UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

In the Matter of: AIRBORNE MAINTENANCE AND ENGINEERING SERVICES

FAA Order No. 2016-1

FDMS No. FAA-2013-0291[1]

Served: April 14, 2016

DECISION AND ORDER[2]

Respondent Airborne Maintenance and Engineering Services ("Respondent," "Airborne," or "AMES"), an aviation repair station, appeals Administrative Law Judge ("ALJ") J.E. Sullivan's grant of summary judgment in favor of the Federal Aviation Administration ("FAA" or Complainant") resolving allegations that Respondent improperly performed maintenance on three Boeing 727 aircraft used in 14 C.F.R. Part 121 air cargo operations. [3] Among other issues, Respondent contends the ALJ erroneously denied expert status to two of its witnesses and "genuine issues of material fact" precluded summary judgment in favor of the FAA. For the reasons set forth herein, Respondent's contentions are rejected and the decision of the ALJ is affirmed in its entirety.

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[1] Generally, materials filed in the FAA Hearing Docket are also available for viewing at *http://www.regulations.gov*. 14 C.F.R. § 13.210(e)(1).

[2] The Administrator's civil penalty decisions, along with indexes of the decisions, the rules of practice, and other information, are available on the Internet at the following address: *http://www.faa.gov/about/office_org/headquarters_offices/agc/pol_adjudication/agc400/civil_penalty/*. *See* 14 C.F.R. § 13.210(e)(2). In addition, Thomson Reuters/West Publishing publishes Federal Aviation Decisions. Finally, the decisions are available through LEXIS (TRANS library) and WestLaw (FTRAN-FAA database). For additional information, see *http://www.faa.gov/about/office_org/headquarters_offices/agc/pol_adjudication/agc400/civil_penalty/*.

[3] A copy of the ALJ's Initial Decision is attached.

I. Facts

Respondent is a certificated aviation repair station under 14 C.F.R. Part 145 ("Repair Stations"). Capital Cargo, an all-cargo air carrier (and Respondent's sister company), hired Respondent to replace the right and left main landing gear on three Boeing 727 aircraft.[4] Capital Cargo's operations specifications and Continued Airworthiness Maintenance Program (CAMP) required Respondent to perform maintenance on the aircraft in accordance with the Boeing 727 Aircraft Maintenance Manual (AMM). Respondent had never performed maintenance on Capital Cargo's Boeing 727s before undertaking maintenance on these three aircraft.[5] The maintenance required Respondent to replace both landing gears of each aircraft, which entails removing, reinstalling and rigging the right and left main landing gear doors (the "flying doors").[6]

Respondent completed work on N287SC on or about March 22, 2010.[7] Less than 1 month later, after departing from Cincinnati-Northern Kentucky International Airport ("CVG") on April 16, 2010, the aircraft began to vibrate to such an extent that the pilot found it necessary to return to the airport.[8] Immediately thereafter, Capital Cargo inspected the aircraft, determined a tubular bearing (also called a "bushing") was missing from the right main landing gear, and installed a replacement.[9]

[4] N287SC, N899AA, and N898AA.

[5] Complainant's MSJ Exhibit B at 9.

[6] Respondent performed the maintenance on N898AA in August 2009, on N898AA in October 2009 and on N287SC in March 2010. Complainant ¶4, Answer ¶4.

[7] Complainant's MSJ Exhibit X.

[8] Complainant's MSJ Exhibits AA, BB.

[9] Complainant's MSJ Exhibits AA, BB.

About 5 weeks later, between May 25 and 27, 2010, the FAA conducted "walk-around" inspections of several of Capital Cargo's Boeing 727 aircraft.[10] Respondent's and Capital Cargo's personnel were present. Inspector Lipinski, the FAA's Principal Maintenance Inspector (PMI) for Capital Cargo, and Inspector Gasche, the FAA's Principal Operations Inspector (POI) for Capital Cargo, determined the flying doors of the three aircraft at issue in this case had been improperly installed and mis-rigged, damaging both the flying doors and aircraft structures that came into contact with the flying doors.[11]

Immediately after concluding the walk-around inspection, on May 27, 2010, the FAA sent the first of two Letters of Investigation (LOI) informing Capital Cargo that during the investigation of N287SC's April 16, 2010 return to CVG, the inspector "identified that the installation of a bearing was missed on the right main landing gear door actuator rod at the point where it attaches to the landing gear."[12] Capital Cargo's response noted Respondent was the last certifying agency to sign for the installation of the tubular bearing.[13]

In response to the FAA's May 25-27, 2010, walk-around inspections, Capital Cargo took N287SC and two other aircraft out of service to address the identified discrepancies and advised the PMI that Respondent performed the main landing gear replacements on the three aircraft in August 2009, October 2009, and March 2010, respectively. After performing some corrective

[10] Complainant's MSJ Exhibits I and J.

[11] Complainant's MSJ Exhibit I and J.

[12] Complainant's MSJ Exhibit AA.

[13] Complainant's MSJ Exhibit BB. In March 2010, Respondent removed both main landing gears, which was the last maintenance that required the removal and reinstallation of the tubular bearing. Complainant's MSJ Exhibits W, X.

actions on N899AA and N898AA, Capital Cargo ferried all three aircraft to Respondent's facility for further corrective actions, which took place in late May and early June 2010.[14]

After completing the corrective actions, on June 8 and 9, 2010, Capital Cargo sent Respondent two Discrepancy Notices, which contained three Corrective Action Records. Each Discrepancy Notice was categorized as "Major." *Respondent's personnel signed* the Discrepancy Notices and Corrective Action Records.

