

SERVED: May 28, 2008

NTSB Order No. EA-5389

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 27<sup>th</sup> day of May, 2008

_____	)	
ROBERT A. STURGELL,	)	
Acting Administrator,	)	
Federal Aviation Administration,	)	
	)	
Complainant,	)	
	)	Docket SE-17864
v.	)	
	)	
ALLEN WAYNE LACKEY,	)	
	)	
Respondent.	)	
_____	)	

**OPINION AND ORDER**

Respondent appeals the oral initial decision of Administrative Law Judge Patrick G. Geraghty, issued October 4, 2007.<sup>1</sup> By that decision, the law judge affirmed the Administrator's complaint and ordered a 120-day suspension of respondent's commercial pilot certificate, based on violations

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

of 14 C.F.R. §§ 91.7(a),<sup>2</sup> 91.9(a) and (b)(1),<sup>3</sup> 39.7,<sup>4</sup> and 91.13(a).<sup>5</sup> We deny respondent's appeal.

The Administrator issued the suspension order, which became the complaint in this case, on October 12, 2006. The complaint alleged that respondent operated a Bell BHT-206B helicopter while the aircraft was not in compliance with Airworthiness Directives (ADs) 72-19-01 and 2004-24-08,<sup>6</sup> and while two

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<sup>2</sup> Section 91.7(a) provides that, "[n]o person may operate a civil aircraft unless it is in an airworthy condition."

<sup>3</sup> The pertinent portion of section 91.9(a) prohibits operation of a civil aircraft in the absence of compliance with "operating limitations specified in the approved Airplane or Rotorcraft Flight Manual, markings, and placards, or as otherwise prescribed by the certificating authority of the country of registry." In addition, the relevant portion of section 91.9(b)(1) provides that a person may not operate a civil aircraft registered in the United States unless "a current, approved Airplane or Rotorcraft Flight Manual" is available in the aircraft.

<sup>4</sup> Section 39.7 provides as follows:

**What is the legal effect of failing to comply with an airworthiness directive?**

Anyone who operates a product that does not meet the requirements of an applicable airworthiness directive is in violation of this section.

<sup>5</sup> Section 91.13(a) states that, "[n]o person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another."

<sup>6</sup> AD 72-19-01 states that it "[a]ppplies to Bell Models 206A, 206B, 206A-1 and 206B-1 helicopters certified in all categories," and requires the removal and replacement of certain retention strap fittings with 90 or more hours total time in service on the effective date of the AD. Exh. C-4. At the hearing, the law judge permitted the Administrator to remove

passengers who were not essential flight crew were on the aircraft. In addition, the complaint alleged that the Flight Standards District Office (FSDO) in Oakland, California, had issued a special flight permit, which provided that occupancy of the aircraft was limited to the pilot and essential flight crew, and that the aircraft must comply with all ADs, unless the AD permits the transport of the aircraft to a location in which the operator can fulfill the requirements of the AD. The complaint also alleged that, during respondent's operation of the aircraft, "there was not available in the aircraft a current, FAA approved Rotorcraft Flight Manual," and that respondent exceeded the engine starter limitations set out in the aircraft's flight manual upon initiating or proceeding with the subject flight. As a result, the complaint charged respondent with violations of the regulations listed above, and alleged that respondent operated the aircraft when it was not in an airworthy condition, and that respondent's conduct was therefore careless or reckless. The complaint ordered a suspension period of 150 days.

At the hearing, the Administrator provided the testimony of Ms. Virginia Bamford, who testified that she observed and recorded respondent arriving at Hayward Airport in California,

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(..continued)  
references to AD 2004-24-08 in the complaint.

taking possession of the aircraft, and attempting to start the aircraft several times. Ms. Bamford acknowledged that she was engaged in a legal dispute with respondent, and that her purpose in recording his activities was to document the condition of the aircraft, as its condition was relevant to their dispute.

In addition, the Administrator provided the testimony of Inspector Dennis Pollard, who is an aviation safety inspector in the Oakland FSDO. Inspector Pollard testified that he frequently issued special flight permits, and was familiar with AD compliance. Inspector Pollard stated that the application for a special flight permit that respondent submitted verified that the aircraft's records complied with 14 C.F.R. § 91.417,<sup>7</sup> indicated that the pilot was the only person required to be on the aircraft, and certified that the aircraft was airworthy. Exh. C-2. Inspector Pollard stated that neither of the two people on board the aircraft with respondent during the flight at issue were "essential flight crew" under 14 C.F.R. § 1.1, and that neither of them were "helicopter-qualified." Tr. at 58-59. Inspector Pollard also testified that he issued the special flight permit to respondent, which included a list of six standard limitations that applied to respondent's operation of the aircraft. Exh. C-3. Inspector Pollard stated that, prior

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<sup>7</sup> Section 91.417 requires that registered owners or operators keep maintenance records with the aircraft.

