

SERVED: April 24, 2014

NTSB Order No. EA-5715

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

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 22nd day of April, 2014

_____)	
MICHAEL P. HUERTA,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-19479
v.)	
)	
LYN MICHAEL GERBER,)	
)	
Respondent.)	
)	
_____)	

OPINION AND ORDER

1. Background

Respondent appeals the oral initial decision of Administrative Law Judge Patrick G. Geraghty, issued September 25, 2013.¹ By that decision, the law judge determined the Administrator proved respondent violated 14 C.F.R. § 91.405(a) when he failed to have his

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

aircraft inspected after mechanics discovered discrepancies in three parts of the aircraft.² We deny respondent's appeal.

A. Facts

Respondent operated a Lear model 55 aircraft (hereinafter, "N905RL") on February 26, 2012, on two flights: one that departed and landed at Tucson International Airport in Tucson, Arizona, and a subsequent flight that departed from Tucson and landed at Phoenix Mesa Gateway Airport in Phoenix, Arizona. In the complaint, the Administrator alleged prior to both flights, staff at the Learjet, Inc. Tucson Service Center (hereinafter, "Service Center") identified three discrepancies on N905RL: (1) all four brake assemblies failed a brake inspection; (2) fuel "was seeping onto the hangar floor"³; and (3) "evidence of a hydraulic leak in the inboard left wing flap area."⁴ Respondent departed on both aforementioned flights without first having these discrepancies inspected and repaired.

On February 25, 2012, tires #3 and #4 on N905RL blew out on the taxiway at Tucson, and the aircraft experienced pressurization problems. Staff at the Service Center removed the main wheel assemblies for tires #3 and #4 and rebuilt them with new tires. As part of the routine inspection of the wheel assemblies, Peter Brake, a maintenance technician who holds an airframe and powerplant mechanic certificate, measured the brakes. Mr. Brake "referenced the [aircraft's] maintenance manual, turned on hydraulics, stepped on the brakes, pulled the parking brake lever,

² Section 91.405(a) states as follows:

Each owner or operator of an aircraft--

(a) Shall have that aircraft inspected as prescribed in subpart E of this part and shall between required inspections, except as provided in paragraph (c) of this section, have discrepancies repaired as prescribed in part 43 of this chapter.

³ Compl. at ¶ 4(b).

⁴ Id. at ¶ 4(c).

and went out to the brake calipers themselves and measured them with [his] micrometers.”⁵ Mr. Brake found all four brakes were beyond the limits set forth in the maintenance manual. Mr. Brake wrote the brake measurements on a piece of scratch paper. Mr. Brake then noticed fuel leaks on one of the aircraft’s wings; he believed the fuel was leaking from the “ropes themselves and from the panels.”⁶ Mr. Brake also saw a hydraulic fluid leak on the left-hand wing near the flap actuator. However, Mr. Brake did not investigate these leaks. On March 2, 2012, Mr. Brake drafted a brief statement summarizing his findings.

Mr. Brake gave the scratch paper with the brake measurements to his supervisor, Robert Duke, and informed Mr. Duke about the fuel seepage and hydraulic fluid. Mr. Duke observed the aircraft and did not notice a fuel leak, but saw a hydraulic fluid leak. Mr. Duke contacted respondent to inform him of the discrepancies and receive authorization to repair them.

Respondent testified he discussed the findings with Mr. Duke, and told Mr. Duke he was sure the appearance of a fuel leak was due to the fact the aircraft had been outside and the wings were full prior to the tire blow-out on the taxiway; therefore, the thermal expansion of the fuel caused it to seep. Regarding the hydraulic fluid leak, respondent told Mr. Duke he had maintenance performed on the aircraft; in particular, the spoileron actuator had been replaced, and the mechanic who changed the actuator had spilled fluid on the spoileron area, directly above the area of the flap. Finally, regarding the brakes, respondent did not believe the brakes were beyond permissible limits. However, respondent told Mr. Duke to change the brakes. Mr. Duke stated the Service Center did not have any “Dash 6” brakes in stock. When respondent offered to supply the brakes himself and bring them to the Service Center for installation,

⁵ Tr. 18.

⁶ Tr. 20.

Mr. Duke refused to install them. Respondent also testified Mr. Duke later informed him he had someone look at the brakes, and found they were suitable for test flight. In addition, respondent stated Mr. Duke told him to return the aircraft to respondent's facility, where he could get the brakes changed.⁷

Based on this discussion, respondent declined to have the Service Center repair the discrepancies they observed. Respondent signed the Service Center's "Departure Checklist," which included numerically coded references to the three open discrepancies.⁸ At the hearing, Steven Sager, a Service Center employee, identified a copy of the Service Order, which showed N905RL's brakes were beyond limits and listed the leaks.⁹ Mr. Sager provided both of these documents to respondent prior to respondent's first test flight on February 26, 2012.

On February 27, 2012, respondent called Stacey Skrocki, an aviation safety inspector in the Scottsdale Flight Standards District Office (FSDO), and informed her of the pressurization problem the aircraft experienced on February 25, 2012. Inspector Skrocki testified respondent did not mention the brakes, the fuel seepage, or the hydraulic leak. On March 6 or 7, 2012, respondent and Inspector Skrocki met at the FSDO and reviewed the invoice showing respondent paid \$6,250.00 on February 26, 2012 for work the Service Center performed.¹⁰ Three rows on the invoice stated as follows:

⁷ Tr. 198.

⁸ Exh. A-5 at Item 11 (stating, "During inspection and/or maintenance to the above listed aircraft, the following discrepancies were recorded but not corrected: 0004, 0005, 0006").

⁹ Exh. A-4 at 4 (stating, "0004-ALL 4 BRAKE ASSEMBLIES FAIL BRAKE INSPECTION/CHECK"), 5 (stating, "0005-FUEL SEEPING ONTO HANGAR FLOOR"), and 6 (stating, "0006-EVIDENCE OF HYDRAULIC LEAK L WING FLAP AREA (INBD)").

¹⁰ Exh. A-3.

REPLACE 4 EA BRAKE ASSEMBLIES (EXCHANGE) *DID NOT WORK*
HYDRAULIC FLUID RUNNING OUT FROM L/H FLAP ACTUATOR
ACCESS PANEL *DID NOT WORK*
INSTALL PRESS CONTROLLER AND F/T *DID NOT WORK*

Inspector Skrocki also testified concerning the “List of Open Discrepancies” the Service Center provided to respondent, which included the brake discrepancies and leaks.¹¹ Inspector Skrocki did not view the aircraft’s logbook and did not inspect the aircraft. At the hearing, she reviewed the portion of the Service Center’s Departure Checklist, which had an “X” to indicate the Service Center returned the aircraft to service under “135.411CAMP,” but did not know if the aircraft was part of a continuous aircraft maintenance program (CAMP).¹²

B. Procedural Background

The Administrator issued the suspension order on April 16, 2013. Based on the allegations, the order sought a 75-day suspension of respondent’s airline transport pilot (ATP) certificate. Respondent appealed. The parties engaged in discovery, during which respondent sought a subpoena for documents from the Scottsdale FSDO concerning the FSDO’s investigation of the Service Center. The law judge initially granted the subpoena, but then granted the Administrator’s motion to quash it, finding the FSDO’s investigation of the Service Center was not relevant to whether the Administrator could prove the facts alleged.

