

SERVED: January 22, 1992

NTSB Order No. EA-3470

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 8th day of January, 1992

BARRY LAMBERT HARRIS,
Acting Administrator,
Federal Aviation Administration,

Complainant,

Docket SE-9841

v.

SAMUEL SHADOW,

Respondent.

OPINION AND ORDER

Respondent has appealed from the oral initial decision issued by Administrative Law Judge William R. Mullins at the conclusion of an evidentiary hearing held on September 12, 1989.¹ The law judge found that respondent had violated §

¹An excerpt from the transcript containing the initial decision is attached. The Administrator filed a brief opposing the appeal, but did not object to the reduction of the suspension period. Therefore, we need not address this issue. Respondent filed a motion to strike part of the Administrator's brief from the record. We deny this motion, as it appears that respondent attempted to use it as a pretext for a reply to the Administrator's reply brief. Under our Rules of Practice,
(continued. . .)

43.13(a) of the Federal Aviation Regulations ("FAR," 14 C.F.R. Part 91) as applied through § 43.13(c) when, on September 27, 1987, respondent allegedly failed to adequately perform and document maintenance required on a Southwest Airlines Boeing 737.²

This case arose from repair of a major hydraulic system failure on a Southwest Airlines' 737. On landing, the pilots reported that the system "A" hydraulics had gone to zero, both low pressure pump lights illuminated, and postflight inspection revealed hydraulic fluid leaking from the nose gear. Respondent, a Continental Airlines employee doing contract work

¹(.. continued)
 replies to a reply brief are not permitted absent a showing of good cause. 49 CFR § 821.48(e). See Administrator v. Welch, 2 NTSB 1990 (1975). We also deny respondent's request for oral argument. The issues in the case are sufficiently developed on the record and in the briefs.

²FAR § 43.13(a) states in pertinent part:

"(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. . . ."

FAR § 43.13(c) states in pertinent part:

"(c) Special provisions for holders of air carrier operating certificates. . . . Unless otherwise notified by the administrator, the methods, techniques, and practices contained in the maintenance manual or the maintenance part of the manual of the holder of an air carrier operating certificate. . . constitute acceptable means of compliance with this section. "

for Southwest, was given the responsibility for repair. He examined the nose gear, identified the source of the leak, replaced an "O" ring in the nose gear, and, after checking with Southwest maintenance center, refilled the fluid reservoir, checked the system for leaks and returned the aircraft for service.

The Administrator's Order of Suspension, the complaint in this case, stated that in connection with his repair of the nose gear respondent failed to perform, or document in the flight log, "the required checks of the corresponding pump pressure filter and case drain filter and...and failed to perform a subsequent leak check." The focus of the evidentiary hearing, not surprisingly, was aimed primarily at these charges. The Administrator's case in main was predicated on the belief that a section of the prescribed maintenance manual containing a requirement to check the pressure and drain filters applied to the work done. The law judge found that it did not, and the Administrator has not appealed this finding.

However, during the hearing there was also some discussion of a subsidiary matter, whether under the prescribed procedures manual the notation "leak checked - OK" was a satisfactory description of the work performed by respondent. If not, the failure could be contained within the broad scope of the Administrator's complaint under 14 CFR § 43.13. The matter was not directly mentioned in the complaint, nor addressed in

either the opening or closing arguments of FAA counsel.³ Nevertheless, the law judge found this notation insufficient under the manual's provisions and, consequently, found a violation of section 43.13(a), reducing by half the Administrator's proposed suspension.

On appeal, the only issue is whether the challenged notation is sufficient documentation of the work done. The provisions of the manual entered into the record state:

"After evaluation, should the findings indicate the problem requires corrective action, enter a brief description of the work performed. Entries such as 'repaired,' 'okay for service,' 'within limits,' etc. , are NOT ACCEPTABLE UNLESS ACCOMPANIED BY A DESCRIPTION OR SPECIFIC MANUAL REFERENCE OF HOW THE DETERMINATION WAS MADE." Southwest Airlines Maintenance Procedures Manual, § VI at 8 (emphasis in original).

The argument of the Administrator on appeal is that the type of leak check performed needed to be cited either explicitly or by reference to a manual provision.⁴ The Administrator largely argues from the quoted text of the manual, with citation to Administrator v. Reeves, NTSB Order

³Respondent was not directly charged with a violation of 14 CFR § 43.9 or any of the related sections that pertain to the form and content of maintenance records.

⁴That the check was performed is not contested. Respondent, in his initial response to FAA's letter of investigation indicated that the leak check was performed in accordance with a specified provision of the manual. This claim is not challenged.

No. EA-2675 (1988). The respondent argues that his notations have to be interpreted as a whole -- that the description of the work done (that is, replaced "O" ring,) taken together with the notation that there was a post replacement leak check, satisfies the requirement for a "brief description of the work done." There is some support for this argument in the examples offered by the Southwest manual, as respondent notes. Respondent also cites the Reeves⁵ case in support of his position.

In the Board's view the proper interpretation of the Southwest manual is not free from doubt. Nevertheless, we feel constrained to overturn the law judge's finding of a violation since we do not believe that the Administrator has established his case by a preponderance of the evidence. The Administrator has offered no argument, much less evidence, as to common interpretation or industry practice with respect to the specific provision of Southwest's manual under which respondent is now found to have acted deficiently -- a provision which taken in its context is open to both interpretations offered here. Nor has the Administrator offered any argument as to the necessity of his interpretation of the provision.

⁵In Administrator v. Reeves Aviation, NTSB Order No. EA-2675 (1988), we stated that a write-up of work performed should "tell anyone perusing the records what was done to correct the problem, information which would have considerable significance if the problem recurs and the effectiveness of past corrective action must be evaluated." Id. at 7.

This Board would feel an obligation to offer some deference to the proposed FAA interpretation of Southwest's manual had it been made in any of the variety of procedures open to the Administrator for the establishment of enforcement interpretations. But, in the present case, the interpretation seems largely to have arisen from the free-for-all of trial, after the case had been brought and without forceful analysis from FAA. Indeed the main impetus appears to have come from a law judge of this agency.⁶ While the Administrator is satisfied to adopt this approach on appeal, we do not believe safety or the public interest would be advanced by sanctioning this form of policy development. As there no longer appears to be any dispute over the adequacy of the actual maintenance work performed, a reversal of the Administrator's order is warranted.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is granted, and
2. The initial decision and order of suspension are reversed.

KOLSTAD, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART, and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

⁶We note again that the failure of record keeping cited by the judge was not developed in the pre-trial order of suspension or in the opening and closing arguments of FAA counsel. While the Administrator is free to develop enforcement policy in the context of adjudication, the norms of notice and rational basis still apply.