UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

In the Matter of: **EMERY WORLDWIDE AIRLINES, INC.**	FAA Order No. 97-30 Served: October 8, 1997 Docket No. CP95WP0167

DECISION AND ORDER

Respondent Emery Worldwide Airlines, Inc.[1] has appealed from the written initial decision of Administrative Law Judge Burton S. Kolko issued on December 31, 1996,[2] finding that Emery had violated 14 C.F.R. §§ 43.13(a)[3] and 121.153(a)(2)[4] on 21 flights between July 23 and August 1, 1992. The law judge held

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[1] Emery is the holder of a Supplemental Air Carrier Certificate and a Supplemental All Cargo Operator Certificate.

[2] The hearing was held on September 17-19, 1996. A copy of the law judge's written initial decision is attached.

[3] Section 43.13(a) of the Federal Aviation Regulations provides in pertinent part:

> Each person performing maintenance, alteration or preventive maintenance on an aircraft, engine propeller or appliance shall use the methods, techniques, and practices prescribed in the current manufacturer's maintenance manual or Instructions for Continued Airworthiness prepared by its manufacturer, or other methods, techniques, and practices acceptable to the Administrator, except as noted in § 43.16.

14 C.F.R. § 43.13(a).

[4] Section 121.153(a)(2) of the Federal Aviation Regulations provides:

> (a) Except as provided in paragraph (c) of this section, no certificate holder may operate an aircraft unless that aircraft --
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> (2) Is in an airworthy condition and meets the applicable airworthiness requirements of this chapter, including those relating to identification and equipment.

that Emery had operated a Douglas DC-8-63 freighter, N952R, with missing plexiglass lens covers in the cargo compartment and as a result, the overhead lighting system was unprotected. The law judge assessed a $9,000 civil penalty against Emery for these violations.[5]

On July 22, 1992, this aircraft flew into Lindbergh Field in San Diego, California, at about 8:00 A.M. (Tr. 200, 244.) Shortly afterwards, FAA Inspector Robert W. Rae went to Lindbergh Field in response to a "hotline complaint" about a crack in the fuselage of N952R. (Tr. 33.) While he was in the aircraft, he noticed that most of the plexiglass lens covers were missing from the overhead lights in the cargo compartment. (Tr. 37.) He does not recall seeing any of the plexiglass lenses in the area. (Tr. 38.) The plexiglass lenses are required to protect the lighting system from damage and to prevent fires. (Tr. 30.) As Mr. Rae explained, "[F]ire could result if bulbs are broken, especially when you have cargo in a compartment." (Tr. 30.) Mr. Rae brought the missing plexiglass lens covers to the attention of Frank Capizano, Emery's station supervisor in San Diego. (Tr. 248.)

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14 C.F.R. § 121.153(a)(2).

[5] Complainant had also alleged in the complaint that Emery had violated the regulations by operating the aircraft on two flights on July 22, 1992, with aluminum speed tape on the two main landing gear striker plates (also called "footballs"). The law judge held that Complainant failed to prove that the aluminum speed tape had been in place during those two flights. As a result of this finding, the law judge reduced the civil penalty sought by Complainant from $10,000 to $9,000. (Initial Decision at 8-9.) Complainant did not appeal this ruling.

On appeal, Emery argues that the law judge's finding that Emery violated Section 43.13 by engaging in maintenance without using the methods prescribed in appropriate manuals was not supported by the evidence. (Appeal Brief at 21 n.15.) Complainant did not respond to this argument in its reply brief. Furthermore, it does not appear that Complainant intended that the law judge find a violation of Section 43.13 for the missing lens covers, but instead for wrapping the main landing gear striker plates with aluminum speed tape. (Tr. 9.) Consequently, the law judge's finding that Emery violated Section 43.13(a) is reversed.

The missing plexiglass light covers were recorded as a discrepancy in the aircraft logbook on July 22, 1992, as follows: "all cargo compartment light covers are missing." (Complainant's Exhibit 9 at 2.) Mr. Capizano testified that the next day he contacted Emery's Maintenance Control Department in Dayton, Ohio, and was told to clear this discrepancy by deferring maintenance under Emery's Minimum Equipment List (MEL).[6] He also deactivated the lights by pulling the circuit breaker. To clear the missing light covers discrepancy entry in the logbook, he wrote in the column under corrective action on July 23, 1992: "Refer to DMI[7] 207227 MEL 33-3 CAT "C" Cabin lights inop[erative]."

