SERVED: December 27, 1996

NTSB Order No. EA-4510

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 12th day of December, 1996

LINDA HALL DASCHLE Acting Administrator, Federal Aviation Administration, Complainant, v. DOYLE CLIFFORD SANDERLIN, Respondent.	)	Docket CP-26

OPINION AND ORDER

Respondent has appealed from the oral initial decision of Administrative Law Judge William E. Fowler, Jr., issued on February 7, 1996, following an evidentiary hearing.[1] The law judge affirmed an order of assessment (civil penalty) issued by

[1] The initial decision, an excerpt from the hearing transcript, is attached.

the Administrator, on finding that respondent had violated 14 C.F.R. 91.13(a), 91.403(c), and 121.371(a).[2] The law judge, however, modified the assessment from the $8,250 sought by the Administrator to $5,000. We deny the appeal.[3]

---

[2] Section 91.13(a), **Careless or reckless operations**, reads:

> (a) Aircraft operations for the purpose of air navigation. No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

Section 91.403(c) reads:

> No person may operate an aircraft for which a manufacturer's maintenance manual or instructions for continued airworthiness has been issued that contains an airworthiness limitations section unless the mandatory replacement times, inspection intervals, and related procedures specified in that section or alternative inspection intervals and related procedures set forth in an operations specification approved by the Administrator under part 121, 127 or 135 of this chapter or in accordance with an inspection program approved under § 91.409(e) have been complied with.

Section 121.371(a), **Required inspection personnel**, reads:

> (a) No person may use any person to perform required inspections unless the person performing the inspection is appropriately certificated, properly trained, qualified, and authorized to do so.

Respondent does not argue that any of these regulations is not applicable to him, as Director of Operations of American International Airways (AIA).

[3] Respondent and the Administrator have each filed a motion. Respondent seeks oral argument, which is denied. The Administrator asks us to strike new evidence (in the form of affidavits) respondent attached to his brief. That motion is granted. Administrator v. Chirino, 5 NTSB 1669 (1987) (Board rule permitting new evidence "was intended exclusively to allow for consideration of evidence of which the proponent was literally unaware before the case was submitted to the Board"). Even were we to consider this information, it is not the

(…continued)

On May 26, 1994, an AIA flight, piloted by Michael Davis, transported various cargo from Miami to Maiquetia, Venezuela (described in the transcript as Caracas, and apparently nearby). On that day, sometime after the flight, the FAA received an anonymous tip that the plane had landed overweight. Mr. Richard Roberts, the FAA's Principal Operations Inspector (POI) for AIA and its investigator in this matter, testified to his conclusion that, unbeknownst to the flight or ground crews, the shipper's weights had been in kilograms, not pounds, and that, as a result, the aircraft was more than 30,000 pounds overweight when it landed in Venezuela. Supporting this belief, the Administrator introduced: cargo manifests, weight and balance computations, and other data prepared or used by the flight crew that day; a contemporaneous statement from Captain Davis; and later correspondence with respondent, among other things.

Exhibit A-7, which contains arithmetical calculations made by POI Roberts, indicates that, if there had been in the range of 40,000 kilos of freight on board, and given the other data available from the flight documents (for example, fuel amounts, aircraft tare weight, pallet weight, etc.), that the aircraft would have landed considerably overweight in Venezuela. See also Exhibit A-12 (manifest showed 43,328 pounds but Captain Davis was

---

(continued…)
compelling evidence respondent contends it is. See discussion infra.

told by shipper that the cargo was in kilos). There is no dispute that, if the aircraft did land overweight, the proper overweight inspection was not performed until after 15 more flights.

Respondent, however, argues that the documentation was unreliable, in that the customs declaration identifies seven attached cargo manifests, not the nine Mr. Roberts considered and counted (and were actually attached to the copy he obtained from the shipper). Eliminating two particular manifests, which respondent claims reflected cargo not actually on the aircraft, would have reduced the landing weight of the aircraft to within authorized limits. Further, contends respondent, the Administrator has not proven that the weight was actually in kilos rather than pounds, or that the aircraft landed overweight. On appeal, respondent also challenges the law judge's particular finding that the aircraft landed in excess of 30,000 pounds overweight, claiming that there was insufficient evidence to sustain that finding, and that it is critical to upholding the complaint, and contends that the absence of proof of certain physical conditions (e.g., hot brakes on landing, and nose-up configuration and excessive tire "squat" pre-takeoff) precludes an overweight finding.

