UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

In the Matter of: RUSHMORE HELICOPTERS, INC.

FAA Order No. 2012-8

Docket No. CP10GL0002

FDMS No. FAA-2010-0023[1]

Served: October 11, 2012

DECISION AND ORDER[2]

I. Introduction

Respondent Rushmore Helicopters, Inc. (Respondent) has appealed the written initial decision of Administrative Law Judge (ALJ) Richard C. Goodwin.[3] The ALJ found that Respondent violated 14 C.F.R. §§ 91.7(a), which prohibits operating an unairworthy aircraft,[4] and 91.13(a), which prohibits operating an aircraft carelessly or recklessly so as to endanger the life or property of another.[5] The ALJ assessed a civil penalty of $22,500 against Respondent.

[1] Materials filed in the FAA Hearing Docket (except for materials filed in security cases) are also available for viewing at the following Internet address: *www.regulations.gov*.

[2] The Administrator's civil penalty decisions, along with indexes of the decisions, the rules of practice, and other information, are available on the Internet at the following address: *www.faa.gov/about/office_org/headquarters_offices/agc/pol_adjudication/AGC400/Civil_Penalty*. In addition, Thomson Reuters/West Publishing publishes Federal Aviation Decisions. Finally, the decisions are available through LEXIS (TRANS library) and WestLaw (FTRAN-FAA database). For additional information, see the Web site.

[3] A copy of the ALJ's written initial decision is attached.

[4] 14 C.F.R. § 91.7(a) provides that, "No person may operate an aircraft unless it is in an airworthy condition."

[5] 14 C.F.R. § 91.13(a) provides that, "No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another."

This decision denies Respondent's appeal and affirms the ALJ's assessment of a $22,500 civil penalty.

II. Background

Respondent is a commercial air tour operator in Keystone, South Dakota and operates under 14 C.F.R. Part 91. (Tr. 18-19.) On August 6, 2009, Robert Leffert, a pilot employed by Respondent, lost the fuel cap while refueling one of Respondent's helicopters, a Bell 206 Jet Ranger, with registration number N2268W ("68 Whiskey"). (Tr. 70.) Leffert searched for the fuel cap without success, and finally placed duct tape over the fuel filler port. (Tr. 71-73.)

The next morning, on August 7, 2009, Respondent's owner and president, Michael Jacob, along with several of his pilots, discussed the missing fuel cap with Leffert. They concluded that it was safe to use the duct tape temporarily to cover the port because the fuel cap was not a structural component of the helicopter and the fuel loads were low. (Tr. 73-74.) At this meeting, Jacob stated that another fuel cap had been ordered and was on its way. (Tr. 74.)

That same morning, Jacob had a telephone conversation with a design engineer at Bell Helicopters named Daniel Bias, who said that the fuel cap prevents fuel contamination and spillage in case of a dynamic rollover. (*Id*.) Bias told Jacob that the missing fuel cap was not a safety issue and that he would send a letter of "non-objection." (Tr. 119.) Jacob told his chief pilot, Roger Dubbs, and Leffert about the conversation. (*Id.*) The three decided that the missing fuel cap was not an airworthiness issue. (*Id.*)

Also on August 7, 2009, FAA Safety Inspectors Gary Kwasniewski and Barry Dunmire went to Keystone to investigate a complaint from a member of the public

about an aircraft with duct tape over a fuel port. (Tr. 19-20.) When they arrived, they saw N2268W. (Tr. 22-23.) According to the inspectors, they met the pilot, Robert Leffert, and asked him if the helicopter had any airworthiness issues.[6] (Tr. 23-24, 110.) He said no. (Tr. 24.) Leffert repositioned the helicopter to a pad that was farthest from the office, and about that time, Inspector Kwasniewski noticed that there was duct tape over the filler port. (Tr. 25.) The helicopter was about to take off and the inspector did not think it would be safe to run to try to stop it. (Tr. 26.)

While waiting for the helicopter to return, Inspector Kwasniewski asked a member of Respondent's ground crew, Mariah Weller, for the day's flight schedule, and she gave it to him. (Tr. 29; Agency Exhibit 4.) He saw her remove the record from a binder. She then made a copy and handed it to him. (Tr. 66-67.) After the inspectors left, they realized that this schedule was marked "August 6, 2009." (Tr. 36.) But Inspector Kwasniewski testified that he believed the schedule was actually for August 7, 2009, because: (1) Weller told him that Respondent takes all previous schedules to a sister company in Custer, South Dakota; (2) it was the only schedule that Weller had for that day; and (3) Weller handed it to him on August 7 and said it was for that day. (Tr. 37.) The schedule that Weller handed him showed that N2268W had flown 10 flights, carrying a total of 27 passengers, that day. (Tr. 40, 66.)

Leffert returned a short time later in N2268W. (*Id.*) He let the passengers out and then repositioned his helicopter so that it was at the far end of Respondent's location, towards the hangar. (Tr. 27.) The two inspectors approached Leffert. (*Id.*) When

[6] Leffert testified that the inspectors asked him whether the helicopter had any maintenance issues. The ALJ accepted Leffert's version, which was that he was asked whether the helicopter had any maintenance, as opposed to airworthiness, issues. (Initial Decision at 8 n.6.)

Inspector Kwasniewski asked about the situation, Leffert admitted that he had lost the fuel cap the day before and had covered the fuel filler port with duct tape, but, he said, the helicopter was airworthy. (Tr. 27-28.) Leffert also said that he had not been able to ask any maintenance personnel about the matter. (Tr. 28.) Inspector Kwasniewski recommended that Rushmore not fly the helicopter until it determined the helicopter's airworthiness and warned that any flights might constitute violations of the regulations. (*Id.)*

That same day, the inspectors went to Custer, South Dakota, to speak with Michael Jacob, Respondent's owner and president. (Tr. 33.) The inspectors noticed that N2268W was in Custer, South Dakota. They told Jacob that they were disappointed that the helicopter had flown there, given that they had warned Leffert about flying without determining N2268W's airworthiness. (Tr. 44.) The inspectors obtained a copy of the August 6, 2009, flight log while at Custer.[7] (Tr. 33-35; Agency Exhibit 3.)

