

SERVED: March 24, 2010

NTSB Order No. EA-5514

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 23rd day of March, 2010

_____)	
J. RANDOLPH BABBITT,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Dockets SE-18562
v.)	and SE-18563
)	
TONY SCOT SURRATT and)	
FRANK WILLIAM WALKER,)	
)	
Respondents.)	
)	
_____)	

OPINION AND ORDER

The Administrator and respondents have appealed from the oral initial decision of Chief Administrative Law Judge William E. Fowler, Jr., issued on August 12, 2009, following a 2-day evidentiary hearing.¹ The law judge found that the Administrator

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

did not prove the allegations in the complaint, in which the Administrator charged respondents with operating an Airbus A320 while it was in an unairworthy condition.² The Administrator alleged that respondents committed the regulatory violations when they operated the A320 on May 17, 2008, on a maintenance acceptance flight that departed from and returned to Miami International Airport, in which two spoilers on each wing of the aircraft were inoperative. The Administrator's complaint ordered a suspension of respondents' airline transport pilot (ATP) certificates for a period of 180 days each. We deny the Administrator's appeal, and dismiss respondents' appeal, based on their lack of timeliness in filing the appeal brief.

In the orders of suspension, which the Administrator issued on April 8, 2009, and submitted as the complaints in this case, the Administrator alleged that, prior to taking off, an amber "LAF DEGRADED"³ message appeared on the aircraft's Electronic

² The Administrator charged both respondents with violating 14 C.F.R. §§ 91.7(a), which prohibits operation of a civil aircraft that is not in an airworthy condition; 91.13(a), which prohibits careless or reckless operations so as to endanger the life or property of another; and 91.213(a), which states that, except as otherwise provided, no person may take off an aircraft with inoperative instruments or equipment installed without meeting the requirements of § 91.213. The Administrator also charged Respondent Surratt with violating § 91.7(b), which states that the pilot-in-command (PIC) of a civil aircraft shall discontinue the flight when unairworthy mechanical, electrical, or structural conditions occur.

³ The evidence in the record provides that the acronym "LAF"

Centralized Monitor (ECAM) in the cockpit, and that such a message appears when a failure of one of the aircraft's spoiler servojacks has occurred. The complaints further stated that, also prior to takeoff, the ECAM indicated that spoiler Nos. 3 and 5 on both the left and right wings were not operational and/or were locked out, and that respondents were aware of this indication. The complaints alleged that the aircraft's Minimum Equipment List (MEL) does not allow operation of the aircraft when two or more spoilers on either wing are in an inoperable condition. The complaints also alleged that, notwithstanding the indications on the ECAM, respondents took off, and that, within 20 minutes of taking off, the ECAM once again indicated that the spoilers at issue were not operational and/or were locked out. The complaints stated that, during the flight, a person who had visually inspected the left wing while onboard the aircraft informed respondents that two spoilers on the left wing were "floating," and that respondents aborted their first landing attempt at Miami after the aircraft's left wing tip contacted the runway and caused damage to the left wing tip.

At the hearing,⁴ the Administrator called four witnesses to

(..continued)
indicates "load alleviation function."

⁴ Prior to hearing, the law judge consolidated the cases, and both parties filed motions for summary judgment under our Rules of Practice. The law judge denied both motions, based on his

testify and presented numerous exhibits. The FAA principal operations inspector for respondents' employer, USA 3000 Airways, Laurence Johnson, as well as an FAA principal avionics inspector for general aviation repair stations, Philip Stauffer, both testified. Inspector Johnson identified an FAA-approved checklist applicable to USA 3000's operation of A320s, as well as a portion of the FAA-approved flight crew operating manual that applies to USA 3000's operation of A320s. Exhs. A-2 and A-3. Inspector Johnson testified that both checklists require checking the flight controls prior to takeoff, and that checking the spoilers involves the captain moving the stick in the cockpit while the copilot observes the ECAM for indications that the spoilers moved in response to the captain's input on the stick. Inspector Johnson stated that the flight controls that the pilots must check include the spoilers, and that Airbus defines spoilers as a primary flight control. Tr. at 44. Inspector Johnson testified that the ECAM should display four green arrows on each side, indicating that all spoilers are working normally. Inspector Johnson opined that, if the ECAM indicates an abnormality with the spoilers, the pilot should refer to the manuals to interpret what he or she observes on the

(..continued)

determination that genuine issues of material fact existed concerning whether respondents knew that the aircraft was in an unairworthy condition prior to and during the flight at issue. As such, the law judge ordered a hearing for the case.

ECAM, and contact the maintenance department about the abnormality. Inspector Johnson stated that a pilot can re-set the ECAM by pressing a button. Inspector Stauffer testified that the ECAM should not display green unless the spoilers have a "healthy hydraulic pressure." Tr. at 96.

Inspector Johnson further testified that, if a spoiler is in "maintenance mode" in an A320, then it will not respond to input from the cockpit because it will not have hydraulic pressure; similarly, Inspector Stauffer stated that a spoiler cannot respond to inputs from the cockpit when it is in such a manual position. Inspector Stauffer testified that an aircraft's spoilers should never be in maintenance mode for flight, according to the USA 3000 Airbus Manual. Tr. at 94; Exh. A-9. Inspector Johnson stated that, if the spoilers on an A320 are not functioning, then this circumstance changes the lift and drag components of the wing. Therefore, Inspector Johnson testified that a pilot's discovery that spoilers are not functioning should cause the pilot to consider immediately returning to a suitable location for landing. Inspectors Johnson and Stauffer both testified that respondents should not have taken off in the A320 after receiving the ECAM warning, because they could not know how the aircraft would fly and land in such a configuration. Inspector Stauffer stated that the FAA received a statement from USA 3000 indicating that, after the

May 17, 2008 flight, they found the spoilers in a manual position.⁵

Inspector Stauffer identified tabular data from the flight data recorder (FDR) on the A320 at issue. Exh. A-11. Inspector Stauffer testified that the data indicates that the pilots performed the flight control checks prior to takeoff, and that, during the checks, half the spoilers responded to inputs from the cockpit normally, while the other half did not. Based on this FDR data, Inspector Stauffer opined that the flight control check was unsuccessful, and that the ECAM must have shown spoiler numbers in amber, rather than green, and indicated that the spoilers were inoperative. Inspector Stauffer also stated that the FDR data indicates that respondents continued with the flight, rather than taking the aircraft back to the gate for maintenance. Inspector Stauffer also identified excerpts from the MEL applicable to the A320 at issue, and testified that the MEL requires eight operative spoilers for flight, and does not allow spoiler Nos. 3 and 5 to be inoperative. On cross-examination, Inspector Stauffer identified a copy of a 1976 airframe and powerplant manual, which categorizes spoilers within a secondary group of control surfaces.