¹¹ Exh. A-6.

¹² Tr. 133. Aircraft operating under a CAMP must fulfill certain requirements, listed in 14 C.F.R. § 135.411, and are identified on the operator’s operations specifications. Such aircraft undergo inspections and maintenance pursuant to an approved aircraft inspection program. 14 C.F.R. § 135.419. An aircraft operating under a CAMP is not subject to the same maintenance requirements to which aircraft operating solely under 14 C.F.R. part 91 are subject.

C. Law Judge's Initial Decision

Following the hearing, the law judge issued an oral initial decision, finding respondent violated 14 C.F.R. § 91.405(a), as charged. The law judge determined respondent did not operate N905RL pursuant to a CAMP; therefore, he found 14 C.F.R. § 91.401 did not apply to the case *sub judice*.¹³ Similarly, in response to respondent's contention the staff at the Service Center violated 14 C.F.R. § 43.11 by failing to make certain specific maintenance entries in the logbook for N905RL when returning the aircraft to service, the law judge determined the lack of a logbook entry did not excuse respondent's violation of § 91.405(a). The law judge further stated any Service Center errors did not justify respondent's operation of the aircraft on February 26, 2012.

The law judge specifically found Mr. Brake's testimony credible. The law judge acknowledged Messrs. Brake and Duke misplaced the record on which Mr. Brake had written the brake pad measurements; however, the law judge nevertheless credited Mr. Brake's recollection of the fact he measured the brake pads with a micrometer and determined they were beyond the limits set forth in the maintenance manual. The law judge also stated the testimony of Cesar Rodriguez,¹⁴ Ms. Skrocki, and Mr. Sager all consistently established respondent received records from the Service Center listing the open discrepancies.

Conversely, the law judge determined respondent's testimony lacked credibility. The law judge recalled respondent said the brakes looked fine to him, but conceded he did not perform a

¹³ Initial Decision at 260. Section 91.401 states, in part, "[s]ections 91.405, 91.409, 91.411, 91.417, and 91.419 of this subpart do not apply to an aircraft maintained in accordance with a continuous airworthiness maintenance program as provided in part 121, 129, or §§ 91.1411 or 135.411(a)(2) of this chapter." As a result, the law judge determined the "X" selection the Service Center made on the Aircraft Departure Checklist (Exh. A-5) was made in error.

¹⁴ Mr. Rodriguez, who testified at the hearing, was, at the time of the flights at issue, a project manager at the Service Center.

measurement of the brake pads. The law judge also stated respondent did not recall seeing a list of discrepancies, notwithstanding the contrary testimony of the Administrator's witnesses. In addition, the law judge found not credible the fact respondent did not review the invoice, which contained the list of discrepancies and summarized the work for which he paid over \$6,000.

The law judge rejected respondent's affirmative defense of reasonable reliance, stating the defense of reasonable reliance is narrow, and "there was nobody to rely on" because respondent declined to have the discrepancies repaired in the first place.¹⁵ Therefore, he held respondent was obligated to resolve the discrepancies identified by the Service Center.

D. Issues on Appeal

Respondent contends both 14 C.F.R. §§ 135.411(a) and 43.11 function to excuse the application of § 91.405(a) to his February 26, 2012 flights. Respondent also asserts the law judge's credibility determinations were erroneous, and he reasonably relied upon Mr. Duke's indication the discrepancies had been resolved. Respondent further contends the law judge inappropriately granted the Administrator's motion to quash a subpoena respondent sought. Finally, respondent contends the law judge's determinations were the result of a bias the law judge harbored against respondent throughout the hearing.

2. Decision

We review this case, as a whole, under *de novo* review.¹⁶

¹⁵ Initial Decision at 275.

¹⁶ Administrator v. Smith, NTSB Order No. EA-5646 at 8 (2013), Administrator v. Frohmuth and Dworak, NTSB Order No. EA-3816 at 2 n.5 (1993); Administrator v. Wolf, NTSB Order No. EA-3450 (1991).

A. *Application of 14 C.F.R. §§ 43.11(a) and 135.411(a)*

1. *Section 43.11(a)*

Title 14 C.F.R. § 43.11(a) states, “[t]he person approving or disapproving for return to service an aircraft ...after any inspection performed in accordance with part 91, 125, § 135.411(a)(1), or § 135.419 shall make an entry in the maintenance record of that equipment” and lists several items the maintenance entry must include. For example, the record must include the date of the inspection, the signature and certificate type of the person who approved the aircraft’s return to service, and a specific statement indicating the aircraft was inspected and found to be in airworthy condition.

Respondent contends § 43.11(a) required such a maintenance record entry for the February 25, 2012 inspections the Service Center conducted. Respondent claims he relied on this requirement, and therefore determined the Service Center must not have conducted an inspection and found the aircraft had open discrepancies. In response, the Administrator contends § 43.11(a) does not apply to this case, because the section only applies to regularly required inspections, rather than assessments performed following an event such as the tire blow-out and pressurization issues, resulting in the Service Center’s work on N905RL.

We find the requirement of § 43.11(a) did not obviate respondent’s duty to ensure the open discrepancies were resolved prior to his operation of the aircraft. The law judge held, and we agree, § 91.405(a) applies to all inspections occurring as a result of an intervening event between required inspections. In this regard, the law judge stated:

Section 43.11 ... does not apply to this case; it refers to different inspections, that is, required inspections. We are talking about inspections of items that might come up between mandatory or required inspections. That is, if a discrepancy occurs, one needs to have it addressed and not wait until the next mandatory inspection, which could be a week, but it could easily be a matter of months. So

obviously Section 91.405 is designed to have potentially hazardous discrepancies at least addressed and resolved one way or the other.¹⁷

Section 43.11(a) is a requirement applicable to mechanics, obligating them to record information concerning required, regular inspections. Staff at the Service Center did not record in the logbook for N905RL that the aircraft underwent an inspection and they found it airworthy.¹⁸ Even assuming, *arguendo*, the Service Center violated § 43.11(a) by failing to complete the record, we find this did not excuse respondent's duty to comply with § 91.405(a).

2. Section 135.411

As stated above, aircraft operating under a CAMP under 14 C.F.R. § 135.411, must fulfill certain requirements, such as regular inspections and maintenance. Such aircraft are not subject to the requirements of § 91.405(a). Mr. Sager acknowledged he marked a box on the Departure Checklist¹⁹ indicating the aircraft was part of a CAMP. Notwithstanding this selection on the checklist, at the hearing, Mr. Sager did not know if N905RL was part of a CAMP.²⁰ Furthermore, we note respondent serves as the director of operations for Jet Team, Inc., an air carrier operating under 14 C.F.R. part 135. N905RL is listed on the operations specifications for Jet Team,²¹ which state “[t]he certificate holder is *not authorized* and *shall not* ... [c]onduct

¹⁷ Initial Decision at 260.

¹⁸ To the contrary, Mr. Sager stated he noted “NO INSPECTIONS” twice on the Aircraft Departure Checklist to indicate the aircraft was not at the Service Center for a “phase inspection,” but was only there for maintenance. Tr. 155 (describing Exh. A-5).

¹⁹ Exh. A-5.

²⁰ Tr. 153.

