

the form of rust and metal deterioration existed on a vertical structural member and attached "U" channel, rendering the aircraft unairworthy. The law judge found that "a thorough inspection would have revealed the rust and corrosion," and that Respondent "did not see the defective piece." Accordingly, the law judge assessed a \$1,000 civil penalty, as was sought in the complaint.

Respondent is a certified aircraft mechanic with an airframe and powerplant rating, and an inspection authorization. On March 20, 1988, Respondent performed an annual inspection on a Piper PA25 aircraft owned by M and J Spray, an agricultural spraying company. He certified the aircraft as airworthy and approved the aircraft for return to service. On October 23, 1988, the aircraft crashed. In the course of inspecting the aircraft wreckage during the ensuing accident investigation, FAA inspectors noted severe corrosion on a vertical structural member and "U" channel located on the left hand side of the fuselage. It was determined that the corrosion -- which one inspector testified was the result of "many years of neglect" -- had been present at the time of Respondent's annual inspection some seven months earlier, and this civil penalty action against Respondent resulted.

In his appeal from the law judge's initial decision, Respondent argues that the preponderance of the evidence does not support the law judge's finding of violation. He does not deny that severe corrosion existed on the aircraft component in

question at the time of his inspection, or that the corrosion rendered the aircraft unairworthy, but he asserts that the corroded area was covered with fresh paint, and he was, therefore, unable to detect the rust and deterioration beneath. Respondent asserts that the testimony of the FAA inspectors who described their inspections of the aircraft was "superficial" and "biased." He then cites the testimony of his expert witness, Dr. Lester Hendrickson,^{3/} that the corrosion which was evident on the subject aircraft component at the time of the trial would have been concealed by the paint, and that it was only apparent at the time of the accident investigation because the bending and distortions of the component caused the paint to flake off, thereby revealing the corrosion.^{4/}

Respondent states that Dr. Hendrickson's testimony was "unrefuted."

Respondent also challenges what he sees as contradictory theories in this case, and summarizes them this way: FAA Inspector Michael Brown testified that the corrosion was visible, and therefore Respondent saw it; the law judge found that Respondent never saw the defective area at all; and the

^{3/} Dr. Hendrickson is an Associate Professor in chemical biology and materials engineering at Arizona State University who also does consulting in the area of failure analysis. He testified on Respondent's behalf as an expert in corrosion identification and degradation of metals.

^{4/} Complainant has at no time suggested that the aircraft's crash was due to the corrosion at issue in this case, or that the corrosion caused the component to bend at that point.

agency attorney argued that a violation occurred once it is determined that the discrepancy existed at the time of Respondent's inspection. Respondent maintains that he inspected the area in question, but saw no signs of corrosion. Finally, Respondent asserts that he is a conscientious professional with a clean record, and that this violation would stand as a "blight on [his] record that could affect his livelihood."

Complainant, in its reply brief, cites the testimony of FAA Inspector John Noel, who testified as an expert witness on airworthiness and corrosion detection, that the corrosion made the aircraft unairworthy and that Respondent should have detected it during his inspection. Complainant also cites Inspector Brown's testimony that an ordinary inspection would have revealed the corrosion at issue, and that paint could not have concealed the corrosion. Complainant points out that even Dr. Hendrickson agreed the corrosion existed at the time of Respondent's inspection, and that Respondent admitted it was his job as an inspector to determine whether corrosion existed. Complainant also argues that the law judge reasonably and correctly found Inspector Brown's testimony -- that the corrosion would have been visible, even through paint -- to be more persuasive than Dr. Hendrickson's contrary testimony. Complainant also asserts that it is not attempting to impose strict liability, but is merely seeking to hold Respondent responsible for his negligent inspection.

Timeliness of Respondent's Appeal Brief

Before addressing the merits of Respondent's appeal, the issue of the timeliness of Respondent's brief in this case bears some discussion. Pursuant to section 13.233(c) of the Rules of Practice in FAA Civil Penalty Actions (14 C.F.R. §13.233(c)), Respondent's brief was due on April 5, 1990. The brief was not served until April 24, 1990. Although the record contains no written request or grant of an extension of time for the filing of Respondent's brief, Respondent's attorney explains (in a memorandum dated September 13, 1990) that he obtained an extension from the law judge's office. Complainant does not dispute this account.

Extensions of time for filing briefs and other documents in cases on appeal to the Administrator in his capacity as FAA decisionmaker cannot be granted by administrative law judges. Such extensions can only be granted by the Administrator or his delegate acting as the FAA decisionmaker, because once a law judge renders an initial decision he is without jurisdiction over the case. In the Matter of Degenhardt, FAA Order No. 90-20 (August 16, 1990). The Rules of Practice in FAA Civil Penalty Actions provide that the parties may agree to extend the time for filing of appellate briefs or, if they do not agree, that a written motion for extension may be filed with the decisionmaker. See, 14 C.F.R. §13.233(c) and (e). But in either case, the time period for filing an appellate brief is

not extended until the extension request is granted by the decisionmaker. Id. The request or motion should be transmitted to the decisionmaker by way of the Appellate Docket Clerk at the following address: Federal Aviation Administration, 800 Independence Avenue, S.W., Room 924A, Washington, D.C., 20591.