Leffert testified that when he saw the inspectors at Keystone, the fuel cap had not even entered his mind. (Tr. 74.) He stated he thought it was a routine ramp check. (*Id.*) He testified that he went over and asked them if he could help them. (*Id*.) They told him to fly his waiting load of passengers and they would talk to him when he returned. (Tr. 75.) When he did so, they came out to the helicopter and told him he was in violation of Section 91.7(a) and they were grounding him. (Tr. 75-76.) Regarding the number of flights on August 7, 2009, with duct tape over the fuel port, he testified, "According to the records, there was [sic] about ten flights. I don't remember doing that many, but that was, apparently, the case." (Tr. 77.)

[7]This flight log reflected a different series of flights than the flight log obtained from Weller.

FAA Inspector James Bad Horse, Respondent's Principal Maintenance Inspector (PMI), testified that he went to speak to Leffert on August 11, 2009, and found that Leffert had left the area. (Tr. 93.) He then spoke to Respondent's owner and president, Michael Jacob. (*Id.*) At first, Jacob said he was unaware of the fuel cap occurrence. (Tr. 94.) But he subsequently told the inspectors that the aircraft had flown a number of flights that day and that he had ordered a fuel cap. (Tr. 95.)

Inspector Bad Horse testified that N2268W did not meet its type design or type certificate when Respondent operated it with duct tape over the fuel filler port. He explained that if a helicopter went down and rolled over on its side, the fuel cap would prevent any fuel spillage and would reduce the risk of the aircraft catching fire. (Tr. 96.) According to Bad Horse, the aircraft is not airworthy without the fuel cap. (*Id*.) The fuel cap, he explained, also prevents contaminants from entering the fuel. (Tr. 98.) If the duct tape was not completely secured, he said, the rotor wash, which includes dust and debris, could get into the fuel cell. (Tr. 98.) Bad Horse testified that operating with the tank only one quarter full would not make a difference. The helicopter still would not meet its type design or comply with its type certificate. (Tr. 98-99.) If there was an engine flame-out, shut down, or emergency, and the pilot had to set it down and the aircraft rolled over, he stated, then fuel would come out of the port and with a hot engine, a fire could result. (Tr. 105.)

Inspector Bad Horse also testified that Respondent had been very helpful to him over the preceding 3 years, giving him whatever information he had requested. (Tr. 100.) He had not found that Respondent intentionally tried to cut corners. (Tr. 101.)

At the hearing, Jacob testified that Leffert, as pilot in command, was responsible for determining that the aircraft was safe to fly. He admitted that there were errors in judgment made on all their parts. (*Id.*) He testified that he did not receive a letter of non-objection from Bias, and that the engineer later told him that his supervisors would not permit him to provide any written documentation because it could establish a legal precedent. (Tr. 120.)

III. ALJ's Decision

The ALJ found that Complainant proved each of the alleged violations. He wrote that Respondent admitted the facts, and that the evidence showed that Respondent violated Section 91.7(a) (operating an unairworthy aircraft) because the helicopter was not airworthy under either prong of the airworthiness test. Regarding the first prong, the ALJ wrote that the helicopter failed to conform to its type certificate due to the duct tape covering the fuel filler port. Regarding the second prong, the ALJ wrote that the duct tape endangered the passengers and crew because of the risk of fire and fuel depletion.

The ALJ also found that Respondent violated Section 91.13(a) (operating carelessly) because of the risk of fuel contamination and fire. He rejected Respondent's argument that the violation of Section 91.13(a) should be treated as merely a residual violation.

Respondent argued that the pilot should be held solely responsible for the violations, but the ALJ pointed out that Respondent's owner and president knew on the morning of August 7, 2009, that the helicopter had duct tape covering the fuel filler port but he still allowed the helicopter to operate. In addition, the ALJ wrote, air carriers are responsible for violations committed by an employee acting within the scope of his or her

employment for that air carrier.

Regarding the civil penalty, Complainant had sought $25,000, but the ALJ assessed $22,500 instead. The ALJ wrote that under the FAA's sanction guidance, operation of an unairworthy aircraft warrants a civil penalty in the moderate to maximum range.[8] He noted that the sanction guidance table lists the following civil penalty ranges per violation for small businesses like Respondent: moderate, $2,200 to $4,399; and maximum, $4,400 to $11,000.[9] The ALJ wrote that this equates to between $22,000 and $110,000 for 10 flights. Complainant asked for $2,500 per flight, or $25,000 total. The ALJ found, however, that $22,500 was appropriate. He wrote that Respondent's helicopter was flown when it was not airworthy on ten occasions, placing the passengers at risk. The ALJ rejected Respondent's contention that it did not intend to bypass any requirement, given that pilot Leffert was coy in his dealings with the inspectors, which the ALJ held was an aggravating circumstance. The ALJ did, however, permit some mitigation due to the fact that Jacob relied on an opinion from a Bell technician, although he noted that the opinion was entitled to less weight because it was hearsay. The ALJ concluded that the sanction amount of $22,500 took into account the totality of the circumstances of this case, was suitably substantial, was within the range given in the sanction guidance, and would have sufficient deterrent effect.

IV. Analysis

On appeal, Respondent argues that the sanction is too high. According to Respondent:

[8] Agency Exhibit 6, FAA Order No. 2150.3B, Appendix B, Part II, Fig. B-3-a(5) at B-20 (October 1, 2007).

