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NTSB Order No. EA-3755

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 16th day of December, 1992

THOMAS C. RICHARDS,	)	
Administrator,	)	
Federal Aviation Administration,	)	
	)	
Complainant,	)	
	)	
v.	)	Docket SE-9186
	)	
DENNIS D. NIELSEN,	)	
	)	
Respondent.	)	
	)	

OPINION AND ORDER

The respondent has appealed from the oral initial decision of Administrative Law Judge William E. Fowler, Jr., issued on July 26, 1990, following an evidentiary hearing.¹ By that decision, the law judge affirmed an order of the Administrator suspending respondent's airman certificate for 30 days for

¹An excerpt from the hearing transcript containing the initial decision is attached.

allegedly operating an aircraft that was not airworthy due to a broken carburetor heat control cable.² The law judge characterized this condition as a "glaring and noticeable defect" that rendered the aircraft unairworthy. He further concluded that by operating the aircraft, respondent carelessly endangered the life and property of another.

Upon consideration of the briefs of the parties and the record below, we find that safety in air commerce or air transportation and the public interest require affirmation of the Administrator's order and the initial decision. For the reasons that follow, we will deny respondent's appeal.

Briefly, the facts are as follows: On the morning of June 27, 1987, respondent acted as pilot-in-command of a Cessna 150 with one passenger on a return flight from the Harlan, Iowa Airport to Sioux City. Shortly after takeoff, the aircraft began emitting smoke, compelling respondent to make an emergency landing in a bean field.³ The aircraft was towed back to Harlan Airport, where an aircraft mechanic examined it. After

²Respondent's alleged actions were in violation of FAR sections 91.29(a) and 91.9 (now 91.7(a) and 91.13, respectively) of the Federal Aviation Regulations ("FAR," 14 C.F.R. Part 91).

These regulations read as follows:
"§ 91.29 Civil aircraft airworthiness.

(a) No person may operate a civil aircraft unless it is in an airworthy condition."

"§ 91.9 Careless or reckless operation.

No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another."

³No injury to persons or property occurred.

discerning that the heat cable in the carburetor was broken off and unusable, the mechanic wired the part the cable controlled into the open or "cold" position in an effort to effect a temporary repair. Respondent was aware that this alteration had been made. Both respondent and the mechanic testified that they believed there would be no need for carburetor heat because it was a hot day, around 90 degrees fahrenheit (F). Before departing, respondent performed a short test flight;⁴ he and his passenger then flew back to Sioux City.⁵

In support of his appeal, respondent advances several arguments.⁶ First, he contends that the aircraft was safe to fly. The charge of flying an unairworthy aircraft is purely technical, he maintains, and the Administrator failed to prove

⁴When testifying about why he performed a test flight, respondent stated that "whenever a plane is worked on, you fly the airplane before someone else flies it or before someone else gets into it." (Tr. at 59).

⁵Respondent argues that since no one testified to observing him take off with a passenger on board, the law judge's conclusion that respondent transported a passenger must be erroneous. This assertion is incorrect. An FAA inspector testified that he interviewed the passenger who confirmed that he had accompanied respondent on the return flight from Harlan to Sioux City. (Tr. 27-28). Moreover, irrespective of whether respondent had a passenger on board, he admitted that the aircraft did not belong to him, and by that fact alone (given that it was an unairworthy aircraft) he endangered the property of another, in violation of FAR section 91.9.

