

SERVED: October 6, 2005

NTSB Order No. EA-5180

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 5th day of October, 2005

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MARION C. BLAKEY,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-17494
v.)	
)	
MICHAEL FRANCIS BRASSINGTON,)	
)	
Respondent.)	
)	
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OPINION AND ORDER

The Administrator and respondent have both appealed from the August 31, 2005, oral initial decision and order of Administrative Law Judge William R. Mullins,¹ which affirmed in part and reversed in part the Administrator's emergency order revoking respondent's airline transport pilot certificate. The law judge dismissed some of the alleged violations, affirmed others, and modified the sanction from revocation to a 30-day

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

suspension of respondent's certificate. As further discussed below, we deny both appeals and affirm the law judge's decision.

Background

The August 3, 2005, emergency order of revocation, which served as the Administrator's complaint, alleged the following facts and circumstances:

I

1. You are the holder of Airline Transport Pilot Certificate Number 083722815.
2. At all times relevant herein, you were the President and Chief Executive Officer (CEO) of Platinum Jet Management ("Platinum"), a non-certificated entity.

II

3. You acted as pilot in command of a Canadair Challenger 600 aircraft, identification number N370V (hereinafter "Aircraft N370V"), on each of the following Platinum flights:
 - a. On or about November 1, 2004, from Miami International Airport, Florida to Teterboro Airport, New Jersey; and
 - b. On or about December 13, 2004 from St. Maarten to Wilmington Airport, to Morristown Airport, New Jersey, to Teterboro, new Jersey.
4. Each of the flights described in paragraph 3, above, carried passengers for compensation or hire and were conducted under Part 135 of the Federal Aviation Regulations (FARs).
5. For each of the flights described in paragraph 3, above, you made or caused to be made entries in the Aircraft Trip/Load Manifest Sheets and the Trip Itinerary and Manifest Sheets that falsely stated that the flights were conducted under Part 91 of the FARs.
6. As a result, you made or cause[d] to be made fraudulent or intentionally false entries in a record or report that is required to be kept, made, or used to show compliance with any requirements for the issuance or exercise of the

privileges of any certificate, rating, or authorization under FAR Part 61.

III

7. On or about January 2, 2005, you acted as pilot in command of Aircraft N370V on a flight from Anguilla to Wilmington, North Carolina and then from Wilmington to Teterboro Airport, New Jersey.
8. The flight described in paragraph 7, above, carried passengers for compensation or hire and was conducted under Part 135 of the FARs.
9. For each of the flights described in paragraphs 3 and 7, above, the Aircraft Trip/Load Manifest Sheets did not indicate:
 - a. the total weight of the loaded aircraft for the flights;
 - b. the maximum allowable takeoff weight of the aircraft for the flights;
 - c. the center of gravity limits of the aircraft for the flights; and
 - d. the center of gravity of the loaded aircraft for the flight.

IV

10. At the time of the January 2, 2005 flight described in paragraph 7, above, you had not, since the beginning of the 12th calendar month before the flight:
 - a. passed the written or oral test described in 14 C.F.R. §135.293(a);
 - b. passed the competency check described in 14 C.F.R. §135.293(b); and/or
 - c. passed the flight check described in 14 C.F.R. §135.299(a).

V

11. During the following flights carrying passengers for compensation or hire and conducted under Part 135 of the FARs, you acted as pilot in command of Aircraft N370V when that aircraft's current empty weight and center of gravity

had not been calculated from values established by an actual weighing of Aircraft N370V within the preceding 36 months:

- a. On or about Novmaber 1, 2004 from Miami International Airport, Florida to Teterboro Airport, New Jersey (as also described in paragraph 3, above);
 - b. On or about November 29, 2004 from Boca Raton Airport, Florida to Morristown, New Jersey;
 - c. On or about December 13, 2004 from St. Maarten to Wilmington Airport, and then to Morristown Airport, New Jersey, and then to Teterboro, New Jersey (as also described in paragraph 3, above);
 - d. On or about December 21, 2004 from Portsmouth, New Hampshire to Coatesville, Pennsylvania and then to West Palm Beach International Airport, Florida;
 - e. On or about December 31, 2004 from Anguilla to Miami, Florida; and
 - f. On or about January 2, 2005 from Anguilla to Wilmington, North Carolina and then from Wilmington to Teterboro Airport, New Jersey (as also described in paragraph 7, above).
12. During each of the flights described in paragraph 11, above, you operated Aircraft N370V in an unairworthy condition in that the aircraft did not conform to its original or properly altered design.
 13. Further, at all times relevant herein, you operated flights carrying passengers for compensation or hire without an appropriate air carrier certificate and appropriate operations specifications.
 14. Further, at all times relevant herein, you operated flights as a direct air carrier without holding appropriate economic authority from the Department of Transportation.
 15. Further, at all times relevant herein, you advertised or otherwise offered to perform operations subject to FAR Part 119 although you were not authorized by the Federal Aviation Administration to conduct those operations.
 16. As a result, during the flights described above, you operated Aircraft N370V in a careless or reckless manner so as to endanger the lives and property of others.