[9] Agency Exhibit 6, FAA Order No. 2150.3B, Appendix B, Part I, § 3c(7) at B-6 (October 1, 2007).

1. There was only one flight on August 7, 2009, rather than ten, as the ALJ found;

2. Respondent did not commit an independent violation of Section 91.13(a); and

3. The ALJ should have considered Respondent's financial hardship.

Respondent asks for a remand so that the ALJ may reconsider the penalty.

A. Number of flights

Respondent argues that the ALJ erred in finding that there were 10 flights with duct tape covering the fuel filler port. (Appeal Brief at 3.) The ALJ appears to have assessed a civil penalty of $2,250 for each of 10 flights, for a total of $22,500. (Initial Decision at 7.)

Complainant introduced a flight log – Agency Exhibit 4 – showing that Respondent had made 10 flights in N2268W, but that log is dated August 6, 2009, rather than August 7, 2009, the date of the alleged violations. Complainant contends that the log was simply misdated and was actually the log for August 7, 2009.

Respondent argues that the only evidence introduced by Complainant showing that it had the correct flight log was hearsay – specifically, FAA Inspector Kwasniewski's testimony that when Weller, a member of Respondent's ground crew, gave him the log dated August 6, 2009, she stated that it was for August 7, 2009, and that the previous days' records were kept at a different location. Respondent argues that Complainant should have called Weller to testify because FAA guidance states: "FAA investigative personnel should obtain direct evidence if it is available …." FAA Order No. 2150.3B, ¶ 10.b (October 1, 2007). The record does not reflect whether Weller was available.

Respondent also takes issue with the ALJ's statement that "Rushmore witnesses each acknowledge that the Bell 206 helicopter … had operated ten flights …." (Initial

Decision at 5.) Respondent is correct that Rushmore owner and president Jacob was the only witness for Respondent and did not testify about whether the log was for August 7, 2009, but this was harmless error. As discussed below, there was still sufficient evidence that there were 10 flights.

Respondent argues that Leffert, who was called by Complainant, did not acknowledge that he flew 10 flights in the Bell 206 helicopter on August 7, 2009. Leffert testified that the records showed about 10 flights even though he did not remember that many. Specifically, he testified, "According to the records, there was [sic] about 10 flights. I don't remember doing that many, but that was, apparently, the case." (Tr. 76-77.)

Respondent asserts that there was proof of only one flight on August 7, 2009 – the air tour flight witnessed by the inspectors. Therefore, according to Respondent, the civil penalty must be reduced to reflect only one violation.

The standard of proof in FAA civil penalty cases is as follows:

> The administrative law judge shall issue an initial decision or rule in a party's favor only if the decision or ruling is supported by, and in accordance with, the reliable, probative, and substantial evidence contained in the record.

14 C.F.R. § 13.233. Hearsay is admissible, although it is entitled to lesser weight than direct evidence. *Ratner*, FAA Order 2009-2 (January 12, 2009), quoting 14 C.F.R. § 13.222(c) ("[t]he fact that evidence submitted by a party is hearsay goes only to the weight of the evidence and does not affect its admissibility"). Particularly where hearsay is consistent with other evidence, it has been held worthy of consideration. *TWA*, FAA Order No. 1998-11 n.18 (June 16, 1998).

There is sufficient evidence to support Weller's out-of-court statement that the flight log was for the August 7, 2009, flights. Inspector Kwasniewski testified that he asked for the flight log for August 7. He saw Weller respond by removing the flight log from the folder and making a copy. He testified that she handed that copy to the inspectors. (Tr. 66-67; Agency Exhibit 4.) Weller contemporaneously told the inspector that it was the record for that day, August 7, 2009, and that the previous days' records were kept at a different location. (Tr. 37, 66.) The inspector did indeed obtain a copy of the previous day's record, another flight log page dated August 6, 2009, at the other location. (Tr. 33; Agency Exhibit 3.)

Complainant is correct that once it produced evidence that there were 10 flights, the burden of production shifted to Respondent, but Respondent failed to carry this burden. Further, Respondent neither objected to the admission of the flight log that Weller gave the inspectors nor did it introduce evidence to show that fewer flights were conducted that day.

The preponderance of the reliable, substantial, and probative evidence showed that the flight log that Weller gave the inspector, showing 10 flights, was for August 7, 2009. The ALJ did not err in finding that there were 10 flights without a fuel cap and with duct tape covering the fuel filler port.

B. Separate Violation of Section 91.13(a)

On appeal, Respondent asserts that Complainant failed to prove a violation of Section 91.13(a) (operating carelessly so as to endanger another's life or property) that was separate and independent from Section 91.7(a) (operating an unairworthy aircraft). (Appeal Brief at 7.) The ALJ stated that:

> Respondent endangered life and property to an unacceptable degree. Its actions risked fuel contamination and created an intolerable risk of fire. Complainant thus proved a violation of § 91.13(a) as well [as § 91.7(a)]. I reject Respondent's counter that § 91.13(a) should be treated merely as a residual violation.

(Initial Decision at 5; citations omitted.)

Section 91.7(a) provides that, "No person may operate an aircraft unless it is in an airworthy condition." The Administrator has held that:

> To be airworthy, an aircraft must: (1) conform to its type design approved under a type certificate or supplemental type certificate and to applicable airworthiness directives; and (2) be in a condition for safe operation.