²¹ Exh. R-2 at 23.

continuous airworthiness maintenance programs.”²² Based on this prohibition, we find no CAMP applies to N905RL and thus § 91.405(a) is applicable to the aircraft.

B. *Credibility Determinations*

We defer to the credibility findings of our law judges in the absence of a showing such findings are arbitrary and capricious.²³ In the case *sub judice*, the law judge expressly determined the testimony of Mr. Brake was credible,²⁴ and respondent’s testimony lacked credibility.²⁵ The law judge provided specific reasons for his findings. In particular, he found the statement Mr. Brake wrote on March 2, 2012 was consistent with Mr. Brake’s testimony at the hearing. With regard to respondent’s testimony, the law judge found respondent’s assertion that he did not read the invoice from the Service Center, yet he initialed it, lacked credibility. Furthermore, the law judge found not credible respondent’s assertion he did not receive the List of Open Discrepancies, as it contradicted Mr. Sager’s specific recollection that he handed the list to respondent, and they discussed it. As we stated in Porco, we will not disturb such credibility determinations tied to factual findings supported by the record. Here, we find the law judge’s findings were not arbitrary and capricious.

C. *Affirmative Defense of Reasonable Reliance*

Respondent contends he relied on the fact the Service Center staff returned the aircraft to service and did not list discrepancies in the logbook. This, he contends, indicated he could therefore operate the aircraft on February 26, 2012, and address the discrepancies later.

²² Exh. R-12 at 20, 23 (emphasis in original).

²³ Administrator v. Porco, NTSB Order No. EA-5591 at 13-20 (2011), aff’d, Porco v. Huerta, 472 Fed.Appx. 2 (D.C. Cir. 2012) (per curiam).

²⁴ Initial Decision at 262, 274.

²⁵ Id. at 266, 274.

Respondent also argues he reasonably relied upon the Service Center staff's advice that he should test-fly the aircraft and then take it home to resolve the discrepancies.

Reasonable reliance is an affirmative defense, which, if proven, can excuse a respondent's admitted violation. In asserting an affirmative defense, the burden shifts to the respondent to prove such an affirmative defense by a preponderance of evidence.²⁶ We have held a respondent must fulfill the burden of proving the factual basis for the affirmative defense, as well as the legal justification.²⁷

Our doctrine of reasonable reliance is one of narrow applicability.²⁸ In the controlling case concerning reasonable reliance, Administrator v. Fay and Takacs, the Board held, "[i]f ... a particular task is the responsibility of another, if the [pilot-in-command] has no independent obligation ... *or* ability to ascertain the information, and if the captain has no reason to question the other's performance, then and only then will no violation be found."²⁹ In determining whether reliance was reasonable, we consider the facts of each case and the entire circumstances surrounding the alleged violation.³⁰ We have held the doctrine also may apply to cases

²⁶ Administrator v. Hermance, NTSB Order No. EA-5706 (2014); Administrator v. Tsegaye, NTSB Order No. EA-4205 at 5-6 (1994) (stating once the Administrator establishes a *prima facie* case, the burden shifts to the respondent, who has the opportunity to prove an affirmative defense excuses his conduct).

²⁷ Administrator v. Donohue, et al., NTSB Order No. EA-5314 at 9 (2007).

²⁸ Administrator v. Angstadt, NTSB Order No. EA-5421 at 18-19 (2008), pet. for review denied, Angstadt v. FAA, No. 09-1005, 348 Fed.Appx. 589 (D.C. Cir. Sept. 24, 2009) (per curiam).

²⁹ NTSB Order No. EA-3501 at 10 (1992) (emphasis in original).

³⁰ Administrator v. Haddock, NTSB Order No. EA-5596 (2011).

“involving specialized, technical expertise where a flight crew member could not be expected to have the necessary knowledge.”³¹

In the case *sub judice*, we find the law judge correctly summarized and applied the reasonable reliance test. Respondent, as pilot-in-command, had the duty to ensure the safe operation of his aircraft when he left Tucson.³² Such assurance required resolving discrepancies that may affect the safe operation of the aircraft. In this case, respondent does not deny Mr. Duke discussed with him the Service Center’s finding that the brakes on N905RL were worn beyond the limits. Respondent challenges Mr. Duke’s estimate that the brakes measured beyond limits, because he saw the distance between the brake housing and pressure plate, and found it sufficient.³³ However, as stated above, the law judge’s credibility finding was the pertinent factor in resolving this issue. The law judge determined Mr. Duke’s recollection the aircraft’s brake pads exceeded the permissible limits was credible, and respondent’s testimony in this regard was not credible.

After assessing the brakes himself, respondent declined to have the discrepancy inspected further and repaired. He testified Mr. Duke told him to test-fly the aircraft with a Service Center employee and then take the aircraft home to repair it. Mr. Duke confirmed he suggested respondent “take the aircraft up with a tech” to assess the pressurization and ensure the facility

³¹ Supra note 29 at 9.

³² Title 14 C.F.R. § 1.1 defines “pilot in command” as follows:

Pilot in command means the person who:

- (1) Has final authority and responsibility for the operation and safety of the flight;
- (2) Has been designated as pilot in command before or during the flight; and
- (3) Holds the appropriate category, class, and type rating, if appropriate, for the conduct of the flight.

³³ Tr. 200, 226.

had resolved the pressurization discrepancy.³⁴ However, Mr. Duke's notes, which he drafted on March 2, 2012, indicate it was respondent's idea to take the aircraft home for repairs. According to Mr. Duke's notes, respondent replied "I'm surprised, as we checked the brakes using the pen method ... we will take care of brakes when aircraft returns to our home base"³⁵ in response to Mr. Duke informing respondent the brakes were below minimum. The law judge determined Mr. Duke's testimony concerning his recollection was credible, while respondent's lacked credibility. Based on this finding, we reject respondent's affirmative defense.

D. Law Judge's Ruling on Subpoena Duces Tecum

Our law judges have significant discretion in conducting hearings and overseeing discovery. In this regard, we typically review our law judges' evidentiary or procedural rulings under an abuse of discretion standard, after a party can show such a ruling prejudiced him or her.³⁶ NTSB administrative law judges must apply the Federal Rules Civil Procedure and the Federal Rules of Evidence in each case, since the passage of the Pilot's Bill of Rights in 2012.³⁷

Respondent contends the law judge erred in granting the Administrator's motion to quash a subpoena duces tecum the law judge originally had granted for respondent. On appeal, respondent contends he needed to obtain "any documentation regarding investigation by the

³⁴ Tr. 78; Exh. R-2 at 34 (Mr. Duke's notes, which state, "I suggested that we perform a 'test flight' on Sunday with a tech on board to verify pressurization issue").

³⁵ Exh. R-2 at 33.

³⁶ See, e.g., Administrator v. Giffin, NTSB Order No. EA-5390 at 12 (2008) (citing Administrator v. Bennett, NTSB Order No. EA-5258 (2006)); Administrator v. Martz, NTSB Order No. EA-5352 (2008); Administrator v. Zink, NTSB Order No. EA-5262 (2006); Administrator v. Van Dyke, NTSB Order No. EA-4883 (2001); see also Lackey v. FAA, 386 Fed. Appx. 689, 2010 WL 2781583 (9th Cir. 2010).

³⁷ Pub. L. No. 112-153, 126 Stat. 1159, § 2(a) .