⁵ Tr. at 96, 100, 102; Exh. A-10 (e-mail message from Joe Miller, director of maintenance and engineering for USA 3000, stating that employees from USA 3000 discovered the spoilers in "maintenance mode" after the flight).

The Administrator also called Thomas Welsh, a quality inspector of aircraft for USA 3000 who was on the May 17, 2008 flight, to testify. Inspector Welsh stated that he saw spoiler Nos. 3 and 5 floating up approximately 8 to 10 inches on the left wing about 15 to 20 minutes into the flight. Inspector Welsh testified that, based on how high he observed the spoilers floating, he knew that they did not have hydraulic fluid. Inspector Welsh also stated that, after they were on the ground, he checked the aircraft's actuator and saw spoiler Nos. 3 and 5 in "M" mode, which indicated that the pilot could not control them with inputs from the cockpit.

The Administrator concluded the case-in-chief by calling Joe Miller, who was in the cockpit with respondents on the flight in question, to testify. Mr. Miller confirmed that he and the pilots saw the "LAF DEGRADED" message on the ECAM prior to takeoff, but that this message did not indicate a serious problem to stop them from taking off. Mr. Miller further stated that he reset the spoiler elevator computers (SEC) in an attempt to clear the "LAF DEGRADED" message, and that, when he and respondents did not see any amber warnings appear on the ECAM, they proceeded with the takeoff. Mr. Miller recalled that, during the flight, the aircraft "[had] some yaw to it," so they turned the autopilot off and re-trimmed the aircraft. Tr. at 223. Mr. Miller also recalled that, once they had reached an

altitude of about 39,000 feet, an observer informed them that he saw two spoilers floating on the left wing. Mr. Miller testified that Respondent Surratt consulted the Quick Reference Handbook (QRH) in the cockpit, and determined that they could continue with the flight, but would need to increase their landing distance. Mr. Miller described the first attempted landing as "unnerving" (Tr. at 226), and recalled that, after landing, an inspection group that he directed informed him that two of the spoilers were in "M" mode (Tr. at 228). Mr. Miller opined that the ECAM was faulty in that it did not register the spoilers as inoperative, and that it was reasonable for respondents to think that it was a spurious message. Mr. Miller stated that he did not believe respondents reacted in an unreasonable manner under the circumstances.

In response to the Administrator's case, respondents both testified on their own behalf. Both respondents stated that they had conducted several previous maintenance acceptance flights, and they both have held ATP certificates with type ratings in A320s for a lengthy period of time. Respondent Surratt recalled that, during the flight control checks that they performed prior to taking off, they noticed several warnings on the ECAM, including an audible chime and message indicating that spoiler Nos. 3 and 5 were inoperative. After resetting the SEC, Respondent Surratt stated that they again

"got multiple warnings," and then reset an additional set of computers. Finally, Respondent Surratt recalled that they "had nothing left except for LAF degraded," which he described as not unusual. Tr. at 287.⁶ Both respondents testified that an A320 can safely take off while this message is on, and that they had seen the message on other flights. Both respondents also stated that they believed they only saw the "LAF DEGRADED" message prior to taking off, and that they did not know that spoiler Nos. 3 and 5 were in maintenance mode until after the flight.

Approximately 20 to 25 minutes into the flight, Respondent Surratt testified, an ECAM message appeared indicating that spoiler Nos. 3 and 5 were inoperative, and that he cleared the ECAM while Respondent Walker operated the aircraft. Respondent Surratt recalled referencing the QRH, which he described as indicating that this was "no problem," and that he need not land the aircraft immediately, but that they should use a "1.15 ... runway multiplier." Tr. at 290.⁷ Respondent Walker stated that the ECAM also did not direct them to land immediately; Respondent Walker opined that landing earlier would not have

⁶ Respondent Surratt testified that Airbus originally intended the "LAF DEGRADED" message to ease turbulence, but that it had never successfully functioned to do so. Tr. at 287.

⁷ On cross-examination, Respondent Surratt acknowledged that the QRH does not address the specific situation in which spoiler Nos. 3 and 5 are in maintenance mode during a flight.

made a difference with regard to the spoiler issue. Respondent Surratt testified that they continued the flight, but that the warning remained on.⁸ Respondent Surratt also stated that he did not consult the MEL during the flight, but that, had he known that spoiler Nos. 3 and 5 were inoperative prior to the flight, he would have referenced the MEL and not taken off.

With regard to the landing, Respondent Surratt recalled that the aircraft "seemed to bounce" on their first approach, and that it "hard roll[ed] left," so he firewalled the throttles and initiated a go-around, after which they had a successful approach. Tr. at 291. Respondent Surratt testified that the aircraft sustained damage to its vertical wing tip vents. At the conclusion of his testimony, Respondent Surratt identified a newsletter that Airbus released 2 months after the flight at issue, which instructs pilots to perform a new flight control check if they have any indication of spoiler problems. Exh. R-7. Both respondents also identified copies of reports and the National Aeronautics and Space Administration (NASA) receipts that they submitted under the Aviation Safety Reporting Program

⁸ Respondent Surratt opined that continuing the maintenance acceptance flight had other benefits, such as burning off fuel and providing the opportunity to identify other potential problems with the aircraft after it had undergone maintenance.

