)
7)
complainant,)
8 v)
) DOCKET NO:
9 FRED MEAD TSOSIE,) SE-15216
)
10 respondent.) EMERGENCY HEARING

11 Honorable William R. Mullins

12 On behalf of the Complainant; Naomi Tsuda, Esq.

13 On behalf of the Respondent; Kent S. Jackson, Esq.

14 ORAL INITIAL DECISION AND ORDER

15 This has been a proceeding before the National
16 Transportation Safety Board held under the provisions of
17 Section I think 44.709 of the Federal Aviation Act, this is
18 an emergency case, on the appeal of Fred Tsosie from an
19 emergency order of revocation that seeks to revoke his
20 airman's certificate. The order of revocation in this case
21 serves as the complaint and was filed and issued through
22 Regional Counsel of the Western-Pacific Region.

23 The matter has been heard before me, William R.
24 Mullins. I'm an Administrative Law Judge for the National
25 Transportation Safety Board and pursuant to the Board's

1 rules and as is mandated by the Board's rules, I will issue
2 a decision today. The matter came on for hearing yesterday,
3 the 27th of May of 1998 here in Phoenix. The Administrator
4 was present and represented by staff counsel, Ms. Naomi
5 Tsuda, Esquire of the Regional Counsel's office and the
6 respondent was present at all times and represented by Mr.
7 Kent Jackson of Overland Park, Kansas. Mr. Jackson also is
8 a practicing attorney.
9 The parties were afforded a full opportunity to
10 offer evidence, to call, examine and cross examine witnesses
11 and in addition the parties were afforded an opportunity to
12 make argument in support of their respective positions.
13 DISCUSSION
14 First, this case -- well, all aspects of this case
15 were interesting but the first one that I'll discuss with
16 you is the fact that the Administrator had 11 paragraphs in
17 the order of revocation of regulatory allegations and the
18 respondent admitted the first nine paragraphs. And
19 basically the allegations are that he was making flights for
20 compensation and hire when he did not have a Part 135
21 certificate and they alleged the flights. They alleged the
22 amount charged in those first nine paragraphs and Mr. Tsosie
23 admitted all of those.
24 So this shifted the burden to Mr. Tsosie to show
25 that he was otherwise authorized to make those flights if he

1 didn't have a 135 certificate. So in that regard in this
2 case the respondent put on his testimony first. The
3 Administrator presented her case in chief second and then
4 closing argument, of course, the respondent had first and
5 last opportunities to make closing argument. So in that
6 regard, the case was different.
7 As I said the first nine paragraphs of the
8 regulatory allegation which involved I believe three
9 flights; flights on March 11th, November 24th, December 5th
10 and December 8th, four flights and the amounts charged were
11 all admitted. Paragraph 10 of the Administrator's order
12 states that, he had operated the flights referenced above
13 when he had not obtained an appropriate certificate and then
14 those -- that sub-part A of paragraph 10 and sub-parts B
15 through G all make reference to requirements that are made
16 of people who operate under 135 certificates.
17 So in the sense that the respondent admitted that
18 he didn't have a 135 certificate, he admitted that he hadn't
19 complied with all of those requirements that are set out
20 under the subparagraphs under paragraph 10 except his
21 position was that he was not required to have a 135
22 certificate, did not need a 135 certificate in the
23 operations that he conducted.
24 Paragraph 11 states that, "Your intentional and
25 repeated operations of the aircraft, November 2676 Baker, in