On "Corrective Action Record No. 1" (QAAVCG004) concerning N899AA, *Capital Cargo* noted:

> Our PMI discovered the [right] flying door [forward] hinge has damaged the mid-section … of the inboard flap fairing. … [O]ur mechanics determined the damage to the fairing was out of limits. The condition was due to the flying door hinge pin migrating out of the hinge assembly. …. The hinge assembly was not properly installed[,] allowing the pin to migrate.[15]

On the same document, *Respondent* noted that the following corrective actions had been accomplished:

> Technician has reviewed the maintenance manual concerning the installation of the door and hinge pins. Training course # MRO-M2-202 has also been accomplished and a test of the material has been completed satisfactorily.[16]

Under Contributing Factors, *Respondent* noted:

> A training and procedural error occurred during the hinge pin installation. The technician and inspector were unaware that Boeing has a Product Standard Process … for ensuring the hinge pins are secure. Technician involved was interviewed and statement given that the hinge pins for the door hinge cover were in place at the time the door was installed. There was no evidence of the pin being out of position or loose.[17]

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[14] Complainant's MSJ Exhibit I.

[15] Complainant's MSJ Exhibits O, P, U, V, EE.

[16] *Id.*

[17] *Id.*

On "Corrective Action Record No. 2" (QAACVG005), *Capital Cargo* noted concerning N898AA:

> [O]ur PMI discovered the [right] flying door hinge has play and damage to the fairing. … [O]ur mechanics determined that the damage was out of limits and the condition exists due to the door being out of rig.[18]

On "Corrective Action Record No. 3" (QAACVG006), *Capital Cargo* noted concerning N287SC:

> [O]ur PMI discovered the [right] flying door hinge has play and damage to the fairing. …[O]ur mechanics determined that the damage was out of limits and the condition exists due to the door being out of rig.[19]

Respondent noted under Corrective Actions Accomplished:

> Reviewed inspection criteria of this area with both techs that performed the A-check inspections. 727 [main landing gear] wing door training is being accomplished by all technicians.[20]

In addition, for "Corrective Action Records Nos. 2 and 3" (QAACVG005 and QAACVG006), *Respondent* created two task cards for "Main Landing Gear – Removal/Installation" – one for the right side, and one for the left side.[21]

On September 30, 2010, the FAA sent a second LOI informing Capital Cargo it was investigating maintenance performed on the main landing gear doors of each of the three aircraft.[22] Capital Cargo's October 25, 2010 response noted it had completed its own investigation of the maintenance of the aircraft and attached the above-referenced Discrepancy

[18] Complainant's MSJ Exhibit U.

[19] *Id.*

[20] *Id.*

[21] Complainant's MSJ Exhibits V, EE.

[22] Complainant's MSJ Exhibit FF.

Notices and Corrective Action Records, which concluded Respondent had not adhered to or followed Boeing's 727 AMM.[23]

On March 3, 2011, the FAA sent an LOI informing Respondent it was investigating the improper installation and mis-rigging of the main landing gear doors on each of the three aircraft, specifically alleging Respondent failed to perform these installations according to the Boeing 727 AMM or Capital Cargo's maintenance program.[24] In his March 21, 2011 reply, Jeffrey Becker, Respondent's Director of Quality Assurance and Training, noted Respondent had "initiated a very detailed investigation" the results of which (together with actions taken) were documented on the above-referenced Corrective Action Records Nos. 1-3 and advised that Capital Cargo's October 25, 2010 letter to the FAA reported the details and results of Capital Cargo's and Respondent's joint investigation.[25]

On June 22, 2013, the FAA filed a complaint alleging Respondent's maintenance on each of the three Boeing 727 aircraft violated each of the following three regulations:

1. 14 C.F.R. § 43.13(a), which requires persons to follow the manufacturer's maintenance manual or Instructions for Continued Airworthiness, or other methods acceptable to the Administrator;[26]

[23] Complainant's MSJ Exhibit H.

[24] Complainant's Exhibit GG.

[25] Respondent also took exception to and corrected the airworthiness release date for each aircraft and noted it had not relocated the routing of the anti-skid conduit on N287SC. Sometime thereafter, Capital Cargo ceased operations, for reasons unknown. Answer ¶ 3.

[26] 14 C.F.R. § 43.13(a) provides:

> Each person performing maintenance, alteration, or preventive maintenance on an aircraft, engine, propeller, or appliance shall use the methods, techniques, and practices prescribed in the current manufacturer's maintenance manual or Instructions for Continued Airworthiness prepared by its manufacturer, or other methods, techniques, and practices acceptable to the Administrator, except as noted in § 43.16. He shall use the tools, equipment, and test apparatus necessary to assure completion of the work in accordance with accepted industry practices. If special equipment or test apparatus is recommended by the manufacturer involved, he must use that equipment or apparatus or its equivalent acceptable to the Administrator.

2. 14 C.F.R. § 43.13(b), which requires persons to perform maintenance so that the aircraft is at least equal to its original or properly altered condition;[27] and

3. 14 C.F.R. § 145.205(a), which requires repair stations, when performing maintenance on an air carrier's aircraft, to follow the air carrier's continuous airworthiness maintenance program and maintenance manual.[28]

Thus, the FAA alleged nine violations and proposed a total civil penalty of $20,625 per aircraft, or $61,875.

