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NTSB Order No. EA-4597

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 26th day of September, 1997

_____)	
JANE F. GARVEY,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket No. SE-14331
LARRY D. LIVINGSTON,)	
)	
Respondent.)	
_____)	

OPINION AND ORDER

The Administrator has appealed from the written initial decision issued by Administrative Law Judge William A. Pope, II, on July 11, 1996.¹ By that decision, the law judge dismissed the Administrator's order suspending respondent's airline transport pilot certificate for 20 days on allegations of violations of Sections 91.7, 91.13(a), 91.407(a)(1), 91.407(a)(2), and 91.203(c) of the Federal Aviation Regulations (FAR), 14 C.F.R. Part 91. The Administrator asserts that the law judge overlooked

evidence that supported affirmation of the allegations of violations of FAR §§ 91.407 and 91.13(a).² For the reasons that follow, we deny the appeal.

The Administrator's order is set forth in its entirety in the law judge's decision. It alleges that in October 1994, respondent operated N900NC, a DeHavilland Caribou DHC-4A aircraft, on a flight departing from Battle Creek, Michigan. The aircraft was being taken to Africa for humanitarian purposes. On board the aircraft when it departed were 4 drums of oil and a 500-gallon fuel tank. According to the owners of the aircraft, the oil and fuel were intended for use when the aircraft made interim stops during the course of the flight, and upon its arrival in Africa. The oil and fuel were carried on the aircraft as cargo because both are expensive in Africa.

During the flight an instrument light illuminated, indicating a loss of oil in the right engine. Respondent shut down the engine, dumped fuel from the auxiliary tank to lighten the aircraft, and made an emergency landing in Kuujjuaq, Canada. After the landing, the aircraft mechanic who was traveling with respondent replenished the oil by hooking up a line to a hand pump on one of the barrels and pumping oil into the oil reservoir. About one-half hour later, a Canadian aircraft mechanic boarded N900NC and noted the large fuel tank and drums

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¹A copy of the initial decision is attached.

²Respondent has filed a reply brief, urging the Board to affirm the initial decision.

of oil, and he observed supply lines running along the ceiling and from the fuel tank that went into the ceiling, to the wing roots. He also observed supply lines going from the oil drums around the cabin to each wing root. The mechanic subsequently notified a Canadian aviation inspector, Inspector Stewart. The day after the emergency landing, Inspector Stewart boarded the aircraft. He also observed the fuel tank and oil drums and supply lines going up through the aircraft and into the wings. He could not see whether the supply lines were attached to the aircraft. Inspector Stewart grounded the aircraft until the leaks were repaired and the fuel tank and oil drums were disconnected from the aircraft. He reported his observations to the Federal Aviation Administration (FAA) and supplied the FAA with photographs he took on the day after the emergency landing.

The gist of the Administrator's complaint was that the fuel tank and oil drums were used to replenish fuel and oil while the aircraft was in flight. Respondent denied the allegations, and testified that the supply lines were coiled in the cavity in each of the aircraft's wings and that they were never attached to the aircraft while it was in flight. He claimed that his mechanic set up the auxiliary system to replenish the fuel that had been dumped and the oil that had leaked but only after the aircraft was on the ground in Kuujjuaq. The law judge found respondent credible and ruled that the Administrator failed to produce sufficient evidence to rebut his testimony.

The Administrator contends on appeal that, notwithstanding

the law judge's acceptance of respondent's claim that the auxiliary fuel tank and oil system were not installed on the aircraft for use in flight, and notwithstanding the law judge's finding that supply lines and hoses were not attached to the aircraft during its operation, he nevertheless should have affirmed the violation of FAR § 91.407, because that charge also encompassed the allegation that the aircraft had been altered by the storage of supply lines in the wings of the aircraft. Moreover, the Administrator asserts, the law judge should have affirmed the FAR § 91.13(a) violation because the carriage of cargo that included hazardous materials such as the fuel, oil, and a battery needed to operate the gas pump, was careless.