In light of the foregoing, Respondent's brief is late because he failed to get an extension of time from the Administrator or his delegate. However, I will accept Respondent's late-filed brief in this case due to his counsel's apparent confusion as to the appropriate procedures for obtaining an extension. Parties should be aware that in the future I will be less forgiving of failures to follow proper procedures in obtaining extensions.

The Law Judge's Finding of Violation

I turn now to the merits of Respondent's appeal. Based upon a review of the entire record in this case, I have determined that the law judge's finding of violation is supported by a preponderance of the reliable, probative, and substantial evidence. Accordingly, Respondent's appeal is denied and the law judge's initial decision is affirmed in its entirety.

It is clear from the evidence and the expert testimony introduced at the hearing in this case -- and Respondent apparently concedes -- that severe corrosion existed on the

aircraft component here at issue at the time of Respondent's inspection, and that that corrosion rendered the aircraft unairworthy. It is also undisputed that, after performing the inspection, Respondent nonetheless certified the aircraft as airworthy and returned the aircraft to service. Thus, a prima facie case that Respondent violated section 43.15(a) was established.

As a defense, Respondent has asserted that the corrosion was hidden by layers of paint, and that he should not be held responsible for the fact that his observation and testing of the area revealed no discrepancy. In support of Respondent's defense, Dr. Hendrickson testified that the corrosion would not have shown through the paint. However, contrary to Respondent's assertion in his brief that Dr. Hendrickson's testimony on this point was "unrefuted," Complainant presented rebuttal testimony from Inspector Brown, who testified as an expert in airworthiness. Inspector Brown stated that paint could not have concealed the severe corrosion which existed on the subject component, and he reaffirmed his earlier-stated opinion that Respondent did not perform a proper inspection in this case. Although Respondent characterizes Inspector Brown's testimony that paint could not have concealed the corrosion as "unsubstantiated," I note that Dr. Hendrickson's testimony to the contrary is equally uncorroborated. By rejecting Respondent's defense, and finding that "a thorough inspection would have revealed the rust and corrosion," the law judge

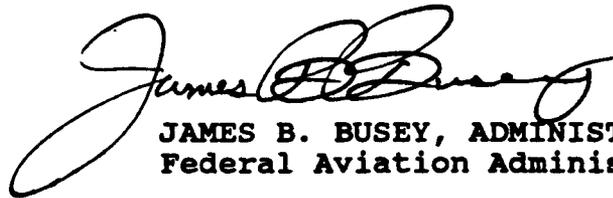
implicitly found Inspector Brown's expert opinion to be more persuasive than Dr. Hendrickson's. I agree with that finding. Nor do I find any support in the record for Respondent's assertions that Inspector Brown's testimony, and that of the other two FAA Inspectors who testified in this case, was "superficial" or "biased."

Regarding Respondent's contention that the government is pursuing contradictory theories in this case, I note first that Respondent's characterization of those alleged theories is inaccurate. The record in this case belies Respondent's assertion that Complainant is attempting to impose strict liability. Inspector Brown testified simply that the corrosion could not have been concealed by paint, and that Respondent did not perform a complete inspection. The law judge found that, although "a thorough inspection would have revealed the rust and corrosion," Respondent, "for whatever reason . . . did not see the defective piece." Both statements are consistent with Complainant's stated position that Respondent performed a negligent inspection in this case. In sum, the basis for Respondent's violation is simply that he should have, but did not, detect the corrosion which rendered the aircraft unairworthy.

Finally, Respondent complains that this decision will constitute a "blight on his record." However, the same could be said of every enforcement case which results in an adverse finding against a respondent. It is for this reason that all

respondents are entitled to and receive due process, in the form of notice and an opportunity for a hearing on the merits of the allegations, before findings of violation become final.

THEREFORE, in light of the foregoing, Respondent's appeal is denied, and the initial decision is affirmed in its entirety.^{5/} A civil penalty of \$1,000 is hereby assessed.^{6/}



JAMES B. BUSEY, ADMINISTRATOR
Federal Aviation Administration

Issued this 11th day of October 1990.

^{5/} I have also considered whether any changes made in the Rules of Practice during the pendency of this case may have affected the result in this case, and have concluded that no change in the Rules is pertinent to this case. If Respondent believes that changes in the rules would have affected the outcome of this case, he may file a petition for reconsideration of this decision and order, pursuant to 14 C.F.R. §13.234. Such a petition for reconsideration must include a particularized showing of harm, citing the specific rule change (or changes) and its relevance to the challenged findings or conclusions. See, 55 Fed. Reg. 15110, 15125 (April 20, 1990). Although the filing of a petition for reconsideration does not normally stay the effectiveness of the Administrator's decision and order, under these circumstances, if Respondent files such a petition I will stay the effectiveness of this decision and order pending disposition of the petition.

^{6/} Unless Respondent files a petition for reconsideration within 30 days of service of this decision (as described in the footnote above), or a petition for judicial review within 60 days of service of this decision (pursuant to 49 U.S.C. App. §1486), this decision shall be considered an order assessing civil penalty. See, 55 Fed. Reg. 27574 and 27585 (July 3, 1990) (to be codified at 14 C.F.R. §§13.16(b)(4) and 13.233(j)(2)).