Respondent's July 18, 2013, answer denied each of the nine regulatory violations. On January 30, 2015, the FAA and Respondent each filed a motion for summary judgment. On March 30, 2015, the ALJ denied Respondent's motion for summary judgment. On April 1, 2015, finding no genuine dispute of material fact, the ALJ granted summary judgment in favor of the FAA as to each of Respondent's nine regulatory violations.[29]

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[27] 14 C.F.R. § 43.13(b) provides:

> Each person maintaining or altering, or performing preventive maintenance, shall do that work in such a manner and use materials of such a quality, that the condition of the aircraft, airframe, aircraft engine, propeller, or appliance worked on will be at least equal to its original or properly altered condition (with regard to aerodynamic function, structural strength, resistance to vibration and deterioration, and other qualities affecting airworthiness).

[28] 14 C.F.R. § 145.205(a) provides:

> A certificated repair station that performs maintenance, preventive maintenance, or alterations for an air carrier or commercial operator that has a continuous airworthiness maintenance program under part 121 or part 135 must follow the air carrier's or commercial operator's program and applicable sections of its maintenance manual.

[29] However, the ALJ denied the FAA summary judgment as to the proposed civil penalty. While the FAA sought a finding of aggravation on the grounds that Respondent allegedly *mis-rigged* not one but two main landing gear doors on all three aircraft, the ALJ found the FAA had neither pled in the complaint any aggravating factors nor thereafter submitted any legal basis to support finding that mis-rigging two main landing gear doors on an aircraft, as opposed to one, was an aggravating factor. Therefore, the ALJ scheduled a hearing on the civil penalty amount for between May 5 and 9, 2015. On April 8, 2015, Respondent filed a stipulation waiving the civil penalty hearing and accepting as appropriate the FAA's total proposed penalty amount of $61,875. On April 10, 2015, the ALJ accepted Respondent's

On April 8, 2015, Respondent filed with the FAA Administrator two Notices – one requesting review of the ALJ's denial of summary judgment in favor of the Respondent, and one requesting review of the ALJ's grant of summary judgment in favor of the FAA. On April 8, 2015, the ALJ denied any inferred request for interlocutory appeal and noted that her final Initial Decision would be forthcoming. On May 5, 2015, the ALJ issued her final Initial Decision in this case.

On appeal, among other issues, Respondent contends the ALJ erroneously denied expert status to two of its witnesses and "genuine issues of material fact" precluded summary judgment in favor of the FAA. For the reasons set forth herein, Respondent's contentions are rejected and the decision of the ALJ is affirmed in its entirety.

II. Standard of Review

On appeal, the FAA decisionmaker considers:

1. Whether each finding of fact is supported by a preponderance of reliable, probative, and substantial evidence;

2. Whether each conclusion of law is made in accordance with applicable law; and

3. Whether the administrative law judge committed any prejudicial errors.

14 C.F.R. § 13.233(b).

III. ALJ's Rejection of Respondent's Proffer of Two Expert Witnesses

The core of Respondent's defense to the alleged violations is that the condition of the aircraft was caused by normal "wear and tear" rather than improper maintenance of the main

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stipulation waiving the hearing and agreeing to the FAA's proposed civil penalty of $20,625 for each of the three aircraft, for a total of $61,875.

landing gear doors. [30] To establish such defense, Respondent sought to rely on two expert witnesses: (1) Jeffrey Becker, its Director of Quality Assurance and Training, whose deposition and declaration the ALJ admitted as specialized lay testimony under the limited exception of Federal Rule of Evidence 701 rather than as expert testimony; and (2) Daniel J. Hancher, Respondent's outside expert, whose Report the ALJ excluded in its entirety as "unreliable." Respondent challenges each evidentiary ruling.

The FAA decisionmaker reviews an ALJ's evidentiary rulings, including decisions as to the admission and use of expert testimony, for an abuse of discretion. *General Elec. Co. v. Joiner*, 522 U.S. 136, 141 (1997). *Salem v. U.S. Lines Co*., 370 U.S. 965 at 1122 (applying abuse of discretion and manifestly erroneous standards, it was within lower court's discretion to exclude expert testimony), *reh'g denied* (1962). "A decision to exclude expert testimony is not an abuse of discretion unless it is 'manifestly erroneous.'" *Fashion Boutique of Short Hills, Inc. v. Fendi USA, Inc*., 314 F.3d 48, 59-60 (2nd Cir. 2002). The Administrator has stated similarly that, "The [ALJ] has broad discretion in the admission or exclusion of expert evidence, and [the ALJ's] action will be sustained unless manifestly erroneous." *Sweeney*, FAA Order No. 1994-21 at 2 (June 21, 1994) (citing *Cella v. United States*, 998 F.2d 418, 422-23 (7th Cir. 1993) (quoting *Salem v. United States Lines Co.*, 370 U.S. 31, 35 (1962).

A. Mr. Becker

Respondent produced Mr. Becker for the FAA's discovery deposition as a Rule 30(b)(6) company representative, not as an expert witness. Nevertheless, the ALJ determined Mr. Becker's education and work experience qualified him as an expert in the fields of aircraft engineering and design, as well as in the subjects of airplane maintenance and repair, oversight

[30] Mr. Becker added that the discrepancies were minor and required only "blend and treat" repairs, meaning "prepping a surface and putting paint on it." Respondent's Opposition, Exhibit 1 at 68, 87.

of FAA-compliant aircraft maintenance, and aircraft inspection training. However, ultimately, the ALJ admitted Mr. Becker's deposition testimony as specialized lay opinion testimony rather than expert testimony because:

- [M]uch of Mr. Becker's proffered deposition testimony… was fragmented, difficult to follow and did not clearly identify or attach the deposition exhibits or data that Mr. Becker was reviewing ….;