Mr. Capizano's logbook entry referenced the portion of Emery's MEL pertaining to the lighting system (system 33) in the cargo compartment. That MEL section provided that the Douglas DC-8 has one cargo compartment light system installed and that zero are required for dispatch. (Complainant's Exhibit 13.) The MEL indicated that this was a Category C item, which meant that the system could be inoperative for up to 10 days. (Tr. 319.)

The aircraft logbook indicates that the plexiglass lenses were replaced 10 days later, on August 1, 1992, in Portland, Oregon. (Complainant's Exhibit 11.)

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[6] Unless permitted under a MEL, no person may take off an airplane with inoperable equipment. 14 C.F.R. § 121.628(a). A MEL provides for the operation of the airplane with certain instruments and equipment in an inoperable condition. 14 C.F.R. § 121.628(a)(3)(ii). "Deferral [of maintenance] under an MEL provision provides an air carrier with the flexibility it needs to manage its operations efficiently." In the Matter of Horizon Air Industries, Inc., FAA Order No. 95-11 at 11-12 (May 10, 1995.)

Emery's MEL is based on the FAA's Master Minimum Equipment List (MMEL). All air carriers, including Emery, are required to base their company MELs upon the FAA's MMEL. (Tr. 174-175.)

[7] DMI stands for deferred maintenance item.

During those 10 days, (July 23, 1992 - August 1, 1992), N952R was flown on 21 flights. (Tr. 64-65.)

The law judge held, relying primarily upon the maintenance logs and Inspector Rae's testimony, that the lens covers were not shielding the overhead lighting system between July 22 and August 1, 1992. The law judge noted that he found Inspector Rae's testimony to be trustworthy. The law judge explained that "it is reasonable to suppose that had the lens covers been installed at some earlier point [before August 1, 1992], the discrepancy would have been cleared at that time ..., but the logbook pages do not reflect any installation or other change regarding the covers prior to [August 1, 1992.]" (Initial Decision at 4.)

The law judge held further that Emery's MEL did not permit operation with missing plexiglass lenses in the cargo compartment. The law judge wrote:

> In the absence of specific direction or implication in the MEL or other relevant document, no hard-and-fast answer exists. It is a functional determination which depends on the purposes of each part in the context of the issue sought to be resolved.

(Initial Decision at 5-6.) The law judge credited the testimony of the FAA inspectors[8] regarding the risk of fire resulting from missing lens covers, and then concluded that Emery's MEL was not intended to include the lens covers as part of the lighting system. (Initial Decision at 6.) Hence, he concluded, operation without the lens covers was not permitted under that portion of the MEL.

Based on these findings, the law judge held that the aircraft was unairworthy on the 21 flights between July 23 and August 1, 1992, because it did not conform to its type design as well as because the aircraft was not in condition

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[8] John Howard the FAA principal maintenance inspector for Emery, based at the San Jose Flight Standards District Office, also testified for Complainant. (Tr. 149.)

for safe flight. Thus, he concluded, Emery had operated the aircraft in violation of 14 C.F.R. § 121.153(a)(2).

After consideration of the evidence in the record and the briefs submitted by each party, Emery's appeal is granted to the extent that the law judge's finding of a violation of 14 C.F.R. § 43.13 is reversed[9]. The law judge's finding that Emery violated 14 C.F.R. § 121.153(a)(2) is affirmed except that no determination is made on the issue of whether the aircraft was in an unsafe condition during the 21 flights.[10] Emery's arguments on appeal and the evidence presented by both parties pertaining to each of these arguments are presented below.

1. Was the law judge's finding that the lens covers were missing from the aircraft supported by the preponderance of the reliable, probative and substantial evidence?

Emery argues that the preponderance of the evidence does not support the law judge's finding that the lens covers were missing during the flights from July 23 to August 1, 1992. After a review of the evidence on this issue, the law judge's determination that the lens covers were missing during these flights is affirmed.