1 flights for compensation or hire when you or your aircraft
2 were not operating under the provisions of an appropriate
3 operating certificate and operation specifications of the
4 Federal Aviation Regulations, was careless or reckless so as
5 to endanger the lives and/or property of others". That's
6 the 91.13 violation.
7 The regulatory violations include FAR 91 -- excuse
8 me, FAR 119.5(g), which states that, "No person may operate
9 as a direct air carrier or as a commercial operator without
10 or in violation of an appropriate certificate and an
11 appropriate operation specification". The next six
12 regulatory allegations all fall under Part 135 and are
13 consistent with the subparagraphs under paragraph 10 of the
14 allegation in that those are all requirements if you have a
15 135 certificate, which includes drug testing, oral testing,
16 competency testing, and so forth.
17 And then the last regulatory allegations is
18 91.13(a) which states that, "No person may operate an
19 aircraft in a careless or reckless manner". What I plan to
20 do is to go through the list of witnesses. I'll just
21 comment briefly on some of their comments. I will make a
22 passing reference to the exhibits. I won't go through the
23 exhibits. There are a number of them. The Administrator
24 had four exhibits and the respondent had 23 exhibits but I
25 won't identify all of those for the record.

1 I would state for the record that I'm going to
2 take FAR 91.501 and mark it as Joint Exhibit 1 and make it
3 part of the record and I state that simply because all
4 emergency cases or almost all emergency cases get appealed
5 and for those people down the road who look at this thing, I
6 think it would probably be helpful, since there are so many
7 references to FAR 91.501 throughout the testimony that it be
8 part of the transcript. And I had stated previously that I
9 could make reference -- that I could take judicial notice of
10 that which I have done, but I'm just putting that in, as I
11 said, as an aid to whoever might have occasion to review
12 this record.
13 (The document referred to was
14 marked for identification as
15 Exhibit Number J-1 and was
16 received in evidence.)
17 The first witness called by the respondent was Mr.
18 Guthrie, who is the aviation safety inspector and the
19 reporting inspector who was involved in this case and he
20 testified not only for the respondent in the respondent's
21 case in chief but also was called again then by the
22 Administrator in the Administrator's case in chief. He
23 testified that some time last fall, and I don't know the
24 specific dates and it's not important, but some time last
25 fall that Mr. Tsosie made application to the Scottsdale FSDO

1 or the Arizona FSDO, the FSDO located here in the Phoenix
2 Arizona for a 135 certificate and that he, Mr. Guthrie, was
3 assigned to that certificate. And as of the filing of this
4 emergency order, that certificate had not been issued.
5 Mr. Guthrie testified also in addition to that
6 sort of exposure to Mr. Tsosie he also did a ramp inspection
7 on March 11th here in the Phoenix area and at that time --
8 and that was one of the flights that was alleged. He
9 interviewed not only Mr. Tsosie but also the passengers who
10 were on board that flight and then later was involved in
11 issuing this revocation notice that was sent out, order.
12 Mr. Tsosie then called Mr. D'Urso who identified
13 himself as an aviation safety inspector operations. When it
14 came out that he was in operations, respondent had no
15 questions of him, so he stepped down. He later was called
16 again in the Administrator's case in chief. The next
17 witness called by the respondent was Mr. Albert Long and Mr.
18 Long is the director -- and if I get these titles wrong, I'm
19 generally, I think close but I believe Mr. Long testified
20 that he was the director of special projects for the
21 Department of Social Services for the Navajo Nation and he
22 testified that he was at some meeting that involved folks
23 from outside of the Navajo Reservation and I'm not sure
24 where the testimony came later but it was later testified
25 that these other people that were at the meeting represented

1 other tribal nations that were at a meeting but in any
2 event, there was a flyer passed out and he identified this
3 flyer which discussed this program that Mr. Tsosie was
4 trying to promote with the Navajo Nation of the FareShare
5 and/or partial ownership of aircraft that he had purchased.
6 Mr. Long testified that he met Mr. Tsosie at that
7 meeting and he had the flyer. A couple of weeks later he
8 had occasion to need air transportation to Phoenix. He had
9 his secretary make arrangements for the aircraft and he, in
10 fact, flew to Phoenix and flew back with Mr. Tsosie and he
11 was very candid in saying that there was no discussion of a
12 demonstration flight at that time. There was no discussion
13 about -- he didn't even know what the fee was going to be.
14 Apparently there was no charge assessed prior to
15 the flight. That charge came later but he was very clear
16 that there was no discussion about this demonstration
17 flight. He believed he was on a charter and that was his
18 testimony.
19 The next witness called was Mr. Fred White who is
20 the director of tourism for the Navajo Nation and Mr. White
21 testified that he was aware of the program of selling shares
22 of the aircraft, that I think it first came out in his
23 testimony that this is a plan that Mr. Tsosie had been
24 presenting to the tribe or the tribal leaders as early as
25 1996 but in any event the concept was to share ownership and