The law judge found that the aircraft had landed overweight,

and he had more than adequate evidence on which to do so.[4] At the time of the incident, Captain Davis submitted an irregularity report indicating a suspected overweight landing. Exhibit A-12. Excerpts of that report indicate poor climb performance, so much so that Captain Davis radioed Miami seeking assistance in ways to verify the aircraft's weight. (His conversation with the shipper indicated the shipper's belief that its cargo manifests were in kilos, not pounds.) The flight plan, Exhibit A-2, shows that, while the projected climb time was 30 minutes, the climb actually took an hour and 5 minutes. Fuel burn was also considerably more than expected (53,600 pounds compared to an estimated 46,600). POI Roberts also testified to a phone conversation he had with respondent, in which respondent further stated that the takeoff roll was very sluggish, and that it had taken a long time to get off the ground. Tr. at 67. All of this evidence is consistent with a cargo weighed in kilos, not pounds.

[4] We find no merit to respondent's argument that the law judge's decision is inconsistent. His comment "How heavy? We can't really tell." (Tr. at 309) was made prior to his actual finding that the aircraft landed in excess of 30,000 pounds overweight, and reflects, as well, the fact that an actual, exact weight would never be available, perhaps recalling Captain Davis' unsuccessful attempt to obtain scales, on landing, to weigh the cargo. Further, respondent is incorrect in arguing that the Administrator must prove the exact details of the complaint (i.e., that the aircraft was "in excess of 30,000" pounds overweight, not just that it was overweight). The factual details of the complaint are intended to ensure that a respondent has adequate notice of the event(s) surrounding the legal charges against him. The Administrator need not prove each and every one exactly as alleged.

The law judge was entitled to view Captain Davis' somewhat different testimony at the hearing in the light of his earlier, and contemporaneous, statements and reach credibility conclusions, and he did so when he accepted Mr. Roberts' testimony. Tr. at 309. (Through testimony at the hearing, the law judge was also aware that Captain Davis was also the subject of an enforcement action in connection with this May 26, 1994 flight.) As the Administrator notes in his reply, respondent has offered no compelling basis in this case to overturn the law judge's assessment of the evidence, relying so much as it does on his credibility assessments. Administrator v. Todd, NTSB Order No. EA-4320 (1995), and cases cited there.[5]

The law judge's finding that an overweight landing occurred is not dependent on whether Mr. Roberts believed that the customs declaration reported nine cargo manifests rather than seven, as respondent alleges. It is equally possible that the declaration's reference to seven manifests was simply in error. Respondent would have the law judge, and this Board, disregard

[5] Furthermore, we do not find FAA v. Empire Airlines, a civil penalty case decided by a Department of Transportation law judge and cited by respondent for the proposition that the Administrator did not satisfactorily investigate alternatives, to require a different result. There is no evidence that Captain Davis even conveyed to POI Roberts or the FAA at any time before the hearing a belief that the climb delay was due to weather conditions. And, in any case, respondent offers no quantifiable showing of what amount of delay those conditions might have produced.

all other evidence supporting an overweight landing finding (including the weight and balance documents used by the crew, which contain weights that approximate the total of nine, not seven, manifests, see Exhibit A-4), and rely instead on one piece of information, quite possibly inaccurate.[6]

Respondent would also have the law judge ignore a letter from respondent dated less than 1 month after the flight. The letter stated, without caveat or condition, that:

> Further investigation into the possible over weight landing of N812CK has confirmed that the load plan was figured in kilos rather than pounds.

Respondent's attempt to explain away that admission is not convincing, and we see no error in the law judge's rejection of it. Todd, supra.

[6] As noted, nine manifests were attached to the shipper's copy of its customs declaration. Respondent's new evidence, if accepted, would show only that the Customs Service believes the number on the form is a seven, not that there actually were seven manifests attached or that the cargo duplicated what was on the manifests.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;

2. The initial decision is affirmed; and

3. Respondent shall submit the assessed $5000 to the FAA within 30 days of the service date of this order.

HALL, Chairman, FRANCIS, Vice Chairman, HAMMERSCHMIDT, GOGLIA, and BLACK, Members of the Board, concurred in the above opinion and order.