- [S]ubstantial portions … did not offer expert testimony or analysis, but instead offered fact witness testimony, fact opinion, general assumptions or suggestions, and speculation; [and]

- [A]lthough Mr. Becker did offer technical opinions …, he did not provide them in conjunction with a discussion of general industry standards or methods, to demonstrate that he had "reliably applied the principles and methods" of expert knowledge and analysis to the facts of the case.[31]

In addition to expert qualifications, as the ALJ noted, Rule 702 requires an expert's testimony be deemed reliable before it is admitted and considered. The expert's testimony must be "based on sufficient facts or data" (FED. R. EVID. 702(b)), be the product of "reliable principles and methods," (FED. R. EVID. 702(c)), and the expert must show that he or she has "reliably applied such principles and methods to the facts of the case (FED. R. EVID. 702(d)). The proponent of the proffered testimony has the burden of meeting by a preponderance of the evidence the applicable reliability requirements.

Mr. Becker's testimony failed to meet these prerequisites because he never prepared or provided a report, never provided information as to "the basis and reasons" for or "the facts or data considered" in forming his opinions, and never identified "reliable principle and methods" that supported his proffered opinions. FED. R. CIV. P. 26(a)(2)(E). Against that factual backdrop, the ALJ's decision to limit Mr. Becker to providing specialized lay testimony in lieu

[31] Order Granting in Part and Denying in Part the FAA's Motion for Summary Judgment, April 1, 2015, at 11-12.

of expert testimony is not manifestly erroneous. *McCullock v. H.B. Fuller*, 981 F.2d 656, 657 (2nd Cir. 1992) (stating its past holding that "[t]he broad discretion of the trial court to determine the qualifications of witnesses will not be disturbed unless its ruling was 'manifestly erroneous'").

B. Mr. Hancher

The ALJ excluded Mr. Hancher's April 30, 2014 expert report in its entirety, finding it "unreliable" because Respondent provided Mr. Hancher "very limited information to prepare his report," consisting of two sets of maintenance records and the FAA's Statement of the Case.[32] Respondent contends Mr. Hancher could not have reviewed additional documents because he submitted his April 30, 2014 report before additional relevant documents (such as Mr. Becker's October 29, 2014) were available. That contention is without merit.

Pursuant to Rule 702(b) of the Federal Rules of Evidence, the facts or data reviewed by an expert must be sufficient to render such testimony reliable. As the ALJ found, the following relevant documents were available to Respondent who, for whatever strategic or tactical reason, chose not to provide them to Mr. Hancher as he was formulating his expert opinions and report:

1. Capital Cargo's June 2010 Corrective Action Records setting forth the results of its and Respondent's review of the discrepancies as well as Respondent's Corrective Actions;

2. Respondent's June 10, 2010 Revised Boeing 727 Main Landing Gear Door Installation Training Program;

3. FAA Inspector Gasche's September 28, 2010 Memorandum as to the results of the May 25-27, 2010 inspection of the three aircraft;

4. Capital Cargo's October 25, 2010 letter and results of its internal investigation, written by Mr. Benjamin Buck, its Chief Inspector;

5. FAA Inspector Lipinski's December 12, 2010 Memorandum; and

[32] The ALJ also noted Respondent failed to identify the specific documents Mr. Hancher actually reviewed as he was formulating his report.

6. Mr. Becker's March 21, 2011 letter setting forth the results of Respondent's "very detailed" internal investigation.[33]

Respondent contends that had the ALJ allowed the case to go to hearing Mr. Hancher could have corrected the deficiencies in the formulation of his report. However, when ruling on motions for summary judgment, the ALJ must accept the evidentiary record as it exists as of the date of the motion and not as Respondent's intends the record to exist as of some date in the future. Indeed, as the FAA correctly notes, if Respondent believed Mr. Hancher's Report required additional explanation, it should have ensured the evidentiary record reflected such information prior to moving for summary judgment. Respondent could have done so by requesting permission to supplement Mr. Hancher's proffered Report to reflect information set forth in Respondent's and Capital Cargo's investigative records and Corrective Actions or, alternatively, information set forth in Mr. Becker's October 29, 2014 and Inspector Lipinski's December 18, 2014, depositions. Respondent chose neither.

In sum, the ALJ reasonably determined Respondent's failure to provide Mr. Hancher any of the above-cited information and records rendered the information he considered too limited to form a reliable opinion as an expert. Thus, the ALJ's exclusion of Mr. Hancher's Report and testimony was neither an abuse of discretion nor manifestly erroneous. *Estate of Stuller*, 811 F.3d 890, 896 (7th Cir. 2016) (court was "well within its discretion" to exclude proffered expert witness's testimony where expert witness had failed to consider relevant records).

IV. ALJ's Grant of Summary Judgment in Favor of the FAA

Both parties moved for summary judgment in their favor on the merits of the alleged regulatory violations. As the ALJ correctly noted:

[33] The ALJ also noted Respondent never provided Mr. Hancher a copy of Mr. Becker's October 29, 2014 discovery deposition. *Id*, at 27.

> Summary judgment is to be denied when there is a bona fide dispute as to a material fact. Summary judgment should not be granted … unless the facts entitling the movant to summary judgment are admitted or are clearly established. However, a genuine dispute is not created by a mere scintilla of a favorable evidence or evidence that is only "colorable" or "insufficiently probative."[34]

Unchallenged by either party is the ALJ conclusion that the regulatory violations charged in this case turn on proof of four material facts, which are whether:

1. Respondent was a certified repair station;

2. Respondent performed maintenance on the aircraft;

3. The maintenance was performed for an air carrier that has a CAMP under Part 121; and

4. Respondent used and followed Boeing's B-727 Aircraft Maintenance Manual (AMM) in performing such maintenance.

Also unchallenged by either party is the ALJ's conclusion the first three material facts were not disputed and, thus, the only dispute was whether Respondent used and followed Boeing's AMM when it reinstalled and rigged the MLG doors on each of the three aircraft. For two reasons, the ALJ held there was no genuine dispute as to whether Respondent used and followed Boeing's AMM. Each reason provides an appropriate support for the ALJ's holding.

