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NTSB Order No. EA-4643

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 26th day of February, 1998

JANE F. GARVEY, Administrator, Federal Aviation Administration, Complainant, v. THURMAN ALPHIN Respondent.	Docket SE-14645

OPINION AND ORDER

Respondent appeals the oral initial decision of Chief Administrative Law Judge William E. Fowler, Jr., rendered after an evidentiary hearing held on April 8, 1997.[1] By that decision, the law judge affirmed the Administrator's order of suspension for respondent's alleged violations of sections 43.13(a) and (b),

[1] An excerpt of the hearing transcript containing the law judge's initial decision is attached.

91.7(a) and (b), and 91.403(c) of the Federal Aviation Regulations, but reduced respondent's sanction to a 60-day suspension of his airframe mechanic certificate and a 90-day suspension of his commercial pilot certificate.[2] We deny the

[2] Section 43.13 (14 C.F.R. Part 43) provides, in relevant part, as follows:

> **§ 43.13 Performance rules (general).**
>
> (a) Each person performing maintenance, alteration, or preventive maintenance on an aircraft, engine, propeller, or appliance shall use the methods, techniques, and practices prescribed in the current manufacturer's maintenance manual or Instructions for Continued Airworthiness prepared by its manufacturer, or other methods, techniques, and practices acceptable to the Administrator, except as noted in § 43.16. He shall use the tools, equipment, and test apparatus necessary to assure completion of the work in accordance with accepted industry practices. If special equipment or test apparatus is recommended by the manufacturer involved, he must use that equipment or apparatus or its equivalent acceptable to the Administrator.
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> (b) Each person maintaining or altering, or performing preventive maintenance, shall do that work in such a manner and use materials of such a quality, that the condition of the aircraft, airframe, aircraft engine, propeller, or appliance worked on will be at least equal to its original or properly altered condition (with regard to aerodynamic function, structural strength, resistance to vibration and deterioration, and other qualities affecting airworthiness.)
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> * * * * *

Sections 91.7 and 91.403 (14 C.F.R. Part 91) provide, in relevant part, as follows:

> **§ 91.7 Civil aircraft airworthiness.**
>
> (a) No person may operate a civil aircraft unless it is in an airworthy condition.
>
> (b) The pilot in command of a civil aircraft is responsible for determining whether that aircraft is in condition for safe flight. The pilot in command shall discontinue the flight when unairworthy mechanical,

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appeal.[3]

On November 10, 1995, respondent arrived at Charlottesville Airport ("CHO"), Virginia, to repair a Cessna 152 that had been damaged by a bird strike. A section of the leading edge of the aircraft's left wing had been crushed, but respondent "hammered out" this damage, returned the aircraft to service as airworthy, and then flew the aircraft to his maintenance facility in Hagerstown, Maryland. In Hagerstown, the damaged area was replaced by a new leading edge skin panel. The Administrator contends that respondent did not adhere to the aircraft's approved service manual in making the repairs at CHO, that the aircraft was unairworthy after those repairs, and that respondent knowingly flew the unairworthy aircraft to Hagerstown without

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electrical, or structural conditions occur.

§ 91.403 General.

* * * * *

(c) No person may operate an aircraft for which a manufacturer's maintenance manual or instructions for continued airworthiness has been issued that contains an airworthiness limitations section unless the mandatory replacement times, inspection intervals, and related procedures specified in that section or alternative inspection intervals and related procedures set forth in an operations specification approved by the Administrator under part 121, 127 or 135 of this chapter or in accordance with an inspection program approved under §91.409(e) have been complied with.

[3] The order of suspension sought a 120-day suspension of respondent's airframe mechanic certificate and a 180-day suspension of respondent's commercial pilot certificate. The Administrator has not appealed the reduction in sanction.

obtaining a special flight permit ("ferry permit"). Respondent denies the Administrator's allegations, claiming that his repairs were proper, and that the aircraft was airworthy following his work at CHO and for the subsequent flight to Hagerstown.[4]

We start with the question of whether the repairs at CHO were proper. The approved service manual states that if leading edge damage "would require a repair which could not be made between adjacent ribs, . . . complete leading edge skin panels must be replaced." Exhibit ("Ex.") A-2, paragraphs 17-43 and 17-44; Transcript ("Tr.") at 355. The preponderance of the evidence also indicates that the damage extended from approximately station 138 to station 174, spanning at least one rib located at station 156.[5] Tr. 87, 150; Ex. A-1D; Ex A-1G; Ex. A-2, figure 1-3. Thus, instead of hammering or tapping out the damage, respondent should have replaced the skin panel during his repair at CHO, and his failure to do so in contravention of the service

[4] Respondent characterizes the Hagerstown repair as cosmetic, and claims that the only reason the leading edge section was subsequently replaced there was because the owner wanted the aircraft returned to its new condition and the aircraft's insurer had approved the repair.