Emery offered the following evidence to prove that the lens covers were in place on the aircraft during those 21 flights. Dennis Kieselhorst, the supervisor and operations manager for Hangar Sixteen,[11] Emery's maintenance contractor, testified that when the aircraft was in San Diego on July 22, his crew observed burned out light bulbs in the cargo compartment. (Tr. 197, 200, 201.) It was noted in the

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[9] *See supra* at n.4.

[10] Emery's request for oral argument is denied. Emery demonstrated no need for oral argument.

[11] Mr. Kieselhorst no longer is employed by Hangar Sixteen. (Tr. 196.)

Hangar Sixteen work order for that date that the burned out mini lamps were removed and 50 new mini lamps were installed. (Respondent's Exhibit 11.)[12] He testified that the lens covers were removed to replace the light bulbs and that his crew reinstalled all the lens covers before the aircraft took off. (Tr. 202, 214.)

Mr. Kieselhorst testified that although he talked to Inspector Rae during the ramp inspection, Inspector Rae did not say anything to him about the missing light covers. (Tr. 203.) According to Mr. Kieselhorst, the lens covers were in the aircraft throughout Inspector Rae's visit. He explained that when the workers remove the lens covers to replace the light bulbs, the covers are put in trays, (Tr. 203) and he recalls that the lens covers were in the trays that day (Tr. 220).

After the Hangar Sixteen crew completed their work, Mr. Kieselhorst inspected the aircraft. He testified that he did not see any missing lens covers. (Tr. 231.) Mr. Kieselhorst signed the Hangar Sixteen work order, signifying that all of the work was complete, and then brought the work order to Frank Capizano, Emery's station manager. (Tr. 214.)

According to Mr. Capizano,[13] on July 22, at about 10:00 A.M., Inspector Rae gave him a piece of paper on which certain discrepancies, including the missing lens covers, were listed, and instructed him to enter those discrepancies in the logbook. (Tr. 279, 281, 282, 284-285.) Mr. Capizano testified that he did not personally

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[12] It was also written in the work order that inspection of the upper cargo light panel revealed impact damage to the light panel in positions 7-8. The Hangar Sixteen crew removed the damaged panel and fabricated a new one, which they installed. (Respondent's Exhibit 1; Tr. 210-211.) Mr. Kieselhorst explained that this entry does not refer to the lens covers but to the panels to which the lens covers were attached. (Tr. 211.)

[13] Mr. Capizano no longer works for Emery. He has been employed by Emery's competitor, Airborne Express, for about 5 years. (Tr. 248.)

inspect the cargo compartment before the entry was made in the logbook regarding the missing lens covers. (Tr. 281; 284-85.) He explained that the missing lens covers entry was put in the logbook because missing lens covers were on the list of discrepancies given him by Inspector Rae. (Tr. 279.)[14]

Later that day, he explained, he inspected the aircraft to make sure that the Hangar Sixteen crew had completed its work. He said that during that inspection of the aircraft, he observed that "... all the lens covers were over the lights and the lights were on." (Tr. 253; *see also* Tr. 271, 275, 277, 280.) Mr. Capizano testified that his signature on the Hangar Sixteen work order signified that he had seen that the work was completed and that it was done correctly. (Tr. 251; *see also* Tr. 214.)

Nonetheless, according to Mr. Capizano, the next morning he contacted Emery's Maintenance Control to find out how he should clear the logbook entry regarding missing lens covers. (Tr. 289.) It is Emery's policy that when an FAA inspector points out a discrepancy, the line stations must contact Maintenance Control to ensure that the item is repaired properly.[15] He said that Maintenance Control gave him a deferred maintenance item number (DMI 207227) and the reference to MEL 33-3, which he then listed in the aircraft log. (Tr. 281-282).

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[14] When asked whether the entry that the lens covers were missing was a truthful entry, he replied: "I have no idea, sir. I was instructed to enter this in the aircraft logbook without looking to see if they were missing or not. I was instructed by the FAA to put it in the logbook and that's exactly what I did." (Tr. 281.) In answer to one of the law judge's questions, he replied, "No, I never ask questions of the FAA when they instruct me to do something. We have a policy to follow what the FAA says and then proceed on with it." (Tr. 286.) Other Emery witnesses also testified about Emery's policy regarding entering discrepancies pointed out by FAA inspectors in the logbook. For example, Rodney W. Hall, Manager of Emery's Western Region Line Maintenance, testified: "Our policy is that any time an FAA inspector gives us a discrepancy, first of all, we really ask for those in writing so we don't misinterpret what he said and we enter those into our flight log. And then we take appropriate action to correct or defer the system until we can do repairs." (Tr. 324.)