(ASRP) following the flight at issue.⁹

Respondents also called Paul Dow to provide expert testimony on the subject of A320 operations. Mr. Dow stated that Airbus aircraft are known for being subject to spurious messages after undergoing heavy maintenance, as the aircraft at issue had undergone. Mr. Dow opined that respondent's belief that the aircraft was fit for takeoff was reasonable, and that the QRH does not advise pilots to land an aircraft when two sets of spoilers are inoperative, but instead only provides an increased factor for landing distance. Mr. Dow further testified that the MEL is not applicable during flight.

At the conclusion of the hearing, the law judge issued an oral initial decision, in which he determined that the Administrator's evidence that respondents knew that spoiler Nos. 3 and 5 were inoperative prior to flight was "lacking." Initial Decision at 523-24. The law judge held that the testimony at the hearing established that the ECAM panel was

⁹ Under the ASRP, the Administrator may waive the imposition of a sanction, despite the finding of a regulatory violation, as long as certain other requirements are satisfied. Aviation Safety Reporting Program, Advisory Circular 00-46D at ¶ 9c (Feb. 26, 1997). The Program involves filing a report with NASA, which may obviate the imposition of a sanction where (1) the violation was inadvertent and not deliberate; (2) the violation did not involve a criminal offense, accident, or action found at 49 U.S.C. § 44709; (3) the person has not been found in any prior FAA enforcement action to have committed a regulatory violation for the past 5 years; and (4) the person completes and mails a written report of the incident to NASA within 10 days of the violation.

"clear, if not green," prior to takeoff (id. at 524), and that respondents' testimony that the "LAF DEGRADED" warning is not a reason for concern was persuasive. The law judge also mentioned that Mr. Dow had testified that he concurred with the actions respondents took under the circumstances. The law judge concluded that the MEL was not applicable to the aircraft at issue, because respondents cleared the ECAM panel. The law judge did not find that Respondent Surratt had erred in choosing to continue with the flight, as the second landing did not result in substantial damage or serious injury. The law judge determined that respondents had operated the aircraft while it was in an unairworthy condition, but that they did not know that it was unairworthy, and therefore did not violate the regulations, as charged.

Respondents' Appeal

Respondents filed an appeal brief, in which they argue that the law judge erred in not granting their motion for summary judgment prior to the hearing. The Administrator submitted a motion to dismiss respondents' appeal, on the basis that their appeal brief was untimely. The certificate of service attached to respondents' appeal brief indicates that they served the brief on October 8, 2009. After filing the notice of appeal, our Rules of Practice state that an appealing party must perfect the appeal by filing an appeal brief within 50 days after the

date of the initial decision. 49 C.F.R. § 821.48(a). In the case at issue, the law judge issued the oral initial decision on August 12, 2009. Therefore, the parties' deadline for perfecting their appeals by filing their briefs was October 1, 2009. Respondents have not filed a motion for leave to submit their appeal brief late, based on good cause, and they do not mention their lack of timeliness in their appeal brief.

Respondents did not reply to the Administrator's motion to dismiss their appeal. Under our Rules of Practice, we grant the Administrator's motion and thereby dismiss respondents' appeal.¹⁰

The Administrator's Appeal

On appeal, the Administrator argues that several aspects of the law judge's decision are erroneous. The Administrator first contends that the law judge did not explain what evidence he accepted or rejected, and failed to address the issue that respondents did not successfully complete a flight control check because the ECAM did not display four green arrows; in this regard, the Administrator argues that the law judge's finding that no ECAM warnings displayed prior to flight is contrary to the overwhelming weight of the evidence. The Administrator also asserts that the evidence establishes that respondents had sufficient knowledge of the inoperable spoilers prior to taking off. The Administrator points out that neither respondent

¹⁰ See, e.g., Administrator v. Hooper, 6 NTSB 559 (1988).

testified that they observed a green ECAM display upon manipulating the sidestick in the cockpit, but that they testified that they saw green displays only after Mr. Miller completed multiple resets of the computers in the cockpit.

The Administrator further argues that the law judge erred when he failed to explain why he believed the MEL was inapplicable, and that this interpretation is contrary to § 91.213(a), which prohibits operation of an aircraft with inoperative equipment, unless the equipment appears on the MEL. The Administrator also challenges the law judge's determination that Respondent Surratt's decision to continue with the flight was reasonable under the circumstances, as Respondent Surratt became cognizant of a serious spoiler problem during the flight, and because respondents provided no support for their contention that the QRH permitted continued operation with floating spoilers. The Administrator contends that respondents have a cavalier attitude concerning aviation safety, and that Respondent Surratt's continuation of the flight for 3 hours after he learned that the spoilers were malfunctioning is indicative of this attitude. Lastly, the Administrator asserts that the circumstances warrant a 180-day suspension of respondents' ATP certificates. Respondents contest each of the Administrator's arguments, and urge us to affirm the law judge's decision.

With regard to the Administrator's appeal, we agree that the law judge did not fully explain the fundamental reasons for some of the conclusions he made. The law judge did not explicitly discuss whether he found respondents' testimony more credible than the Administrator's witnesses' testimony, but his decision seems to indicate that respondent's and Mr. Dow's testimony formed the basis for his decision. We have long held that we defer to law judges' credibility determinations, absent a showing that the determinations were arbitrary, capricious, or contrary to the weight of the evidence.¹¹ In the case at hand, the key determination that the law judge articulated was his belief that respondents saw green on the ECAM, and therefore believed that the previous warnings on the ECAM, including the "LAF DEGRADED" warning, were spurious.

Sections 91.7(a), 91.13(a), and 91.213(a)

In reviewing the law judge's decision and considering respondent's appeal, we are mindful of the fact that the Administrator has the burden of proving that the aircraft was unairworthy by a preponderance of the evidence.¹² In cases in

¹¹ Administrator v. Nickl, NTSB Order No. EA-5287 at 6 (2007) (citing Administrator v. Kocsis, 4 NTSB 461, 465 n.23 (1982); see also Administrator v. Smith, 5 NTSB 1560, 1563 (1986); Administrator v. Sanders, 4 NTSB 1062 (1983)).