A. Respondent's Failure to Use and Follow Boeing's AMM

First, the ALJ concluded there was not a genuine issue as to whether Respondent reinstalled and re-rigged the aircrafts' landing gear doors pursuant to Boeing's AMM because Respondent admitted it had not done so.[35] While acknowledging its participation in constructing

[34] Order Granting in Part and Denying in Part the FAA's Motion for Summary Judgment, April 1, 2015, at 28.

[35] Order Granting in Part and Denying in Part the FAA's Motion for Summary Judgment, April 1, 2015, at 18-20. The ALJ properly excluded as proof of culpable conduct Respondent's June 10, 2010 implementation of a revised training program for mechanics performing landing gear door installations. FED. R. EVID. 407.

a correction plan as well as in producing a training module and work cards, Respondent contends such activities do not constitute an admission that it mis-rigged the landing gear doors, because none of the Corrective Action Records explicitly makes any such admission. In this case, the ALJ correctly concluded Capital Cargo's October 25, 2010 Investigative Report noted Respondent's failure to follow AMM procedures and attached corrective action reports acknowledging that Respondent's technician and inspector had been unaware that Boeing had a standard process for ensuring MLG door hinges were properly secured, which Mr. Becker, as Respondent's agent, signed.

In addition, Mr. Becker's March 21, 2011 letter to the FAA[36] explicitly references Capital Cargo's October 25, 2010 Investigative Report as reflecting the "details and results" of Capital Cargo's and Respondent's joint investigation. Notably, Mr. Becker's letter did not disagree with the results of Capital Cargo's investigation; indeed, he reported that Respondent had worked very closely with Capital Cargo to put together a corrective action plan:

> Not only to resolve any future problems for [Respondent] but also to provide to Capital Cargo the benefits of the results of [Respondent's] investigation to share the lessons learned to further help prevent a reoccurrence not only for [Respondent] but for Capital Cargo also; and
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> The results of *our* review and actions taken were documented on Capital Cargo's Corrective Action Record #'s QAACVG004, QAACVG005, and QACVG006 …. The details of the investigation and results have been sent to you by Capital Cargo in a letter dated October 25, 2010 …."[37]

While Mr. Becker's letter specifically noted its disagreement with two matters – the aircraft release dates and Respondent's responsibility for the misrouting of the anti-skid conduit on one aircraft – it did *not* disagree with Capital Cargo's findings that Respondent mis-rigged the flying

[36] Complainant's MSJ Exhibit HH.

[37] Complainant's MSJ Exhibit HH (emphasis added).

doors and, in fact, it adopted such findings.

As the ALJ noted, admissions by their very nature have a "special reliability" and when a party opponent admits some "damaging" fact, then such statement may be used to prove the truth of the facts asserted, irrespective of the party's or the party's agent's motive in making them.[38] In this case, it is beyond peradventure Mr. Becker acted as Respondent's agent in his communications with the FAA. Accordingly, the ALJ did not err in concluding there was no genuine issue as to Respondent's failure to use and follow Boeing's AMM.

Respondent also contends it compiled the training aid simply to satisfy any FAA concerns and demonstrate a good compliance disposition – but it did not intend to admit to any regulatory violations. In addition, Respondent contends that treating its LOI responses as an admission is bad public policy and will have a chilling effect on the resolution of enforcement cases, in that respondents may choose to decline to respond to LOIs. Respondent's prophetic judgment is misguided. LOIs "provide an opportunity for the apparent violator to tell his or her side of the story …" and clarify issues early in the agency's investigatory process. FAA Order No. 2150.3B at ¶ 9. Early notice through LOIs also provides certificate holders the opportunity to achieve compliance before potential safety issues escalate into accidents. If the FAA were to turn a blind eye when certificate holders acknowledge compliance issues, the FAA would be acting contrary to its statutory duty to promote safe flight through enforcement of safety-related regulations. 49 U.S.C. §§ 44701, 46301. Failing to enforce the safety regulations would not only be contrary to statute but it would be bad public policy.

B. Respondent's Contentions as to Wear and Tear and a Tire Change

The ALJ held that Mr. Becker's testimony failed to create a genuine issue of material fact. Respondent contends Mr. Becker's testimony created a genuine issue as to whether the

[38] ALJ's Order Granting in Part and Denying in Part the FAA's Motion for Summary Judgment at 25-27.

visual condition of the three aircraft during the May 25-27, 2010 inspections was attributable to normal "wear and tear"[39] rather than non-compliant maintenance, and whether a tire change on N287SC sometime after the March 2010 replacement of its landing gear doors caused the April 16, 2010 vibration incident. The ALJ concluded that Mr. Becker's October 29, 2014 testimony failed to create a genuine issue of material fact for three reasons.