to his issuance of the permit, respondent contacted him and informed him that the "TT straps" on his aircraft, which are tension straps that hold the main rotor head of the aircraft, had "timed out." Tr. at 51. Inspector Pollard testified that he told respondent that he could not "extend life-limited parts" (Tr. at 51), and that respondent would therefore need to obtain permission from another FAA office in order to verify that the aircraft was airworthy, because Inspector Pollard could not authorize operation of a component that had exceeded its flight limits (Tr. at 55). Inspector Pollard also identified AD 72-19-01, and stated that it was applicable to respondent's Bell 206-B, and that no records showed that respondent had brought the aircraft into compliance with the AD. Exh. C-4. In addition, Inspector Pollard identified a portion of the flight manual for the aircraft that lists maximum start limitations for the aircraft, and indicates that operators must allow the aircraft to rest for 30 minutes after attempting to start the aircraft on three consecutive occasions. Tr. at 64; Exh. C-5. Inspector Pollard stated that Ms. Bamford's recording of respondent showed that he attempted "[a]t least 11 engine starts total," and that respondent had exceeded the limitations listed in the flight manual. Tr. at 65, 67. Inspector Pollard also identified the type certificate data sheet for the aircraft, which requires

that an "FAA approved Helicopter Flight Manual" be present in the aircraft. Exh. C-6 at 13.

During respondent's case-in-chief, respondent testified that he had three persons with him while he operated the aircraft on the day at issue, and that they each had aviation expertise. Respondent stated that he and his crew members inspected the aircraft for approximately 1 hour prior to operating it. Respondent also testified that Inspector Pollard had authorized him to fly the aircraft without its flight manual, and allowed him to fly the aircraft with the aforementioned people on board. Respondent stated that he learned during his training at Bell that a "start" does not occur until "you reach flight idle at 58 percent." Tr. at 125. As a result, respondent alleges that no "starts" ever occurred, so a 30-minute waiting period was unnecessary. Respondent disagreed with Inspector Pollard's testimony that pressing the starter button on the aircraft counted as an attempted start for purposes of the flight manual instructions.

During rebuttal, the Administrator's counsel again summoned Inspector Pollard to testify. Inspector Pollard presented a record of his telephone conversation with respondent regarding the absence of the flight manual, which indicates that Inspector Pollard told respondent that he could not waive the requirement of the flight manual. Exh. C-9. In addition, Inspector Pollard

stated that respondent never inquired about, and that he never authorized, any passengers on board the aircraft. Tr. at 154-55.

After reviewing the evidence, the law judge concluded that respondent had violated the regulations as charged. The law judge stated that he was aware of the dispute between Ms. Bamford and respondent, and that he had considered the existence of the dispute in evaluating Ms. Bamford's testimony. The law judge indicated that he considered each attempt to start the engine as an attempt for purposes of the limitations in the flight manual; the law judge discredited respondent's assessment that his attempts to start the engine were not "starts" under the manual. The law judge also determined that AD 72-19-01 applied to respondent's aircraft, and that no records indicated that respondent had complied with the AD. Finally, the law judge determined that Inspector Pollard's testimony regarding whether Inspector Pollard approved respondent's operation of the aircraft without the flight manual and with people on board was more credible than respondent's testimony. As such, the law judge affirmed the Administrator's complaint, but reduced the suspension period to 120 days, due to the Administrator's withdrawal of the references to AD 2004-24-08.

On appeal, respondent argues that the law judge erred with regard to numerous evidentiary rulings at the hearing. In

particular, respondent argues that the law judge misinterpreted the parole-evidence rule<sup>8</sup> by not allowing evidence regarding the interpretation of the special flight permit; challenges the law judge's assessment that the permit was a contract between the Administrator and respondent; and asserts that the permit was open to interpretation, thereby precluding application of the parole-evidence rule. In addition, respondent argues that the law judge erred in not allowing evidence regarding engine starter limitations and contends that the law judge should have continued the hearing in order to provide respondent with the opportunity to provide an expert witness to testify concerning engine starts. Respondent also argues that AD 72-19-01 does not apply to the aircraft at issue, because the aircraft does not contain the parts that the AD references. With regard to evidentiary rulings, respondent argues that the law judge erred in allowing Ms. Bamford's video recording into evidence; in not allowing respondent's counsel to ask Inspector Pollard certain hypothetical questions during cross-examination and questions concerning the records that Inspector Pollard requested from respondent to determine whether respondent had complied with the AD; and in not granting respondent's motion to continue the

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<sup>8</sup> The parole-evidence rule is a common law doctrine concerning the law of contracts that prohibits evidence that adds to, varies, or contradicts a written contract. Black's Law Dictionary 1149 (8th ed. 2004).

hearing.<sup>9</sup> The Administrator disputes each of these arguments, and urges us to uphold the law judge's decision.<sup>10</sup>

First, with regard to respondent's arguments concerning evidentiary rulings, we review law judges' evidentiary rulings under an abuse of discretion standard.<sup>11</sup> Moreover, the Board's Rules of Practice, at 49 C.F.R. § 821.49(a), provide that the standard for reviewing issues on appeal includes evaluating the law judge's findings of fact and conclusions of law, asking whether the law judge committed any prejudicial errors, and determining whether either party has presented substantial questions on appeal. As such, the Board will only entertain evidentiary questions when they amount to prejudicial error.<sup>12</sup>

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<sup>9</sup> We note that, subsequent to submitting his appeal brief, respondent submitted a "Notice of Related Cases," in which he requested that we consolidate this case with two other cases on appeal: Administrator v. Lackey, Docket No. SE-17863, and Administrator v. Ferguson, Docket No. SE-17865. Given that we have issued decisions on both of the other cases, we deny this request as moot.

<sup>10</sup> The Administrator does not contest the law judge's reduction in sanction.