Whitley, FAA Order No. 2009-4 at 12 (January 14, 2009), quoting *Kilrain*, FAA Order No. 1996-18 at 10 (May 3, 1996), *petition for reconsideration denied*, FAA Order No. 1996-23 (August 13, 1996), *petition for review denied*, *Kilrain v. FAA*, No. 96-3587 (3rd Cir. May 1, 1997). Both requirements of this test must be met for an aircraft to be airworthy. *Id.* Airworthiness means more than that an aircraft can be flown. *Id.*, citing *Copsey v. NTSB*, 993 F.2d 736, 739 (10th Cir. 1993); *US Air*, FAA Order No. 1996-25 at 13 (August 12, 1996). Complainant elicited testimony from its inspectors that the fuel cap is an essential part of the helicopter's drawings, which are part of the type certificate data sheet. (Tr. 45-46.) Thus, with the fuel cap missing and duct tape covering the filler port,

the aircraft failed to meet its type design and was not in condition for safe operation. (Tr. 45-46, 49-50.)

As for Section 91.13(a), it provides that, "No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another." Regarding Section 91.13(a) as a residual violation, the National Transportation Safety Board (NTSB) has explained that:

> A residual violation is one that flows solely from a respondent's violation of another, independent regulation. A residual violation has no effect on sanction. …[T]he finding of a violation of an operational provision …, without more, is sufficient to support a finding of a "residual" or "derivative" Section 91.13(a) violation.

FAA v. Richard, NTSB Order No. EA-4223, 1994 WL393358 at *6 n.17 (July 22, 1994). The NTSB has further stated that an independent violation of Section 91.13(a) requires a higher threshold of evidence. *FAA v. Hollabaugh*, NTSB Order No. EA-5609, 2011 WL 7025300 at *3 (December 21, 2011). (*Id*. at 3.) The NTSB requires "proof of an unacceptably high likelihood of potential harm or clearly deficient judgment … to establish an independent violation of Section 91.13(a)." *FAA v. Richard*, NTSB Order No. EA-4223, 1994 WL393358 at *6 (July 22, 1994). The Administrator is not required to follow NTSB case law in this forum, but may do so if it is persuasive. *Richardson & Shimp*, FAA Order 1992-49 at 9 n.13 (July 22, 1992).

It is not necessary to decide whether the violation of Section 91.13(a) was an independent or residual violation because the ALJ does not appear to have assessed a higher civil penalty on the grounds that the violation was independent. The sanction he assessed was near the bottom of the range and was appropriate even for a residual violation.

C. Financial Hardship

Respondent did not raise the issue of financial hardship during the proceedings below. On appeal, Respondent argues that it was Complainant's burden to produce evidence that Respondent was able to pay the penalty and continue in business despite the penalty. (Appeal Brief at 6.) Respondent notes that Complainant did not ask a single question about financial hardship at the hearing, even though Respondent believes that its *pro se* status should have been "at least a slight indication that money was an issue." (*Id*.) Respondent also points out that in his decision, the ALJ did not consider Respondent's ability to pay the penalty or the penalty's effect on Respondent's ability to continue in business. (*Id.*) For these reasons, Respondent asks for a remand to consider the issue of financial hardship, which it states has only increased since the hearing. (*Id*. at 7.)

Respondent has attached to its appeal brief what it terms new evidence in the form of two affidavits and a profit-and-loss statement. Respondent argues that these documents should be considered under the standard in 14 C.F.R. § 13.234(c)(2) (emphasis added), which provides as follows:

> If the petition is based, in whole or in part, on new material not previously raised in the proceedings, the party shall set forth the new material and include affidavits of prospective witnesses and authenticated documents that would be introduced in support of the new material. *The party shall explain, in detail, why the new material was not discovered through due diligence prior to the hearing.*

Respondent is correct that although Section 13.234(c)(2) applies to petitions for reconsideration, it should also be applied here; the Administrator held in a previous case that it was reasonable to apply the standard in this provision to all post-hearing requests to submit new evidence. *Blue Ridge Airlines*, FAA Order No. 1999-15 at 7-8 n.6 (December 22, 1999).

Respondent is correct that among the various factors to consider in determining an appropriate civil penalty are the respondent's ability to pay the civil penalty and the effect on the respondent's ability to stay in business. *Folsom's Air Service, Inc.*, FAA Order No. 2008-11 at 11 (November 6, 2008). However, financial hardship is an affirmative defense that a respondent has the burden of proving, because its financial records are within its sole control. *Atlas Frontiers, LLC,* FAA Order No. 2010-10, 2010 WL 7940346 at *6 (June 16, 2010). It was not Complainant's burden to produce evidence showing Respondent's ability to pay.

Respondent asks for leniency, pointing out that it was *pro se* at the hearing, having been represented by its owner and president. *Pro se* respondents, however, are not exempt from the procedural rules governing civil penalty proceedings. *Global Peace Initiative, Inc. (GPI)*, FAA Order No. 2008-8 at 6 (August 21, 2008), citing *Conquest Helicopters, Inc.*, FAA Order No. 1995-25 at 6 n.6 (December 19, 1995). Under the Rules of Practice, a respondent has the burden of asserting and proving an affirmative defense like financial hardship. (*See* 14 CFR 13.224(c) "[a] party who has asserted an affirmative defense has the burden of proving the affirmative defense"). *GPI* stated that the "latitude traditionally afforded *pro se* respondents [was] justifiably narrower when the respondent [was] the corporate owner of a Boeing 747 aircraft." *GPI*, FAA Order No. 2008-8 at 6. The latitude is also narrower when, as in the instant case, the respondent is a commercial air tour operator. Respondent's *pro se* status at the hearing does not alter the fact that by failing to raise financial hardship at the hearing, Respondent failed to preserve it for appeal. *Northwest Aircraft Rental, Inc.*, FAA Order No. 1994-4 at 8 (March 10, 1994).