FAA into [the Service Center] or any of its employees related to N905RL.”³⁸ The law judge determined this request was irrelevant to the case *sub judice*, because respondent’s appeal was not related to any FAA investigation of the Service Center. Respondent contends this ruling was erroneous, because our Rules of Practice state subpoenas may be issued upon a showing of the relevance and the reasonable scope of the evidence sought.³⁹ In addition, respondent cites Federal Rule of Civil Procedure 26(b)(1), which provides a party is entitled to discover any evidence that appears “reasonably calculated to lead to the discovery of admissible evidence.” Respondent surmises investigation documents that may exist concerning the Service Center could inform him of mistakes the Service Center may have made in examining N905RL and completing the Aircraft Departure Checklist.

We do not find the law judge abused his discretion or misapplied our Rules of Practice or the Federal Rules of Civil Procedure in denying respondent’s subpoena. The Administrator’s investigation, if the Administrator pursued one, of any violations the Service Center may have committed is a matter between the Administrator and the Service Center. Respondent failed to show the relevance of any such FAA investigation to the case at issue. If the Service Center incorrectly completed paperwork applicable to N905RL, respondent, at the hearing, had the opportunity to cross-examine the Service Center employees who testified in an attempt to prove such a theory. Furthermore, we find respondent’s attorney, in fact, took advantage of these opportunities at the hearing.⁴⁰ Additionally, respondent has not established the law judge’s denial of the subpoena prejudiced him. Based on these facts, and the significant discretion we

³⁸ Appeal Br. at 13.

³⁹ In his appeal brief, respondent cites 49 C.F.R. § 821.21. However, the section of our Rules of Practice concerning subpoenas is codified at 49 C.F.R. § 821.20(a).

⁴⁰ See, e.g., tr. 33, 87, 101, 115, 127, 132, 154, 156, 158, 161.

provide law judges concerning their evidentiary and procedural rulings, we do not believe the law judge erred in granting the Administrator's motion to quash the subpoena.

E. *Bias*

Respondent further contends the law judge exhibited bias against his case throughout the hearing. Regarding allegations of bias, we have held in order to disqualify a law judge for bias or prejudice, "the bias or prejudice must stem from an extra-judicial source and result in an opinion on the merits on some basis other than what the judge has learned from his or her participation in the case."⁴¹

Concerning the actual evidentiary rulings, respondent argues the law judge erred in sustaining the Administrator's attorney's objection concerning a question about the documents the Service Center completed. Respondent sought to inquire of Mr. Duke about why, in the Preliminary Inspection Findings list, six discrepancies were listed, but only three discrepancies appeared on the Aircraft Departure Checklist. The law judge determined the questions were irrelevant, because the Administrator's complaint only based respondent's alleged violation of § 91.405(a) on three open discrepancies, not six.⁴²

Respondent also contends the law judge improperly considered Exhibit R-12, a copy of the Jet Team, Inc. Operations Specifications, with regard to its prohibition on N905RL being part of a CAMP. At the conclusion of the hearing, the law judge stated he would receive all the exhibits respondent offered, but not "attach any weight" to the exhibits about which no one

⁴¹ Administrator v. Lackey, NTSB Order No. EA-5419 at 11 (2008), aff'd, Lackey v. FAA, 386 Fed. Appx. 689, 2010 WL 2781583 (9th Cir. 2010); see also Administrator v. Steel, 5 NTSB 239, 243 n.8 (1985).

⁴² Tr. 80.

testified, referenced, or argued.⁴³ Respondent briefly discussed Exhibit R-12 during his testimony, and the Administrator's attorney referenced Exhibit R-12 during closing argument.

We do not find the law judge's evidentiary rulings concerning the questions about the preliminary inspection list and the admission of Exhibit R-12 were an abuse of discretion or were the result of bias. The law judge correctly determined questions about items on the preliminary inspection list were irrelevant, because the Administrator did not allege those items as discrepancies in the complaint. Furthermore, respondent failed to articulate how the law judge's exclusion of such questions prejudiced his case. In addition, respondent's contention the law judge erred in considering Exhibit R-12 is paradoxical, because respondent's attorney expressly relied on the exhibit at the hearing.⁴⁴ These rulings do not amount to an abuse of discretion or judicial bias.

As for the law judge's conduct at the hearing, the hearing transcript shows the law judge exhibited a brisk demeanor toward both attorneys. However, he explained his reasoning for his findings on the issues respondent argued, and provided a detailed decision containing analysis and rationale for his conclusions. The record also shows the law judge explained his bases for his evidentiary rulings. In addition, the law judge issued several evidentiary rulings in respondent's favor.⁴⁵ Overall, respondent has not established the law judge's denial of his appeal was the result of any judicial bias.⁴⁶

⁴³ Tr. 257.

⁴⁴ Tr. 255.

⁴⁵ Tr. 33, 52, 77, 88-89, 101, 129, 149, 189.

⁴⁶ In his appeal brief, respondent contends the law judge motioned at the Administrator's attorney during the hearing, silently indicating the Administrator's attorney should object to a question respondent's attorney asked. Respondent also alleges, after the conclusion of the hearing, the law judge made a gesture at the Administrator's attorney and laughed with him. Given the clear

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;
2. The law judge's order is affirmed.⁴⁷

HERSMAN, Chairman, HART, Vice Chairman, and SUMWALT, ROSEKIND, and WEENER, Members of the Board, concurred in the above opinion and order.

(continued..)

testimonial and documentary evidence establishing the allegations in this case, we find any such alleged misbehavior on the part of the law judge did not inappropriately effect the outcome of this case.

⁴⁷ 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).

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

* * * * *

In the matter of: *

MICHAEL P. HUERTA, *
ADMINISTRATOR, *
FEDERAL AVIATION ADMINISTRATION, *

Complainant, *

v. *

Docket No.: SE-19479
JUDGE GERAGHTY

LYN M. GERBER, *

Respondent. *

* * * * *

U.S. Tax Court
Sandra Day O'Connor Courthouse
401 West Washington Street
Courtroom 406
Phoenix, Arizona

Wednesday,
September 25, 2013

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

BEFORE: PATRICK G. GERAGHTY,
Administrative Law Judge

APPEARANCES:

On behalf of the Administrator:

ADAM RUNKEL, ESQ.
Office of the Regional Counsel
Federal Aviation Administration
Western Pacific Region
15000 Aviation Boulevard
Hawthorne, CA 90250
Tel: 310-725-7142
Fax: 310-725-6816
adam.runkel@faa.gov

On behalf of the Respondent:

PAUL S. ROWLEY, ESQ.
JOSHUA BOYLE, ESQ.
63 East Main Street, Suite 501
Mesa, AZ 85201
Tel: 480-833-1113
Fax: 480-833-1114

1

2

3

4

ORAL INITIAL DECISION AND ORDER

5

ADMINISTRATIVE LAW JUDGE GERAGHTY: This has been a proceeding before the National Transportation Safety Board on the Appeal of Lyn M. Gerber, herein Respondent, from an Order of Suspension which seeks to suspend his Airline Transport Pilot Certificate for a period of 75 days. The Order of Suspension serves as the Complaint herein and was issued on behalf of the Administrator, Federal Aviation Administration, herein the Complainant.