First, as noted above, Mr. Becker's testimony contradicts both Respondent's and Capital Cargo's submissions to the FAA and contradicts his March 21, 2011 letter to the FAA. Prior to Mr. Becker's October 29, 2014 deposition, Respondent told the FAA that "the results of its review were documented on [Capital Cargo's] Corrective Action Reports… [and] the details of the investigation and results have been sent to you by [Capital Cargo] in a letter dated October 25, 2010 in response to your letter …."[40] The October 25, 2010 letter stated Capital Cargo had completed its investigation found that Respondent failed to follow Boeing's AMM

[39] Mr. Becker testified he reviewed Respondent's maintenance records, had actual knowledge of Respondent's investigations into Complainant's allegations, viewed the aircraft daily when they returned to Respondent's facility, and spoke with Respondent's inspectors about the work being performed, before concluding the corrective actions were minor and done only to ameliorate normal wear and tear.

On the other hand, as the ALJ pointed out, Mr. Becker conceded in his deposition as follows:

> [Mr. Becker] had not spoken to any of Respondent's aircraft technicians or inspectors about Respondent's MLG installations on the three B-727 aircraft since the respondent had performed its initial investigation. When he had spoken to them, early in the investigation, the technicians and inspectors had no personal recollection of the door rigging and inspection work they had performed. (Exh. KK, 40.) All they could do is look at the maintenance records they had created and signed. (*Id*. at 41.) Mr. Becker testified he did not recall the specific results of the Respondent's own internal investigation after the FAA's May 2010 inspection. (Exh. KK, 41 (lines 19-25)). He agreed that prior to his employment with the Respondent, he had had no prior experience working with Boeing B-727 aircraft. (Exh. B, 9.) He also agreed that his company had never worked on any CCIA B-727 aircraft prior to its first MLG installation on CCIA's Boeing N899AA in August 2009. (Exh. B, I 0.)

Id. at 20-21.

[40] Complainant's MSJ Exhibit HH.

when removing, installing and rigging the aircrafts' landing gear doors and that the aircraft flying doors were improperly installed and rigged.[41]

Second, and more important, the ALJ concluded Mr. Becker's testimony was speculative, unreliable, and insufficiently probative to provide evidentiary support to create a genuine dispute as to whether the three aircraft only had insignificant "wear and tear" damage. As the ALJ noted:

> When Mr. Becker looked at the maintenance records during the deposition, he was unable to justify his opinion. An example: when Mr. Becker was asked what Respondent's records meant by hinge pins improperly installed, he testified, "No comment." A second example: when asked if a damaged fairing needed to be repaired in accordance with Boeing's AMM, he stated, "Yeah. I mean, no. I'm thinking. I don't – yeah. No, I don't know." Respondent explains in its appeal brief that the reason Mr. Becker could not explain these matters was that there is nothing in the applicable section of the AMM that requires a maintenance technician to insert or secure pins in hinge access doors.
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> The fact remains, however, that Mr. Becker was unable to provide explanations. His answers understandably did not instill confidence.
>
> [L]arge portions of the Respondent's opposition evidence regarding the alleged violations of 14 C.F.R. § 145.205(a)) were based on Mr. Becker's lack of memory (*e.g.*, we don't remember the results of our own investigation), intentional ignorance (*e.g.*, we haven't talked to the mechanics about the repairs since our initial investigation), hopeful assumption (*e.g.*, it is a possibility that it wasn't us), downplaying evidence (*e.g.*, the damage was just minor nicks and scratches), lack of knowledge (*e.g.*, I don't know), speculation (*e.g.*, it must be wear and tear because of the passage of time), general accusations of blame (*e.g.*, Mr. Buck didn't investigate enough and also treated us unfairly), and unsupported opinion (*e.g.*, because this is what we believe). This evidence was not reliable, and did not create a genuine dispute as to any of the material facts established by the FAA's Motion.[42]

Thus, when viewing the evidence in a light most favorable to Respondent, the ALJ appropriately and reasonably concluded there was no genuine dispute as to whether Respondent

[41] Complainant's MSJ Exhibit H.

[42] Order Granting in Part and Denying in Part the FAA's Motion for Summary Judgment, April 1, 2015, at 28. Other significant problems with Mr. Becker's testimony support the ALJ finding such testimony "insufficiently probative" to create a genuine dispute of a material fact. *See id.* at 20-24, 26 and 28.

failed to use and follow Boeing's AMM, notwithstanding Mr. Becker's transparent attempt a year later to create such a dispute.[43]

Third, as noted above, immediately after vibrations caused N287SC to return to CVG, Capital Cargo inspected the aircraft, determined a tubular bearing was missing from the right main landing gear, and installed a replacement. Capital Cargo's June 8, 2010 letter to the FAA noted that after the March 2010 replacement of the aircraft's landing gear doors, no intervening maintenance "could account for" the missing tubular bearing. Respondent's investigation, which was completed by October 2010, determined that subsequent to the March 2010 replacement of the landing gear doors, the aircraft's tires were changed. During his deposition, Mr. Becker testified the missing tubular bearing "could have" resulted from a mechanic improperly changing the aircraft's tire. However, Mr. Becker's unsupported speculation is put to rest by both Capital Cargo's June 8, 2010 letter to the FAA affirming no intervening maintenance could account for the aircraft's missing tubular bearing and Inspector Lipinski's expert testimony that the proper procedure for changing a tire (removing the two bolts in the actuation rod, extending the rod a few inches, and then putting one of the two bolts back in, supporting the flying door while the wheel is being changed) "could not possibly have any effect on the tubular bearing …."[44]

In addition, as the ALJ noted, Mr. Becker's testimony failed to explain why his view was not factored into Respondent's and Capital Cargo's joint investigation, or any subsequent communications with the FAA, including Mr. Becker's March 21, 2011 letter to the FAA.[45] Nor

[43] *Id*. at 29.