¹² Administrator v. Van Der Horst, NTSB Order No. EA-5179 at 3 (2005); see also Administrator v. Schwandt, NTSB Order No. EA-5226 at 2 (2006) (it is the Board's role to determine, after

which the Administrator alleges that an operator has violated 14 C.F.R. § 91.7(a), we have long held that the standard for airworthiness consists of two prongs: (1) whether the aircraft conforms to its type certificate and applicable Airworthiness Directives; and (2) whether the aircraft is in a condition for safe operation.¹³ With regard to the first prong of the test, we recognize that operators may check the aircraft for conformance with its type design and, where it does not conform, the MEL may nevertheless permit operation of the aircraft.¹⁴ We have also concluded, however, that when small, insignificant deviations are present, an aircraft may still substantially conform to its type design.¹⁵ With regard to whether an aircraft is in a condition for safe operation, we have recognized that, "[t]he term 'airworthiness' is not synonymous with flyability."¹⁶

(..continued)

reviewing the evidence the Administrator presents, whether the Administrator has met the requisite burden of proof).

¹³ Administrator v. Doppes, 5 NTSB 50, 52 n.6 (1985) (citing 49 U.S.C. § 1423(c)); see also Administrator v. Anderson, NTSB Order No. EA-3976 at 2 (1993); Administrator v. Nielsen, NTSB Order No. EA-3755 at 4 (1992); Administrator v. Copsey, 7 NTSB 1316, 1317 (1991).

¹⁴ See generally Anderson, supra note 13, at 4 n.5 (stating that, "[t]he MEL contains items that may be inoperative without rendering the aircraft unairworthy").

¹⁵ Administrator v. Frost, NTSB Order No. EA-4680 (1998); Administrator v. Calavaero, Inc., 5 NTSB 1099, 1101 (1986).

¹⁶ Doppes, supra note 13, at 52 n.6.

Moreover, in determining whether an aircraft is airworthy in accordance with the aforementioned standard, the Board considers whether the operator knew or should have known of any deviation in the aircraft's conformance with its type certificate.¹⁷

In the case at hand, the Administrator did not introduce the type certificate data sheet into evidence, but did provide relevant excerpts from the MEL, which establish that the aircraft did not conform to the applicable airworthiness standards. In any event, given that both prongs of the airworthiness standard are required, the Administrator may prevail in airworthiness cases without introducing the type certificate, but by proving that the aircraft was not in a condition for safe operation. The evidence in this case establishes that the A320 was not performing in a safe manner.¹⁸ In addition, at the hearing, both respondents acknowledged that Airbus did not intend for the aircraft to fly with two pairs of

¹⁷ See, e.g., Administrator v. Yialamas, NTSB Order No. EA-5111 (2004); Administrator v. Bernstein, NTSB Order No. EA-4120 at 5 (1994); see also Administrator v. Easton, NTSB Order No. EA-4732 at 2 (1998) (acknowledging that significant risks exist when a pilot fails to confirm that an aircraft is airworthy following maintenance).

¹⁸ See, e.g., Tr. at 223-26, 291, 372; Exh. R-8 at 2 (Respondent Walker's narrative description of flight in ASRP report, in which he stated, "I was the flying pilot and noticed several times during the flight the rudder trim was going out of range making the autopilot have trouble holding the aircraft stable ... During approach I noticed the aircraft was sloppy and sluggish on the controls").

spoilers in "M" mode, and that such a condition rendered the aircraft unairworthy.¹⁹ Overall, the evidence in this record establishes that the aircraft did not fulfill both prongs of the airworthiness test.

As discussed above, we have previously held that we will also consider whether a respondent knew that an aircraft was in an unairworthy condition when he or she operated the aircraft. In Administrator v. Thibert, NTSB Order No. EA-5306 (2007), we held that the Administrator failed to prove that the respondent knew or should have known that the Bell helicopter he operated had a broken lateral cyclic control servo mount bracket and a cork inserted in the engine oil quick drain in lieu of an approved part. We determined that the Administrator did not prove that the respondent knew or should have known about these discrepancies, because the person who performed maintenance on the aircraft had not informed the respondent of any discrepancies, and because many flight students who were mechanics accompanying the respondent performed pre-flight inspections and did not discover the discrepancies. In Thibert, we cited Yialamas, supra note 17, for the "knew or should have

¹⁹ Tr. at 328 (discussion of MEL requirements), 378-79 (Respondent Walker's statements that respondents discovered that aircraft had been unairworthy during the flight); see also Exhs. A-12 (relevant excerpts from MEL), R-7 (Airbus newsletter warning about spoiler issues).

known" standard; in Yialamas, we determined that the respondent's reliance on maintenance certifications indicating that the aircraft was airworthy and safe to fly was reasonable and showed that the respondent did not know of the discrepancies at issue in that case.²⁰

In his oral initial decision in this case, the law judge indicated that he believed the Administrator needed to prove that respondents had actual knowledge of the fact that the spoilers were malfunctioning. Initial Decision at 523-24. However, our precedent establishes that we do not determine only whether an airman had actual knowledge of a discrepancy, but that we also consider whether the airman *should have known* of the discrepancy. Even based on this standard, the Administrator has not provided sufficient evidence to compel us to find that respondents should have known that the spoilers were malfunctioning. The Administrator's evidence consists of indications that the ECAM displayed several warnings prior to takeoff. However, respondents and Mr. Miller testified that resetting the SEC caused these warnings to clear. In addition, the Administrator presented no evidence to refute respondents' assertion that A320s are subject to spurious warnings, such as

²⁰ Id. at 6-7 (citing Bernstein, supra note 17, at 5, and stating that, to prove a violation of § 91.7(a), "the Administrator must show that the airman operated an aircraft that he knew or reasonably should have known was not airworthy").

