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NTSB Order No. EA-3556

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 30th day of April, 1992

BARRY LAMBERT HARRIS,
Acting Administrator,
Federal Aviation Administration,

Complainant,

Docket SE-10017

v.

ROBERT J. CHIPLOCK,

Respondent.

OPINION AND ORDER

Respondent has appealed from the initial decision issued by Administrative Law Judge Joyce Capps on August 4, 1989, following an evidentiary hearing.¹ The proceeding was initiated by a February 7, 1989 order of suspension (complaint), in which the Administrator alleged that respondent had violated sections 91.9 and 135.65(b) of the Federal Aviation Regulations ("FAR") , 14 CFR

¹The initial decision and order, an excerpt from the transcript of the hearing, is attached. By letter of November 13, 1989, respondent moved to correct the transcript. On November 24, 1989, the law judge edited that part of the transcript that constituted her initial decision. Those corrections suffice.

Parts 91 and 135.² The Administrator suspended respondent's airline transport pilot certificate for 60 days.³ We deny the appeal.

The genesis of the complaint was respondent's actions on April 1, 1987 as pilot-in-command of a Beech 99 passenger-carrying flight for Mall Airways. During the post-landing taxi at Syracuse Hancock International Airport, the aircraft collided with a jetway, damaging the aircraft.⁴ Respondent claimed the collision was the result of glycol on the taxiway, which caused the aircraft to skid.⁵ No log entry of the damage was made until the following day.

In finding respondent violated section 91.9, the law judge reviewed the evidence under the principles of Administrator v.

²Section 91.9 (currently 91.13(a)) provided:

No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

Section 135.65(b) provided:

The pilot in command shall enter or have entered in the aircraft maintenance log each mechanical irregularity that comes to the pilot's attention during flight time. Before each flight, the pilot in command shall, if the pilot does not already know, determine the status of each irregularity entered in the maintenance log at the end of the preceding flight.

³As a result of an incident report respondent filed pursuant to the Aviation Safety Reporting Program, the Administrator later amended the complaint to waive sanction.

⁴There was only minor scratching of the jetway and no injuries.

⁵Although respondent never states so directly, it appears that his position is that the glycol was a supervening cause and, therefore, he was not careless in violation of § 91.9.

Lindstam, 41 C.A.B. 841 (1964). There, we held that the Administrator need not allege or prove specific acts of carelessness to support a violation of section 91.9. Instead, using circumstantial evidence, he may establish a prima facie case by creating a reasonable inference that the incident would not have occurred but for carelessness on respondent's part. The burden then shifts to respondent to come forward with an alternative explanation for the event sufficient to cast reasonable doubt on (i.e., overcome the inference of) the Administrator's claim of carelessness.

The law judge noted that damage to a stationary jetway could only be caused by the negligence of another (thus implicitly finding that the Administrator had made a prima facie case) , and then found that respondent had not presented a reasonable, alternative explanation. She discounted testimony offered by respondent's expert that glycol would have made the surface slippery, noting, for example, the copilot's statement that he had noticed no slipping and sliding.⁶ Her assessment of the cause of the incident was that respondent simply was moving a little too fast, and in turning into the gate he got too close to the jetway.

As to the log violation, the law judge acknowledged that the

⁶Other eyewitnesses also testified that the glycol was not slippery and that braking tests showed good traction. The law judge found nonsensical respondent's position that the surface would be slippery only to aircraft and not to pedestrians or motor vehicles. Tr. at 183.

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regulation fails to specify a time period in which the entry must be made. She applied a reasonableness standard, and found that making the entry the next day, after the aircraft had been turned over to a mechanic, was not reasonable. She noted that the purpose of the log entry is to advise the mechanics and that this cannot occur if the entry is made too late.

Respondent appeals on a number of grounds. As to the section 91.9 violation, he claims, first, that Lindstam does not apply and, second, that the preponderance of the evidence does not support the law judge's decision. Regarding the log violation, he argues that his action met the requirements of Mall Airways' manual, and that, if a conflict exists between that manual and the FAR, respondent should not be held liable, citing Administrator v. Krog, 5 NTSB 1426 (1986). We find no merit in any of these arguments.

Respondent misconstrues the working of the Lindstam doctrine. Contrary to respondent's claim, Lindstam does not require the complaint to refer to that case or to include a specific allegation that the incident would not have occurred "but for" carelessness. Not only would such an allegation be redundant, given that the complaint makes clear the nature of the charge, but respondent is confusing the complaint itself with the necessary proof and procedure under Lindstam.⁷

⁷We also fail to see the relevance of respondent's citations to Administrator v. Walters, 3 NTSB 120 (1977), and Administrator v. Richards, 2 NTSB 1160 (1974). Neither case applies or discusses Lindstam, as they deal only with section 91.9 as a residual
(continued. ..) "

Respondent's challenge to the weight of the evidence is equally unpersuasive. There is substantial support in the record for a finding of carelessness, as well as the law judge's skepticism regarding respondent's alternate theory.⁸

Finally, we agree with the Administrator that the company manual is superseded by the FAR when the two are inconsistent. Krog does not hold otherwise or support a contrary result. In Krog, we concluded that a violation could not be found for an overweight takeoff where the performance manual prepared by the airline showed the aircraft overweight but the manufacturer's airplane flight manual did not. We specifically held that a standard contained in an airline's manual does not substitute for that contained in the manufacturer's handbook. Once again, this case has no bearing on the matter before us, where we are dealing solely with an airline manual, unapproved by the FAA. And, although we have declined to impose sanctions when airline manuals are confusing, see, e.g., Administrator v. Loutham, 3 NTSB 928 (1978), extending this precedent to dismissal of the

⁷ (...continued)
violation. Richards, in addition, simply states the general burden of proof before the Board.

⁸Moreover, even if that theory had been accepted, it need not in our view have exonerated respondent. Under Lindstam, an alternate theory is offered to demonstrate that respondent was not careless. This may involve a judgment as to whether he could (and should) have foreseen difficulty and taken measures to avoid it. Respondent had operated at this airport on numerous occasions and should have been aware that, in winter conditions, glycol was likely to be present on the ramp. Thus, even assuming the glycol was slippery enough to have caused a skid into the jetway, respondent failed to exercise the extra care that would have been necessary to ensure safe passage through the area.

complaint is unwarranted.⁹

ACCORDINGLY , IT IS ORDERED THAT:

1. Respondent's appeal is denied; and
2. The initial decision is affirmed.

COUGHLIN, Acting Chairman, LAUBER, KOLSTAD, HART, and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

⁹That the intent of the regulation was coincidentally not thwarted here would have been a factor in analyzing the appropriate sanction, had it not been waived.