113

1 therefore make aircraft use more feasible than the
2 Department of Transportation with the Navajo Nation, which
3 apparently had been undergoing and it was testified by
4 several of the people who testified, sort of been going
5 downhill. Their budget costs and their loss of revenues to
6 the tribe obviously everyone was experiencing budget cuts
7 but apparently the tribal aircraft department or the
8 Department of Transportation was having this problem, too.
9 Mr. White testified that at the time of his -- I
10 don't know how many trips he was on but one of the trips was
11 with Mr. Notah, who also testified here. Mr. Notah was
12 director of economic development for the tribe, but at one
13 point on the March 11th flight when Mr. Guthrie asked about
14 how much it was costing and Mr. Notah said $1,000.00 and on
15 cross examination it was asked of Mr. White, "Well, if that
16 wasn't what was going to be charged why didn't you correct
17 him", and his comment was he didn't want to embarrass Mr.
18 Notah and he sort of implied by that that Mr. Notah might
19 not have been in the loop as to the discussions about the
20 arrangements of the flight.
21 But in any event, that was his testimony. The
22 next witness called was Mr. Notah, who is the director of
23 economic development for the Navajo Nation. And if I say
24 tribe I don't want to offend anyone, I mean, nation and I
25 appreciate, and I'll make a comment about that a little bit

1 later, but I appreciate the level of this nation that
2 appeared here in Court, including the president.
3 But Mr. Notah talked about his experience and his
4 awareness of the time share -- not time share but the
5 ownership share program that Mr. Tsosie was trying to
6 promote within the tribe and with his testimony and also Mr.
7 White's several of these exhibits came in and it shows
8 communication that was ongoing throughout the tribe, at
9 least the tribal leaders or the nation leaders, about this
10 program that Mr. Tsosie was trying to start of this cost
11 ownership share, cost distribution program which I think
12 it's clear even by the testimony of Mr. Guthrie and the
13 parties that that certainly is a program that if it goes
14 forward as planned, does not require a 135 certificate.
15 It falls under the NetJet and there was an exhibit
16 about the NetJet organization and some other organizations
17 out in our aviation community who do partial ownership of
18 aircraft and there's no requirement apparently under those
19 and there's no suggestion from the FAA that those programs
20 have to have 135 or commercial operator certificates.
21 The next witness was the president of the Navajo
22 Nation, Mr. Atcitty. He testified here yesterday and it was
23 clear from Mr. Atcitty's comments that he was aware of the
24 FareShare plan that Mr. Tsosie was promoting, had written
25 letters endorsing the program, although I thought it was

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1 clear that he did not have an absolute grasp of what that
2 plan encompassed. And if you ask the president of any
3 nation to talk about somebody trying to sell a piece of a
4 Cessna to different departments of the state, I doubt that
5 any president, any governor of any state could be very
6 explicit about the exact details and I was impressed not
7 only by his testimony but by the other people's testimony
8 because it was clear, for example, Mr. Long, I mean, for the
9 respondent to call Mr. Long was almost tantamount to
10 shooting one's self in the foot, because he absolutely
11 didn't know anything about demonstration flights and he was
12 very clear about it.
13 And he said he thought it was a charter and I
14 appreciated his testimony and I thought that the other
15 leaders of the Navajo tribe that testified were equally
16 credible in the testimony that they presented.
17 Then Mr. Tsosie testified and I thought -- I share
18 this comment with you, Mr. Tsosie, and I hope this doesn't
19 offend you but I listened. I grew up in Oklahoma and I
20 spent many years there as a District Judge and I had
21 dealings with all of the Oklahoma Indian Tribes or many of
22 them and it was very clear that the tribal leaders who
23 testified here today were tribal leaders and they testified
24 the way that I would expect Indian Nation leaders to
25 testify.