[15] *See e.g.*, testimony of Thomas Wood, Emery's Director of Quality Control, at Tr. 424-425.

Also, although Maintenance Control did not instruct him to do so and the MEL did not require it, Mr. Capizano went to the aircraft on July 23 and pulled the circuit breaker to the cargo compartment lights so that there would be no power to the lights. (Tr. 291-292.) He acknowledged that it was not a requirement to pull the circuit breaker, but, he said, "he felt more comfortable ensuring that the lights were inoperative. (Tr. 294.) Mr. Capizano explained that he deactivated the lights because he did not want the crew "playing with the lights" (Tr. 292), and because the system was deferred (Tr. 295.) Afterwards, he signed the aircraft logbook, indicating that he had "inspected the aircraft and found it safe for the flight intended." (Complainant's Exhibit 9 at 1-2.)

Mr. Capizano stated that he received lens covers from another line station, perhaps Seattle or Portland in August. He was not expecting those lens covers. (Tr. 253.)

James Helms, the president of Transport Aircraft Technical Services Company, testified as an expert witness for Emery. It was his opinion based upon the testimony and his review of the aircraft logbook entry dated August 1, 1992, that the lens covers were replaced in Portland, Oregon, and that the lens covers were on the aircraft during this time period. (Tr. 454-55.)

In his written initial decision, the law judge held that the lens covers were missing from the aircraft during the 21 flights between July 23 and August 1, 1992, rejecting the testimony of Emery's witnesses "to the contrary ... [as] simply not credible." (Initial Decision at 4.) The law judge rejected Emery's assertion that Carl Peterson, the Emery line station manager in Portland, Oregon, had removed the existing lenses and replaced them with sturdier lenses on August 1 finding that

this theory was unsubstantiated, in that neither the employee nor documentary evidence was offered at the hearing to support this claim. Moreover, the law judge wrote, "it seems strangely fortuitous that existing lens covers would have been replaced on August first, the tenth and last day that category "C" items could be deferred under the MEL ...." (Initial Decision at 5.) Also, the law judge rejected as lacking in credibility the claim that the new lens covers for the aircraft were unexpected and unnecessary. (Initial Decision at 5.)

On appeal, Emery seeks reversal of the law judge's finding that the lens covers were missing during these 21 flights. Emery argues that the law judge ignored contemporaneous maintenance records and logs, and the testimony of Mr. Kieselhorst, Mr. Capizano and Mr. Helms, and instead gave credence to the Complainant's evidence which did not prove that the lens covers were missing. (Appeal Brief at 9-13.)

A law judge is in the best position to observe the demeanor of witnesses at a hearing, and, as a result, the law judge's credibility findings deserve special deference. In the Matter of Werle, FAA Order No. 97-20 (May 23, 1997). There is no reason to disturb the law judge's credibility assessment on this issue. It is hard to believe that Mr. Capizano would not have cleared the discrepancy about the missing lens covers by simply entering in the corrective action column that the lens covers were not missing. If indeed he had to check with Maintenance Control about clearing this item, then -- if the lens covers were actually installed -- he should have informed them that the lens covers were in place.[16] Had he done so, Maintenance

[16] Mr. Capizano testified at first that he could not recall whether he had informed Maintenance Control that the lens covers had been replaced before he asked them how to clear the discrepancy. Then after further questioning, he testified that Maintenace Control did not know about "the fix" (the reinstallation of the lens covers.) (Tr. 299-301.)