<sup>11</sup> See, e.g., Administrator v. Raab, NTSB Order No. EA-5300 at 9-10 (2007); Administrator v. Zink, NTSB Order No. EA-5262 at 7-8 (2006); Administrator v. Seyb, NTSB Order No. EA-5024 at 5-6 (2003); Administrator v. Van Dyke, NTSB Order No. EA-4883 at 5 (2001).

<sup>12</sup> See generally Administrator v. Blair, NTSB Order No. EA-4253 at 7 n.10 (1994) (stating that the law judge had improperly excluded evidence, but that the error was harmless). Moreover, an error is considered *prejudicial* when it "actually [affects] the outcome of the proceedings." United States v. Hastings, 134 F.3d 235, 240 (4<sup>th</sup> Cir. 1998).

On appeal, respondent does not establish how any of the law judge's evidentiary rulings prejudiced him. With regard to his assertion that the law judge misapplied the parol-evidence rule, respondent does not describe what other evidence he would have presented that would alter the terms of the special flight permit and the application on which the permit was based. For example, the application unambiguously identified the pilot as the only crew required for operation of the aircraft, as well as a certification from respondent that the aircraft was airworthy and in compliance with all applicable ADs. Respondent's appeal does not assert that extrinsic evidence exists that indicates that this information in the application was incorrect. Similarly, the argument that the law judge erred in not allowing evidence concerning engine starter limitations does not describe any evidence to indicate that the flight manual is ambiguous or subject to multiple interpretations.

Likewise, respondent's assertions concerning the law judge's other evidentiary rulings are similarly deficient with regard to a showing of prejudice. For example, the argument that the law judge erred in not permitting certain questions of Inspector Pollard on cross-examination does not establish how the ruling prejudiced respondent. We have reviewed the record and determined that respondent's counsel had the opportunity to cross-examine Inspector Pollard on each issue. Indeed, the law

judge did not abuse his discretion in determining that the question to which respondent now asserts he was entitled was inappropriate, because it included an incorrect statement of the facts for a hypothetical question. Similarly, respondent argues that the law judge should have allowed inquiries regarding the records that Inspector Pollard requested during his investigation. Respondent, however, neither explains how a description of requested records is relevant, nor describes how the lack of a response to this inquiry prejudiced him. Respondent also asserts that the law judge erred in allowing Ms. Bamford's video recording into evidence, because the Administrator did not show that the recording was accurate. This argument, however, is incongruous with testimony regarding the handling and copying of the recording. Tr. at 26, 29. In addition, respondent did not provide any evidence that the recording was adulterated or otherwise inaccurate.

With regard to the law judge's denial of respondent's motion to continue the hearing to allow his expert witness to be present, we do not find that the law judge erred. Respondent submitted this motion 2 days before the hearing, and did not subpoena the witness. The law judge denied the motion as untimely, and stated that respondent did not establish good cause for a continuance. Tr. at 11-12. As explained above, law judges have significant latitude in overseeing hearings and

discovery matters.<sup>13</sup> On appeal, respondent does not show that the law judge's ruling was an abuse of discretion, and only now attempts to introduce arguments to establish good cause that he should have included in his written motion to continue the hearing. Respondent has not made an offer of proof to demonstrate the types of issues about which his witness would testify, and therefore has not established that he suffered prejudice as a result of the law judge's ruling.<sup>14</sup> We reject respondent's arguments as untimely, and do not find that the law judge's denial of his motion was an abuse of discretion.

Finally, respondent argues that his aircraft did not contain the parts cited in AD 72-19-01, and is, therefore, inapplicable. The statement in the applicability section of the AD indicates that it applies to "Bell Models 206A, 206B, 206A-1 and 206B-1 helicopters certificated in all categories." Exh. C-4. It does not include an exception, as respondent contends, for aircraft in which an operator has exchanged main rotor retention strap fittings. Therefore, on this record, the law

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<sup>13</sup> See, e.g., Administrator v. Ferguson, NTSB Order No. EA-5360 at 10-12 (2008); Administrator v. Robertson, NTSB Order No. EA-5315 at 3 (2007) (citing 49 C.F.R. §§ 821.19(b), 821.35(b)); Administrator v. Zink, NTSB Order No. EA-5262 at 3 (2006).

<sup>14</sup> See, e.g., Administrator v. Gerritsen, NTSB Order No. EA-4837 at 2-3 (2000); Administrator v. Hasley, NTSB Order No. EA-3971 (1993) (no abuse of discretion where continuance denied even though new counsel retained a few days before hearing; no showing of what respondent would have done differently had continuance been granted).

judge's resolution of the issue was correct, as no records indicated that the AD did not apply.

Based on the record before us, we find that respondent has violated 14 C.F.R. §§ 91.7(a), 91.9(a) and (b)(1), 39.7, and 91.13(a), and we affirm the law judge's decision.

**ACCORDINGLY, IT IS ORDERED THAT:**

1. Respondent's appeal is denied;
2. The law judge's decision, including the reduction in sanction from 150 to 120 days, is affirmed; and
3. The 120-day suspension of respondent's commercial pilot certificate shall begin 30 days after the service date indicated on this opinion and order.<sup>15</sup>

ROSENKER, Chairman, SUMWALT, Vice Chairman, and HERSMAN, HIGGINS, and CHEALANDER, Members of the Board, concurred in the above opinion and order.