1 The question was asked and there was no immediate
2 response and they sat and they thought through those
3 questions and then I thought their answers were articulate.
4 I think your answers were articulate but you didn't think
5 through the answers. I mean, you kept coming back and an
6 example was you kept going uh-huh. And I noticed at one
7 point you wrote down yes so you'd say yes when it was
8 pointed out to you but it was obvious that you haven't spent
9 all your life on the tribe, on the reservation as these
10 other gentlemen have.
11 And likewise, Ms. Rozak, she was very quick with
12 her answers. I gathered that she has spent a great deal of
13 time outside of the reservation. But I understand that
14 that's the way those things go. But in any event, Mr.
15 Tsosie testified last and his testimony sort of put together
16 all of these efforts that he had made over the last two or
17 three years to create this program called FareShare of
18 selling pieces of his airplane to different entities within
19 the Navajo Nation and there was several exhibits about that
20 and I thought it was clear from his testimony, there was
21 even a document, one of the documents was a legal opinion by
22 the Department of Justice of the Navajo Nation that thought
23 that this FareShare thing did not require a 135 certificate.
24 But in any event, I believe that Mr. Tsosie
25 believed that he didn't need a 135 certificate to do what he

1 was doing and that was his testimony.

2 Then the complainant's case in chief, Ms. Rozak

3 was called first and that was late last evening but she

4 testified that she made one of these flights. No one ever

5 mentioned to her that it was a demonstration flight. An

6 exhibit was handed to her which shows that someone within

7 their organization perhaps had been briefed about Mr.

8 Tsosie's attempts to set up this FareShare program; however,

9 she said she had never seen it although she was listed as

10 one of the addressees. But in any event, that was withdrawn

11 or it certainly wasn't offered.

12 But she, on the trip that she made, did not -- she

13 testified there was no comments made to her about

14 demonstration flight. I am going past -- and I want to just

15 mention this in comment. Several people talked about the

16 lack of the safety briefing. I'm going past that and I'm

17 not going to put any stock in that one way or the other

18 because; one, it's not an allegation in this case and; two,

19 there was no requirement under the demonstration flight that

20 I know of -- if there would have been -- there would have

21 been a requirement for it under 135 flight and, of course,

22 that's not the issue before me.

23 The issue is whether or not it should have been a

24 135. Then Mr. D'Urso was called and he testified about this

25 safety briefing but he said everything about the aircraft

1 was okay. Mr. Guthrie was called again. Mr. Guthrie
2 testified about the comments that Mr. Notah had made about
3 the $1,000.00 charge and then later when they went back to
4 the airplane that figure had been changed from $1,000.00 to
5 300, I think he said 300 to 350. And it was his impression
6 that they had gotten together and discussed that so they
7 could change their story.
8 There was nothing in the evidence, the testimony
9 from Mr. Guthrie that would indicate that these people knew
10 that he was going to be back out there when they came out or
11 if there was, I certainly didn't hear it. Another thing,
12 Mr. Guthrie provided some figures that he had calculated the
13 expense that would have been allowable under the Part 91
14 which was, I think, subparagraph (d) of 91.501, FAR 91.501
15 and I had asked him about the cost, the salary figures and
16 he said that the salary of the pilots was not one of the
17 factors that you could consider under 91.501 and that was
18 consistent with Ms. Tsuda's cross examination of Mr.
19 Tsosie's calculations in this aspect.
20 So those were the witnesses. As I said, there
21 were a number of exhibits. I'm not going to go through
22 them. A lot of those exhibits are communication that was
23 ongoing throughout the Navajo Tribe, Nation, concerning this
24 FareShare, the endorsements it was receiving, not only from
25 the former president, Mr. Hale, but the current president