Control surely would not have instructed him to use a deferred maintenance procedure.[17] After all, as the FAA principal maintenance inspector assigned to Emery, John Howard, explained, the deferred maintenance procedures are for tracking inoperable equipment which, pursuant to the MEL, will be repaired or replaced at a later time; these procedures are not for tracking operative equipment. (Tr. 484-485.) Also, if the lens covers were in place and the lights were working, there would have been no reason for Mr. Capizano to have pulled the circuit breaker to the lights because with the lens covers in place, there would have been no undue risk of fire. The MEL did not require deactivating the lights. (Tr. 477.) It simply makes no sense that the Emery crews would have been deprived of the lights in the cargo compartment if those lights actually worked and the lens covers were installed. Finally, if the lens covers were installed, it reasonably could have been expected that someone would have noted in the logbook before the 10-day deferral period ended that the lens covers actually were not missing.[18]

Emery is correct to the extent that it argues that Inspector Rae's testimony about his observations on July 22, 1992, of the cargo compartment was not sufficient to prove that the lens covers were missing when the aircraft took off the next day. Inspector Rae did not talk to Mr. Kieselhorst about the missing light covers, and Inspector Rae did not return the next day to re-inspect the aircraft.

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[17] Mr. Capizano acknowledged that if the lens covers were in place it would have made more sense to write as the corrective action that the previously missing covers have been replaced. (Tr. 299-300.)

[18] When asked during cross-examination whether at some point, someone should have simply noted that the lens covers were not actually missing, Emery's Thomas Woods replied, "I would probably agree with you, but I can't comment." (Tr. 425.)

However, Inspector Rae's observations in the cargo compartment coupled with the missing light covers logbook entry as well as the related DMI, constitute reliable evidence deserving of considerable weight. The law judge's reliance on the contemporaneous aircraft maintenance logbook kept in the ordinary course of business was justified.

The law judge's rejection of Emery's claim that Mr. Peterson had installed new lens covers after removing the old ones when the aircraft was in Portland on August 1, 1992, also is not unreasonable and therefore does not warrant reversal. Mr. Peterson's declaration, dated August 8, 1996, was not admitted into evidence (Tr. 445-46),[19] and Mr. Helms, who referred to the content of that declaration in his testimony, had no personal knowledge of what Mr. Peterson had done. According to Mr. Helms, Mr. Peterson had stated in his declaration that he had removed all of the lens covers, replaced them with heavier-duty lens covers, and then shipped the original ones to Hangar Sixteen. (Tr. 456-57.) While hearsay evidence is admissible in civil penalty proceedings, the law judge nonetheless must determine the weight to be accorded to it on a case by case basis. 14 C.F.R. § 13.222(c).[20] The declaration, unlike the logbooks, was not prepared in the ordinary course of business, but was written about 4 years after the incident (shortly before the hearing.) (*See* Tr. 446.)

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[19] The agency attorney objected to this delaration being admitted into evidence because it had not been provided to Complainant prior to the hearing during discovery. The law judge made it clear that admission of this document "goes against the ground rules that we have had and I would rather not get into that procedural morass at this point." (Tr. 445.)

[20] Section 13.222(c) provides:

> Hearsay evidence. Hearsay evidence is admissible in proceedings governed by this subpart. The fact that evidence submitted by a party is hearsay goes only to the weight of the evidence and does not affect its admissibility.

14 C.F.R. § 13.222(c).

No reason was given why Emery failed to bring Mr. Peterson to the hearing to testify, and no other member of the Portland maintenance crew was brought to the hearing to corroborate the contents of the declaration (as it was described by Mr. Helms.) The fact that the declaration itself was not in evidence only makes more reasonable the law judge's decision not to credit the statements allegedly contained in that declaration.

On a related point, Emery argues that Mr. Peterson's logbook entry on August 1, 1992, is further evidence that Mr. Peterson first removed and then replaced the lens covers. Mr. Peterson wrote that he performed the following corrective action: "replaced lite covers." Emery argues that the use of the word "replaced" means that first the existing lens covers were removed and then new ones were installed. Otherwise, according to Emery, Mr. Peterson would have used the word "installed" to signify that lens covers were being installed where none had existed. (Appeal Brief at 12.) The law judge's rejection of this argument was not unreasonable. Mr. Peterson could have used, and it is found, did use, the word "replaced" correctly because the light covers were missing and needed to be replaced.

Consequently, the law judge's finding that the light covers were missing during those flights from July 23 to August 1, 1992, is affirmed because it is supported by the preponderance of the reliable, probative and substantial evidence.