As to the FAR § 91.407 allegation, we do not disagree with the Administrator that his complaint sets forth an allegation that the aircraft had been altered by the attachment of supply lines to the body of the aircraft in order to effect the transfer of oil and fuel during the aircraft's operation, and that respondent was on notice to defend that charge. However, the law judge accepted respondent's testimony that the supply lines leading to the wing roots had been coiled, capped and secured in cavities in the wings, and that they were not attached to the aircraft while in flight. The law judge found that the evidence produced by the Administrator failed to establish his claims because all of the photographs taken showed the aircraft the day after it landed, and in any event, no witness looked into the wing cavities to see if the fuel and oil supply lines were

actually attached to the aircraft. (Initial decision at 14, 18). Thus, the law judge concluded, the system was consistent with a temporary arrangement and had only been used on the ground.

The Administrator argues that even if the lines were not connected to the aircraft, storage of coiled hoses in the wings was nevertheless an alteration of the aircraft. We reject this contention. There is absolutely no evidence in the record to support the claim that the storage of coiled, capped, lines, secured in the wings of the aircraft, constitutes an alteration. The Administrator cites in his appeal brief the testimony of FAA Inspector Phelps, but the reference takes the witness' testimony out of context. (See TR-50). Inspector Phelps testified that as a pilot, he would be concerned if he had observed, before operating the aircraft, that supply lines had been installed, and that he would expect the prudent pilot to demand a Form 337 showing that such an installation had been proper.³ He explained that he would be concerned with how the hoses were attached to the aircraft wings, because they could interfere with flight control cables and electrical wiring. Inspector Phelps was never asked, nor did he testify that the storage of capped, coiled supply lines, not attached to the aircraft and secured with tie downs in empty cavities in the wings, constituted an alteration.⁴

³Respondent in fact testified that he did question the mechanic a week or so before their departure, when he boarded the aircraft and observed that the coiled supply lines had been stored on the aircraft.

⁴An alteration is an act that causes something to become different in some particular characteristic, without changing it

In fact, on cross-examination he agreed that if the supply lines were not connected to the aircraft and were properly secured and stowed, FAA approval would not be required. (TR-560).⁵ In sum, there is no evidence to show that the storage of the hoses could affect the airworthiness of the aircraft.

Finally, we reject the Administrator's argument on appeal that a finding of carelessness should be affirmed by the Board because it is supported by evidence in the record that respondent permitted the carriage of hazardous materials on the aircraft. The complaint is clear on its face that the allegation of FAR § 91.13(a) was residual to the claim that respondent operated an aircraft with an auxiliary oil and fuel system that had been installed or attached to the aircraft, without FAA approval. Since the appropriateness of carrying hazardous materials such as fuel, oil and batteries on this flight as cargo was not charged or litigated by the parties below, it is not a proper issue for resolution on appeal.⁶

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into something else. Webster's Dictionary 63 (3d. New International Ed. 1966). FAR § 1.1 defines a major alteration as an alteration "(1)That might appreciably affect weight, balance, structural strength, performance, powerplant operation, flight characteristics, or other qualities affecting airworthiness; or (2)That is not done according to accepted practices or cannot be done by elementary operations."

⁵We also note that this witness was not a mechanic.

⁶The Board, of course, is not privy to the Administrator's reasons either for not pursuing charges against respondent for any suspected violation of Department of Transportation regulations on the carriage of hazardous cargo by aircraft (see 49 C.F.R. Part 175) or for not specifically alleging, in support of a non-derivative charge of carelessness, that hazardous cargo

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's appeal is denied; and
2. The law judge's initial decision dismissing the complaint is affirmed.

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

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had been, in light of those regulations, improperly carried. Moreover, we should add that in these circumstances, it was well within the law judge's discretion to limit the evidence sought to be introduced to matters relevant to the reasons identified in the complaint as the bases for the certificate action against the respondent.