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<sup>15</sup> For the purpose of this order, respondent must physically surrender his certificate to a representative of the Federal Aviation Administration pursuant to 14 C.F.R. § 61.19(g).

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

\* \* \* \* \*

In the matter of: \*

ROBERT A. STURGELL, \*  
ACTING ADMINISTRATOR, \*  
Federal Aviation Administration, \*

Complainant, \*

v. \* Docket No.: SE-17864

JUDGE GERAGHTY

ALLEN WAYNE LACKEY, \*

Respondent. \*

\* \* \* \* \*

U.S. Court of Appeals  
9th Circuit, Third Floor  
95 Seventh Street  
San Francisco, CA 94102

Thursday,  
October 4, 2007

The above-entitled matter came on for hearing, pursuant  
to Notice, at 9:40 a.m.

BEFORE: PATRICK G. GERAGHTY,  
Administrative Law Judge

## APPEARANCES:

On behalf of the Administrator:

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ORAL INITIAL DECISION AND ORDER

This has been a proceeding before the National Transportation Safety Board on the Appeal of Allen Wayne Lackey, herein Respondent, from an Order of Suspension which seeks to suspend his Commercial Pilot Certificate for a period of 150 days.

The Order of Suspension, as provided by Board Rules, was filed as the Complaint herein, and that was filed on behalf of the Administrator, Federal Aviation Administration, herein the Complainant.

The matter has been heard before this Judge and, as permitted by the Board's Rules of Practice, I am issuing a Bench Decision in the proceeding.



1 Respondent as a ferry flight on September 22nd, 2005, from  
2 Hayward, California, to, essentially, Vacaville, California. It  
3 is further charged that in the conduct of that operation, the  
4 Respondent operated in regulatory violation of several Sections of  
5 the Federal Aviation Regulations. I will refer specifically to  
6 those subsequently in this Decision and the requirement of those  
7 specific Regulations.

8           The Complainant's case was made through two witnesses  
9 and several exhibits. The first of the witnesses was Ms. Virginia  
10 Bamford. She testified that she was at Hayward Airport on the  
11 date in question of this flight operation. She was there because  
12 of a concern about the helicopter being essentially collateral for  
13 a loan. She was, as she admitted, directed to turn the helicopter  
14 over to the Respondent as a result of some court proceeding and it  
15 is clear, and I mention here that there is some animosity going on  
16 between the Respondent and Ms. Bamford in which they are engaged  
17 extraneous to this proceeding.

18           However, on her testimony, on cross-examination, she  
19 readily conceded having to turn the aircraft over, as I mentioned,  
20 by some proceeding in a court; that she had concern, and had  
21 contacted an insurance company because she wanted to know whether  
22 or not she actually had been made a named insured, because she had  
23 lent a large sum of money to the Respondent. In any event, I  
24 found nothing in her testimony which would cause me to have any  
25 doubts about the veracity of the testimony that she in fact

1 offered.

2           While she was at this airport she testified she was  
3 there the entire time, before the Respondent even arrived. And  
4 then once he was there, the aircraft being out on the ramp, having  
5 been removed from a hangar where, according to her, the aircraft  
6 had been hangared and had not, in fact, been flown for about two  
7 years. It had been run up once. She made a DVD or a camera  
8 recording and then transferred it onto a DVD, which was received  
9 into evidence as Exhibit C-1. This shows, according to her, about  
10 2 hours and 20 minutes of operation, which she observed, and  
11 indicating there were no breaks, other than when she switched  
12 tapes, which took place in less than a minute.

13           The DVD does show various attempts to start the  
14 aircraft. Mr. Pollard testified as to 11 starts. However, the  
15 issue in front of me is whether or not the first three to four  
16 starts fall within the parameters of the charges in the Complaint.  
17 So when we looked at the DVD, we observed essentially only those  
18 four starts as to whether or not they supported the allegations in  
19 the Complaint and compliance with the required Flight Manual.

20           Mr. Pollard is an Aviation Safety Investigator. He was  
21 the investigator on this event. He holds an Airframe and Power  
22 Plant Certificate and Inspection Authorization, as pertinent here.  
23 His background and experience, including that in the U.S. Air  
24 Force, are included in the record and don't have to be reiterated  
25 here. He's sufficiently qualified to express his testimony and

1 opinions contained therein.

2 He testified that he had been assigned by a supervisor  
3 to effect a request for a special flight permit or ferry permit --  
4 using either one of those terms -- as Mr. Lackey had apparently  
5 contacted the FSDO to get a ferry permit for flight of this  
6 aircraft from the Hayward Airport.

7 C-2 was testified to by Mr. Pollard as the Application.  
8 The Application is dated 9/14/05, signed by the Respondent. Of  
9 significance on the Application is on the first page thereof, on  
10 Paragraph C. There's a check mark that the records of the  
11 aircraft are in compliance with the requirements of Section 91.417  
12 of the Regulations. That's a certification. And then on the  
13 second page thereof, in the description of the aircraft, and then  
14 down to subpart C and Part VII, the crew required to operate the  
15 aircraft and its equipment, the only check is a "pilot". As  
16 defined in Part 1 of the Federal Aviation Regulations, "flight  
17 crew" is a pilot, the navigator, or a flight engineer. And on  
18 Mr. Pollard's testimony, the aircraft itself, under the Flight  
19 Manual, requires only one individual, the pilot, for operation  
20 thereof.