2. Was it error for the law judge to conclude that the light covers were not part of the cargo lighting system?

Judge Kolko held as follows:

> In view of the hazard represented by an uncovered and unprotected overhead lighting system in a cargo aircraft, I cannot conclude that the MEL

> included the lens covers in its description of the lighting system in the absence of explicit language to that effect.

(Initial Decision at 7.). Emery argues on appeal that this determination was not supported by the preponderance of the evidence. According to Emery, "[a]bsent some **actual evidence** that the lens covers are not considered a part of the cargo lighting system, the ALJ's finding to the contrary is factually unfounded and not supported by substantial and probative evidence." Appeal Brief at 15 (emphasis in the original.)

After a review of the evidence and the arguments presented by both parties on this issue, the law judge's determination that the lens covers are not included as part of the cargo compartment lighting system under Emery's MEL is affirmed.

The term "lighting system" is not defined in either Emery's MEL for this aircraft or the FAA's MMEL. In Inspector Rae's opinion, the plexiglass lens covers are part of a protective system for the lighting system. (Tr. 66.) He stated, "[i]t's an item that would have to be treated separately from the lighting system because the purpose of the covers is to prevent fires that may result from the heat produced by the bulbs or from sparks from bulbs that might be broken due to shifting cargo in the cargo compartment. (Tr. 66.) Inspector Howard, Emery's principal maintenance inspector, testified that there is simply no deferral mechanism for a missing plexiglass cover. (Tr. 481.) He explained that there are two separate systems: 1) a lighting system, including the wiring, the dome fixtures, and the light bulbs; and 2) a lens system. The latter system, he explained, has a safety function. (Tr. 182-83.)

The McDonnell-Douglas Illustrated Parts Catalogue includes the lens covers in the pages pertaining to the lighting system for this aircraft. (Emery's Exhibit 8;

Tr. 100, 388.) Emery's witnesses pointed to the placement of the lenses in the parts catalogue as the basis for their opinions that the plexiglass lens covers are part of the lighting system.[21]

Emery argues in its appeal brief that contrary to the law judge's conclusion, the MMEL contains specific direction that should lead to the conclusion that the lens covers are part of the lighting system. Emery points to the MMEL preamble language that provides that a system includes all parts of that system. (Tr. 453.) However, this preamble language does not constitute clear direction on the issue here. As the law judge correctly held, the MMEL's preamble language "merely begs the question." (Initial Decision at 6.)

Emery argues further that the law judge in his decision denigrated the significance of the manufacturer's parts manual as proof that the plexiglass lens covers are part of the lighting system.[22] Emery asserts that the manufacturer is in the best position to know what constitutes the cargo compartment lighting system.[23] What the law judge understood, but Emery and its witnesses ignored, however, are the different purposes served by the parts catalogue and the MEL. As the law judge found, apparently crediting Inspector Rae's explanation, the lens covers may be catalogued with the lights "simply to facilitate ease of reference." (Initial Decision

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[21] *See* the testimony of Rodney Hall, Emery's manager of Western Region Line Maintenance at Tr. 315-316. *See* also the testimony of James Helms, president of Transport Aircraft Technical Services Company, at Tr. 453-454.

[22] *See* Initial Decision at 6.

[23] On cross-examination, Inspector Howard acknowledged that he could not point to any evidence that the manufacturer considers that the protective lens covers are in a system separate from the lighting system. (Tr. 186.)

at 6.)[24] The MEL is not a mere list of parts and parts numbers. Instead, an FAA-approved MEL constitutes an approved change to the type design, and as such, indicates that the FAA has approved operation of the aircraft under certain conditions with certain equipment inoperable. 14 C.F.R. § 121.628(a)(1), (2), (3). As the law judge correctly noted, by specifying which equipment may be inoperable for a specified period of time while the aircraft continues to be allowed to operate, "... the MEL sets out acceptable parameters of safety." (Initial Decision at 7.)

