SERVED: June 10, 2004

NTSB Order No. EA-5098

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 9th day of June, 2004

MARION C. BLAKEY, Administrator, Federal Aviation Administration, Complainant, v. DAVID P. CANNAVO, Respondent.	)	Docket SE-16783

OPINION AND ORDER

The respondent has appealed from the oral initial decision Administrative Law Judge William E. Fowler, Jr., rendered in this proceeding on April 29, 2003, at the conclusion of an evidentiary hearing.[1] By that decision the law judge affirmed, with a modification in sanction, an order of the Administrator that sought, as amended at the hearing, a 45-day suspension of respondent's airman certificate for his alleged violation of sections 91.13(a) and 91.7(a) of the Federal Aviation Regulations

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

("FAR", 14 C.F.R. Part 91).[2] The law judge modified the order to provide for a 30-day suspension.[3] For the reasons that follow, we have determined to grant the appeal and reverse the initial decision.[4]

The Administrator's January 13, 2003 order, as amended, which served as the complaint before the law judge, alleged, among other facts and circumstances concerning the respondent, the following:

1. You are the holder of Airline Transport Pilot Certificate Number 002226971.

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[2]FAR sections 91.7(a) and 91.13(a) provide as follows:

§ 91.7 Civil aircraft airworthiness.

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

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§ 91.13 Careless or reckless operation.

(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.

[3]The Administrator did not appeal the sanction modification.

[4]The Administrator filed a reply opposing the appeal. She also moved to strike an *ex parte* letter that the respondent submitted to the law judge after the time had expired for him to reconsider his decision. We will grant the request to strike, but we have determined not to issue an order requiring that the respondent show cause why a sanction should not be imposed. *See* 49 C.F.R. 821.63. The respondent appears to have acted without the knowledge or consent of his counsel, and he only sent the letter to the law judge. Since the *ex parte* communication was not considered by the law judge (who forwarded it to the Board's General Counsel) in reaching his decision and will not be considered by the Board in connection with its review of the appeal from that decision, we do not believe further action is necessary.

2. On or about August 24, 2001, you were the pilot-in-command of an Delfin L-29 aircraft, tail # N7857Y, that was observed to be trailing smoke upon landing at the Sky Acres Airport in Millbrook, NY.

3. On or about August 28, 2001, an FAA Aviation Safety Inspector conducted an inspection of this aircraft and determined that an "Aircraft Condition Notice" was warranted because of various maintenance violations [sic] observed.

4. The violations [sic] consisted of the following: a) Nose tire showing signs of dry rot . . . d) duct tape was securing a canvas covering on the nose strut . . . .[5]

The law judge appears to have accepted the testimony of the Administrator's single witness, Aviation Safety Inspector Gerard Beirne, that the two discrepancies remaining in paragraph four of the complaint after amendment established unsafe conditions that demonstrated a lack of airworthiness.[6] We find ourselves unable to agree that the evidence in the record supports that assessment.[7]

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[5]We assume that the term "discrepancies" was intended instead of "violations" in paragraphs 3 and 4.

[6]Respondent flew the aircraft at the request of its owner, who needed to move the aircraft from Stormville Airport, some eight miles distant from Sky Acres Airport, because Stormville Airport, also in New York, was scheduled to be closed.

[7]We also question whether the two conditions cited in the complaint are facially sufficient, or detailed enough, to establish a safety issue. In this connection we note that on brief the Administrator refers to the first discrepancy as one dealing with an alleged "rotted tire." We do not believe that that term accurately paraphrases a complaint that only indicated a tire showing "signs" of dry rot. Similarly, the brief repeatedly refers to the other discrepancy as one involving a deteriorated nose strut boot. In our estimation, the second discrepancy in the complaint challenges as unairworthy only the existence of duct tape on the boot, not the condition of the boot itself. Stated differently, the complaint, in our opinion, does not give fair notice that the airworthiness of the boot was part of respondent's defensive burden.

As a starting point, we note that "dry rot" is not a term the FAR defines. Nevertheless, the parties treated it as a matter covered by Advisory Circular AC 43.13-1B, "Acceptable Methods, Techniques, and Practices—Aircraft Inspection and Repair." *See* Administrator's Exhibit (Adm. Exh.) 8. Specifically, paragraph 9-14 entitled, "Tire Inspection and Repair," directs the removal from service of tires that, among other possible indications of significant wear or damage, exhibit:

(1) Any cuts into the carcass ply.

(2) Cuts extending more than half of the width of a rib and deeper than 50 percent of the remaining groove depth.

(3) Weather checking, cracking, cuts, and snags extending down to the carcass ply in the sidewall and bead areas.

(4) Bulges in any part of tire tread, sidewall, or bead areas that indicate a separation or damaged tire.

(5) Cracking in a groove that exposes fabric or if cracking undercuts tread ribs.