1 who testified here today, the several directors, including
2 Mr. Notah, of course, Mr. White and there were a couple of
3 other people whose names were on these pieces of
4 correspondence.
5 Let me go through and tell you what I thought were
6 some of the keys here for me. First, there is just no clear
7 definition anywhere in the FAR's about what is a
8 demonstration flight. Mr. Guthrie testified that he didn't
9 think it could include transportation of people from Point A
10 to Point B for purposes other than just a demonstration
11 flight. There's nothing that I saw in any regulations or
12 suggestions that said you can't do that. Certainly if I
13 were in Mr. Tsosie's position I'd -- you know, there's
14 nothing that would suggest to him that there was some sort
15 of prohibition on that sort of flight.
16 There seems to be and it's suggested by some of
17 the cases that every person on board the flight has to be
18 briefed as to whether or not it's a demonstration flight
19 versus in this case whether or not if the tribal/nation
20 leaders are aware that there is this program going on and
21 the program is being attempted to be sold to the nation, if
22 there has to be under the regulation a requirement that each
23 individual who's using this air service needs to know since
24 it appeared under the evidence here that -- well, it was
25 clear under the evidence here that all of these flights were

1 for the Navajo Nation and then the question is, as long as
2 the nation leaders were aware of it, do the individual
3 passengers have to be briefed on it, that's not clear.
4 It's not clear about what the billing requirements
5 are. Certainly the bills submitted by Mr. Tsosie to these
6 folks at least the first few bills just said for aircraft
7 services. It didn't mention demonstration flight. Is the
8 bill required to have demonstration flight? I suppose if
9 you take it one step farther, you might have to have a
10 written statement from every person that sets foot on the
11 airplane that they have been briefed, that they understand
12 it's a demonstration flight, that they have received this,
13 they have received that and have them sign it and then, I
14 guess you could take it a step farther and have it
15 notarized. I mean it's just not clear what the requirements
16 are under this Part.
17 And again, as I said, it's not clear whether it
18 can be coupled with other purposes, transporting people from
19 A to B. So there's a lot of gray area out here that is not
20 clear. In fact, if you read the cases from the Safety Board
21 it's not clear because the Safety Board, each case -- you
22 have to deal with each case I guess would be the best way to
23 characterize it, and so that's -- that was kind of the
24 underlying thing here throughout all of this evidence.
25 It was clear from the evidence that there has been

131

1 an ongoing program by Mr. Tsosie for some time, two years
2 maybe, to develop and sell to the Navajo Nation and the
3 different departments of the Navajo Nation this FareShare
4 plan and I think it was also clear under the evidence that
5 if the plan goes through as proposed, then under these other
6 activities that are ongoing across the country the NetJet
7 plan and so forth, that there would be no requirement for an
8 Part 135 certificate.
9 But as I said it was clear that this program has
10 been ongoing for some time and all of the leaders of the
11 Navajo Nation not only through the exhibits but the leaders
12 who testified here were aware of the plan and it's not just
13 something like in the Wagner case it was dreamed up the
14 night before one of these flights was originated.
15 Another key for me was the fact that the Navajo
16 leaders came here and testified and I know they were under
17 subpoena but still, I think they could have easily gotten
18 out of those subpoenas and I know through me reading and the
19 brief exposure that I had with the tribal nations growing up
20 in Oklahoma that the Navajo Nation is one of the largest and
21 one of the most sophisticated from the standpoint of their
22 government. I think they, in a sense, probably are an
23 example for the other tribal nations in the way that they
24 would like to run their government, but I consider Mr.
25 Atcitty, who testified here, as comparable to any state