21 Based upon the Application, according to Mr. Pollard,  
22 the ferry permit or the special flight permit was issued. That  
23 was received as Exhibit C-3. And the flight permit speaks for  
24 itself, on its face contains the authorization and the limitations  
25 under which the permit is to be utilized. I do note, as brought

1 out on cross, that the authorization is set to expire on September  
2 31, so there's a mistake on the date, but that does not affect the  
3 rest of the terms of this flight permit.

4           Mr. Pollard also testified that there had been  
5 apparently another permit issued before this, and that this one in  
6 C-3 replaced the prior one. But in the earlier conversation with  
7 the Respondent, the Respondent had asked Mr. Pollard about life-  
8 limited parts on the helicopter, and according to the witness,  
9 this was about TT straps, which are part of the main rotor head.  
10 He indicated those are life-limited; that he, Mr. Pollard, had no  
11 authorization or authority to change the time requirements, and  
12 that if that was to be done, the Respondent had to contact the  
13 engineering department or office of the FAA to get that  
14 permission.

15           C-4, as testified to by Mr. Pollard, as being the AD  
16 applicable to this aircraft. That is AD 72-19-01, and it applies  
17 on its face to Bell helicopter models 206-B, which is, in fact,  
18 the type of aircraft that Respondent was operating in September of  
19 2005.

20           Mr. Pollard indicated that there was information he  
21 received that there were additional people in the helicopter at  
22 the time it was being operated. And Mr. Pollard did go on to  
23 describe the qualifications of these individuals. One was not a  
24 helicopter-qualified pilot, he was in the left, front seat, and  
25 the one in the rear seat did hold an Airframe and Powerplant, but

1 he had no piloting experience. And there's really no dispute that  
2 the two other individuals were, in fact, aboard this aircraft when  
3 it was operated out of Hayward Airport on the date in question.

4 Mr. Pollard also indicated that there was conversation  
5 about getting permission to over-fly time on the AD, and again  
6 Mr. Pollard told the Respondent that he'd have to go to the  
7 engineering office to get this, because he, as an ASI, did not  
8 have the authority to grant permission to over-fly any time.

9 With respect to the Flight Manual, it is admitted in  
10 Paragraph 5 of the Complaint that the Rotorcraft Flight Manual is  
11 required equipment. And it is also admitted in paragraph 11 that  
12 the Flight Manual was not aboard the aircraft. C-5 is a copy of a  
13 Flight Manual. The type data certificate is C-6, and on its face  
14 in the upper right-hand corner it clearly says that the revision,  
15 H-2-SW, applies to Bell 206-B.

16 The Flight Manual itself has a stamp and it says, "Type  
17 certificate number H-92." So there is a dispute as to whether  
18 this excerpt of a flight manual applies. However, that is  
19 resolved if one refers to Exhibit C-6, which is the Type  
20 Certificate Data Sheet. And on page 13 of 19 in that Exhibit C-6,  
21 under "equipment," the basic required equipment, as prescribed in  
22 the applicable Airworthiness Regulations must be installed in the  
23 helicopter. Subparagraph (c) says the FAA approved helicopter  
24 flight manual, which, of course, has not really been disputed.  
25 But as to whether or not C-5 is the applicable flight manual is

1 resolved by that on page 14, subparagraph 2, which states, "Model  
2 206-B, dated July 30, 1971, reissued December 20, 1972."

3           If you look at the front page of C-5, you see at the  
4 bottom that this is an issuance of 20 December, 1972, which is  
5 clearly within the reissue date of the revisions. And, therefore,  
6 I find on the evidence that C-5 is clearly applicable. The Rotor  
7 Flight Manual in Exhibit C-5 is applicable to this particular  
8 helicopter.

9           In the Flight Manual that is also part of C-5 and  
10 testified to by Mr. Pollard and shown on the DVD that there are  
11 engine starter limitations. This page clearly goes with this  
12 Flight Manual, because if you look at the top of the right-hand  
13 side of C-5, it has at the very top, "BHT-206-B-FM-1." And if you  
14 look at the top of C-5 on the left-hand side, that this page is  
15 from that Manual.

16           It has engine starter limits. And then it says, "Limit  
17 starter energized time to the following." There's no dispute that  
18 external power was used on attempted starts on this aircraft on  
19 the date in question. Therefore, the column under external power  
20 starts is the column that is applicable. It gives how many  
21 seconds power may be energized and then how many seconds one has  
22 to wait before you try again. And then after three attempts,  
23 there is a mandatory wait of 30 minutes.

24           Mr. Pollard's testimony was that every time that you  
25 energize the system by pushing this button, it is considered as a

1 starter being energized, because if you push the button, that  
2 energizes the system, turns the starter motor, and so that every  
3 time that is attempted, that is considered as a start for purposes  
4 of engine starter limits. He also testified that it doesn't make  
5 any difference whether the energized time is five seconds or 10  
6 seconds or the full 25 seconds. Each attempt of whatever duration  
7 constitutes an attempt, which requires a 30-second wait, and then  
8 after three attempts of any duration between zero and 25 or one  
9 and 25, there's a 30-minute requirement before you attempt again.

10           On the DVD and on the testimony, it is clear that there  
11 were not 30 minutes between the third attempt and the fourth  
12 attempt on the starts. The rest of the attempts are not relevant  
13 here.