13

The matter has been heard before this Administrative Law Judge and, as provided by the Board's Rules, I am issuing a bench decision in the proceeding.

16

Pursuant to notice, this matter came on for hearing on September 25, 2013, in Phoenix, Arizona. The Complainant was represented by one of its Staff Counsel, Adam Runkel, Esquire, of the Western Pacific Region, Federal Aviation Administration. The Respondent was present at all times as was represented by his Counsel, Paul S. Rowley, Esquire, and Josh Boyle, Esquire, both of Mesa, Arizona.

23

The Parties have been afforded full opportunity to offer evidence, to call, examine and cross-examine witnesses, and to make argument in support of their respective positions.

25

1 subsequently.

2 With respect to the applicability of the Regulation,
3 Federal Aviation Regulation, FAR 91.405(a), I find on the legal
4 argument that that Federal Aviation Regulation is applicable to
5 the operation done by the Respondent on the dates alleged. First
6 of all, Section 43.11 FAR does not apply to this case; it refers
7 to different inspections, that is, required inspections. We are
8 talking about inspections of items that might come up between
9 mandatory or required inspections. That is, if a discrepancy
10 occurs, one needs to have it addressed and not wait until the next
11 mandatory inspection, which could be a week, but it could easily
12 be a matter of months. So obviously Section 91.405 is designed to
13 have potentially hazardous discrepancies at least addressed and
14 resolved one way or the other.

15 Also with respect to the supposed Continuous
16 Airworthiness Maintenance Program, under the provisions of Section
17 91.401, CAMP does not apply to this aircraft. If you look at
18 Exhibit R-12, page 23, the Operations Manual, which the Respondent
19 would be charged with having knowledge of -- he's been flying
20 Learjets for, I think he said, 18 years, he's type-rated, and he's
21 operating, so he's charged with knowledge of the Operating Manual.
22 And page 23, specifically in the nonapplicable section, states
23 CAMP does not apply to this aircraft, Section 91.405(a) does, and
24 we proceed with that understanding.

25 Secondly, I would observe that if in the presentation of

1 the evidence in this case it appears that there were any
2 violations performed by personnel of Bombardier Aerospace or
3 Learjet, those are not issues in this case. Those violations
4 would be chargeable to those particular individuals and would not
5 excuse the Respondent from whatever duties he had as pilot in
6 command with the alleged resolution of these charged and alleged
7 discrepancies. It is not up to the Board to tell the FAA what to
8 do with possible violations. That is a determination of the
9 Administrator, and whether they pursue those or don't pursue those
10 is strictly within the discretion of the Federal Aviation
11 Administration. What the main thing is, is that -- and I make no
12 finding as to whether Bombardier or Learjet did or did not comply
13 with any requirements, but if they did, they are not sufficient to
14 excuse any duty imposed upon the Respondent. Those would be
15 separate violations for those individuals.

16 Turning, then, to the evidence in the case, Mr. Brake
17 testified that he was the maintenance tech who actually inspected
18 the brakes after this aircraft had blown some tires out on a
19 landing in Tucson. He testified that the lower limits were .0492,
20 and the highest a .502, and that these exceeded the limits for the
21 manual. The manual excerpt was received as A-1, page 1. He also
22 testified he used a micrometer, which had been calibrated, on his
23 testimony, used to determine the fact that the brakes were out of
24 compliance with their requirements.

25 I also find that the statement that he made, which is

1 included in the Respondent's Exhibits, is consistent with his
2 testimony here today. I know he said that he wrote it down on a
3 piece of paper, which apparently was disposed of or lost; however,
4 his statement just a month or so after his actual measurements is
5 consistent with his testimony. And there's no showing that he in
6 fact could not remember what he did on this particular inspection.
7 So I find his testimony credible.

8 He testified that he informed one of the supervisors,
9 Mr. Duke, of the discrepancies that are listed on A-2 on the
10 morning of February 26, and it was his overall opinion that, based
11 upon his inspection, that the brakes needed to be replaced before
12 the aircraft could be operated again.

13 On cross-examination, he reiterated that he had
14 inspected the brakes, although he wasn't sure of the model of the
15 aircraft, but he again stated that he had used a digital
16 micrometer and that he recorded that and passed that on to
17 Mr. Duke, and somewhere between him and Mr. Duke the slip of paper
18 with the actual recordation was lost, and I've already discussed
19 that.

20 He stated that he found from the maintenance manual that
21 .464 was a number that was to be used and that his finding was
22 .500 on his micrometer measurements. And I would observe here
23 that this is the only witness that actually used any approved
24 device to measure the brakes. Anybody else used either a pen or
25 simply looked, and I'll discuss that subsequently. In any event,

1 he did testify that with respect to Administrator's A-2, page 1,
2 that he did not do any of the items listed as 2 and 3, and that he
3 did check "Found Discrepancies" in the box which appears on page
4 1.

5 Mr. Duke testified. He is employed by Bombardier
6 Aerospace. He's a General Supervisor, been in that position since
7 2004. He has a crew that he supervises and they work on all
8 models of Learjets, and part of his duty is to communicate with
9 customers, which Respondent would have been on February 24, 25,
10 26, at Bombardier.

11 Mr. Duke testified the aircraft was in their hangar, it
12 was Hangar D, and there's no indication as to Hangar D being
13 painted. Nobody has testified that Hangar D was being painted.
14 There was just a statement made by somebody, and nobody was ever
15 identified, as to a painted hangar. Nobody identified it as
16 Hangar D. In any event, Mr. Duke testified he started a work
17 package.

18 With respect to his discussions with the Respondent,
19 Mr. Duke testified that he discussed on A-2 the items with him,
20 that particularly all four brakes had failed the inspection test.
21 Mr. Duke testified that the Respondent stated that he would have
22 the work done subsequently at their home base where they had brake
23 pads there, but also that, according to Mr. Duke, they couldn't
24 begin working on any of these items because there was some kind of
25 an accounting problem, but that was essentially ultimately

1 resolved.

2 Mr. Duke stated he didn't recall any discrepancy about
3 the fuel but that he did discuss the possible hydraulic leak
4 discrepancy with the Respondent and that the Respondent declined
5 having Bombardier or Learjet do an inspection or any work in
6 reference to the possible hydraulic discrepancy.

7 With respect to Administrator's A-3, which is the
8 spreadsheet and also a credit card statement showing a payment of
9 \$3,750 for the work performed, Mr. Duke testified that he
10 discussed this spreadsheet with the Respondent and that he,
11 Mr. Duke, had created this, and that the entries where there's no
12 initials show that no work was done, and that these were accurate
13 in his conversation discussing that with the Respondent.

14 He also acknowledged that the Respondent had indicated
15 to him that the hydraulic leak could be a leftover from some work
16 that had been done previously, that is, residual. And also, I'll
17 mention here that the Respondent did indicate to him that from the
18 wet wing, that because he had mismanaged some of the fuel supply,
19 getting it from the wing into the trunk tank, that it could be
20 simply expansion due to climatic conditions.

21 On cross-examination, he testified that he did not
22 personally inspect but he did observe the hydraulic leak, and
23 referring to Respondent's Exhibit R-2, page 33, he indicated that
24 he in fact had typed those entries through the time sections there
25 that are indicated, and the ones appearing on page 33 and 34

1 reference to the conversations or phone calls that he had with the
2 Respondent. And particularly to the time phone call of 11:27,
3 Mr. Duke stated this was the first phone call that he received
4 from the Respondent, and that at that time and in that phone call,
5 he had informed the Respondent of the Bombardier findings with
6 respect to the brakes on the aircraft.