Although Inspector Beirne said he had seen cracks in the grooves of the nose tire that extended all the way around, he never described or evaluated the nature of the cracking under the circular's specified criteria. We do not know whether this was because he believes, contrary to the guidelines, that *any* cracking is enough to require a tire's replacement. See Transcript (Tr.) at pages 58, 69. We hold, nevertheless, that the inspector's personal opinion cannot fairly be the basis for a violation finding when an airman's conduct comports with the

Administrator's own written advice on how to judge the continued serviceability of a tire.[8]

We do not agree with counsel's suggestion that the inspector's assessment that the tire exhibited "severe" dry rot must be deemed a sufficient basis to conclude that it had to be replaced, as a matter of airworthiness, even if replacement would not be required under the terms of the circular. *See* Adm. Brief at 11. While the circular may be "advisory," it purports to inform the industry of practices that are acceptable to the Administrator.[9] Pilots and mechanics should not be subject to enforcement action because their paths cross with an inspector who does not find the Administrator's published advice to be controlling.[10]

In these circumstances, even if the law judge did not credit respondent's uncontradicted, detailed testimony (Tr. at pages

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[8]Respondent's entitlement to rely on the circular is not foreclosed in this instance because he agreed with the inspector that a tire revealing severe dry rot should be removed. Respondent did not agree that this one did. Moreover, that the inspector or the respondent might reject a tire the circular would allow to continue in service does not compel a judgment that the tire could not still be safely used.

[9]Counsel for the Administrator's effort to downplay the standards set forth in the circular is both baffling and transparent. The circular was, after all, the Administrator's exhibit. The willingness to minimalize it on appeal may bespeak counsel's belated recognition of the impact of the respondent's proper reliance on the circular on the balance of evidence in the case.

[10]The Board, under 49 U.S.C.A. Section 44709(d)(3), "is bound by all validly adopted interpretations of laws and regulations the Administrator carries out…." It would be indeed anomalous if the Administrator's inspector's were not.

101-104) to the effect that any cracks in the tire did not rise to the circular's standards for removal, he could not find that the respondent operated the aircraft with an unsafe tire.[11] Since the inspector's testimony did not to establish that the tire should be scrapped under the circular's standards, it provided an insufficient basis for a finding that respondent was culpable under the regulations for not changing the tire.[12]

Also uncontradicted in the record is respondent's testimony to the effect that the L-29 jet trainer was manufactured with a piece of "fabric-type tape," no longer available, covering the hand-stitched vertical seam on the optional canvas dust cover for the front strut. Tr. at pages 112-113. Given that circumstance, it is difficult to perceive a genuine safety issue in the inspector's concern that the duct tape on the boot might come loose and be ingested by the turbine engine, as that possibility must be viewed as falling within the aircraft's design

[11]Respondent, like the inspector, is an airframe and powerplant mechanic with inspection authorization. Unlike the inspector, he appeared to understand that dry rot, or the degradation of tire rubber associated with aging, involves an ongoing process with respect to which judgments, informed by the circular and other maintenance knowledge and experience, must be made in connection with deciding whether to retain or reject a tire.

[12]Although the Administrator sponsored a picture (Adm. Exh. A-6) that shows the aircraft's front strut and part of the tire associated with it, the inspector expressed the belief that the tire in the picture, which exhibits no apparent damage, was not the tire on the aircraft at the time of the flight. Apparently the Administrator did not have a picture of the tire the inspector says he saw. It is far from clear to us why the complaint references a tire showing "signs" of dry rot if the only witness the Administrator would later call to testify about it believed it displayed severe dry rot.

parameters. The respondent was not obligated to ensure that the Czech-built military aircraft was in a safer condition when he flew it than when it entered service. Indeed, to the extent the aircraft was designed to be operated from unimproved airfields and in formation with others in front and behind, it is reasonable to assume that some thought was given to the likelihood that potentially more damaging objects, such as gravel and other off-paved runway debris, would be encountered by the aircraft on takeoffs and, perhaps, landings as well.[13] If the designers believed that the aircraft could withstand those conditions without taking special precautions to guard against engine ingestion, it seems to us that they could not have viewed the risk that an errant piece of fabric tape might come loose to be a significant safety concern.

In light of these factors, we think the inspector's view that the duct tape presented a safety issue reflects, once again, not so much an objective appraisal of the actual (or imagined) risk of the use of the tape, but his personal judgment that duct tape is never appropriate for a repair. Tr. at pages 49-50. In this case, however, the respondent is not charged with making an improper repair; he is charged with flying an aircraft that the Administrator says was unsafe because it had duct tape on its front strut dust boot, notwithstanding the undisputed testimony

[13]The inspector believed that the dust cover was intended to protect the strut on which it was located from dust and materials kicked up from the nose wheel on that strut. Respondent, more logically, we think, related that its purpose was the protection of the strut from matter kicked up by other aircraft.

that the boots were supposed to have a piece of fabric tape on them.[14] We do not think the existence of the tape can reasonably be held on these facts to have presented a genuine airworthiness issue.[15]

In view of the foregoing, we will overturn the suspension order.

ACCORDINGLY, IT IS ORDERED THAT:

1. The respondent's appeal is granted; and

2. The initial decision and the order of suspension are reversed.

ENGLEMAN CONNERS, Chairman, ROSENKER, Vice Chairman, and GOGLIA, CARMODY, and HEALING, Members of the Board, concurred in the above opinion and order.

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[14]The Administrator did not argue that duct tape would not be a suitable replacement for the fabric tape originally installed on this model aircraft, which holds an experimental airworthiness certificate. The substitution would appear to be a minor alteration. Respondent denied that he had used any tape on the aircraft during his three-hour preflight for the brief repositioning flight. He testified to extensive experience in restoring and operating such aircraft, as well as a later variant, the L-39.

[15]We are aware that the inspector testified, contra the respondent, that when he saw the boot several days after the flight the duct tape was around the strut, not on a vertical seam. Assuming the correctness of his recollection, there is no evidence in the record that would support a judgment that tape wrapped around the boot would be any more likely to break loose and cause a problem than would a single piece along a seam. In fact, it might be less likely.