1 governor who would have had occasion and I was not only
2 impressed by all of those folks who testified here today and
3 yesterday but I felt like their answers were very credible.
4
5 In fact, I don't -- in assessing credibility, I
6 don't -- I think everyone who testified here today was
7 credible. I think there were some mistakes made, but you
8 know, that doesn't -- I don't think there was any distortion
9 of what those individuals believed as they testified.
10 Another key for me was Mr. Long's testimony and I
11 mention that briefly. He was very candid about there was no
12 talk of a demonstration but also I think it came out and the
13 testimony was unrebutted that when he said that there were
14 other people at this meeting that received this flyer about
15 FareShare, he knew only that they were not necessarily
16 Navajo Nation individuals but I think the evidence was clear
17 that these were people from other tribes and these were also
18 people, leaders from other tribes, also people that Mr.
19 Tsosie was targeting with his FareShare plan.
20 So the fact that he was passing out these
21 FareShare things in no way represented to me that he was
22 holding himself out as a charter operation. In fact, the
23 only evidence that there was any holding out was this one
24 exhibit which there was some suggestion that there was going
25 to be some testimony later that this had been disseminated

123

1 in the public but no one who testified here today or
2 yesterday testified that they had ever read anything or seen
3 anything where Mr. Tsosie was holding himself out as a
4 charter operator and I think that was important.
5 There was this one flyer but it was testified to
6 by Mr. Tsosie that it was something that they had come up
7 with in anticipation of this 135 certificate coming out and
8 it didn't -- the 135 certificate had not been received.
9 Let me comment about the 135 certificate. Mr.
10 Guthrie testified that one of the problems he was having
11 with the 135 certificate is that Mr. Tsosie's resume did not
12 include flight times, pilot in command, captain, 135 versus
13 other types of experience and one of the problems I had -- I
14 didn't have a problem with that but one of the questions
15 that comes to my mind and I'll be blunt with you, it's not
16 relevant to my decision today, but if he received that with
17 the application, and this is eight months later, I mean, why
18 wasn't -- when you got the resume, why didn't you raise a
19 question?
20 It raises a question to me, you know, why do these
21 135 certificates take so long particularly since it's just
22 one pilot and one airplane. And the other thing, and I
23 suppose if there was any bottom line that I would suggest to
24 you, Mr. Tsosie, is that if you spend $400,000.00 for an
25 airplane that you're going to run under a certificate from

1 the FAA, then you ought to take 10 percent of that amount
2 and spend it on consulting fees to get the thing through the
3 FAA.
4 And if you spend $30,000.00 on an airplane, you
5 ought to spend 3,000. I think 10 percent is a fair share
6 and I see these issues come up in all these cases. And a
7 classic example, I'll just comment on this right now because
8 I think it's very clear of this whole case, the suggestion,
9 the questions from Ms. Tsuda on cross examination of the
10 respondent were that salary, pilot's salaries are not an
11 appropriate consideration in computation of these fees that
12 you can charge under 91.501. Mr. Guthrie testified today
13 that you cannot charge pilot salaries for this but I'll read
14 from the trial brief.
15 "The FAA gave the following information about
16 demonstration flights in promulgating 91.501", and then
17 there's a quote that according to this appears in the
18 Federal Register. It says that the preamble to this notice
19 of proposed rule making was issued by the FAA to make it
20 clear that a manufacturer or aircraft sales company did not
21 need a commercial operator's certificate to demonstrate
22 aircraft in flight to a prospective customer when that
23 customer is charged a fee to defray the normal operating
24 expenses of the flight including fuel, oil, hangar or
25 landing fees and salary of the flight crew", i.e. the folks