the "LAF DEGRADED" message that the ECAM displayed, following heavy maintenance. The Administrator also did not provide evidence to establish that the ECAM was functioning properly; given that the FDR data showed that respondents performed the flight control checks wherein they moved the sidestick to check the spoilers, and that some of the spoilers did not respond appropriately, the Administrator should have provided evidence to show conclusively that the ECAM displayed valid messages at all times.²¹ While Inspector Stauffer explained how the ECAM works, and the photographs of the re-creation of the flight indicated that a functioning ECAM would display appropriate messages when the spoilers are malfunctioning, no one could establish that the ECAM functioned as intended on this particular flight. This lack of evidence, combined with the law judge's assessment that respondents' testimony that they never saw amber numbers on the ECAM prior to takeoff was credible, leads us to conclude that the Administrator did not show that respondents knew or should have known that the spoilers were in

²¹ The Administrator did not provide evidence to explain how respondents and Mr. Miller only saw the "LAF DEGRADED" warning. According to the evidence in the record, the ECAM should have displayed amber-colored numbers indicating exactly which spoilers were malfunctioning. Instead, however, all three witnesses in the cockpit consistently testified that the ECAM only displayed the "LAF DEGRADED" warning. The Administrator did not challenge respondents' testimony that this warning is known as an advisory message, rather than a message indicating that the aircraft is unairworthy.

"M" mode prior to taking off.

At several points in the appeal brief, the Administrator emphasizes that respondents could not have had a successful flight control check in accordance with the mandatory checklists, because it was impossible for the spoilers to have reacted in response to inputs from the cockpit. The Administrator's evidence on this issue is persuasive. See, e.g., Tr. at 56-57, 96, 103-104; Exhs. A-2, A-3. However, the Administrator has not charged respondents with violating any regulation that requires adherence to such checklists. Instead, the Administrator charged respondents with operating an aircraft while it was in an unairworthy condition, and while it had a mechanical, electrical or structural problem. In this case, the Administrator failed to establish a nexus between the checklist requirements and the regulations charged.

Section 91.7(b)

With regard to the Administrator's § 91.7(b) charge against Respondent Surratt, we agree with the law judge's determination that Respondent Surratt, as PIC on the flight at issue, had the discretion to continue with the flight. Under the circumstances of this flight, Respondent Surratt's decision to continue with the flight was not unreasonable, in light of the fact that it behooved him to land the aircraft with less fuel than the amount the aircraft carried only 20 minutes into the flight. Moreover,

the Administrator did not introduce evidence to show that the QRH or any other records functioned to prohibit continuation of the flight. We also note that it would be unreasonable to consider the MEL as mandatory during the flight, and the Administrator has provided no authority establishing otherwise.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondents' appeal is dismissed;
2. The Administrator's appeal is denied; and
3. The law judge's decision, reversing and dismissing the Administrator's orders of suspension, is affirmed.

HERSMAN, Chairman, HART, Vice Chairman, and SUMWALT, Member of the Board, concurred in the above opinion and order.

UNITED STATES OF AMERICA
 NATIONAL TRANSPORTATION SAFETY BOARD
 OFFICE OF ADMINISTRATIVE LAW JUDGES

* * * * *

In the matter of: *

J. RANDOLPH BABBITT, *

ADMINISTRATOR, *

Federal Aviation Administration, *

Complainant, *

v. * Docket Nos.: SE-18562

JUDGE FOWLER SE-18563

TONY SCOT SURRATT and *

FRANK WILLIAM WALKER, *

Respondents. *

* * * * *

200 Chestnut Street
 Courtroom 300
 Philadelphia, Pennsylvania

Wednesday,
 August 12, 2009

The above-entitled matter came on for hearing, pursuant
 to notice, at 10:00 a.m.

BEFORE: WILLIAM E. FOWLER, JR.,
 Chief Administrative Law Judge

APPEARANCES:

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ORAL INITIAL DECISION

This has been a proceeding before the National Transportation Safety Board held pursuant to the provision of the Federal Aviation Act of 1958 as that Act was subsequently amended on the appeals of Tony Scot Surratt and Frank William Walker from Orders of Suspension dated April 8, 2009, issued by the Regional Counsel, Southern Region of the Federal Aviation Administration, which purports to suspend Respondent Surratt's airline transport pilot certificate number (omitted) for a period of 180 days, and also Respondent Walker's airline transport pilot certificate number (omitted) for a period of 180 days.

1 This has been a consolidated proceeding on the appeals
2 of Respondents Surratt and Walker.

3 The Administrator's Orders of Suspension as duly
4 promulgated, pursuant to the National Transportation Safety
5 Board's Rules of Practice in Air Safety Proceedings, as I
6 mentioned earlier, was issued by the Regional Counsel of the
7 Southern Region of the Federal Aviation Administration.

8 This matter has been heard before this United States
9 Administrative Law Judge and is provided by the Board's Rules of
10 Practice, specifically Section 821.42 of those rules, while it is
11 not mandatory, according to that section of the rules, that as the
12 Judge in this proceeding I issue an Oral Initial Decision. I'm
13 going to do that at this time.

14 Following notice to the parties, this matter came on for
15 trial on August 11th and 12th in Philadelphia, Pennsylvania. The
16 Complainant in this proceeding was very ably represented by
17 Counselor Christensen, Esquire, of the Regional Counsel's Office,
18 Southern Region of the Federal Aviation Administration. The
19 Respondents were represented by Counselors Dickstein and Stubbs,
20 Esquire, and both have done a very admirable job, I might add.

21 Both parties have been afforded the opportunity to offer
22 evidence, to call, examine, and cross-examine witnesses. In
23 addition, the parties were afforded the opportunity to make final
24 argument in support of their respective positions.