14           Mr. Pollard's testimony was that the Respondent, in  
15 fact, had exceeded the limitations called out in the Flight Manual  
16 for engine starter limitations for an external power start.

17           On cross-examination there was inquiry as to the  
18 applicability of the AD and the fact that the part numbers called  
19 out in there were not identified as being on this aircraft.  
20 Mr. Pollard testified, however, on cross that the original  
21 application of the aircraft was not shown as altered. So,  
22 therefore, he inferred that the original equipment, as applied to  
23 206-B models, was still on this aircraft. He also testified that  
24 he had checked the databases and the FAA repositories in Oklahoma  
25 City, Oklahoma, and had found no indication in any of the records

1 applicable to this aircraft that any major alterations had been  
2 made. A change out of the rotor head would be a major alteration,  
3 so if that had been done, there should, in fact, have been a Form  
4 337. On his testimony, which is not contradicted, no such Form  
5 exists, nor was there any indication in any of the aircraft  
6 records which he had available to him, none others had been  
7 supplied by the Respondent to the FAA, although in the letter of  
8 investigation, as Mr. Pollard testified, the Respondent was asked  
9 to submit any documents that he had that would support his  
10 position.

11 In any event, on the testimony and the evidence in front  
12 of me, the aircraft records do not show any changes from original  
13 parts on this particular aircraft. Therefore, the testimony, as I  
14 understood it, as given by Mr. Pollard in more than one form, is  
15 that for this AD to be complied with there were at least three  
16 ways that it could be done. One, that the AD, in fact, had been  
17 complied with, as directed. That is if the parts had been changed  
18 out. And there has to be an entry made in the aircraft records to  
19 that work.

20 Secondly, there should have been at least a Form 337  
21 which would show that there had been an alteration and, therefore,  
22 that the AD would no longer apply, because the rotor heads had  
23 been changed out.

24 And, lastly, then, there should have also been an entry  
25 in the records both of the Form 337 itself and then a further

1 entry as to the AD no longer being applicable, so it wouldn't have  
2 to be recorded again and again, because of the changes made under  
3 the Form 337.

4           None of that is there. So on the evidence in front of  
5 me, I find that the requirements of the AD 72-19-01 were, in fact,  
6 applicable to this aircraft at the time in question.

7           The Respondent testified on his own behalf. He's the  
8 owner of Wine Country Helicopters, the organization that is  
9 utilizing this helicopter. He is also the pilot for this company.  
10 He testified that he is the one, in fact, that made the  
11 application for the ferry permit. He applied the first time and  
12 called the FAA because, in his testimony, he wasn't sure if there  
13 were some changes to the requirements for ferry permits, since he  
14 hadn't utilized one in some period of time. In any event, the  
15 Application was made as I've discussed, and the ferry permit,  
16 which speaks for itself, was, in fact, issued. And the controller  
17 ferry permit is that of C-3.

18           As to the date in question, the Respondent concedes that  
19 he was at the airport. He was using an external power source for  
20 starts. He had two other individuals, or, I believe, maybe even  
21 three. I think Andy is the first name of Mr. Danovaro, and there  
22 was another individual who was identified as "Jeff." They were at  
23 the airport to inspect the aircraft. On the testimony of  
24 Respondent, these individuals spent about an hour going over the  
25 aircraft, because the Respondent wasn't sure of the condition of

1 the aircraft, it having been not flown for the period of time I've  
2 discussed.

3           The Respondent contends that he called Mr. Pollard, and  
4 that Mr. Pollard authorized him to fly without the Manual. And,  
5 of course, that is denied by Mr. Pollard. And the ferry flight  
6 permit itself does not contain any authorization to deviate from  
7 the requirements of the Type Certificate and Regulations.

8           Respondent admits that he attempted to start the  
9 helicopter. However, he also contends that having attended two  
10 Bell schools, that what he did in the three attempts and then the  
11 fourth attempt, and at least in inference, and I did look at time  
12 on the DVD, the fourth start is within 30 minutes, so it is  
13 Respondent's contention that what he did did not constitute  
14 "starts." In support thereof, he testified that he spoke to an  
15 individual at Rolls Royce and they confirmed his observations of  
16 this. However, that is hearsay testimony. While it's admissible,  
17 it's subject to valuation and weight, because all I have is the  
18 Respondent's testimony that he, in fact, called somebody and they  
19 told him something. And I don't consider that as substantial  
20 evidence.

21           Respondent again reiterated that the "no starts" had  
22 occurred because simply energizing it does not constitute a start,  
23 since the start never reached the requisite temperatures and  
24 turns. He was concerned about a hot start, because the TOT was  
25 rising too quickly and that he shut down each time. And,

1 therefore, he considered the fact that having shut down, that  
2 there never was a start. Of course, the contrary is that of the  
3 FAA as to simply energizing to commence the start.

4           With respect to the AD, the Respondent stated that he  
5 believed that the aircraft had been properly certified and that  
6 the ADs had been complied with previously, having been told that  
7 by somebody. Again, this is hearsay. There's nothing offered to  
8 substantiate that ADs had been complied with at some time in the  
9 past or that they didn't have to be complied with because some  
10 changes had been made to the aircraft.