It was undisputed that a risk of fire exists when there are unprotected light bulbs and wires in a cargo compartment. The FAA has recognized the risk and promulgated regulations to address it. As the law judge explained:

> The agency has emphasized its concern for the danger of fire in cargo aircraft. Part 121 of the FARs calls for carriers to adequately protect any item in a cargo-carrying area so that damage to or failure of the item would not create a fire hazard in the area. [14 C.F.R.] § 121.221(a)(1); 2 Tr. 332. Further, cargo compartment lamps in aircraft subject to Part 25 must prevent contact between lamp bulb and cargo (see 14 C.F.R. § 25.787(c); CAM 4B.382; 2 Tr. 487-89; Exh. C-1). FAR section 25.855(g), additionally, requires that sources of heat be shielded and insulated to prevent igniting cargo or baggage (14 C.F.R. § 25.855(g); see 1 Tr. 33,67).

(Initial Decision at 6.)[25] In light of the purpose of the MEL and of the fire hazard arising from unprotected light bulbs in the cargo compartment, the term "lighting

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[24] Inspector Rae explained that he did not regard the parts catalogue organization as dispositive of the issue whether the plexiglass covers are part of the lighting system for purposes of the MEL because manufacturers try to put associated things together in the parts manual for ease of reference. (Tr. 100.)

[25] The law judge noted that he was not deciding if this aircraft was subject to Part 121, Part 25 or another regulation. At the hearing, Emery contended that Section 121.221 and Part 25 were not applicable to this aircraft. *See* testimony of James Helms at Tr. 458-460. Complainant took the position that Part 25, which contains airworthiness standards for transport category aircraft, applied to this aircraft. (Tr. 85, 118-124) Section 25.855, in particular, provides:

> For each cargo and baggage compartment not occupied by crew or passengers, the following apply:

system" should be interpreted as *not* including the plexiglass lens covers. As Complainant's witnesses testified, the plexiglass lens covers should be considered as separate from the lighting system.[26]

> (e) No compartment may contain any controls, wiring, lines, equipment, or accessories whose damage or failure would affect safe operation, unless those items are protected so that --
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> > (1) They cannot be damaged by the movement of cargo in the compartment, and
> > (2) Their breakage or failure will not create a fire hazard.
>
> (g) Sources of heat within the compartment must be shielded and insulated to prevent igniting the cargo or baggage.

14 C.F.R. § 25.855(e)and (g). Also, Section 25.787 specifies:

> (c) If cargo compartment lamps are installed, each lamp must be installed so as to prevent contact between lamp bulb and cargo.

14 C.F.R. § 25.787(c).

The dispute over the applicability of Part 25 to this aircraft arose because the DC-8 was type-certificated prior to the issuance of Part 25. However, even if the airworthiness standards in Part 25 do not apply to this aircraft, the standards contained in Part 25's predecessor, CAM 4B, would apply. (Tr. 165-66.) CAM 4B.382 provides:

> (a) Cargo and baggage compartments shall include no controls, wires, lines, equipment or accessories the damage or failure of which would affect the safe operations of the airplane unless such items are shielded, isolated or otherwise protected so that they cannot be damaged by movement of cargo in the compartment and so that any breakage or failure of such item will not create a fire hazard.
>
> (d) Sources of heat within the compartment shall be shielded and insulated to prevent ignition of cargo.
>
> Note: *Sources of heat likely to ignite cargo include light bulbs*, combustion heaters, heater ducts, electrical appliances, etc.

CAM 4B.382(a)(d) (emphasis added)(Tr. 488-489.) Thus, regardless of which applied, wires and sources of heat, including light bulbs, in the cargo compartment, must be shielded and protected.

[26] Emery has not argued that it did not know or could not have known that the term "lighting system" in the MEL does not include the protective plexiglass lens covers. In light of Mr. Capizano's decision on his own intiative to turn off the power to the lights in the cargo compartment, it appears that he may have questioned the wisdom of interpreting the MEL provision permitting deferrring maintenance on the lighting system as including the plexiglass lens covers. His apparent concern might also have put him on notice to contact the FAA to determine whether he was interpreting the MEL correctly.

3. Are the law judge's findings that the aircraft was not in conformance with its type certificate and that the aircraft was not in condition for safe flight supported by the preponderance of the evidence?

On appeal, Emery challenges the law judge's determination that the aircraft was unairworthy. The law judge held:

> I find and conclude that the aircraft was not then airworthy because it was not in a condition for safe flight. Safety ... was unduly compromised. Further, by operating with required equipment missing, the aircraft did not conform to its type design.