7 With respect to R-5, page 1, Paragraph C, Mr. Duke did
8 indicate on cross-examination that he didn't recall whether or not
9 an out-of-service tag had been placed on the aircraft. He also
10 states that he did record in the logbook the work that they had
11 performed, which was on the four tires replacement. With respect
12 to R-2, page 45, as also A-4, he stated that he did not give a
13 copy of this document to the Respondent but that he did show on
14 these forms that the aircraft had been returned to service.

15 Mr. Rodriguez is an Operations Manager with Bombardier.
16 He's been in that position for 2 months, and prior to that from, I
17 think, 2012 he was a Project Manager. He did work on this
18 particular aircraft, 05-Romeo-Lima. With respect to A-3, the
19 squawk sheet, Mr. Rodriguez states that he gave this sheet to the
20 Respondent on Sunday, and that was never contradicted. And with
21 respect to A-3, he testified that the initials in the box,
22 initials okay to do the work are the initials from the Respondent,
23 and that he observed the Respondent do these initialings in front
24 of him, Mr. Rodriguez. Mr. Rodriguez testified that the initials
25 were to approve the work that was actually done. So the boxes

1 with initials are the work that was performed by Bombardier.

2 The noninitialed boxes, which are items 2 and 3, and
3 also 5, are not initialed, and therefore those items were not
4 worked on by Bombardier, which means they were not inspected.
5 Now, the testimony, and I'll reference that briefly here, from the
6 Respondent is that he didn't read this, yet we have the initials.
7 So I don't know how you would initial a form and not see the form,
8 and particularly initialing a form giving charges for a total
9 estimate down here when you get 3,000-something for labor and
10 another couple thousand for parts and a grand total of over
11 \$6,000, that any normal person would, I think, take a look at a
12 document to see what I'm being charged \$6,000 for. So I don't
13 believe it is credible to accept the testimony of the Respondent
14 that he did not observe what is plainly on this document, A-3,
15 particularly in light of Mr. Rodriguez's testimony.

16 Mr. Rodriguez also stated he was aware of a possible
17 discrepancy of the fuel leak and that he had discussed it with the
18 Respondent and the Respondent had directly told us, meaning
19 Bombardier, not to work on it, meaning not to inspect it. With
20 the pressurization, he indicated that he had the Respondent sign
21 the sheet about the pressurization, and there's no question that
22 the presumed pressurization problem had in fact been worked on by
23 Bombardier.

24 On cross-examination, Mr. Rodriguez indicated he had
25 never looked at the aircraft logbooks. R-2, 37 was admitted by

1 him as being his written statement, which he states had been done
2 some months ago, with no real number as to that. As to the
3 release of the aircraft to the Respondent, upon Mr. Rodriguez's
4 testimony, that was done by the quality assurance department and
5 not by him. And with respect to R-5, C, he did indicate that he
6 didn't put any out-of-service tag on the aircraft and, in fact, he
7 did not recall ever seeing one.

8 On redirect, referencing R-1, page 25, he stated that he
9 had written the corrective actions on there and that we, meaning
10 Bombardier, were not authorized to do any work on the brakes, and
11 that would be authorized by the Respondent.

12 Ms. Stacey Skrocki is employed by the FAA at the
13 Scottsdale FSDO. She had one phone conversation with the
14 Respondent and also one face-to-face meeting with the Respondent.
15 The first phone call was only about the pressurization possible
16 problem. In the second meeting, which was on, I believe, March 6,
17 a discussion was had with the Respondent considering both the
18 brakes, the fuel, and the hydraulic leak possibilities. She
19 indicated that he discussed the brakes being out of limits, with
20 Lear not having the pads and that it was going to be subsequently
21 done; also that, in his view, in his talk with Ms. Skrocki, that
22 the hydraulic leak was a residual from prior work and that the
23 fuel spillage, if there was any, was due to his, the Respondent's,
24 mismanagement of the fuel system, as I've already mentioned.

25 With respect to Exhibit A-3, on her testimony this was

1 discussed with the Respondent and the Respondent stated that he
2 had received a copy of the document before he departed from
3 Tucson. She also had asked him whether he received a copy of A-6,
4 which is a list of open discrepancies, and according to her
5 testimony, which was not contradicted, that when inquired as to
6 whether the Respondent got a copy of this, he indicated that he
7 had received a copy of this prior to his departure on February 26.

8 On cross-examination, Ms. Skrocki, in response to the
9 questioning, gave her opinion that an open discrepancy on the
10 aircraft renders the aircraft unairworthy and that it was her
11 position. And she conceded that during her interviews with the
12 Respondent, the Respondent was cooperative with the Federal
13 Aviation Administration.

14 Mr. Sager is also employed by Bombardier Aerospace. He
15 was familiar with the aircraft and referred to Exhibit A-4,
16 referencing the seven pages of that document and, going through
17 each of these documents, did indicate as to what work was not
18 done. For example, on page 4, all four brake assemblies are noted
19 as a discrepancy, failed brake inspection check, but no work done
20 on it. The fuel seeping onto the hangar floor was listed as a
21 discrepancy, with no work. And also evidence of a hydraulic leak
22 on the, I believe, left wing flap area, and no work done on that.
23 And, of course, the logbook entry as signed off by Mr. Sager only
24 shows the work done in the replacement of four tires. So his
25 testimony is consistent with that.

1 Mr. Sager stated that he in fact had given a copy of
2 A-4, all seven pages, to the Respondent prior to the Respondent's
3 departure, and conceded that he was aware of the maintenance
4 flight and that he was aware of the release of the aircraft and
5 the discrepancies prior to that flight. He stated that he had
6 discussed the discrepancies with the Respondent and gave him a
7 list of the open discrepancies and the Respondent had stated to
8 him, Mr. Sager, that these would be addressed at the aircraft's
9 home base or facilities at a later date, again referencing A-6 as
10 a list of open discrepancies which he stated had been given to the
11 Respondent listing the work that had not been done and giving that
12 to the Respondent prior to the maintenance flight.

13 This witness also discussed Exhibit A-5, which is the
14 Aircraft Departure Checklist, and it does show in box 5 an
15 approval for a return to service under Section 135.411 CAMP, but
16 that's Bombardier's entry. On the evidence in front of me, CAMP
17 does not apply, as I've already discussed and I don't need to
18 review. But, in fact, the aircraft was returned to service
19 because that block is checked "yes." However, what is also to be
20 noted on block 9, no inspections as being done, and airworthiness
21 directives between biweekly, no inspections. And then listed in
22 item 11, and this is the part that Mr. Sager indicates that he
23 discussed on this form with the Respondent, item 11, he informed
24 the Respondent to see the numbers 004, 005, 006, and these refer
25 back to Exhibit A-4, the pages -- for example, 0004 is the all

1 brake assemblies failure inspection check and the corrective
2 action, no work done. So on Mr. Sager's testimony, the
3 Respondent, between A-4 and A-5, was being told that these
4 possible discrepancies had not in fact been addressed.