⁶One of respondent's arguments, that he was entitled to waiver of sanction under the Aviation Safety Reporting Program (ASRP), is without merit and need not be discussed. Respondent did not submit a report to the National Aeronautics and Space Administration (NASA) within 10 days of the incident, as required under FAA Advisory Circular No. 00-46C (1985). Therefore, even assuming he was otherwise qualified for immunity, he was not eligible for a waiver of sanction under the ASRP.

that respondent knew or should have known the aircraft was unairworthy. In response, the Administrator maintains that the unavailability of carburetor heat was serious: respondent should have known the aircraft was not in compliance with its type certificate and was unsafe to operate. Before an aircraft may be considered airworthy, it "(1) must conform to its type certificate, if and as that certificate has been modified by supplemental type certificates and by Airworthiness Directives; and (2) must be in condition for safe operation." Administrator v. Doppes, 5 NTSB 50, 52 n.6, citing Section 603(c) of the Federal Aviation Act of 1958 (49 U.S.C. §1423(c)). As will be discussed infra, the aircraft in the instant case was neither in conformance with its type certificate nor safe to operate.

Respondent testified that although the mechanic explained that no carburetor heat would be available when the part was safety-wired, he never intimated the aircraft was unsafe to operate on that day. Before taking off, respondent referred to the FARs and decided that carburetor heat was not necessary for the flight.⁷ At the hearing, respondent produced an excerpt from

⁷According to respondent, he "review[ed] some of the FAR Part 91s to see what I could do here, what was permissible for me to do. And I looked up the FARs at that time and got into the area where it talked about requirements for VFR [Visual Flight Rules] flight. I looked into that and saw the carburetor heat was not required. Looking through the rest of the FARs at that point, I could not find that that was a necessity for this flight." (Tr. at 56-57.)

He was aware that carburetor heat would be required if he closed the throttle on the engine. (Tr. at 64.)

a military training manual stating that carburetor icing can occur in cloudless skies when the temperature is as high as 72 degrees F.⁸ Thus, he argues, his conclusion that carburetor icing would not be a problem at 90 degrees F. was a logical one.

The Administrator contends that according to Part 3 of the Civil Air Regulations (the predecessor to the FARs), carburetor heat was necessary for the aircraft to be considered airworthy.⁹ One of the Administrator's witnesses, a supervisory aerospace engineer for the FAA, explained that the venturi carburetor utilized in the Cessna 150 is conducive to ice formation, even in 90 degree temperatures. The presence of high humidity also increases the likelihood of ice forming in the throat of the carburetor. This witness testified that "[c]arburetor heat is required on the Cessna 150 during all operating conditions and it is used during the landing phase." (Tr. at 40.) The heat is most critical during landing because ice can form more easily when power is off and the throttle is pulled back to a low power setting. As the velocity of the air going through the carburetor

⁸Respondent was referring to a passage from "Air Force Manual 5112, Weather Flying for Pilots" which, he admitted on cross-examination, is a "generic training excerpt from a military manual." (Tr. at 69.)

⁹Part 3 of the Civil Air Regulations dated May 15, 1956, as amended by 3-4, is the certification basis for the Cessna 150. Section 3.606 entitled "Induction system de-icing and anti-icing provisions" states:

"(a) Airplanes equipped with sea level engines employing conventional venturi carburetors shall be provided with a preheater capable of providing a heat rise of 90 [degrees] F. when the engine is operating at 75 percent of its maximum continuous power."

increases, the temperature decreases. The witness concluded that if the carburetor de-icing function was inoperable, then the aircraft would not be airworthy. Based on this testimony, the law judge found, and we agree, that respondent operated an aircraft that was not airworthy.¹⁰

Another argument advanced by respondent is that his reliance on the mechanic's expertise and his assumption that the mechanic would have informed him if the aircraft was unsafe to fly serve to exculpate him from the consequences of his decision to fly the airplane. The Board believes, however, that it was respondent's ultimate responsibility, as pilot-in-command, to ascertain whether the aircraft was airworthy. Even if he did not know with absolute certainty that the broken cable rendered the aircraft unairworthy, he should have known of the necessity for the availability of carburetor heat to the proper and safe operation of the aircraft he was piloting.¹¹ The operating manual for the Cessna 150, introduced into evidence by the Administrator, requires the application of full carburetor heat when closing the throttle before landing.