11           Respondent also testified that because of concerns about  
12 the aircraft having been tampered with, that he again called  
13 Mr. Pollard, or maybe even in the same phone call, and informed  
14 Mr. Pollard there was a problem with the fuel control, and  
15 indicated to Mr. Pollard that he wanted these other two  
16 individuals to fly with him on this ferry flight, inferring that  
17 Mr. Pollard granted that permission. Again, the ferry permit does  
18 not state that. It restricts to essential flight crew, which is  
19 defined in Part 1, which I've already discussed, and Mr. Pollard,  
20 of course, denies that ever having been done.

21           And I then jump to the rebuttal testimony. C-9 is a  
22 contemporaneous memorandum made by Mr. Pollard of the phone calls  
23 with Mr. Lackey on the date in question concerning the Flight  
24 Manual being missing from the helicopter. And on this, C-9 backs  
25 up the testimony given today by Mr. Pollard, that Mr. Pollard

1 simply told the Respondent that he would have to follow the  
2 special flight permit limitations and that he, Mr. Pollard, could  
3 not waive not having a Flight Manual on board. To me that is the  
4 more reliable and probative evidence. There is also no indication  
5 in here that any exemption was given for other individuals being  
6 aboard this helicopter. In any event, that would be contrary to  
7 the flight permit that had been issued and under which this  
8 operation was taking place.

9           If the Respondent was concerned about the safety of the  
10 flight and the necessity for having a mechanic aboard the  
11 aircraft, that sort of limitation has to be included in the  
12 special flight permit, the ferry permit. The flight should have  
13 been canceled and a new ferry permit requested. That would have  
14 been the thing to do if there was really that concern. Also, the  
15 concern that the wait until a Flight Manual could be obtained to  
16 be aboard the aircraft or get the permission from whatever  
17 authority, the engineering office, possibly, or whoever else  
18 within the FAA could give that permission, if it could be given,  
19 to operate without the Flight Manual being aboard the aircraft.  
20 That was not done, so the controlling authority is Exhibit C-3,  
21 the flight permit which, in fact, was issued and authorized this  
22 trip.

23           Turning then to the charges in the Complaint, I find  
24 that evaluation of the hearsay testimony, looking at the testimony  
25 given by Complainant's witnesses, evaluating their demeanor, and

1 the way in which it was given, and that of the Respondent, I find  
2 that the preponderance of the credible evidence rests with the  
3 Complainant in this case. I find, therefore, that with respect to  
4 the following numbered Paragraphs, that the evidence by a clear  
5 preponderance of the reliable and probative and credible evidence  
6 supports these conclusions:

7           That the allegations contained in Paragraph C of the  
8 Complaint are established and that, in fact, that the requirements  
9 of the AD 72-19-01 are, in fact, applicable to this aircraft,  
10 N4155K, on the date in question.

11           I find that Paragraph 8 of the Complaint has been  
12 established. That is established by C-3, the flight permit  
13 itself, and the testimony of Mr. Pollard.

14           Paragraph 10 is also established on the testimony of  
15 Mr. Pollard. There is no contrary evidence being offered to show  
16 that in any way that AD 72-19-01 had been prior complied with or  
17 did not have to be complied with because of some changes having  
18 been made prior to this flight or that AD not being otherwise  
19 applicable because of something previously being done to the  
20 aircraft. No entries are shown in any records, on Mr. Pollard's  
21 testimony no such records exist, and there's nothing to contradict  
22 that testimony. 10 is established, Paragraph 10.

23           Paragraph 12, I find on the evidence is clearly  
24 established by the testimony of Mr. Pollard and Exhibit C-7.  
25 Also, along with that, I find that Paragraph 14 is established in

1 that the Respondent did operate the aircraft when it was not in an  
2 airworthy condition and that Paragraph 12, he exceeded the engine  
3 starter limitations. Reading the Flight Manual and listening to  
4 the testimony, this Flight Manual doesn't say that the engine has  
5 to fire. It says "starter energize time to the following." It  
6 was the starter energized in an attempt to start, not whether the  
7 start was successful. It's whether there was an energizing of the  
8 starter to attempt to start. It doesn't say the start has to be  
9 successful or be completed. It's that the attempt was made. Once  
10 the attempt is made, power is being utilized in that starter. The  
11 starter itself is being energized, so it is prone to possibly  
12 over-heating. That's why there is a cool-off time. And I would  
13 agree with the interpretation that the starter can be energized  
14 for one second to 25 seconds on an attempt, but 25 is the limit.  
15 You don't carry over. If you only use the starter for 10 seconds,  
16 it doesn't mean the next attempt can be 35 seconds. Each  
17 energizing of the starter is limited by this to 25 seconds.

18           The testimony of Mr. Pollard and Exhibit C-7 clearly  
19 show that there were four attempts. There were three attempts  
20 when the starter was energized and, obviously, the starts were  
21 never fully completed. However, the fourth start is also  
22 attempted in less than 30 minutes. So the starter was then,  
23 again, energized in less than 30 minutes. That is contrary to the  
24 engine starter limitations in this required Flight Manual.  
25 Therefore, I find that it has been established on a preponderance

1 of the reliable evidence the allegations in Paragraph 12 of the  
2 Complaint in that you exceeded the starter engine limitations set  
3 out in the FAA-approved Rotorcraft Flight Manual.