The affidavits and profit-and-loss statement that Respondent has attached to its appeal brief constitute new material, having not been submitted before the appeal. Respondent, however, knew about any financial hardship and most of the supporting information before the hearing on April 27, 2011. *See, e.g.*, Jacob Affidavit, ¶¶ 4, 8, 9. Respondent has not provided a satisfactory explanation for why it did not present this claim and information at the hearing. Further, "[i]t is too late to submit … documents on appeal when their significance cannot be clarified through cross-examination." *Tabula,* FAA Order No. 2010-6 at 13 (June 15, 2010).

For all these reasons, this case will not be remanded to the ALJ for further proceedings. Respondent has already had its day in court. *Blue Ridge Airlines,* FAA Order No. 1999-15 at 7 n.6 (December 22, 1999).

Respondent's appeal is denied.[10] This decision affirms the $22,500 civil penalty assessed by the ALJ.[11]

[Original signed by Michael P. Huerta]

MICHAEL P. HUERTA
ACTING ADMINISTRATOR
Federal Aviation Administration

[10] Any arguments not specifically discussed have been considered and found unworthy of discussion.

[11] This order shall be considered an order assessing civil penalty unless Respondent files a petition for review within 60 days of service of this decision with the U.S. Court of Appeals for the District of Columbia Circuit or the U.S. court of appeals for the circuit in which Respondent resides or has its principal place of business. 14 C.F.R. §§ 13.16(d)(4), 13.233(j)(2), 13.235 (2009). *See* 71 Fed. Reg. 70460 (December 5, 2006) (regarding petitions for review of final agency decisions in civil penalty cases).

SERVED OCTOBER 3, 2011

UNITED STATES DEPARTMENT OF TRANSPORTATION
OFFICE OF HEARINGS
WASHINGTON, D.C.

FEDERAL AVIATION ADMINISTRATION, Complainant, v. RUSHMORE HELICOPTERS, INC. Respondent.	FAA DOCKET NO. CP10GL0002 (Civil Penalty Action) DMS No. FAA-2010-0023

INITIAL DECISION
OF ADMINISTRATIVE LAW JUDGE RICHARD C. GOODWIN

Found: 1) Respondent violated 14 CFR §§91.7(a) and 91.13(a) as charged; and
2) Respondent is hereby assessed a civil penalty of $22,500.

I. Background

Respondent Rushmore Helicopters, Inc. ("Respondent" or "Rushmore"), is a Part 91 commercial air tour operator located in Keystone, SD (Tr. 18-19). One of its pilots, Robert L. "Lee" Leffert, discovered in the late afternoon of August 6, 2009, that the fuel cap for the Bell 206 helicopter he had been operating was not in place. After he tried and failed to locate it, he placed duct tape over the fuel filler port. The Complaint of the Federal Aviation Administration ("Complainant," "FAA," or "the agency"), as amended, asserts that Respondent violated Federal Aviation Regulations ("FARs") when Mr. Leffert operated ten passenger-carrying air tour flights on August 7, 2009, in this condition.

Complainant charges that Respondent violated the following FARs (both in 14 CFR): section 91.7(a), which prohibits the operation of a civil aircraft unless it is in an airworthy condition; and section 91.13(a), which prohibits a person from operating an aircraft in a careless manner so as to endanger life and property. The agency seeks a civil penalty of $25,000.

Respondent, which appeared through its president and owner, Michael Jacob ("Mr. Jacob"), acknowledged the facts underlying the allegations (Tr. 41,

117-18). Lee Leffert, the pilot, conceded that, on August 6, 2009, once he realized that the fuel cap had been misplaced and that an adequate replacement was unavailable, he placed duct tape over the fuel port. He flew the aircraft the next day, August 7, in that condition (Tr. 70-73). Mr. Jacob testified that he learned of the situation on the morning of August 7th, before any flights took off. He permitted the helicopter to be flown in that condition (Tr. 42, 44, 118, 120; *see also* Resp. Br., p. 1). Respondent denied liability, however (Resp. Br., pp. 1, 9).

A hearing was held on April 27, 2011, in Rapid City, SD. I determined that a written decision was reasonable and appropriate under the circumstances (Tr. 122). The parties have filed briefs and the matter now is ready for decision.

I hold that the facts and circumstances of this case justify findings of violations of each count and, allowing for mitigating and aggravating factors, warrant an assessment against Respondent of $22,500.

II. The Proceeding

A. The Evidence

Aviation safety inspectors Gary Kwasniewski and Barry Dunmire of FAA's Flight Standards District Office ("FSDO") in Rapid City, SD looked into the matter. Each testified at the hearing. James Bad Horse, Rushmore's principal maintenance inspector ("PMI"), also testified.

On August 7, 2009, inspector Kwasniewski stated, he learned of a complaint that Rushmore had placed duct tape over the fuel filler port on one its helicopters. He and inspector Dunmire traveled to Respondent's facility in Keystone, SD, and talked to a pilot, Mr. Leffert. A helicopter Leffert had been operating had just landed and its engine was running. The inspectors did not yet know if this was the helicopter implicated by the complaint they had received. They could not see the fuel port. Kwasniewski asked Leffert if his helicopter had any maintenance issues. Leffert replied in the negative (Tr. 113). Inspector Kwasniewski testified that he did not have any reason to doubt the pilot's response. As inspector Dunmire explained, "We take the pilot's word for it." (Tr. 113). But this in fact was the helicopter in question. Leffert did not volunteer to the inspectors that duct tape was covering the fuel cap (Tr. 75, 84). "They didn't ask, and I didn't say," he testified (Tr. 86).

Leffert also seemed to be in a hurry. He said that he had passengers waiting. Kwasniewski and Dunmire allowed him to continue (Tr. 21-26, 61, 110-15). According to Leffert, the inspectors told him to fly the aircraft and said that they would talk after he returned (Tr. 75).