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1 here today said that you can't count salary but it appeared
2 in the Federal Register that you could count salary as part
3 of this.
4 Again, it's just an example of how unclear and how
5 muddied up this water is and even the different levels of
6 the FAA don't understand or at least they're not consistent.
7 They may understand at each level but they're not
8 consistent. And that's why I say, if you spend $400,000.00
9 for an airplane, I think you're foolish if you don't spend
10 10 percent of that amount just to make sure that you don't
11 run afoul of any of these things and it may be that you do.
12 What if the notice of proposed rule making said
13 you couldn't charge for salary and the local folks said you
14 could, and then the local folks move on down the road and we
15 get some new local folks and then you might get dinged for
16 that. So there's no guarantee even with the consulting fee
17 I'm suggesting.
18 Another key in this case and I thought it
19 absolutely is the way things work if you think about it was
20 Mr. White's comments about he didn't want to correct Mr.
21 Notah because he didn't want to embarrass him in front of
22 these representatives of another nation. That was
23 inherently credible to me. And at the same time, I can see
24 that once they got away from the FAA that Mr. White probably
25 went up to Mr. Notah and said, "Look, I don't know where you

1 got that $1,000.00 figure but, you know, here's the deal",
2 and so when they come back, they've got a different figure
3 they present to Mr. Guthrie. But as I said previously,
4 there was no indication that from Mr. Guthrie or the
5 evidence that he was going to be back. So it's not like
6 they were changing their story. It was like they were
7 getting coordinated.
8 Another comment that I'll make and I'm not sure
9 what this means but there were time gaps. I've mentioned
10 the time gap between your application for one pilot and one
11 aircraft 135 certificate that's gone on for many months but
12 also on the part of respondent, there was a period of
13 time -- apparently the aircraft was purchased in early 1997
14 and why an application and/or the application for the
15 National Business Aircraft Association wasn't made sooner
16 than that and I don't understand those gaps in time.
17 I do know what the interest would run on a
18 $400,000.00 loan every month and that's not insignificant at
19 all. Finally, I guess a last comment I'd make and then I'll
20 just get onto my findings. Specifically I'm going to find
21 that there was not 91.13 violation and my basis for making
22 that finding is two-fold. First of all, in all of this
23 operation there was no suggestion except for the emergency
24 door thing that there was no suggestion that there was
25 anything unsafe about the operation.

1 The aircraft apparently was in good maintenance
2 condition. You held the certificates that were required and
3 so throughout those operations there was nothing that
4 indicated a 91.13 violation. And equally as important for
5 me was the fact that Mr. Guthrie, after he briefed your
6 folks on March 11th that it wasn't a charter and that you
7 couldn't charge for it, but his testimony was that he told
8 those people, "But it's okay for you to get on the airplane
9 and go back to Window Rock", I guess that's where you're
10 from, on the airplane. And certainly if there was a 91.13
11 issue, he wouldn't have done that or I hope he wouldn't have
12 done that.
13 All right, the bottom line for me is first, I
14 believe that Mr. Tsosie believed that he was operating
15 legally under the demonstration flights under 91.501 and
16 this NBAA exemption. I think the testimony not only from
17 Mr. Tsosie but from the other people that he was trying to
18 sell this share operation to made it clear that he believed
19 that, but I'm also finding that his belief fell short of
20 complying with that exemption. He hadn't complied with
21 notification to the FAA, although there was some indication
22 that Mr. Guthrie was gone for a long period of time there,
23 but there was no suggestion that there was any attempt to
24 contact him during this period of time.
25 There was no waiting on the receipt of an NBAA

1 membership. There was just the sending of the money. There
2 was no briefing of the individual passengers, and I'm not
3 suggesting that that's a requirement but there were several
4 factors including those I've just suggested to you that
5 would indicate to me that you hadn't done the appropriate
6 research and the study of the requirements to make the kind
7 of flight you believe you were making. And so, therefore, I
8 find that you were in regulatory violation of FAR 91 --
9 excuse me, FAR 119.5(g) and then the different regulatory
10 violations alleged under FAR 135 but I certainly don't
11 believe that there was established under the evidence or the
12 admissions any showing of lack of qualifications to hold a
13 certificate.
14 In fact, sometimes these things develop steam of
15 their own but I believe that -- I really believe that if the
16 Administrator had had the input from the Navajo Nation that
17 I have received that this would never have proceeded as an
18 emergency revocation and there -- unfortunately or maybe
19 fortunately, depending on how you look at it, there's
20 legislation ongoing for the United States Congress to put
21 some brakes if you will, or certainly some speed brakes on
22 this emergency authority and maybe those issues -- if that
23 legislation goes through, those issues might have been
24 surfaced to get this out of the category of an emergency
25 revocation and would have proceeded, perhaps on a

129

1 suspension.