[44] Complainant's Response in Opposition to Respondent's Motion for Summary Judgment Exhibit JJ at ¶ 36.

[45] Order Granting in Part and Denying in Part the FAA's Motion for Summary Judgment, April 1, 2015, at 23-24.

did Mr. Becker's testimony explain how his view would have changed the substance of Respondent's and Capital Cargo's submissions to the FAA.

Respondent contends the ALJ's finding that Mr. Becker's testimony was "speculative," "unreliable," and "lacked evidentiary support" to create a genuine issue of material fact constitutes improper "weighing" of the evidence in the FAA's favor. Respondent correctly notes that on summary judgment, an ALJ's duty is not to weigh evidence and determine the truth of the matter asserted but, rather, to determine whether there exists a genuine issue of material fact. Respondent's Appeal Brief at 14, citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) (citations omitted); *Hardwick ex rel. Hardwick v. Heyward*, 711 F.3d 426, 434 (4th Cir. 2013), *cert. denied* 134 S. Ct. 201, (Oct. 7, 2013). It is true an "ALJ must view all evidence and inferences in [the] light most favorable to the non-moving party." Baicker-McKee, FEDERAL CIVIL RULES HANDBOOK at 1135 (West 2012), citing *Liberty Lobby*, 477 U.S. at 256. However, it also is true that:

> To raise a genuine dispute, the "*caliber" and "quantity*" of the evidence presented must "allow a rational finder of fact" [t]o return a verdict for the nonmoving party. *Liberty Lobby, Inc*., 477 U.S. at 254. A "genuine" dispute is not created by a "mere scintilla" of favorable evidence, or evidence that is "merely colorable … or is not significantly probative .... *Id.* at 249-50, 252 (citations omitted).

Id. at 29-30 (emphasis added).

Contrary to Respondent's claim, however, in this case the ALJ did not weigh the FAA's against the Respondent's evidence to resolve ambiguities and determine the truth of an otherwise disputed fact. Rather, the ALJ carefully evaluated whether Respondent's evidence generally, and Mr. Becker's assertions, specifically, constituted sufficiently "probative" evidence or evidence of sufficient "caliber and quantity" to create a genuine dispute as to a material fact, and the answer was a resounding no. *United Steelworkers of Am. v. Phelps Dodge Corp.,* 865 F.2d

1539, 1542 (9th Cir.1989) ("mere submission of [evidence] opposing summary judgment is not enough; the court must consider whether the evidence presented is … of sufficient caliber and quantity to support a jury verdict for the non-movant") citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 254 ("there is no genuine issue if the evidence presented in [opposition to the motion for summary judgment] is of insufficient caliber or quantity"); *Kitchen v. Pierce*, 565 Fed. Appx. 590, 593 (Wallace, J., dissenting) (9th Cir. 2014) (where a party lacked personal knowledge, "his assertions as to this matter cannot be regarded as evidence of sufficient 'caliber and quantity' to create a genuine issue of material fact").[46] Indeed, in this case the only real dispute is between Mr. Becker's 2014 testimony and the substance of both Respondent's and Capital Cargo's prior submissions to the FAA.

Given the speculative nature of, and lack of evidentiary support for, Mr. Becker's conclusions and in light of the contradiction between his testimony and Respondent's earlier submissions to the FAA, the ALJ did not abuse her discretion by concluding Mr. Becker's testimony was "speculative," "unreliable," and "lacked evidentiary support" to create genuine issues of fact. *Knox Creek Coal Corp. v. Sec'y of Labor, Mine Safety, and Health Admin.*, -- 3rd --, 2016 WL 241399 (4th Cir. 2016) (finding it reasonable for the Secretary to discount certain evidence); *Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012) (holding that the ALJ may discount certain evidence if he or she gives "germane" reasons for doing so). In this case, the ALJ more than adequately detailed her reasons for finding Mr. Becker's testimony unreliable and such reasons do not constitute an abuse of discretion. *UA Local 343 of the United Ass'n of Journeymen and Apprentices of the Plumbing and Pipefitting Industry v. Nor-Cal Plumbing*, 48 F.3d 1465, 1473 (9th Cir. 1994), *cert. denied*, 516 U.S. 912 (1995) (holding that "internal

[46] Order Granting in Part and Denying in Part the FAA's Motion for Summary Judgment, April 1, 2015, at 20-21, 23-24, and 28-29, provides ample support for concluding Mr. Becker's testimony was "insufficiently probative."

inconsistencies in a party's … testimony fail[ed] to create a genuine issue of material fact").

C. The Decisions in *Administrator v. Lewis* and *Florida Propeller* Do Not Require an Evidentiary Hearing

Respondent further contends the ALJ's grant of summary judgment in favor of the FAA contravenes rules established in *Administrator v. Lewis*, 3 NTSB 1241 (1978) and *Florida Propeller and Accessories, Inc.*, FAA Order No. 1997-32 (October 8, 1997) requiring a hearing to assess the probative value of circumstantial evidence. That contention is without merit.