Momentarily, and before Mr. Leffert took off with his passengers, inspector Kwasniewski noticed that Leffert had repositioned the helicopter to another pad.

Passengers were loading. The inspectors now could see the fuel port, and duct tape appeared to be covering it (Agency Exhs. 1 and 2; Tr. 31-32). So this was the helicopter in question. It had the registration number 2268W (referred to as "68 Whiskey"). The aircraft now began to take off. Inspectors Kwasniewski and Dunmire agreed that it was not safe to approach. They let it go (Tr. 25-26, 59, 67, 112).

Mr. Leffert returned a short time later. When inspector Kwasniewski – now aware of the duct tape covering the fuel port – asked the pilot to explain, Leffert stated that he had discovered that the helicopter's fuel cap was missing shortly before 4 o'clock in the afternoon on the previous day (August 6, 2009). With no adequate substitute cap available, he then decided to cover the fuel filler port with duct tape until a replacement could be obtained. Kwasniewski wondered if Leffert then thought the helicopter had been airworthy. Leffert replied in the affirmative (Tr. 26-30). The pilot had not sought the opinion of any maintenance personnel, he said, because there had been none to ask. Inspector Kwasniewski now advised Leffert to refrain from further flying until the airworthiness of the aircraft could be determined. The inspector also told Leffert that any flights already undertaken in that condition might be in violation (Tr. 28, 45, 75-76, 85).

Inspectors Kwasniewski and Bad Horse testified that to be airworthy, an aircraft must 1) conform to its type certificate or supplemental type certificate ("STC") and 2) be safe for flight (Tr. 45-46, 95). This indeed is the Administrator's test. *See, e.g., Delaware Skyways LLC,* FAA Order No. 2005-6 (March 8, 2005), p. 2; *California Helitech,* FAA Order No. 2000-18 (August 11, 2000), p. 3 n. 7. The inspectors concluded that 68 Whiskey, with duct tape covering the fuel filler port, had not been airworthy.

The inspectors supported their position by explaining that the fuel cap is an essential component of the aircraft. It is shown in the helicopter's engineering drawings. The drawings are considered part of the type certificate data sheet. This view was confirmed by a Bell Helicopter technician inspector Kwasniewski later contacted (49-50). When an aircraft does not conform to its type certificate, it is not airworthy by definition (Tr. 45-46, 96, 104). It fails the first prong of the airworthiness test. Moreover, inspector Kwasniewski added, the aircraft had not been safe for flight – thus failing the second, independent, prong as well. The use of duct tape risked fuel contamination (Tr. 46-47, 58). Rotor wash could get into the fuel cell. Additionally, in an aircraft rollover, fuel might spill out and lead to a fire.[1] Three Bell Helicopter technicians whom inspector Kwasniewski later contacted substantiated his conclusion that the aircraft in the described condition had been unairworthy. One technician specifically confirmed that the fuel-cap

[1] Tr. 47, 96-98, 105. Had the cap been vented, duct tape sealing up the port would have prevented the port to vent. That could have caused partial fuel cell collapse and eventually fuel starvation. This was not a concern in this case because the cap had not been vented. Tr. 48, 97, 104.

substitution created unacceptable concerns for safety (Tr. 49-51, 64; Agency Exh. 7).

Inspector Kwasniewski determined from Respondent flight records that 68 Whiskey had operated ten times on August 7 with duct tape substituting for a fuel cap. The helicopter had carried a total of twenty-seven passengers.[2]

Respondent defended its conduct. Rushmore witnesses testified that Respondent had received assurances from knowledgeable and experienced people in the industry that the duct-tape solution – which, the witnesses noted, was expected to last only until another cap could be delivered to it – did not render the helicopter unairworthy.

Mr. Jacob testified that on the morning of the 7th , after he learned of the situation, he had spoken with a design engineer at Bell. The engineer had advised that the cap was not a structural component. This individual, whom Jacob named, said that, as such, the situation had not created a safety or flight issue. According to pilot Lee Leffert, the engineer added that while Rushmore's temporary solution was not recommended, it had not been a violation to operate without a fuel cap (Tr. 82). The engineer also had promised to forward to Mr. Jacob a "letter of non-objection." (Tr. 118-19). Jacob, in consultation with Rushmore's chief pilot – a veteran of more than 40 years of flying -- and other Rushmore pilots, including Mr. Leffert, decided after this conversation that the duct-tape substitution did not render the aircraft unairworthy (Tr. 82-83, 119). Leffert added that he proceeded to operate with relatively little gas in the tank to keep the helicopter's total weight down and thereby fly the passengers in a safer condition (Tr. 73-74).

Jacob also noted in Respondent's defense that Mr. Leffert was pilot in command ("PIC"). Protocol and custom dictated that he alone was charged with determining if the aircraft was safe to operate. Since his decision as PIC had been in the affirmative, the implication was that Leffert's decision should be respected.

Perhaps, Mr. Jacob hinted, the pilot's fix nonetheless had constituted an error in judgment. But it had not been undertaken with the intention to circumvent any regulation or to create a hazardous situation, Jacob maintained (Tr. 119).

The Bell engineer was unable to make good on his promise. He told Mr. Jacob later, the witness testified, that his supervisors directed him not to provide written approval. The reason offered was that such a letter could establish a (presumably unwanted) precedent (Tr. 120).

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[2] Agency Exhibits 3 and 4; Tr. 40. The flight schedules list the date as August 6, 2009, but the evidence showed that the flights took place on August 7, and the documents properly should have reflected that. Tr. 36-37.

B. Findings and Conclusions

I find and conclude that Complainant proved each of the violations it alleged.