2 I think under the evidence that there has not been
3 shown any egregious violation. I think you believed that
4 you were complying but the facts are that you were not and I
5 think an appropriate sanction in this case and under those
6 violations would be a 30-day suspension of your airman's
7 certificate and that will be my order.

8 ORDER

9 IT IS THEREFORE ORDERED that safety in air
10 commerce and safety in air transportation does not require
11 an affirmation of the Administrator's emergency order of
12 revocation as issued. Specifically I find that there has
13 been no showing of lack of qualifications of this
14 individual. There has been no showing of regulatory
15 violation of FAR 91.13(a). I find that there was
16 established by a preponderance of the evidence the
17 regulatory violation of FAR 119.5(g), 135.95(b), 135.251(a),
18 135.255(b), 135.293(a) and 135.293(b) and I find under this
19 evidence that's been presented yesterday and today that an
20 appropriate sanction in this case would be a 30-day
21 suspension of your airman's certificate and it will be so
22 ordered.

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25 WILLIAM R. MULLINS
ADMINISTRATIVE LAW JUDGE

1 JUDGE MULLINS: Mr. Tsosie, you have the right to
2 appeal this order and you may do so by filing your notice of
3 appeal within two days of this date. You have certain
4 rights. Then within seven days of this date you need to
5 file a brief with the National Transportation Safety Board
6 Office of General Counsel. I'd ask Mr. Jackson, if you'd
7 come up, I'll hand you a written statement of those rights
8 to appeal.
9 The Administrator is entitled to appeal this order
10 today and if you'd like, I can give you a copy of this
11 also --
12 MS. TSUDA: Thank you, your Honor.
13 JUDGE MULLINS: -- which sets forth where -- the
14 times for appeal and where the briefs and so forth go. Mr.
15 Jackson, do you have any question about the order?
16 MR. JACKSON: I have one question, sir. Would the
17 30-day suspension include time served so to speak?
18 JUDGE MULLINS: Yes, and I think that's automatic
19 if the suspension has been surrendered in these emergency
20 cases.
21 MR. JACKSON: Just wanted to confirm.
22 JUDGE MULLINS: Right. Any question from the
23 Administrator?
24 MS. TSUDA: No.
25 JUDGE MULLINS: All right, thank you, folks. I

1 thought it was well-tried and thank you for the tribal
2 leaders who were here today and for those who have already
3 gone. I appreciate their time and interest in this case.
4 The hearing is terminated.
5 (Whereupon, at 11:30 a.m. the hearing in the
6 above-entitled matter concluded.)
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1 CERTIFICATE OF REPORTER

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This is to certify that the attached proceedings

3 before: NATIONAL TRANSPORTATION SAFETY BOARD

4

5 In the Matter of:

ADMINISTRATOR, FEDERAL AVIATION

6 ADMINISTRATION,

7 V.

8 FRED MEAD TSOSI.

9

10

11

12 Case No. SE-15216

13 Location: Phoenix, Arizona

14 Date: 5-28-98

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were held as herein appears, and that this is the

19 ORIGINAL transcript thereof for the files of

the Department or Commission:

20

21 Dolli Fuqua

Reporter

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CERTIFICATE OF SERVICE

This is to certify that a copy of the Oral Initial Decision and Order which was signed and edited on June 8, 1998, by the officiating Judge in this case, was mailed to the appropriate parties and/or their attorneys this 9th day of June, 1998.

ANNE SMITH
Hearing Assistant
CIRCUIT III, Office of Administrative
Law Judge PATRICK G. GERAGHTY,
Denver, Colorado

Fred Mead Tsosie
SE-15216

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