25 I have reviewed the testimony and the documentary

1 exhibits adduced by counsel. The Administrator has had 21
2 Exhibits. The Respondent has had 11 Exhibits. The Administrator
3 has had the testimony of four witnesses. The Respondent has had
4 the testimony of three witnesses. Two of those witnesses of the
5 Respondent were the two Respondents, themselves, Respondent
6 Surratt and Respondent Walker.

7 I have reviewed the totality of the testimony and the
8 documentary exhibits, and as you know the burden of proof in a
9 proceeding of this type is on the Administrator.

10 The Administrator has set forth two Orders of Suspension
11 here with 21 specific paragraphs set in the Orders against Captain
12 Tony Scot Surratt, and against Captain Frank William Walker there
13 were 12 paragraphs.

14 I'm going to try to be as brief and as concise as I can.

15 This case in my humble estimation rises or falls on what
16 the two Respondents knew, what knowledge they possessed prior to
17 takeoff on May 17th, 2008, from Miami International Airport.

18 We have the testimony of four witnesses on behalf of the
19 Administrator, Witness Laurence Johnson, Principal Operations
20 Inspector; Witness Philip Stauffer is also a Principal Operations
21 Inspector, Witness Thomas W. Welsh, who is an Inspector at USA3000
22 Airlines, the company we're dealing with in this proceeding and
23 witness Frank Miller. All four of these gentlemen are exceedingly
24 experienced.

25 Inspector Stauffer was declared to be an expert,

1 particularly in maintenance, maintenance engineering. And to make
2 a long story short, the witnesses of the Administrator all
3 testified validly and substantiated many of the numbered
4 paragraphs set forth in both Orders of Suspension against
5 Respondent Surratt and Respondent Walker.

6 Respondent had three witnesses, Respondent Surratt,
7 Respondent Walker, and Witness Paul O. Dow, Jr., who was qualified
8 as an expert. Witness Dow has 4,300 hours in the A320 and has
9 11,000 hours as an airline transport certificated pilot.

10 I have reviewed the testimony in this case. The two
11 Respondents have testified and one of the Administrator's
12 witnesses, Mr. Frank Miller, has testified that prior to takeoff,
13 even though the Respondents in this aircraft knew there were
14 spoiler difficulties, spoilers 3 and 5 were, as counsel for the
15 Administrator has ably stated, locked out.

16 Respondents and other members present in the aircraft
17 including Witness Miller who has testified on behalf of the
18 Administrator, that computer buttons were reset and that the ECAM
19 panel prior to takeoff was green. The pilots, Respondent Walker
20 was the flying pilot, Respondent Surratt was tending to the other
21 duties of a First Officer.

22 The evidence here in my determination is persuasive,
23 logical, and compelling that the ECAM panel prior to takeoff or
24 just before takeoff was green or clear, however you want to deem
25 it when this flight took off from Miami International Airport.

1 Some 10, 15, 20 minutes later, messages came on the ECAM of the
2 spoiler problems.

3 The flying pilot, or I should say pilots, conversed
4 about this problem, referred to the QRH, Quick Reference Handbook,
5 which is the National Operation Manual reference book and decided
6 since they had no prior knowledge before they took off with these
7 spoiler difficulties; that even since they then had knowledge of
8 the spoiler difficulties, that they would proceed with their
9 flight, as they did, approximately two hours or more before they
10 attempted their first landing, which had to be aborted because as
11 you have heard during the testimony in this proceeding, the left
12 wing fence as the testimony has stated, as opposed to the
13 Administrator's Order which says the left wingtip, scraped the
14 runway. So, the first attempt at landing was aborted and there
15 was a second uneventful landing.

16 I have heard a number of these cases, not similar to
17 this one, but my point in raising this is there was no accident,
18 no damage, no injuries, no fatalities, and that to me is always a
19 bit refreshing to have a case like this because so many times they
20 are just the opposite.

21 The burden of proof, as I stated earlier, is on the
22 Administrator to prove by a fair and reasonable preponderance of
23 the probative, reliable, and substantial evidence, the charges and
24 allegations as set forth in these Orders of Suspension.

25 It is my determination the Administrator's evidence as

1 to what the Respondents knew prior to takeoff, the Administrator's
2 evidence is lacking based on the totality of what we've had during
3 the course of this two day proceeding.

4 We've had the testimony of both Respondents, as well as
5 the last witness of the Administrator, Mr. Frederick Miller, who
6 is the Director of Maintenance for USA3000 Airlines, who concurred
7 with the two Respondents' testimony that immediately prior to
8 takeoff the ECAM panel was clear, if not green. There was some
9 testimony that it was green. And thereby and thereupon the flight
10 took off.

11 Administrator's witnesses have testified to the opposite
12 result concerning the ECAM panel prior to takeoff and notice to
13 the pilots, but I don't believe, and it is my determination that
14 the Administrator's case is persuasive and compelling enough to
15 rebut the total testimony adduced on the Respondents side of the
16 case.

17 We can look at this case, I believe in another way.
18 Both Respondents are airline transport rated certificated pilots
19 who are held to the highest degree of care, judgment, and
20 responsibility. Now, the evidence is on the Respondents' side, I
21 believe, in this case that the Respondents did not know when they
22 took off the full situation of the spoilers. Three witnesses, as
23 I mentioned, have testified the ECAM panel was clear, indicated
24 green, and they took off.

25 Now, the question after that comes down to what did

1 Respondents Surratt and Walker do when they got the message during
2 the flight some 20, 25 minutes later about the inoperable
3 spoilers. Respondent Surratt is the Pilot-in-Command of this
4 flight. Respondent Walker was the flying pilot. As Pilot-in-
5 Command, Captain Surratt within the realm of his authority as
6 Pilot-in-Command, continued the flight as opposed to the
7 contention of the Federal Aviation Administration, that when they
8 were afforded this message during the flight about the spoiler
9 situation that they immediately end and abort the flight.