17. Your actions as described above show an indifference to aviation regulatory requirements, to the need for accuracy in aviation records, and for aviation safety.
18. As a result, you lack the qualifications to continue to hold any airman privileges.

The emergency order alleged that, as a result, respondent had violated: 14 Code of Federal Regulations §§ 119.5(g), 119.5(i), 119.5(k), 135.185(a), 135.293(a), 135.293(b), 135.297(a), 135.299(a)(1), 135.299(a)(2), 135.299(a)(3), 135.3(a)(1), 135.343, 135.63(c), 135.63(c)(1), 135.63(c)(2), 135.63(c)(3), 135.63(c)(4), 61.59(a)(2), 91.13(a), and 91.7(a).

The law judge found that the only violations the Administrator had proven were those associated with respondent's alleged failure to include required weight and balance information on the load manifest for three flights, as described in section III of the complaint. Accordingly, he affirmed only the alleged violations of 14 C.F.R. §§ 135.63(c), 135.63(c)(1), 135.63(c)(2), 135.63(c)(3), and 135.63(c)(4), and dismissed the remaining alleged violations. He modified the sanction from revocation to a 30-day suspension, citing the FAA's sanction guidance table.²

On appeal, the Administrator argues that the law judge erred

² The FAA's Enforcement Sanction Guidance Table (FAA Order 2150.3A, Appendix 4), which provides general guidelines for selecting an appropriate sanction, states that the normal range of sanction is a 15 to 60-day suspension for a single violation of a regulation involving failure to make entries in an aircraft log, and a 15 to 30-day suspension for failure to make entries in worksheets.

in dismissing the bulk of the alleged violations and asks that they be affirmed, and that the sanction of revocation be reinstated. Respondent argues that the violations the law judge affirmed were based on offenses that occurred more than 6 months prior to the Administrator's issuance of the order of revocation and, therefore, should be dismissed under the Board's stale complaint rule. We will discuss each section of the complaint separately.

Section II - Falsification

The Administrator introduced into evidence the Aircraft Trip/Load Manifest sheet³ and Platinum's Trip Itinerary and Manifest sheet for flights conducted on November 1, 2004, and December 13, 2004. (Exhibits A-3, A-4, and page 2 of A-5). These sheets indicated that the flights were conducted under Part 91. Respondent, who signed all four of these forms, does not appear to contest that the Part 91 designation on each of these forms was incorrect and that both flights should have been designated as Part 135. In any event, the evidence clearly showed that.⁴

However, with regard to the November 1 flight, respondent

³ FAA Inspector Symons testified that these records are required for Part 135 operations. (Transcript (Tr.) 53.)

⁴ Both flights were chartered by individuals who testified they believed the flights would be conducted under Part 135. The November 1 flight was booked by the customer through a charter broker. (Tr. 38-46.) The customer for the December 13 flight chose respondent after personally obtaining quotes from several charter operators and determining that respondent's was "a little

claimed that the first officer, Francis Vieira, actually filled out the form and respondent did not look at it when he signed it.⁵ He testified that he knew it was a charter flight, and if he had seen Part 91 on the form, he would not have signed it. But respondent said it was his practice to sign such forms before they were filled out. (Tr. 272-273.) Regarding the December 13 flight, respondent's position at the hearing was that he regarded the flight as a demonstration flight for a potential purchaser of the airplane and, therefore, as properly operated under Part 91.⁶ Respondent testified that he had been talking with this customer about buying an airplane and had done previous demonstration flights for him. The customer acknowledged during his testimony that he was in fact shopping for an aircraft at the time, including possibly one from Platinum, but stated that there was no discussion about the December 13 flight being a demonstration flight.