[5] The form 337 signed by respondent following the repair in Hagerstown indicates that two ribs, at station 156 and 174, were replaced. Although respondent presented testimony that the mechanic who replaced the leading edge section damaged the ribs in the course of performing that repair, we find persuasive the testimony that where the leading edge skin was crushed "it stands to reason that the rib -- the nose rib that attaches to the skin that forms the contour of the leading edge -- [was] also crushed." Tr. at 150, 202, 234. In any event, proper evaluation of this testimony requires a credibility assessment and the Board defers to such determinations. Administrator v. Smith, 5 NTSB 1560, 1563 (1986).

manual constitutes a violation of section 43.13(a).

We also think that the Administrator has proved the section 43.13(b) violation by a preponderance of the evidence, even though, as respondent argues, none of the witnesses who claimed that the aircraft remained unairworthy after the CHO repair actually observed the results of respondent's work. Respondent's Brief at 5, 10-12. Mr. Ramon Smeltz, the airframe and powerplant ("A&P") mechanic who first surveyed the damaged aircraft, and Mr. Edward Hall, a Federal Aviation Administration ("FAA") airworthiness safety inspector and A&P mechanic, testified that the damage compromised the aircraft's structural integrity, and that hammering out the damage as respondent did could not solve, and indeed could exacerbate, this problem. Respondent's proffered testimony does not contradict this evidence about the aircraft's structural integrity, other than to dispute the degree of damage originally inflicted upon the wing. The law judge has already necessarily weighed the conflicting testimony about the degree of damage to the wing, however, and we generally defer to such credibility determinations.[6] Smith, supra. The record supports the finding that respondent violated section 43.13(b).

We also sustain the operational violations of sections 91.7(a) and (b), and 91.403(c). Respondent's knowledge as the aircraft's mechanic is, of course, imputed to his decisionmaking

[6] We also note that the Administrator's photographic exhibits bolster the Administrator's witnesses' account of the extent of the damage to the wing, including the claim that at least one structural rib was crushed. Ex. A-1; see Tr. at 202.

as pilot-in-command, and respondent's failure to consider the effect upon the aircraft's structural integrity of hammering out the damage was not reasonable. Respondent should have known that the aircraft was not airworthy for the flight to Hagerstown and, accordingly, neither his actions as airframe mechanic nor as pilot-in-command can be excused as the product of good faith, albeit erroneous, judgment.[7] We affirm the law judge's finding that respondent violated FAR sections 43.13(a) and (b), 91.7(a) and (b), and 91.403(c).[8]

[7] Because the aircraft was not airworthy, an FAA-issued ferry permit was needed to fly the aircraft to Hagerstown. The purpose behind the procedure for obtaining a ferry permit is to give the FAA an opportunity to observe an aircraft and determine, before issuing the ferry permit, that it is in a safe condition to fly even though it may not technically be airworthy. Respondent's post hoc rationalization – that a ferry permit would have been issued if the FAA had been contacted – is, even if true, an attempt to substitute his judgment for that of the disinterested FAA decisionmaker contemplated by the requirement. Respondent's argument that it was impossible to obtain a ferry permit because the local Flight Standards District Office ("FSDO") was closed is also unavailing, for we have never equated inconvenience with impossibility. Respondent should have waited until the FAA could be contacted. Indeed, the Administrator presented evidence that indicates that if respondent had exercised even minimal initiative he could have succeeded at contacting someone at the FAA capable of issuing him a ferry permit outside of normal business hours.

[8] Respondent's contention that the law judge "applied an entirely incorrect decisional standard" is not persuasive. Respondent's Brief at 7-8. The law judge indicated that his findings and conclusions were "based on the totality of the evidence" and, moreover, our review of the record convinces us that the law judge's findings are amply supported by a preponderance of the evidence. Respondent also complains that at least one witness was allowed, over objection, to testify about matters that were not specifically disclosed during discovery. Respondent's Brief at 13. The testimony complained of, however, was directly related to the witness's knowledge and experience, cannot be legitimately characterized as surprise testimony, and reasonably

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ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;

2. The initial decision, and the order of suspension as modified by the law judge, are affirmed; and

3. The 60-day suspension of respondent's airframe mechanic certificate, and the 90-day suspension of respondent's commercial pilot certificate, shall commence 30 days after service of this order.[9]

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

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followed the description of anticipated testimony provided by the Administrator.

[9] For the purpose of this order, respondent must physically surrender his certificates to a representative of the Federal Aviation Administration pursuant to FAR § 61.19(f).