4 Paragraph 3 is established from the testimony of both  
5 Ms. Bamford and Mr. Pollard, and the admissions of the Respondent  
6 himself in his testimony, that he carried two other individuals on  
7 this flight from Hayward. They are not, on the testimony in front  
8 of me, essential flight crew. They were not authorized by  
9 Mr. Pollard, on his testimony. C-9 does not indicate anything  
10 being given to Mr. Lackey for permission to do that. And the  
11 ferry permit itself does not authorize anyone being aboard this  
12 aircraft. And, as pointed out in Exhibit C-2, the Respondent  
13 himself, when he made the Application, indicated that the only  
14 required crew would be himself, the pilot. Therefore, 13 is  
15 clearly established.

16 Paragraph 14 of the Complaint is also established on all  
17 of the facts and circumstances, Mr. Pollard's testimony, and  
18 Exhibits C-3, C-4, and C-6. I find that the aircraft, having  
19 exceeded its engine start energizer limitations, and particularly  
20 not having complied with the requirements of the AD 72-19-01, was  
21 no longer airworthy, and, therefore, it was operated by the  
22 Respondent when the aircraft was not in an airworthy condition,  
23 that being outside the requirements of the AD.

24 As to his operation and the circumstances, it is charged  
25 that the operation was careless and reckless, and I will discuss

1 that when I discuss the Regulations themselves.

2 I will turn now to that. Section 91.7 is charged as  
3 having been violated. It requires that no person may operate a  
4 civil aircraft unless it is in an airworthy condition. On the  
5 evidence in front of me by a preponderance the aircraft was not  
6 airworthy for the reasons I've already discussed and I, therefore,  
7 find that a violation of that Section of the Regulations has been  
8 established.

9 There's a charge of violation of Section 91.9(a) of the  
10 Regulations, which requires that no person may operate a civil  
11 aircraft without complying with the operating limitations in the  
12 approved airplane or rotorcraft flight manual, placards, and  
13 markings, or otherwise prescribed by the certificating authority.  
14 As I've already discussed, the Respondent, by exceeding the  
15 starter energize times in the required Flight Manual, is in  
16 regulatory violation of this Section, and I find that that  
17 violation is established.

18 On the admissions of the Respondent, it is admitted that  
19 the Flight Manual required was not aboard the aircraft. The  
20 evidence here is that he was never authorized to operate this  
21 aircraft without the required Rotorcraft Flight Manual being  
22 aboard. And, therefore, a violation of Part 91.9(b)(1) is clearly  
23 established. Subparagraph (d) charges a violation of Section  
24 39.7, which states that anyone who operates an aircraft that does  
25 not meet the requirements in the applicable Airworthiness

1 Directive is in violation of the Section. As I've already  
2 discussed, the evidence by a preponderance shows that there was  
3 never compliance with AD 72-19-01, the applicable AD, and,  
4 therefore, I do find that that regulatory violation is established  
5 with respect to that AD.

6           The last section is a charge of violation of 91.13(a),  
7 which prohibits operation of an aircraft in a careless or reckless  
8 manner so as to endanger the life or property of others. Potential  
9 endangerment is sufficient, and there only needs to be a  
10 reasonable connection between the operation and the potential  
11 endangerment. Operation in non-compliance with the specific  
12 requirements of the special flight permit, the ferry permit, that  
13 is not having the Flight Manual aboard and not knowing, by their  
14 own testimony, manuals being available to the people who are  
15 inspecting this aircraft, and carrying of two individuals contrary  
16 to the requirements of the Special Flight Permit, is at least  
17 potentially hazardous. There is a reason that this is a special  
18 flight permit. It's being operated under limited conditions, the  
19 conditions that there would be no passengers. I, therefore, find  
20 that there is a regulatory violation of Section 91.13(a).

21           Turning to the issue of sanction. Deference is to be  
22 shown to the Administrator's choice of sanction unless it is shown  
23 to be arbitrary or capricious or not in accordance with precedent.  
24 The sanction sought in this case is 150 days. I am aware of what  
25 is called out in the sanction guidance table. But I must take

1 into account here the fact that the Administrator, through Counsel  
2 this morning, struck from the Complaint the alleged violation of a  
3 second Airworthiness Directive. That changes the Order of  
4 Suspension, the Complaint. It is to be reasonably inferred that  
5 the sanction sought by the Administrator initially on the Order of  
6 Suspension, as issued, with violations of two Airworthiness  
7 Directives is what the Administrator was relying upon for  
8 imposition of 150 days suspension. Since only one Airworthiness  
9 Directive was proven as having been applicable and violated, this  
10 warrants a reduction in the period of time, and I will reduce the  
11 period of time and modify the Complaint and the Order of  
12 Suspension by modifying the period of suspension from that of 150  
13 days, the AD compliance being a significant violation, and,  
14 therefore, reduce it to a period of 120 days.

15 IT IS THEREFORE ADJUDGED AND ORDERED:

16 One, that the Order of Suspension, the Complaint herein,  
17 be, and the same hereby is, modified to provide for a period of  
18 suspension of 120 days, rather than 150 days.

19 Two, that the Order of Suspension, the Complaint herein,  
20 as modified, be, and the same hereby is, affirmed.

21 Entered this 4th day of October, 2007, in San Francisco,  
22 California.

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2 EDITED & DATED ON

3 OCTOBER 30, 2007

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Patrick G. Geraghty,

Administrative Law Judge