When asked if he signed the flight manifest for the December 13 flight without looking at it, respondent said he did not recall, but he prefaced this answer by noting that the flight was "intended to be" conducted under Part 91. (Tr. 286-288.) Thus, respondent's testimony suggests that he may have been aware of

bit better" than the others. (Tr. 27.)

⁵ We note that respondent's brief misrepresents Mr. Vieira's testimony, incorrectly suggesting that Mr. Vieira's reason for indicating the flight was Part 91 was because he believed one of the owners was on board the aircraft. In fact, Mr. Vieira testified that he indicated Part 91 because he was told to do so by Platinum's "operations executive." (See Tr. 209.)

⁶ See 91.501(b)(3).

the Part 91 designation for the December 13 fight when he signed the form. This is consistent with his brief, which states that he, "openly admitted that he completed the flight log and entered Part 91 into the flight log with the understanding that the flight was conducted pursuant to [the exception for demonstration flights]." (Respondent's Reply Brief at p. 3.)

The law judge found that the evidence did not establish intentional falsification. He discussed reasons offered by the Administrator as possible motivations for respondent to have falsified the information (not having current check rides at the time of the November 1 flight and avoidance of weight and balance entries for the December 13 flight), and rejected them as unconvincing. He stated that he was satisfied the incorrect statements on the forms were, "just a mistake on the paper work," and not intentional falsification by respondent. (Tr. 346.) He noted the Board's statement in Administrator v. Hart, 3 NTSB 24 (1977), that circumstantial evidence on the issue of scienter must be, "so compelling that no other determination is reasonably possible."⁷ The law judge concluded that the evidence in this case did not rise to that level.

On appeal, the Administrator contends that the law judge misconstrued the Administrator's burden of proof when he stated

⁷ The Administrator correctly notes that subsequent court decisions have upheld falsification charges based on circumstantial evidence of knowledge, confirming that knowledge of falsity can be inferred from circumstantial evidence. Erickson v. NTSB, 758 F.2d 285 (8th Cir. 1985); Olsen v. NTSB, 14 F.3d 471 (9th Cir. 1994).

that the Administrator is required to prove that the respondent "intended to lie", arguing that "intent to lie" is an element of a fraud charge, but is not required to prove intentional falsification. The Administrator argues that respondent had a motive to falsify the November 1 manifests because he was not qualified to fly Part 135 flights at that time, due to the expiration of his IFR proficiency check. Regarding the December 13 flight, the Administrator questions the credibility of respondent's assertion that he believed it was a demonstration flight that could lawfully be conducted under Part 91, pointing out that the price this customer paid was similar to the full price that would be charged for a charter flight of this duration.

We agree that the evidence and argument proffered by the Administrator could support a conclusion that respondent intentionally falsified the flight logs. However, we do not agree that such a conclusion is required on this record, nor can we conclude that the law judge's acceptance of respondent's explanation for the entries must be rejected as inconsistent with the overwhelming weight of the evidence. Respondent's explanations,⁸ while arguably questionable, are not so far-fetched as to be inherently incredible. It is well-established that the law judge is in the best position to assess the

⁸ Specifically, respondent stated that in the first case he never saw the incorrect information before he signed the form, and in the second case he believed, at least at the time he signed the form, that the information was true.

credibility and demeanor of the witnesses. Absent a showing that his evaluations are arbitrary, or that the credited testimony is inherently incredible or inconsistent with the overwhelming weight of the evidence, they are entitled to the Board's deference. See, e.g., Chirino v. NTSB, 849 F.2d 1525 (D.C. Cir. 1988); Administrator v. Del Rio, NTSB Order No. EA-3617 (1992).

Nor do we read the law judge's oral initial decision, as a whole, to apply an incorrect standard of proof. We agree with the Administrator that the law judge's statement that the Administrator must prove that respondent "intended to lie" appears to require the Administrator to meet one of the elements of fraud and is, therefore, erroneous.⁹ We do not endorse this articulation of the burden of proof in intentional falsification cases. However, we view this as an extraneous statement that is not foundational to the law judge's rationale in this case. His discussion of relevant case law on burden of proof issues, including Administrator v. Hart, 2 NTSB 839 (1976), and Administrator v. Motrinec, 7 NTSB 900 (1991),¹⁰ indicated a

⁹ The elements of intentional falsification under section 61.59(a)(2) are (1) a false representation; (2) in reference to a material fact; (3) made with knowledge of its falsity. To prove fraud under this section, the Administrator must also show (4) an intent to deceive; and (5) action taken in reliance upon the representation.