¹⁰That the aircraft could be flown does not necessarily mean it was airworthy. As the Board has made clear in the past, an aircraft that is flyable may nonetheless be considered unairworthy. See Administrator v. Brodnax, 3 NTSB 2795, 2797 (1980); Administrator v. Blackwell, 2 NTSB 360, 361 (1973).

¹¹To prove a violation of section 91.29(a), the Administrator must show that the airman operated an aircraft that he knew or reasonably should have known did not conform to its type certificate. Administrator v. Parker, 3 NTSB 2997 (1980), reconsideration denied, 3 NTSB 3005 (1981). See also Administrator v. Gasper, NTSB Order No. EA-3242 (1991).

Respondent contends he was justified in assuming the aircraft was airworthy. Yet, uncontroverted testimony established that the mechanic never signed the log book or said the aircraft was airworthy.¹² The mechanic testified that after witnessing the emergency landing, he volunteered to try to repair the aircraft, but because he could neither fix the cable nor get a new cable that day, he gave respondent the option of having the part the cable actuated secured into the open position. Respondent "wanted to get home," the mechanic stated, and so told him to proceed.¹³ (Tr. at 13, 15.) The law judge accepted the version of the events as told by the mechanic and we see no reason to disturb his decision. See Administrator v. Smith, 5 NTSB 1560, 1563 (1986)(law judge's determination of witness credibility will be upheld unless made in an arbitrary or capricious manner). Given these facts, respondent was not justified in assuming the aircraft was airworthy.

¹²Respondent claims that he was away from the aircraft for most of the time while the mechanic was working on it and that, when he returned, he never checked to see if the mechanic had made an entry into the log book. (Tr. at 62.) The mechanic contradicted this testimony, stating that respondent was present and observed all the repairs made. (Tr. at 18.)

¹³The mechanic acknowledged that, in retrospect, he should not have performed the repairs, but should have instead either written in the log book that the aircraft was not airworthy or just left it alone. He did, however, caution respondent to have the aircraft fixed as soon as he landed. Respondent testified that after landing, he immediately had the aircraft taken out of service. (Tr. at 59.)

It should have been evident to respondent that the aircraft had not been repaired or returned to service using the correct protocol. See Administrator v. Doppes, 5 NTSB 50, 52 n.6 (1985).

Asserting that he did not act carelessly, respondent claims that the section 91.9 charge is unjustified. This argument, too, is unavailing. The operation of an aircraft in an unairworthy condition can support a finding of a section 91.9 violation.

Administrator v. Parker, 3 NTSB 2997, 3000 (1980), reconsideration denied, 3 NTSB 3005 (1981); Administrator v. Nunn, 2 NTSB 1802, 1804 (1975).

Regarding sanction, respondent insists that a 30-day suspension is excessive. To evaluate whether a sanction should be modified, the Board must look to the penalties imposed in similar cases. Administrator v. Shelton, 3 NTSB 2173, 2174 (1979). We have done so and determine that the sanction in the instant case is not inconsistent with Board precedent and thus, we see no reason to reduce the period of suspension imposed on respondent. See, e.g., Administrator v. Copsey, EA-3448 (1991) (60-day suspension for violations of §§ 91.29(a) and 91.9); Administrator v. Doppes, 5 NTSB 50 (1985) (45-day suspension for violations of §§ 91.29(a) and 91.9); Administrator v. Parker, 3 NTSB 2997 (1980), reconsideration denied, 3 NTSB 3005 (1981) (60-day suspension for violations of §§ 91.29(a) and 91.9); Administrator v. Brodnax, 3 NTSB 2795 (1980) (10-month suspension of student pilot certificate for operating unairworthy aircraft four times, in violation of § 91.29(a)).

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;
2. The Administrator's order and the initial decision are affirmed; and
3. The 30-day suspension of respondent's airman certificate shall begin 30 days after service of this order.¹⁴

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

¹⁴For the purpose of this order, respondent must physically surrender his certificate to a representative of the Federal Aviation Administration pursuant to FAR § 61.19(f).