10 Administrator's A-7, which is a letter January 11, 2008,
11 to Inspector Laurence Johnson issued by Joseph Guhin, Director of
12 Safety and Regulatory Compliance for USA3000 Airlines, and I will
13 read a certain portion of that letter. The fourth paragraph on
14 the first page of this Exhibit A-7 said during the flight control
15 check, during the taxi checklist the crew noted there was an ECAM
16 caution of LAF degrader. It was cleared by resetting the spoiler
17 elevated computer SEC push buttons. According to both Captain
18 Surratt and Joe Miller, this caution is not uncommon, and was
19 quickly cleared. The aircraft had a clean upper ECAM page prior
20 to the uneventful takeoff.

21 While airborne, during routine page call-ups the ECAM
22 panel displayed symmetrical spoiler 3, 5 Left R spoiler amber
23 indications. During the flight a pilot left the cockpit and
24 returned noting two spoilers on the left wing were floating.

25 A USA3000 Airline Inspector's employee took some

1 pictures of those spoilers, noted that the rudder trim going out
2 of limits, and Captain Walker disengaged the autopilot and
3 manually trimmed the aircraft.

4 The paragraph goes on to say about somewhat difficulty
5 there was in landing the aircraft and with the scrape of the
6 runway by the left wing fence.

7 As I mentioned, the totality of the seven witnesses that
8 have testified in this proceeding, among the four, one was
9 designated an expert, Inspector Johnson, and there was one expert
10 witness, Paul O. Dow, on behalf of the Respondent.

11 You may recall Witness Dow, who was present during the
12 course of this proceeding, said that he concurred wholeheartedly
13 with the actions of Respondents Surratt and Walker and his
14 testimony also encompassed the situation that has often occurred
15 on a maintenance acceptance test flight which has the aircraft
16 involved, which has been laid up for quite a while, that it is not
17 uncommon for the things that occur in the flight we're concerned
18 with here that did occur, and as both the Respondents and Witness
19 Miller testified, this caution as they exercised by resetting the
20 computer buttons which cleared the ECAM panel and allowed them to
21 takeoff in an uneventful takeoff with no problems in their mind.
22 And as they have both testified to, both Respondents were not
23 cognizant of a serious spoiler problem until during the flight,
24 they were later notified and they made their decisions,
25 particularly Respondent Surratt as Pilot-in-Command, to continue

1 the flight, which they did. And other than the wing fence
2 scraping the runway on the second landing attempt, the landing was
3 uneventful and as I said, fortunately, this was merely an incident
4 and not an accident.

5 So that, ladies and gentlemen, as I said I thought the
6 Respondents' case successfully rebutted the Administrator's case.
7 Much has been made of the utilization or non-utilization of the
8 minimum equipment list prior to takeoff. I think the Respondents
9 successfully were persuasive and compelling in their evidence that
10 the minimum equipment list was not applicable or apropos since the
11 ECAM panel was cleared and the Respondents took off accordingly.

12 So that, ladies and gentlemen, I'm sure you get the
13 drift of my decision here now which to use a colloquialism,
14 Respondents have carried the day. And I will make my specific
15 following Findings of Fact and Conclusions of Law accordingly.

16 Taking up first Captain Tony Scot Surratt, his Order of
17 Suspension.

18 1) Respondent Surratt admits and it is found that he was
19 and is the holder of airline transport pilot certificate number
20 (omitted).

21 2) The Respondent admits and it is found that all times
22 relevant herein he was employed as a pilot for Brendan Airways,
23 LLC.

24 The remaining Paragraphs 3, 4, 5, 6, and 7, I will not
25 spell those out because the Respondent has admitted all of those

1 allegations as set forth in Paragraphs 3, 4, 5, 6, and 7. And I
2 will find and admit accordingly where those numbered paragraphs
3 are concerned.

4 8) It is found that the amber LAF degraded message on
5 the aircraft's ECAM panel comes on when there is a failure of one
6 of the aircrafts spoiler servo jacks.

7 9) It is found that during the flight but prior to
8 takeoff the ECAM panel indicated that the following wing roll
9 spoilers were not operational and/or locked out. It is my
10 determination that designated Paragraphs C and D dealing with the
11 right wing spoilers number 3 and 5 were found accordingly.

12 10) It is found that during the flight but prior to
13 takeoff Respondent Surratt was not aware that the aircraft's ECAM
14 indicated that the following wing roll spoilers were not
15 operational and were blocked out, but that the right wing spoiler
16 number 3 and right wing spoiler number 5 were indicated
17 accordingly. It is my determination that appropriate action was
18 taken to clear the ECAM panel and the takeoff quickly followed
19 thereafter.

20 11) It is found that pursuant to the aircraft's minimum
21 equipment list, the aircraft cannot be dispatched when two or more
22 spoilers on either wing are in an inoperable condition. But based
23 on the totality of the evidence and the facts and circumstances
24 we've had adduced during the course of this proceeding, the
25 minimum equipment list immediately prior to takeoff was not

1 operable and should not have been invoked at the time prior to
2 takeoff, and was not invoked.

3 12) The Respondents admit and it is found that
4 notwithstanding the above, during the flight the Respondent
5 Surratt operated the aircraft during the takeoff with no knowledge
6 of the following inoperative instruments: C and D of Paragraph 12,
7 which is the right wing roll spoiler number 3, and D, the right
8 wing roll spoiler number 5.

9 13) It is found that during the flight and after 20
10 minutes after takeoff, the ECAM panel once again indicated that
11 the following wing spoilers were not operational and/or were
12 locked out: C and D as set forth in Paragraph 13 of that Order.

13 14) It is found that during the flight the flying pilot,
14 Frank William Walker, disconnected the autopilot because the
15 rudder trim was not operating properly and was out of range.

16 15) It is found and the Respondent admits that during
17 the flight Respondent was informed that two flights [sic] on the
18 left wing were floating by a person who had visually inspected the
19 left wing while on board the aircraft.

20 16) It is found that during the flight when Respondent
21 first attempted to land the aircraft at Miami International
22 Airport, the aircraft's left wing fence contacted the runway
23 causing damage to the left wing fence.