¹⁰ In Motrinec, the Board reversed the law judge's affirmation of a falsification charge, finding that there was no affirmative showing of scienter. The Board stated that, "the law judge apparently held that respondent may be found to have violated section 65.20(a)(2) whether or not he was aware that the information he furnished [certifying that certain individuals met the experience requirements for certification of mechanics] was false (i.e., without an affirmative showing of scienter)..."

correct understanding of the principles discussed in those cases. Accordingly, we are satisfied that the law judge accurately understood and applied the burden of proof in this case, and we will not disturb his determination that respondent lacked the requisite scienter for a finding of intentional falsification.

The Administrator further argues that the law judge should have drawn an adverse inference against respondent based on his assertion of his Fifth Amendment privilege during his June 23, 2005, deposition, citing several cases in which an adverse inference was drawn after a party failed to testify in a civil proceeding. While it is true that during his deposition respondent refused to answer a number of questions related to these manifests,¹¹ he did not assert his Fifth Amendment privilege during the hearing before the law judge. At the hearing he answered all questions put to him. While we commend the Administrator for giving respondent an opportunity during the investigation to explain how the flight manifests bearing his signature came to include the false statements, his refusal to provide an explanation at that time was effectively superceded by his subsequent explanation at the hearing. None of the cases cited by the Administrator holds that an adverse inference is justified solely on the basis of a party's assertion of a Fifth

¹¹ For example, respondent asserted his Fifth Amendment privilege when asked at the deposition how the manifests were prepared, whether he told Mr. Vieira the flights were to be conducted under Part 91 or 135, whether Mr. Vieira's handwriting appeared on the manifests, and whether respondent signed the manifests.

Amendment privilege during a discovery deposition when that party later testifies freely at the hearing, and we decline to hold so in this case.

Section III - Missing Weight and Balance Information on Manifests

Respondent admitted that certain required information for Part 135 flights (total weight, maximum allowable takeoff weight, center of gravity limits, and center of gravity limits for the flight) was lacking from the load manifests for the three flights cited in the complaint. The law judge affirmed the associated violations of section 135.63 (subsections (c) (1), (2), (3), and (4)).¹²

On appeal, respondent argues that these violations should be dismissed as stale because they occurred 7 to 8 months before the Administrator issued the emergency order.¹³ Stale charges need

¹² Respondent suggests in his brief that the basis for these violations was simply that the load manifest was not completed "in duplicate." However, in our view neither the oral initial decision nor the record supports such an interpretation. The required information does not appear on any documents in this record.

¹³ 49 C.F.R. 821.33, titled **Motion to dismiss stale complaint**, states:

Where the complaint states allegations of offenses which occurred more than 6 months prior to the Administrator's advising the respondent as to reasons for proposed action under 49 U.S.C. 44709(c), the respondent may move to dismiss such allegations as stale pursuant to the following provisions:

(a) In those cases where the complaint does not allege lack of qualification of the respondent:

- (1) the Administrator shall be required to show, by reply filed within 15 days after the date of service of the

not be dismissed if the Administrator had good cause for the delayed discovery of the offense and investigated the matter with due diligence upon discovery. Administrator v Shrader, NTSB Order No. EA-4971 (2002). Unfortunately, the Administrator did not brief this issue and we are unable to determine on the record whether this standard was met. However, we need not address this issue because the stale complaint rule also provides that in those cases where the lack of qualification is alleged, if an issue of lack of qualification is presented assuming all of the allegations, stale and timely, are true, the charges should not be dismissed. See Administrator v. Wingo, 4 NTSB 1304 (1984) (to avoid dismissal, allegations need only present an issue of lack of qualifications). In this case, the complaint as a whole, which included the charges of falsification, presented such an issue.¹⁴

respondent's motion, that good cause existed for the delay in providing such advice, or that the imposition of a sanction is warranted in the public interest, notwithstanding the delay or the reasons therefor.

- (2) If the Administrator does not establish good cause for the delay, or for the imposition of a sanction in the public interest notwithstanding the delay, the law judge shall dismiss the stale allegations and proceed to adjudicate the remaining portion of the complaint, if any.

(b) In those cases where the complaint alleges lack of qualification of the respondent, the law judge shall first determine whether an issue of lack of qualification would be presented if all of the allegations, stale and timely, are assumed to be true. If so, the law judge shall deny the respondent's motion. If not, the law judge shall proceed as in paragraph (a) of this section.