Lewis sets forth a rule as to the strength of an inference as to the cause of non-compliance based on the temporal proximity between a repair and a subsequent inspection revealing a noncompliant condition. Emphasizing the need to carefully scrutinize circumstantial evidence to ensure it meets the FAA's burden of proof, the National Transportation Safety Board ("NTSB") held that when the time between the alleged violations and their discovery is long (14 months in *Lewis*), "the record will be *carefully scrutinized* to insure that the quality of the … evidence … is sufficient to establish a reasonable inference that the deficient condition existed at the time of, and resulted from, the respondent's earlier repair …." (emphasis added).[47]

Florida Propeller provides guidance as to when the FAA should be expected to provide expert testimony to buttress an inference of causation based on temporal proximity between a repair and a subsequent inspection revealing a noncompliant condition. In *Florida Propeller*, the FAA alleged that the respondent approved a propeller for return to service with blades that were too thin. Forty-six days had passed and the airplane had logged 125 hours of flight time on approximately 120 flights between the respondent's overhaul of the airplane and the discovery of the undersized blades. The Administrator held that while the FAA may use circumstantial

[47] The NTSB decided *Lewis*, and the Administrator is not bound by NTSB case law (although the Administrator may choose to follow it if it is persuasive). *Gatewood*, FAA Order No. 2000-1 at 20 (February 3, 2000); *WestAir Commuter Airlines*, FAA Order No. 1993-18 at 6 (June 10, 1993).

evidence to sustain its burden of proof, the circumstantial evidence that had been admitted in *Florida Propeller* was insufficient, and the FAA had failed to introduce expert testimony on the critical issue of whether a propeller could wear down a certain amount in a certain length of time.

Respondent contends the FAA's evidence in this case was similarly insufficient for four reasons. First, depending on the aircraft between 2 and 9 month periods elapsed between the August 2009, October 2009, and March 2010 maintenance dates, on the one hand, and the April and May 2010 inspections, on the other hand. Second, during such period each aircraft engaged in significant operations, which meant that:

- N899AA's landing gear were extended and retracted 1,568 times (784 cycles);
- N898AA's landing gear were extended and retracted 1,256 times (628 cycles); and
- N287SC's landing gear were extended and retracted 344 times (172 cycles).

Third, Inspector Lipinski acknowledged he did not see the three aircraft until after Capital Cargo returned them to Respondent's facility for corrective action. Given those circumstances, Respondent's contends *Lewis* and *Florida Propeller* requires the ALJ to conduct an evidentiary hearing. That contention is without merit.

First, as discussed above, the strength of the FAA's case is predicated on the results of Capital Cargo's and Respondent's inspections of the aircraft and review of their maintenance and the expert testimony of FAA Inspectors, not solely or primarily on the temporal proximity between the maintenance and subsequent inspections. Second, neither *Lewis* nor *Florida Propeller* stand for Respondent's proposition that the ALJ is required to hold a hearing to consider circumstantial evidence. *Lewis* simply requires the ALJ to scrutinize the record carefully to insure that the quality of the Administrator's evidence is sufficient to establish a reasonable inference that the deficient condition resulted from the respondent's repair. Similarly,

Florida Propeller holds that circumstantial evidence must be scrutinized to see if it is sufficient, and it *may* be found to be insufficient in the absence of supporting expert testimony.

Consistent with *Lewis* and *Florida Propellor*, before finding violations and granting summary judgment, the ALJ carefully scrutinized the evidentiary record in this case, including the results of the Respondent's inspections and expert testimony of FAA Inspectors:

- Inspector Lipinski's and Inspector Gasche's statements that the discrepancies were major, were caused by improper rigging, were not normal wear and tear, and that it was "highly unlikely" that intervening maintenance had caused the damage.

- Respondent's June 2010 revised training program for reinstalling and re-rigging Boeing 727 main landing gear doors, which noted, "It is suspected that the doors may have been improperly rigged by Maintenance Technicians."

- Capital Cargo's Chief Inspector's June 8, 2010, letter to the FAA noting Capital Cargo had examined all the records for N287SC and no intervening maintenance "could have accounted for" the missing tubular bearing.

- Capital Cargo's Chief Inspector's October 25, 2010, Investigative Report finding that Respondent had mis-rigged the main landing gear doors on all three aircraft, having failed to follow Boeing's AMM when installing the main landing gear.

- Mr. Becker's March 21, 2011 letter to Inspector Lipinski noting Capital Cargo had sent the results of Respondent's investigation to Inspector Lipinski in a letter dated October 25, 2010.

- Mr. Becker's March 21, 2011 letter, which affirmatively referenced Capital Cargo's Corrective Action Reports. The Corrective Action Reports noted the main landing gear on the three aircraft had not been properly installed. Mr. Becker signed Corrective Action Records.

- During Mr. Becker's October 29, 2014 deposition, he "speculated" that the damage on each aircraft could have been from wear and tear, the damage had been minor or, in the case of N287SC, the damage could have been due to an intervening tire change. But the ALJ found no evidentiary support for Mr. Becker's views.

- Respondent gave its expert witness very limited information to review in preparing his report, making his opinion testimony "unreliable and inadmissible."[48]

[48] ALJ's Order Granting in Part and Denying in Part Complainant's Motion for Summary Judgment, April 1, 2015, at 17-29.

In light of that evidence, it is beyond peradventure that the ALJ amply complied with the teaching of both *Lewis* and *Florida Propeller* to scrutinize the record carefully to ensure there is sufficient evidence to support summary judgment.

V. Conclusion

In light of the foregoing, Respondent's appeal is denied and a civil penalty of $61,875 is assessed.[49]

MICHAEL P. HUERTA
ADMINISTRATOR
Federal Aviation Administration

[49] This order shall be considered an order assessing civil penalty unless Respondent files a petition for review within 60 days of service of this decision with the U.S. Court of Appeals for the District of Columbia Circuit or the U.S. court of appeals for the circuit in which the respondent resides or has its principal place of business. 14 C.F.R. §§ 13.16(d)(4), 13.233(j)(2), 13.235 (2009). *See* 71 Fed. Reg. 70460 (December 5, 2006) (regarding petitions for review of final agency decisions in civil penalty cases).