

SERVED: June 28, 2010

NTSB Order No. EA-5527

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 25th day of June, 2010

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

The Administrator seeks reconsideration of our opinion and order in this case, NTSB Order No. EA-5514, served March 24, 2010. In that decision, we affirmed the law judge's order, in which he granted respondents' appeal. The law judge determined that the Administrator failed to prove both that respondents operated an Airbus A320 while it was in an unairworthy condition,¹ and that Respondent Surratt violated 14 C.F.R.

¹ The Administrator charged both respondents with violating 14 C.F.R. §§ 91.7(a), which prohibits operation of a civil aircraft

§ 91.7(b) when, as pilot-in-command (PIC), he did not discontinue the flight after learning that two sets of the aircraft's spoilers were "floating."

In particular, the law judge determined, and we affirmed, that the Administrator did not adequately rebut the testimony of both respondents and Joe Miller, a mechanic in the cockpit with respondents, that they believed the Electronic Centralized Monitor (ECAM) in the cockpit only displayed a LAF DEGRADED message after respondents and Mr. Miller reset the spoiler elevator computers (SEC). We determined that the LAF DEGRADED message did not function to advise respondents that two sets of spoilers had been left in "maintenance" (or "manual") mode prior to the flight.² Therefore, we concluded that the Administrator had not proved that respondents knew or should have known that the aircraft was in an unairworthy condition prior to taking off.

We also rejected the Administrator's argument that Respondent Surratt should have landed the aircraft as soon as he learned that two sets of spoilers were "floating." Because the flight was a maintenance acceptance flight, we found reasonable respondents' arguments that there were benefits to continuing the flight, such as identifying other potential maintenance issues and burning off fuel. We based this determination largely on our reading of the definition of PIC in 14 C.F.R. § 1.1,³ finding that the PIC has significant discretion to choose

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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.

² See NTSB Order No. EA-5514 at 9 n.6, and surrounding text.

³ Title 14 C.F.R. § 1.1 defines "pilot-in-command" as a person who, "(1) Has final authority and responsibility for the operation and safety of the flight; (2) Has been designated as pilot in command before or during the flight; and (3) Holds the appropriate category, class, and type rating, if appropriate, for the conduct of the flight." See generally Administrator v. Jeffreys, 4 NTSB 681, 682 (1982) (stating that a PIC is the pilot who possesses ultimate decisional authority regarding the flight).

whether to continue a flight when faced with circumstances of this nature.

The Administrator now petitions us to reconsider our original decision, on several bases. The Administrator argues that our "factual findings" in the original opinion are inconsistent with the evidence in the record, particularly with regard to our assessment that the evidence indicated that the ECAM ultimately displayed only a LAF DEGRADED warning and that the LAF DEGRADED warning did not clearly indicate a problem with the spoilers. The Administrator further asserts that respondents' failure to complete a successful flight control check demonstrated their failure to act reasonably and prudently, and that the Airbus newsletter that came into evidence, which concerns ECAM warnings, further indicated that respondents should have successfully completed a flight control check prior to taking off. The Administrator also contends that we erred in finding that the Administrator should have "conclusively" established that the ECAM was functioning properly prior to and during the flight, and that we erred in determining that Respondent Surratt had the discretion to continue with the flight. Respondents oppose the Administrator's arguments, and urge us to reject the petition.

Section 821.50(c) of our Rules of Practice requires that petitions for reconsideration "state briefly and specifically the matters of record alleged to have been erroneously decided, and the ground or grounds relied upon." Furthermore, § 821.50(d) provides that the Board will not consider, and will summarily dismiss, repetitious petitions for reconsideration. The arguments that the Administrator raises in the petition at issue here are not based on new matter, but consist of assertions that our original decision contained incorrect factual and legal conclusions. Although the petition appears somewhat repetitious of the arguments the Administrator made on appeal, we will address the assertions, in the interest of ensuring that our decision on this reconsideration request is clear.