¹⁴ In stale complaint cases, the question of lack of qualifications is based on consideration of the pleaded incidents

It is undisputed that an airman who falsifies required documents lacks qualifications to hold an airman certificate. The Administrator had evidence suggesting that respondent signed, as pilot in command, required records containing materially incorrect entries.¹⁵ The Administrator could not be expected to have known that the law judge would believe respondent's explanation for the false statement. Indeed, in light of respondent's assertion of his Fifth Amendment privilege during his earlier deposition, when FAA counsel attempted to ask respondent about these circumstances, the Administrator was likely not even aware of respondent's explanation until the hearing. Accordingly, we hold that the complaint in this case presented a legitimate issue of lack of qualifications and, therefore, the charges affirmed should not be dismissed as stale.

Section IV - Overdue Airman Competency and Proficiency Checks

Platinum records showed that respondent received the knowledge, competency, line, and IFR proficiency checks required for part 135 operations on December 15, 2003. (See Exhibit A-8.) The IFR proficiency check is required every 6 months,¹⁶ and the

in the aggregate, not one by one. Administrator v. Konski, 4 NTSB 1845 (1984).

¹⁵ We have held that, in the context of applications for medical certificates, an incorrect answer on an application is prima facie proof of intentional falsification. Administrator v. Manin, NTSB Order No. EA-4303 (1994) at 3, citing cases.

¹⁶ See 14 C.F.R. § 135.297.

others are required every 12 months.¹⁷ Platinum's records also included a subsequent Airman Competency Proficiency Check Form, indicating that respondent successfully underwent the IFR proficiency check (given by David Contreras) on November 27, 2004, 6 months after the December 2003 IFR check expired, but did not indicate that he completed the other required checks. (Exhibit A-9.) Both the Administrator's and respondent's witnesses indicated that upon the expiration of respondent's December 2003 IFR check, respondent would have been prohibited from piloting flights under Part 135. (Tr. 81, 240.)

At the hearing, Mr. Contreras produced a second copy of the Airman Competency Proficiency Check Form, that was similar to Exhibit A-9 except that it showed that respondent had completed all of the required Part 135 checks on November 27 and December 4, not just the IFR check. The law judge admitted this document over the Administrator's objection that respondent should not be permitted to bring in records that were not contained in the company's files. In his oral initial decision, the law judge reversed the violations, finding the document to be credible. He noted that Mr. Contreras was, "not one of the players in this drama...he was just someone called in to do this job and he kept a copy of what he did." (Tr. 336.) The law judge also stated there was no showing in this case that the FAA had sought records from the certificate holder, Darby Aviation.¹⁸

¹⁷ See 14 C.F.R. §§ 135.293 and 135.299.

¹⁸ In this regard, we note respondent's claim in his brief

The Administrator reiterates on appeal that Exhibit R-2 should not have been admitted, pointing out that it was not provided to the Administrator in accordance with the law judge's order compelling respondent to hand deliver all records he intended to use at the hearing by 12:00 the day before the hearing. While the law judge might properly have excluded the document on this basis, he was not required to do so. Respondent and his counsel represented that they themselves did not receive this document until the day of the hearing. (Tr. 246.) Therefore, we think it was within the law judge's discretion to admit the document pursuant to section 821.38 of our rules, which states that the law judge should admit all "material and relevant evidence." Accordingly, the law judge's decision to admit and credit Exhibit R-2 is not reversible error. Therefore, we will not overturn his dismissal of these charges.

Section V - Overdue Aircraft Weighing

The Administrator's complaint cited six flights that allegedly occurred more than 36 months after the aircraft's most recent weighing, in violation of 14 C.F.R. 135.185(a). The Administrator introduced a weight and balance report documenting that the aircraft was weighed on September 9, 2001. (Exhibit A-10.) Airworthiness Inspector John Ho testified that no weight

that a record of these check rides existed at Darby Aviation and if the FAA had conducted a site visit it would have discovered this key document. This claim is unsupported by any evidence in this record.

and balance reports from any subsequent weighings were found in Platinum's records, nor were any provided by Darby Aviation in response to the subpoena that was issued to that company.