As noted, Respondent admitted the facts underlying the charges. Rushmore's witnesses each acknowledged that its Bell 206 helicopter known as 68 Whiskey had operated ten flights without a fuel filler cap and with duct tape over the area (Initial Decision ("I.D."), p. 2).

Complainant showed that Rushmore violated 14 C.F.R. §91.7(a) by operating in an unairworthy condition. The evidence demonstrated that the helicopter was not airworthy under either prong of the airworthiness test.[3] As inspectors Kwasniewski and Bad Horse explained, the duct tape covering the fuel filler port meant that the helicopter did not match its essential engineering drawings. I found that, as such, the aircraft failed to conform to its type certificate (I.D., p. 3). I agree also with inspector Kwasniewski's testimony that the aircraft was neither airworthy under the second prong because the substitute covering placed the safety of passengers and crew at an unacceptable risk. The prospect of fire and the possibility of fuel depletion were too great to be consistent with minimum mandated levels of aircraft safety. Taping the fuel filler port, while well-intentioned and anticipated to be short-term, was an unaccepted and unapproved solution to the lack of a fuel cap.[4] The described situation compels the conclusion that the aircraft was not airworthy when operated for the ten flights on August 7, 2009 shown by the evidence. As such, Complainant proved a violation of §91.7(a).

Secondly, by operating the helicopter in the manner described, Respondent endangered life and property to an unacceptable degree. Its actions risked fuel contamination and created an intolerable risk of fire (*see* I.D., p. 3). Complainant thus proved a violation of §91.13(a) as well. I reject Respondent's counter that §91.13(a) should be treated merely as a residual violation or that Complainant failed to prove the elements of the violation (Resp. Br., pp. 7-8). Complainant made its case.

Respondent also contends that it should not be held responsible for the violations. It was the PIC, Lee Leffert, who operated the helicopter, not Rushmore. The aircraft was Leffert's sole responsibility. Rushmore did not "operate" the aircraft in the regulatory sense, it maintains, and therefore cannot be accountable for the results (Resp. Br., pp. 3-4, 9). This argument is rejected.

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[3] *See* I.D., p. 3. Respondent states that Complainant must demonstrate that Rushmore violated both prongs of the airworthiness test to prove a §91.7(a) violation. Resp. Br., p. 5. This is not correct; the agency is required only to prove *either* that Respondent violated the first prong *or* that it violated the second. *See* I.D., p. 3; Compl. Reply Br., p. 2.

[4] Complainant was not required to show that the described condition was unsafe in fact. It was enough to demonstrate that it carried the potential for harm. *Polynesian Airways*, FAA Order No. 1994-40 (December 9, 1994); *David H. Mayer*, FAA Order No. 1997-12 (February 20, 1997).

Rushmore's contention ignores the fact that Respondent's president and owner, Mr. Jacob, knew on the morning of August 7 that 68 Whiskey had covered its fuel filler port with duct tape and nonetheless had allowed the helicopter to operate the ten flights in issue (I.D., p. 2). Responsibility for the resultant violations thus falls squarely on him and, through him, on his company, the Respondent. But even putting that fact aside, it is well-established that air carriers are responsible for regulatory violations committed by anyone acting within his or her scope of employment for that carrier. *See, e.g., Warbelow's Air Ventures, Inc.*, 2000 WL 298578 (FAA Order No. 2000-3), February 2, 2000; *Alika Aviation,* FAA Order No. 1999-14 (December 22, 1999). Air carriers, mandated to perform their services with the highest possible standard of care, carry responsibilities too critical to permit them to transfer their obligations to another. An air carrier's duty of care simply is non-delegable. The public must be assured that carriers will do everything in their power to ensure that everyone working on their behalf complies with safety regulations. *TWA,* FAA Order No. 1999-12, pp. 9, 10 (October 7, 1999). As the pilot of 68 Whiskey, Mr. Leffert clearly was acting within his scope of employment. Respondent is legally responsible for Leffert's conduct. Respondent operated the helicopter.

Against this background, I find and conclude that Respondent violated FAR §§ 91.7(a) and 91.13(a) as set out in the Complaint.[5]

III. Penalty

The agency has asked for a total civil penalty of $25,000. Respondent takes exception. It asks that, should a violation or violations be found, the agency's proposed fine be "significantly reduc[ed]." (Resp. Br., p. 1). Complainant bears the burden of justifying the amount of the civil penalty it seeks. *Phyllis Jones Luxemburg,* FAA Order No. 1994-18 (June 22, 1994), p. 6.

I conclude that the evidence, taken in total, warrants a civil penalty in the amount of $22,500.

A. Issues

Complainant is obligated to consider the following factors when determining the civil penalty amount: (1) the nature and circumstances of the violation; (2) the extent and gravity of the violation; (3) the respondent's degree of culpability; (4) the respondent's history of prior violations, if any; (5) the respondent's ability to pay the civil penalty; (6) the effect on the entity's ability to stay in business; and (7) other matters as justice may require. *See, e.g., Folsom's Air Service, Inc.*, FAA Order No. 2008-11 (November 6, 2008), p. 11. The determination weighs whether the violation was inadvertent or deliberate, the private or public character of the violation, and the attitude of the violator. The agency also considers the respondent's size, particularly in determining the

[5] I have considered all other arguments advanced by Respondent and reject them without comment.

offender's ability to absorb the sanction. An appropriate civil penalty must reflect the totality of the circumstances surrounding the violations (Tr. 110-11, 117; *Folsom's Air Service, Inc.*, FAA Order No. 2008-11 (November 6, 2008), p. 12; *Eastern Air Center, Inc.*, FAA Order No. 2008-3 (January 28, 2008). Finally, the civil penalty should provide sufficient incentive to deter the respondent and similarly-situated entities from future violations. *Folsom's Air Service, Inc., Id.*, p. 20.