We first note that the central issue in this case revolved around what the ECAM displayed prior to takeoff. The Administrator's petition states that respondents' and Mr. Miller's testimony was contradictory, because they did not consistently testify that the ECAM displayed only the LAF DEGRADED message immediately prior to flight. In support of this argument, the Administrator cites several portions of the record. Those citations, however, refer to testimony concerning

various warnings that occurred when Respondent Walker and Mr. Miller reset the SEC. The testimony indicated that, when re-booting the SEC, certain warnings would flash and then clear. All warnings cleared except the LAF DEGRADED warning, which respondents and Mr. Miller determined to be spurious, given that the aircraft had recently undergone heavy maintenance. As we stated in our original opinion, both respondents and Mr. Miller testified that the ECAM displayed green messages after they reset the SEC, other than the LAF DEGRADED message, indicating to them that the aircraft was in an airworthy condition. The Administrator, on the other hand, argues that respondents should have been aware of a mechanical problem with the aircraft because of the cleared warnings on the ECAM and the LAF DEGRADED message.

As we discussed in our original opinion, the law judge determined that respondents' and Mr. Miller's testimony concerning the green messages on the ECAM was credible. NTSB Order No. EA-5514 at 15. The Administrator did not convince us that this determination was arbitrary, capricious, or contrary to the weight of the evidence. Therefore, we deferred to the law judge's determination that respondents and Mr. Miller observed green messages appear on the ECAM prior to takeoff. The Administrator now appears to assert as well that respondents should not have taken off with the LAF DEGRADED message displaying on the ECAM. However, the only evidence the Administrator presented at the hearing concerning the import of the LAF DEGRADED message was the opinion of FAA principal avionics inspector for general aviation repair stations, Philip Stauffer, who stated that the purpose of the ECAM is to display information concerning various flight controls.⁴ Inspector

⁴ Inspector Stauffer's testimony concerning the ECAM included the following:

Q. What is the purpose of the ECAM?

A. It's got two purposes. It has two displays there. The upper one is primarily the one that displays engine information to the upper, the central two displays. It would be that one. The bottom one is used to call up different system pages, either manually or automatically by the aircraft when faults occur.

Q. Now, when you say system pages, what do you mean by system pages?

A. The lower screen can display any number of pages listed from hydraulics, wheels, doors, oxygen pressure. In this case what's relevant for us is the

Stauffer did not state that the LAF DEGRADED message meant that spoilers were locked down or inoperative. On the contrary, both respondents and Mr. Miller, who is the director of maintenance for respondents' employer, USA3000, testified that receiving a spurious LAF DEGRADED message was not uncommon after an aircraft had undergone heavy maintenance. As we stated in the original opinion, Respondent Surratt also testified that Airbus originally intended the LAF DEGRADED message to assist in easing turbulence, but that it had never successfully functioned to do so. We do not believe that we erred in determining that the evidence was insufficient to show that the LAF DEGRADED message informed respondents the aircraft was in an unairworthy condition.

The Administrator's petition also includes the argument that we have inconsistently applied our case law concerning 14 C.F.R. § 91.7(a). In this regard, as we stated in the original opinion, 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. In determining whether an aircraft is airworthy in accordance with the aforementioned standard, we will consider whether the operator knew or should have known of any deviation in the aircraft's conformance with its type certificate. See cases cited at NTSB Order No. EA-5514 at 17 n.17.

In this case, we affirmed the law judge's conclusion that respondents did not know, nor should have known, that the aircraft was in an unairworthy condition. The law judge found respondents' and Mr. Miller's testimony, that they all believed that the LAF DEGRADED message was an ordinary spurious message, to be credible. In addition, Mr. Miller, as the director of maintenance with many years experience concerning maintenance

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flight control page which is automatically called when you have a fault relevant to it or when the flight crew does their flight control check.

ADMINISTRATIVE LAW JUDGE FOWLER: This would include the spoilers, correct?

THE WITNESS: That would display the spoilers, yes.

ADMINISTRATIVE LAW JUDGE FOWLER: All right.

THE WITNESS: That would display all the flight controls, Your Honor.