5 On cross-examination, the witness indicated that the
6 items as no inspections simply meant that the aircraft had not
7 been brought to their facilities to do any type of phase
8 inspections, that it was there really because of the blown tires,
9 as we've already had reference to. He stated that with respect to
10 item 11, that the entries of 004, 0005, which I've already -- none
11 of those entries were made after the form had been given to the
12 Respondent, therefore those entries were there at the time that
13 A-5 was discussed and given to the Respondent.

14 Turning then to the Respondent's case, his first witness
15 was Mr. Gaertner, who was the Second in Command on this particular
16 flight. He states, to his knowledge, the aircraft was not kept in
17 a hangar, but I don't know what that is based on. It's simply to
18 his knowledge, so that's not dispositive of whether it was or was
19 not. The evidence appears to be that it was in Hangar D. This
20 witness also stated that he didn't hear anyone discussing
21 discrepancies with the Respondent, but the fact that Mr. Gaertner
22 didn't hear it doesn't mean that that discussion of discrepancies
23 did not occur with the Respondent.

24 And, in fact, as I've already gone through, the
25 Complainant's witnesses, where appropriate, those witnesses have

1 testified that they have discussed the discrepancies, given him an
2 open discrepancies checklist, discussed item 11 on Exhibit A-5.
3 So the fact that Mr. Gaertner didn't hear anything doesn't mean
4 that it didn't occur. It simply means he didn't hear it. He also
5 states that he didn't see anyone give any paperwork to the
6 Respondent. That's not sufficient to contradict the testimony of
7 the Complainant's witnesses that in fact they did give copies of
8 the pertinent documents to the Respondent. The fact I didn't see
9 something doesn't mean that it didn't occur, at least sufficient
10 to overcome direct testimony that in fact the event had happened.

11 This witness testified that upon landing that there was
12 no problem with any possible fuel leaks, hydraulic leaks, or any
13 problems with the brakes. It was testimony that was not disputed
14 by the Complainant that no leaks were seen subsequently, either of
15 those, no smoke, no problem with braking either after a test
16 flight or on departure, and I would agree with the Respondent's
17 testimony that the Manual does call out for this airplane, and
18 most other airplanes, that a brake test be done as part of a
19 preflight on your taxi out to make sure that they are working
20 before you get out there.

21 With respect to the brakes themselves, Mr. Gaertner
22 testified that he did a pen test, and there was testimony from the
23 Respondent as to how the pen test is done, but it is conceded by
24 Mr. Gaertner that the pen test is not a calibrated test. It is a
25 test that you can make, you know, on the spot, but it is not, in

1 my view, sufficient to contradict a calibrated micrometer test as
2 testified to by Mr. Brake. And he also had indicated that some
3 Bombardier person, again not identified, in the lobby was giving
4 them, he and the Respondent, some paperwork before they departed,
5 but again there is no indication of that.

6 Respondent testified on his own behalf. He holds an
7 ATP. He has a Learjet type rating, has type rating in other
8 aircraft, and as I understood it, he's been flying Learns for about
9 18 years. He also has Commercial Privileges, Airplane Single-
10 Engine Land and Sea, on his testimony.

11 The witness testified that on his preflight on February
12 26 he did not observe any hydraulic leak. He had discussed
13 admittedly the hydraulic leak over the phone with Mr. Duke as
14 Mr. Duke had testified to, that on February 25, and again the
15 testimony was to the effect that it was residual leftover from
16 some that had been spilled from a prior work on the aircraft.

17 He also testified on his behalf that on the second
18 departure that there was no hydraulic leak, the actuator
19 functioned properly, and he stated that in his mind, so that was
20 just to him, there were on open discrepancies on either the
21 hydraulic possible discrepancy or the possible fuel discrepancy.
22 And the explanation, of course, for the fuel discrepancy, as I've
23 already indicated that he gave to Bombardier and the FAA, was that
24 it was simply mismanagement by him of the fuel system.

25 He did testify that in his conversation with Mr. Duke

1 that he had been told of the potential brake discrepancy by
2 Mr. Duke and that it had failed an inspection, but that Mr. Duke
3 had told him that, in Mr. Duke's opinion, that the aircraft flying
4 back to the home base was a suitable operation.

5 With respect to Exhibit R-2, page 38 of the Exhibits,
6 Respondent does acknowledge that -- his testimony is that on his
7 inspection, the brakes did look fine to him, but that he conceded
8 that in fact he did not perform any measurement, actual
9 measurement of the brakes.

10 On cross-examination, he indicated in his conversation
11 with Mr. Duke that Duke had mentioned to him the potential
12 hydraulic leak and that Exhibit A-3 was gone over with the
13 personnel at Tucson Service Center, as I've already indicated. He
14 did indicate that he did not recall receiving Exhibit A-6, which
15 is the "List of Open Discrepancies" by its caption. He simply
16 states he doesn't recall receiving it and says that he does not
17 recall going down these items or being given it by Mr. Sager. Of
18 course, that comes down to the credibility between the two of
19 them. With respect to A-4, page 7, he agrees that page 7 on A-4
20 simply addresses the release of the work done on the tires and
21 there is nothing there about any of the brakes on that Exhibit.

22 With respect to the presence of Bombardier personnel,
23 Mr. Wyant, on the test flight, and I did read the statement by
24 Mr. Wyant in Respondent's Exhibits and he does indicate that he
25 did not feel endangered, that the brakes did not appear to be out

1 of service to him but simply to be close. But again, the
2 testimony of Mr. Wyant is based upon his visual inspection. He
3 did not, on the evidence in front of me, conduct any type of
4 inspection with any type of calibrated instrumentation. He simply
5 looked at them and says they looked okay to me, might be close on
6 wear, but he did not actually inspect the brakes. He looked at
7 them; he did not perform an inspection.

8 That to me is the pertinent evidence in the case. The
9 burden of proof overall in this case, of course, rests with the
10 Complainant throughout and it must be carried by a preponderance
11 of the reliable and probative and credible evidence.

12 On my evaluation of the testimony given by the
13 witnesses, I resolve an issue of credibility in favor of the
14 Complainant. Mr. Brake's testimony, with his written statement
15 and his testimony here, I found to be credible. He is the only
16 one that actually conducted an inspection measurement of these
17 brakes.

18 Similarly, with the majority of the testimony, it is
19 really not in dispute other than, as I've indicated, the statement
20 that I didn't look at the list, although there is a charge of over
21 \$6,000 and there's initials in the column. That to me is just
22 incredible and goes against a determination of credibility in
23 favor of the Respondent.

24 With respect, also, to an affirmative defense of
25 reasonable reliance, as under the Board's decision in Fay and

1 Takacs, the Board has held in that case, and subsequently
2 thereafter, that that exception is a very narrow one. It can be
3 applied only where there is a showing that the individual who is
4 claiming the exception can rely upon what was told him or has no
5 duty to make his own determination of whatever the particular
6 problem is here.

7 Here, in front of me, the testimony that Bombardier
8 personnel had given him an open list of discrepancies, had
9 discussed items with him, and there was indication that the
10 Respondent had declined having work done on what were possible
11 discrepancies and, therefore, there was nothing here for him to
12 rely upon that the discrepancies had in fact been inspected and
13 resolved. So there was nobody to rely on. And then secondly, as
14 the pilot in command, he had his own particular obligation to
15 assure that any discrepancies that he had been told about or that
16 he was informed about, as an example, on A-6, the List of Open
17 Discrepancies, that they had not been addressed. So he had his
18 own individual obligation, therefore, Fay and Takacs is not
19 applicable in this case. And I so find.