However, respondent presented a document titled "Aircraft Compliance Statement for 135 Operations" (Exhibit R-1) that was apparently prepared by Darby's director of maintenance for presentation to the FAA in connection with receiving FAA approval to use the aircraft in Darby's Part 135 operations. Among other information about the airplane recorded on the form, the document included on page 6, next to the statement "Date Last Weighed," a handwritten entry indicating "8/20/02." Platinum's director of maintenance testified that Darby's director of maintenance would have gotten this information from the weight and balance manual on board the airplane. On cross-examination he stated he did not know why the aircraft would have been reweighed at that time. Respondent testified that the August 20, 2002, weighing took place before Platinum acquired the airplane, and that records of this weighing were passed on to Platinum when Platinum took possession of the airplane. He stated that the detailed weight and balance manual documenting the reweighing was on board the airplane and was destroyed in the February 2, 2005, accident. The law judge noted that this testimony was uncontroverted, and accepted the August 20, 2002, date in Exhibit R-1 as true. Accordingly, the law judge found that the regulatory violations were not proven.

On appeal, the Administrator claims that the August 20,

2002, date is suspect and unreliable in that there were no maintenance records or reports to substantiate that the airplane was in fact weighed at that time. Further, the Administrator points out that respondent offered no explanation for why the airplane would have been reweighed less than one year after its last weighing (i.e., more than two years before it was due to be reweighed). Although we agree that this seems curious and suspect, we do not view respondent's testimony as inherently incredible or inconsistent with the overwhelming weight of the evidence. Therefore, we will not reject the law judge's credibility finding or his resulting dismissal of these charges.

Section V - Other Operational Violations

Section V of the complaint also contains several allegations that were not well developed in the record, including that respondent conducted commercial flights without an air carrier operating certificate or the required economic authority from the Department of Transportation, and that he impermissibly advertised to perform commercial operations.

As the law judge noted, Platinum's aircraft and pilots (including respondent) were listed on Darby Aviation's Part 135 certificate. In connection with the enforcement action against Darby, we found that Darby was not properly exercising operational control over the flights conducted by Platinum purportedly under Darby's certificate. Administrator v. Darby Aviation, NTSB Order No. EA-5159 (2005). However, as we also

noted in that decision, Darby's principle operations inspector and other officials at the FAA's Flight Standards District Office in Birmingham had approved the arrangement between Darby and Platinum and did not question the issue of operational control.

Therefore, although the evidence in the Darby case seemed to indicate that Platinum was exercising operational control of Darby's flights, and while this might constitute a violation of the cited regulations, no evidence was proffered that respondent knew or should have known that he was committing such violations. Pilots are not held to a standard of strict liability.¹⁹ In fact, the evidence in the Darby case that FAA officials responsible for overseeing Darby Aviation found no fault with the operational arrangements between Platinum and Darby suggests that respondent could reasonably have believed that Platinum's operations under the auspices of Darby's certificate were permitted by the FAA and, thereby, by the FARs. Accordingly, we will not disturb the law judge's dismissal of these charges.

Sanction

It is clear from the complaint that the Administrator sought revocation based on the falsification charges. The only specific sanction guidance cited in the complaint was that providing for revocation in cases of falsification. This is consistent with statements made at the hearing by FAA counsel acknowledging that

¹⁹ See Administrator v. Dress, NTSB Order No. EA-5115 (2004) at 7, citing cases.

falsification was the "main issue" in the case (Tr. 18) and by Inspector Symons that he recommended revocation based on the suspected falsifications (Tr. 129 and 153). Accordingly, since these charges are not being affirmed, revocation is not justified. However, a suspension is warranted for the weight and balance violations that are being affirmed.

We note that the 30-day suspension imposed by the law judge for these violations does not appear to take into account that respondent was found to have violated the cited regulations on three separate flights and by omitting four separate items of information. Therefore, because the FAA's sanction guidance table specifies a recommended suspension of 15 to 60 days for each violation, a suspension of greater than 30 days would seem to be supportable under the Administrator's sanction guidance. However, other than arguing that revocation is the appropriate sanction in this case, the FAA has not appealed from the length of the suspension and has not requested a longer suspension period. Therefore, we will not disturb the law judge's imposition of a 30-day suspension for the violations affirmed.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;
2. The Administrator's appeal is denied;
3. The law judge's initial decision is affirmed; and
4. The 30-day suspension of respondent's pilot certificate is affirmed.