Tr. at 88-89.

issues in an Airbus A320, was in the cockpit and did not believe the LAF DEGRADED message was a cause for concern. Based on these facts, we agreed that respondents did not know that the aircraft was unairworthy, and we considered this knowledge element in reaching our conclusion that respondents did not violate § 91.7(a).

The Administrator's reliance on Administrator v. Olsen, NTSB Order No. EA-3743 (1992), concerning the knowledge element is misplaced. In Olsen, the respondent was in the unique position of having been the pilot of the aircraft at issue as well as performing maintenance on the aircraft as its mechanic shortly before the flight at issue. With regard to the knowledge element, we stated as follows:

We are not imposing a standard of strict liability when we hold that respondent's behavior is to be measured against what he personally knew or should have known about the aircraft, both as its pilot and as a mechanic who had recently been involved in its maintenance. Such a standard merely expects respondent to react reasonably and prudently to information of which he is or should have been aware (from whatever source).

Id. at 5-6. The Administrator argues that respondents did not act reasonably and prudently because they did not complete a successful flight check. However, respondents contend that Respondent Walker completed a flight check⁵ and that they believed that the aircraft was in an airworthy condition prior to taking off. The Administrator attempts to prove that respondents violated § 91.7(a) because they did not complete a flight control check subsequent to clearing the ECAM warnings, and therefore did not act reasonably and prudently. This

⁵ On this issue, the record contains the following colloquy between Respondent Walker and his attorney:

Q. Okay. Did you perform any flight control checks?

A. Yes.

Q. And did anything unusual occur during your flight control check?

A. No.

Tr. at 366. Respondent Walker then testified that Respondent Surratt completed a flight control check that indicated a problem with spoiler nos. 3 and 5, but that Respondent Surratt and Mr. Miller were able to clear the warning that displayed on the ECAM by resetting the SEC. Tr. at 366-67.

argument is inconsequential, however, because the reasonable and prudent standard, as articulated in Olsen, is merely a consideration in the overall "knew or should have known" analysis. The Administrator's petition does not overcome our conclusion that respondents' testimony that they did not know, nor have reason to believe, that the spoilers were inoperative prior to takeoff was credible. As we stated in our original opinion, we have long held that we will consider whether a respondent knew or should have known of the unairworthy condition of an aircraft in determining whether he or she has violated § 91.7(a). The Olsen opinion did not change this standard, but instead explicitly rejected the application of a strict liability standard.

The Administrator also argues that, in our opinion below, we imposed a burden that is impossible for the Administrator to fulfill when we stated that the Administrator failed to establish that the ECAM worked properly. We disagree with this assertion. The burden is on the Administrator to prove each element of each offense charged. In the case at hand, the Administrator was aware that respondents and Mr. Miller testified that they believed the aircraft was airworthy because the ECAM only displayed the LAF DEGRADED warning prior to takeoff, after they reset the SEC. In rejecting the Administrator's arguments on appeal, we indicated that the Administrator could have strengthened his case by establishing that the ECAM properly displayed messages. This lack of evidence was one of what we believed to be several shortcomings in the Administrator's case. We specifically reject the Administrator's notion that we are imposing an unreasonable burden on the Administrator to present evidence that the equipment in question operated properly throughout the flight. In the context of this case, we believe evidence along such lines would have been necessary to rebut adequately the testimony of respondents and Mr. Miller concerning what they observed on the ECAM.

The Administrator's final argument, that Respondent Surratt did not have the discretion to continue with the flight, is also without merit. We stated in our original opinion that Respondent Surratt, as PIC, acted reasonably in continuing the flight, as he took advantage of the opportunity to land with less fuel, and he utilized the Quick Reference Handbook on the aircraft, which allows landing the aircraft with inoperative spoilers after applying a multiplication factor to calculate the necessary length of runway. The Administrator provides no new evidence concerning this conclusion, but instead again simply

argues that Respondent Surratt acted unreasonably. We disagreed with this contention in our original opinion, and we likewise reject it now.

ACCORDINGLY, IT IS ORDERED THAT:

The Administrator's petition for reconsideration is denied.

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