24 17) The Respondent admits and it is found that during
25 the above referenced inoperable ring roll spoilers during the

1 flight your first landing attempt was aborted.

2 18) During the flight it is found that the Respondents
3 operated the aircraft which then was in an unairworthy condition
4 but the Respondents had no notice until that time that the
5 aircraft was in an unairworthy condition.

6 19) It is found that during the flight the Respondent
7 Surratt failed to discontinue the flight after the unairworthy
8 mechanical, electrical, or structural condition occurred with
9 reference to the condition of the spoilers.

10 20) It is found that during the flight the Respondent
11 did not operate the aircraft in a careless manner so as to
12 endanger the life or property of another.

13 21) It is found by reasons of the foregoing, the
14 Respondent did not violate the following aviation regulations and
15 I'm incorporating by reference as set forth in Paragraphs A, B, C,
16 and D of Paragraph 21 of the aforesaid Order of Suspension as it
17 was based on the totality of the evidence, coupled with the
18 documentary exhibits, that there was a non-violation of Section
19 91.23(a), Section 91.213(a), and Section 91.7(a), and Section
20 91.7(b) of the aforesaid Federal Aviation Regulations.

21 22) This Judge finds that safety in air commerce or air
22 transportation and the public interest does not require the
23 affirmation of the Administrator's Order of Suspension as to
24 Captain Tony Scott Surratt, dated April 8th, 2009, because of the
25 previously alluded to non-violations of the four FARS sections

1 mentioned earlier.

2

3

ORDER

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IT IS ORDERED AND ADJUDGED THAT the Administrator's
5 Order of Suspension as to Captain Tony Scot Surratt, dated
6 April 8th, 2009, be, and the same, hereby is dismissed and
7 reversed.

8

This order is issued by William E. Fowler, Jr., a
9 United States Administrative Law Judge.

10

ADMINISTRATIVE LAW JUDGE FOWLER: As to Captain Frank
11 William Walker I will now proceed to make the following specific
12 Findings of Fact and Conclusions of Law.

13

1) That Respondent Walker admits Paragraphs 1, 2, 3, 4,
14 5, 6, and 7, and I incorporate those admissions of the Respondent
15 Walker by reference as those numbered paragraphs 1 through 7,
16 pertaining to the Administrator's Order of Suspension are set
17 forth regarding Respondent Walker.

18

8) It is found that the amber LAF degraded message on
19 the aircraft's ECAM panel came on as it did when there was a
20 failure of one of the aircraft spoiler servo jacks.

21

9) During the flight but prior to takeoff it is found
22 that the ECAM panel indicated that it was clear and green even
23 though the right wing spoiler number 3 and right wing spoiler
24 number 5 had been locked out and both Respondents as they have
25 testified, the ECAM panel was subsequently cleared with the

1 aforementioned four green indicators and the takeoff proceeded.

2 10) It is found that during the flight but prior to
3 takeoff, Respondent Walker was not aware that the ECAM panel had
4 indicated that the roll spoilers were not operational and/or were
5 locked out because computers were reset clearing the aforesaid
6 ECAM panel enabling the Respondents to takeoff with apparently the
7 spoilers problem not being problematical at that time.

8 11) It is found that pursuant to the aircraft's minimum
9 equipment list which is acknowledged by its pilots that the
10 aircraft cannot be dispatched when two or more spoilers on either
11 wing are in an inoperable condition, the Respondents, both Surratt
12 and Walker, were not knowledgeable because the ECAM panel stated
13 clearance or it was green for them to make the takeoff as they
14 did.

15 12) The Respondent admits notwithstanding the above,
16 that during the flight Respondent Walker operated the aircraft
17 during takeoff and thereafter with the following inoperative
18 instruments and I'm incorporating by reference under Paragraph 12,
19 Paragraph C and D right wing roller and the right wing roll
20 spoilers number 3 and 5.

21 13) It is found that during the flight and within 20
22 minutes after takeoff the ECAM panel once again indicated that the
23 following right wing spoilers were not operational and/or were
24 locked out -- right wing spoiler number 3 and right wing spoiler
25 number 5. As the evidence would indicate, this is the first

1 knowledge that both Respondents had where the ECAM panel were
2 concerned that they had any knowledge of the spoiler problem.

3 14) It is found that during the flight when Respondents
4 first attempted to land the aircraft at Miami Airport, the
5 aircraft's left fence connected with the runway causing damage to
6 the left wing fence.

7 15) It is found that due to the above referenced
8 inoperable wingtip spoilers during the flight your first landing
9 attempt was aborted.

10 16) The Respondent operated the aircraft in an
11 unairworthy condition, but had no knowledge at the time when it
12 first became unairworthy that it was unairworthy.

13 17) During the flight the Respondent did not operate the
14 aircraft in a careless manner so as to potentially endanger the
15 life or property of another.

16 By reason of the foregoing, there was a non-violation of
17 the Federal Aviation Regulations and I'm incorporating by
18 reference those sections without spelling them out, Section
19 91.13(a), Section 91.213(a), and Section 91.7(a) as there was a
20 non-violation of these sections by Respondent Walker.

21 18) This Judge finds that safety in air commerce or air
22 transportation and the public interest does not require the
23 affirmation of the Administrator's Order of Suspension dated
24 April 8th, 2009, as it applies to Respondent Walker due to the
25 non-violation by Respondent Walker on the aforesaid mentioned

1 regulations alluded to that were not violated by Respondent Walker
2 based on the totality of the evidence, coupled with the
3 documentary exhibits as afforded during the course of this
4 proceeding.

5

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ORDER

9

IT IS ORDERED AND DECREED THAT the Administrator's Order
10 of Suspension as to Captain Frank William Walker is hereby
11 reversed and dismissed because of the non-violations of the
12 aforementioned Federal Aviation Regulations.

13 This Order is issued by William E. Fowler, Jr.,
14 United States Administrative Law Judge.

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19 EDITED ON

20 September 2, 2009

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WILLIAM E. FOWLER, JR.

Chief Administrative Law Judge