20 And again, I would just simply observe here that if
21 there are any FAR problems with Bombardier, those do not in any
22 way insulate the Respondent from any responsibilities of
23 compliance with FAR 91.405.

24 On the evidence in front of me, it does appear that the
25 Respondent was in fact aware that possible discrepancies existed

1 with respect to the hydraulic leak, a possible discrepancy of a
2 fuel leak, and the reported discrepancy with the brakes. That
3 these in his mind were not discrepancies does not satisfy the
4 Regulation. To comply with the Regulation, the aircraft has to
5 have been inspected by authorized personnel, that is, Airframe and
6 Powerplant mechanic, someone properly certificated to conduct the
7 inspection and sign it off as either a discrepancy which has been
8 resolved or in fact was not a discrepancy.

9 It is, on the evidence in front of me, possible that the
10 hydraulic leak was simply spillage and that the fuel leak was
11 simply the result of fuel mismanagement and climatic change, but
12 we don't know that for sure because nobody inspected the aircraft.
13 It could equally be true that something untoward had happened
14 between the time of when spillage had occurred and the time that
15 it actually was observed in Tucson. Similarly with the fuel leak,
16 it could have been mismanagement, but it also could have been the
17 result of something else occurring with the aircraft in the
18 interim, possibly occurring when the tires blew out, causing the
19 aircraft to maybe come to a more abrupt stop. Whatever, it cannot
20 be in your mind. The Regulation requires that it be looked at and
21 resolved, either no discrepancy found or a discrepancy and we
22 fixed it. That was not done here.

23 The Respondent, on the evidence in front of me, and I so
24 find, knew, and that is what's the main issue in this case: On
25 this evidence, does the Respondent know or should he have known

1 that there were possible discrepancies with the hydraulic and the
2 fuel and what was given to him as measured discrepancies with the
3 brakes that needed to be inspected and resolved? The evidence is
4 that he knew that these discrepancies had not been worked on,
5 which means it had not been inspected, and therefore I find and
6 conclude that he was in regulatory violation of the provisions of
7 Section 91.405(a) of the Federal Aviation Regulations.

8 With respect to the violation of Section 91.13(a), that
9 precludes operation by any person of an aircraft in a careless or
10 reckless manner so as to endanger the life or property of another.
11 Potential endangerment is sufficient by numerous Board and Court
12 of Appeals decisions as long as there's a reasonable connection or
13 nexus between the event and the potential endangerment. The
14 operation of the aircraft with unresolved discrepancies is at
15 least potentially hazardous to the persons on the aircraft, as it
16 is to the aircraft to itself. If the brakes had completely failed
17 on a subsequent landing, the aircraft could have been damaged. If
18 something untoward happened with fuel or hydraulic leaks, that
19 also could have endangered the individuals on the aircraft, the
20 Respondent and Mr. Gaertner, or people on the ground under the
21 flight path. So I do find as a residual violation that is
22 sufficient. There is an operational violation of FAR 91.405(a)
23 and, therefore, I do find that the Respondent is in regulatory
24 violation of FAR 91.13(a) in that he was operating the aircraft in
25 a careless manner so as to potentially endanger the life or

1 property of another.

2 Turning to the sanction, the Administrator has asked for
3 deference to the sanction sought and has referenced to the
4 Sanction Guidance Table, and that table does show that the
5 sanction sought is within the mid-range for similar events. Under
6 the applicable requirements and under Supreme Court decisions,
7 deference is still to be shown to the Administrator's choice of
8 sanction unless it's shown to be arbitrary, capricious, or not in
9 accordance with law. That has not been demonstrated here, and
10 that would be a burden upon the Respondent. Since that is not
11 shown, I must extend deference to the Administrator's choice of
12 sanction and, therefore, I will find that the period of suspension
13 sought should be affirmed.

14

15

16

17

18

19

20

21

22

23

24

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

ORDER

IT IS THEREFORE ORDERED that:

1. The Order of Suspension, the complaint herein, be, and the same hereby is, affirmed as issued.

2. That the Respondent's Airline Transport Pilot Certificate be, and the same hereby is, suspended for a period of 75 days.

Entered this 25th day of September 2013, at Phoenix, Arizona.

EDITED ON
OCTOBER 25, 2013

PATRICK G. GERAGHTY
Administrative Law Judge

APPEAL

ADMINISTRATIVE LAW JUDGE GERAGHTY: The record will reflect that at this time -- Mr. Runkel, will you come up; I'll use you -- that I am giving to Mr. Runkel two copies of the appeal provisions from an oral initial decision, and ask that you keep one and hand one copy to the Respondent's counsel.

And, Mr. Rowley, you have received a copy of the appeal provisions?

MR. ROWLEY: Yes, Your Honor.

1 ADMINISTRATIVE LAW JUDGE GERAGHTY: Thank you.

2 He acknowledges receipt.

3 Anything further for the record?

4 MR. RUNKEL: No, Your Honor.

5 ADMINISTRATIVE LAW JUDGE GERAGHTY: Nothing? The
6 proceeding is closed.

7 MR. ROWLEY: You're not asking me? I had something
8 further on the record.

9 ADMINISTRATIVE LAW JUDGE GERAGHTY: Thank you,
10 gentlemen, for your presentation. I appreciate your compliance
11 with the pretrial notice.

12 MR. ROWLEY: Your Honor, you asked if we had anything
13 further.

14 ADMINISTRATIVE LAW JUDGE GERAGHTY: Yeah, there was no
15 response so I said no.

16 MR. ROWLEY: Yeah, I said I have something further.

17 ADMINISTRATIVE LAW JUDGE GERAGHTY: Okay, what is it?

18 MR. ROWLEY: On the appeal --

19 ADMINISTRATIVE LAW JUDGE GERAGHTY: Just follow what it
20 says on there.

21 MR. ROWLEY: I know, but it says we must perfect the
22 appeal by filing a brief in support of the appeal within 50 days
23 after the date of the initial decision or order. Will the Judge
24 be issuing a written --

25 ADMINISTRATIVE LAW JUDGE GERAGHTY: No, this is it.

1 Today is the first day. Today, counsel.

2 MR. ROWLEY: Okay. Very good. Thank you.

3 ADMINISTRATIVE LAW JUDGE GERAGHTY: Yeah. Yeah, I don't
4 know, maybe that should be rewritten to make it clearer, I don't
5 know.

6 MR. ROWLEY: I just wanted to clarify for the record.

7 ADMINISTRATIVE LAW JUDGE GERAGHTY: Yeah, no, I don't
8 have any problem with that at all.

9 (Whereupon, at 5:48 p.m., the hearing in the above-
10 entitled matter was adjourned.)

11

12

13

14

15

16

17

18

19

20

21

22

CERTIFICATE

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

IN THE MATTER OF: Lyn M. Gerber
DOCKET NUMBER: SE-19479
PLACE: Phoenix, Arizona
DATE: September 25, 2013

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

Vesta Knight
Official Reporter

Lisa Furstenberg
Transcriber