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NTSB Order No. EA-5425

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 31st day of December, 2008

ROBERT A. STURGELL, Acting Administrator, Federal Aviation Administration, Complainant, v. JOHN J. GLENNON and KEITH M. SHEWBART, Respondents.	Dockets SE-17500RM and SE-17615RM

ORDER DENYING RECONSIDERATION

The Administrator seeks reconsideration of our decision in this proceeding, NTSB Order No. EA-5411, served October 15, 2008. In that decision, we reversed the law judge's decisional order on remand, finding that the Administrator had not fulfilled his burden of proof that respondents violated 14 C.F.R. §§ 121.639 and 91.13(a). The Administrator's order sought suspension of respondents' airline transport pilot certificates, based on the allegation that respondents, prior to taking off on a shuttle flight from Ronald Reagan National Airport, Washington, D.C., to LaGuardia Airport, New York,

accepted a new route that was 97 nautical miles longer than the originally planned route without having the requisite minimum takeoff fuel. In particular, we determined that the Administrator impermissibly attempted to read additional requirements into § 121.639 when he in essence alleged that the regulations did not permit respondents' utilization of any of the planned contingency fuel (PCF) categorization of fuel in the original fuel computations for the extended route.

In the law judge's decisional order below, the law judge denied respondents' appeal of the Administrator's order, and found that the Administrator met his burden of proof on the issue of whether respondents had the requisite amount of fuel upon takeoff. In particular, the law judge concluded that the new route would require an additional 850 to 900 pounds of fuel above the amount originally calculated, and that respondents did not add this amount to the originally computed minimum fuel for takeoff under Delta Airlines fuel standards or coordinate the new fuel requirements with Delta Dispatch before taking off. The law judge also determined that Respondent Shewbart, as first officer, shared responsibility for the flight and that he also violated § 121.639, as alleged. The law judge reduced the suspension periods to 60 days and 10 days for Respondents Glennon and Shewbart, respectively; the law judge based these reductions on other cases in which the Board reduced suspension periods when respondents had engaged in improper fuel planning.

Respondents appealed the law judge's decision, and we granted the appeal, finding that the law judge erred in finding that the Administrator had met his burden of proving that respondents violated §§ 121.639 and 91.13(a) when they reallocated at least some portion of the original amount of planned contingency fuel to serve as trip burn fuel for the flight.

In our opinion and order, we stated that the Administrator could not read into § 121.639 a requirement that pilots have at takeoff the full amount of planned contingency fuel computed under Delta policies. Instead, we reiterated that the plain language of § 121.639 provides only that pilots, before taking off, must ensure that their aircraft has enough fuel: (1) to fly to the airport to which they are dispatched; (2) to fly to an alternate airport (where required); and (3) to fly for 45 minutes at normal cruising fuel consumption. Neither party disputed that respondents' aircraft contained sufficient fuel at takeoff to satisfy these requirements. We also stated that, to the extent that § 121.647 is implicit in the requirements of

§ 121.639, § 121.647 does not precisely define how operators should compute its requirements. Instead, § 121.647 provides that each person who computes fuel "shall consider" certain factors in calculating the amount of required fuel, such as weather and anticipated traffic delays (emphasis added). Furthermore, we stated that nothing in § 121.647 mandates that operators include the full amount of Delta's PCF in its minimum fuel computations.[1] As such, we disagreed with the law judge's conclusion that the Administrator had fulfilled his burden of proof, and reversed the law judge's decision, on the basis that the Administrator failed to prove that he could enforce a requirement for a specific quantity of additional fuel above that which § 121.639 expressly required, even if the requirements of § 121.647 implicitly augment § 121.639.

The Administrator has now filed a petition for reconsideration under 49 C.F.R. § 821.50. Section 821.50(c) requires that such petitions "state briefly and specifically the matters of record alleged to have been erroneously decided, and the ground or grounds relied upon." Section 821.50 also provides for the submission of arguments based on new matter, when the petitioner sets forth the new matter in "affidavits of prospective witnesses, authenticated documents, or both, or an explanation of why such substantiation is unavailable," and directs petitioners to "explain why such new matter could not have been discovered in the exercise of due diligence prior to the date on which the evidentiary record closed." Id. § 821.50(c). Section 821.50(d) provides that the Board will not consider, and will summarily dismiss, repetitious petitions for reconsideration.

In his petition, the Administrator attempts to revisit the issue of whether § 121.639 requires a particular amount of fuel in addition to the requirements included in the plain language of the regulation. In particular, the Administrator argues that, in our decision below, we erred in finding that PCF was an amount of fuel in addition to the amount that the Administrator required in § 121.639, and that we should have determined that PCF must indeed be included in the amount of minimum takeoff fuel. The Administrator asserts that the evidence he presented

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[1] The Flight Planning and Releasing section of the Delta Flight Control Operations Manual provides that PCF is for "known airborne contingencies" and gives the following examples: "[w]eather deviations due to enroute thunderstorms," and "[a]nticipated ATC delays and reroute." Administrator v. Glennon and Shewbart, NTSB Order No. EA-5411 at 17 (2008).

established that respondents were required to take off with 2,200 pounds of PCF, and that the 1,680 pounds that could be categorized as PCF on board respondents' aircraft upon takeoff was insufficient. The Administrator asserts that both §§ 121.639 and 121.647 require this amount of PCF, and that, in our decision below, we "failed to see the connection between §§ 121.639 and 121.647."

Respondents oppose the Administrator's petition, and urge us to uphold our decision below. In their response, respondents emphasize that the Administrator did not charge respondents with a violation of § 121.647, and that the Administrator's petition merely contains a reiteration of the Administrator's previous arguments.

While the Administrator presents the arguments in his petition in a more articulate manner than in the pleadings filed and in oral argument in the case below, he misstates key portions of our findings. This Board did not exclude those fuel quantities that § 121.647 ostensibly requires; we simply found that the Administrator failed to charge them or prove that respondents did not have whatever particular amount of fuel that § 121.647 requires on their aircraft. In this regard, the Administrator still has not shown that the plain language of § 121.639, even as augmented by § 121.647, requires a specific minimum amount of PCF not present at the beginning of the flight at issue. We note that we addressed this argument in our opinion and order, where we stated that the Administrator had not provided any evidence or argument indicating that all of the initially computed PCF was no longer available for the accepted route of flight at takeoff, and alternatively, that the Administrator did not present any evidence to show that the quantity of PCF with which respondents departed was insufficient under §§ 121.639 and 121.647. Administrator v. Glennon and Shewbart, NTSB Order No. EA-5411 at 19 (2008). Consequently, the Administrator has neither shown that Delta's entire PCF amount is required by any particular regulation, nor charged or proved that Delta's operating certificate somehow requires the amounts that Delta's flight planning computer calculates. In essence, the Administrator does not ask us to consider any new matter, but instead attempts to reargue the case-in-chief. Such arguments are generally not cognizable in the context of a petition for reconsideration. See 49 C.F.R. § 821.50(d). Overall, nothing in the Administrator's petition leads us to reverse our decision below.

ACCORDINGLY, IT IS ORDERED THAT:

The Administrator’s petition for reconsideration is denied.

ROSENKER, Acting Chairman, and HERSMAN, HIGGINS, and SUMWALT, Members of the Board, concurred in the above order. CHEALANDER, Member, did not participate, by way of recusal.