The agency has issued enforcement guidelines for its employees to follow in determining appropriate sanctions. The guidelines also advise the public of the sanction policy that the Administrator intends to abide by in adjudicating individual cases. *Folsom's Air Service, Inc.*, FAA Order No. 2008-11 (November 6, 2008), p. 13. (A relevant excerpt was admitted as Exhibit 6. It is also found at www.airweb.faa.gov). The guidelines set out penalty recommendations within three ranges of amounts – designated minimum, moderate, and maximum – to best reflect the nature and circumstances of each violation. Mitigating and/or aggravating factors are part of the calculus.

Complainant states that its civil penalty determination followed the guidelines. Under them, an unairworthy aircraft having an actual or potential adverse effect on safe operation warrants a civil penalty in the moderate-to-maximum range. For a small business concern such as Respondent, the Sanction Guidance Table sets out the civil penalty ranges per violation as follows: moderate, $2,200 to $4,399; and maximum, $4,400 to $11,000. For ten violating flights, then, the Sanction Guidance Table recommends a total penalty of between $22,000 and $110,000 (Agency Exh. 6; Compl. Br., p. 12)

Complainant concluded that, in view of the guidelines' recommendations and all the factors pertinent to this case, an appropriate civil penalty should be $2,500 per flight, or $25,000 in total (Compl. Br., p. 12).

B. Decision

In weighing all the facts and circumstances, I find and conclude that a civil penalty assessment of $22,500 is appropriate. It is commensurate with the nature and extent of the violations, while accounting in suitable measure for mitigating and aggravating factors.

The record shows that Respondent's helicopter was flown outside of the specifications of its type certificate and in an unsafe manner on ten occasions. These actions placed the travelling public at significant and unacceptable risk. Respondent's conduct warrants a substantial penalty.

Rushmore contends in mitigation that it did not intend to bypass or evade any requirement. Nor was it trying to court an unsafe situation (*see* I.D., p. 4). This argument fails to persuade. The behavior of 68 Whiskey's pilot, Lee Leffert, was not completely forthcoming. He demonstrated that he was aware that the

fuel-cap situation might raise questions. When the inspectors asked him if he had any maintenance issues with the helicopter, he replied in the negative (I.D., p. 2). Perhaps in his own mind he had no such issues -- but as a veteran PIC with forty years' experience (Tr. 43), Mr. Leffert was not naive. He had to have known what the inspectors were getting at. He had a duty under the circumstances to offer a fuller explanation. He should have raised the matter of the missing fuel cap. He did not. Additionally, Leffert claimed to be in a hurry – and it may be fairly inferred in this context that he was hoping to cut short the inquiry.[6] The pilot's behavior during this conversation, in sum, was not particularly accommodating. Against this background, Respondent may not fairly assert that it had no intention to overlook requirements. It may claim no mitigation on this ground. In fact, Leffert's coy conduct amounts to an aggravating circumstance.

Mr. Jacob also asserted in mitigation that Respondent had operated in reliance on an opinion from a Bell technician (I.D., p. 4). I will permit some mitigation on this ground, noting that this testimony is entitled to lesser weight as pure hearsay. Respondent produced neither the technician nor an attestation from him.[7]

The sanction amount of $22,500 suitably accounts for the totality of the circumstances of this case. The assessment determined also is substantial. Further, it is within the guidelines' moderate-to-maximum range of suggested penalty amounts. I find also that the penalty has sufficient "bite," or deterrent effect (*see Toyota Motor Sales, Inc.*, FAA Order No. 94-28 (September 30, 1994), p. 11).

[6] I note that inspector Kwasniewski testified not that he had asked Mr. Leffert if his helicopter had any maintenance issues, but the more pointed – and more difficult to deny -- question of whether the pilot had any airworthiness issues. Tr. 24. Leffert denied that the inspectors asked him specifically about airworthiness. Tr. 84. For purposes of the discussion in the text, I accept Leffert's recollection of the conversation.

[7] Complainant's assertion that three Bell technicians believed that the duct-tape solution rendered the helicopter unairworthy also was hearsay, of course; however, it was supported by an e-mail written by one of the technicians. Agency Exhibit 7. Moreover, this testimony was offered in support of, and confirmed, by the expertise of Complainant's inspectors -- who did, of course, testify.

I give no weight to the opinions of other Rushmore pilots supporting Mr. Leffert's duct-tape solution. In addition to its hearsay nature, there was no showing of expertise; moreover, their opinions, as Rushmore employees, were self-serving.

Rushmore Helicopters, Inc. is hereby assessed a civil penalty of $22,500 for violations of FAR §§91.7(a) and 91.13(a) as described in this Initial Decision.[8]

Richard C. Goodwin
Administrative Law Judge

Attachment – Service List

[8]Any appeal from the Initial Decision to the Administrator must be in accordance with section 13.233 of the Rules of Practice, which requires 1) that a notice of appeal be filed no later than 10 days (plus an additional 5 for mailing) from the date of this order and 2) that the appeal be perfected with a written brief or memorandum not later than 50 days (plus 5 for mailing) from the date of this order. Each is to be sent to the Appellate Docket Clerk, Room 924-A, Federal Aviation Administration, 800 Independence Avenue, S.W., Washington, DC 20591, and to agency counsel. Service upon the presiding judge is optional.

FAA Docket No. CP10GL0002
(Civil Penalty Action)

SERVICE LIST

ORIGINAL & ONE COPY

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[1] Service was by U.S. Mail. For service in person or by expedited courier, use the following address: Federal Aviation Administration, 600 Independence Avenue, S.W., Wilbur Wright Building—Suite 2W1000, Washington, DC 20591; Attention: Hearing Docket Clerk, AGC-430.