ROSENKER, Acting Chairman, and ENGLEMAN CONNERS and HERSMAN, Members of the Board, concurred in the above opinion and order. Member ENGLEMAN CONNERS submitted the following concurring statement, in which Acting Chairman ROSENKER joined. In addition, Member HERSMAN submitted a separate concurring statement.

Member Engleman Connors, Concurring:

The role of the National Transportation Safety Board is twofold. As the lead investigator in accident investigations, we serve in a broad capacity. It is our responsibility to determine probable cause and issue safety recommendations. In respect to FAA enforcement cases, our role is much more narrow. We are not a regulator or enforcer of FAA rules. The Board serves only as the adjudicator. As such, the Board must determine if the results in a case are correct as a matter of law. Therefore it would be inappropriate for the Board to offer suggestive, extraneous thoughts, indicating disappointment or discomfort with a legal determination - such legal determinations must be approved if and only if they are correct as a matter of law.

Certainly the CEO of an airline not only should but must be held to a high standard of safety and compliance with government safety regulations. And the FAA, as the federal regulator, should aggressively enforce these standards. However, we must be mindful of the fact that when the Board is acting as an appellate adjudicator, it is bound by legal principles that do not apply when it is acting as an investigative body. When we are acting as an appellate body, principles of safety do not supercede principles of administrative law. Our long-standing precedent of deferring to our law judges in matters of witness credibility is one such principle.

The fact that additional violations could have been alleged against Mr. Brassington by the FAA, or the prospect that more of the violations could have been proven if the law judge had reached different credibility determinations, is not relevant. We must base our decision on the actual pleadings, facts, and findings in this record, without regard to what might have been pled, proven, or found. This is our legal role and responsibility.

Member Hersman, Concurring:

While I agree that the National Transportation Safety Board is correct as a matter of law in affirming the decision of Administrative Law Judge William R. Mullins, I feel compelled to express my disappointment in the outcome of this case.

The Administrator issued an emergency order to revoke Michael Francis Brassington's airline transport pilot certificate for a number of alleged violations in the operation of Platinum Jet Management. According to the Administrator, Mr. Brassington acted as Pilot-in-Command for flights on November 1 and on December 13, 2004 that were designated by Platinum Jet Management as Part 91 flights when they carried passengers for compensation and were actually conducted under Part 135. The Administrator further alleged that Mr. Brassington acted as Pilot-in-Command for a flight on January 2, 2005 when he was overdue for knowledge, competency, line, and IFR proficiency checks. Finally, the Administrator alleged that Mr. Brassington failed to perform weight and balance checks for all three flights. Judge Mullins affirmed only the violations for failure to perform the weight and balance checks on the three flights.

My expectation of a hearing of allegations of this nature is that the presiding judge appreciates the important safety role of an airline CEO and that a person in that position should be held to a high standard of safety and compliance with government safety regulations in the operation of the airline. In this case, the record reflects a pattern of alleged corporate violations, both in operations and in paperwork, by the individual charged with setting the safety standard for Platinum Jet Management. Furthermore, the evidence shown in the written record seems to indicate that a decision affirming all of the Administrator's allegations could have been supported. That said, I believe it is appropriate for the Safety Board to accept Judge Mullins's assessment of the proof offered by the Administrator because he saw and heard firsthand the evidence presented and the examination of the witnesses.

My expectation of the Administrator in pursuing egregious safety violations of this nature is that she would pursue every violation demonstrated by the evidence. In this case, the evidence gathered by the Administrator showed that Mr. Brassington's IFR proficiency check was several months overdue when he acted as Pilot-in-Command on all three flights. For reasons not explained in the record, the Administrator chose to allege a violation of the safety check requirement for only the flight on January 2, 2005. One of the witnesses at the hearing presented evidence that Judge Mullins believed was credible and refuted the Administrator's allegation concerning the January 2 flight. The evidence would not have refuted a similar violation for the November 1, 2004 flight, but the Administrator did not prosecute that violation.

Finally, I am disappointed that the Administrator did not challenge Judge Mullins's imposition of only a 30-day suspension of Mr. Brassington's pilot certificate despite finding that Mr. Brassington had failed to perform weight and balance checks on three separate flights. This failure by Mr. Brassington

represents a serious and dangerous omission of basic aviation safety precautions. At the very least, an appropriate penalty would have been a certificate suspension for a duration that reflected a consequence for each flight. However, the Administrator did not present this argument in her appeal to the Safety Board, and the Safety Board does not deem it proper to make the argument on her behalf.