(Initial Decision at 7.) Hence, the law judge found, Emery violated 14 C.F.R. § 121.153(a)(2).

"To be airworthy, an aircraft must 1) conform to a 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." In the Matter of Kilrain, FAA Order No. 96-18, 1996 FAA LEXIS 1225 *14 (May 3, 1996), *reconsideration denied,* FAA Order No. 96-23, 1996 FAA LEXIS 1598 (August 13, 1996), *petition for review denied*, Kilrain v. FAA, No. 96-3587 (3rd Cir. May 1, 1997.)[27]

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[27] In the Matter of Valley Air Services, FAA Order No. 96-15, 1996 FAA LEXIS 1226, at *17 (May 3, 1996); In the Matter of America West Airlines, FAA Order No. 96-3, 1996 FAA LEXIS 1064, at *45 (February 13, 1996); In the Matter of Watts Agricultural Aviation, Inc., d/b/a Growers Air Service, FAA Order No. 91-8, 1991 FAA LEXIS 330, at *19 (April 11, 1991), *review denied*, Watts Agricultural Aviation, Inc., d/b/a Growers Air Service v. Busey, Administrator, Federal Aviation Administration, *reported as table case at* 977 F.2d 594, 1992 U.S. App. LEXIS 36181, *full-text slip opinion reported at* 1992 U.S. App. LEXIS 25020 (9th Cir. 1992). It is provided in 49 U.S.C. § 44704(c) that "[t]he Administrator shall issue an airworthiness certificate when the Administrator finds that the aircraft conforms to its type certificate and, after inspection, is in condition for safe operation."

Emery argues on appeal that the aircraft was operated in conformance with its type certificate and in a safe condition because the lens covers were in place during the 21 flights. As already discussed in this decision, the law judge's finding that the preponderance of the evidence demonstrated that the lens covers were *not* in place during those flights is affirmed. Without the lens covers, the aircraft did not conform to its type design. (Tr. 76, 79.)[28]

The law judge held that the aircraft was unsafe despite the deactivation of the cargo compartment lights. (Initial Decision at 7.) Emery challenges this holding on appeal, arguing that a fire requires oxygen, fuel and ignition, and without electricity to the lighting system, no ignition source existed to start a fire. (Appeal Brief, at 19, n.12.)[29]

Complainant introduced the following evidence to support its position that the aircraft was unsafe during the 21 flights. Inspector Howard testified on rebuttal that a fire hazard still exists when the lens covers are missing even if the circuit breaker was pulled and collared[30] "but only to the extent that there might be other wiring or other circuits in and around those light fixtures ...." (Tr. 500.) Inspector Howard asserted that he knew that there were other wires around the general area of the lenses, and as a result of the existence of these wires, "the fire

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[28] James Helms, Emery's expert witness, testified that lights are not required in the cargo compartment, but if lights are installed, the lights must be protected by covers. However, he testified further, in his opinion, "if the lights are decommissioned by taking the power off of them, it is the same as if they are not installed." Emery is not arguing on appeal that cutting the power to the installed light equipment is tantamount to the lights not being installed for purposes of the regulations pertaining to airworthiness and minimum equipment lists.

[29] James Helms testified that "[t]here was no fire threat because there was no electric power to the lights." (Tr. 452.)

[30] Mr. Capizano testified, "The first thing I would do is pull the circuit breakers and collar it to show the air crew that the system in inop." (Tr. 292.)

hazard has not been mooted simply because a circuit breaker has been pulled." (Tr. 500.) Inspector Howard also noted that Emery is authorized to transport hazardous materials, which may be caustic or volatile, and could pose a fire hazard. (Tr. 183.) Inspector Rae testified that it is possible that a lighting system in a DC-8 could be inoperable and still create a fire hazard such that plexiglass lens covers would be necessary. (Tr. 76.) He also noted that plexiglass lens covers would be necessary to prevent damage caused by glass from lightbulbs broken due to shifting cargo. (Tr. 76.)

On the one hand, this evidence leaves many questions unanswered, including:

> 1) Are the wires to other systems in the cargo compartment exposed if the plexiglass lens covers are missing?
>
> 2) Could there still have been power going to these other wires if Mr. Capizano pulled the circuit breaker to the lighting system?

If those other wires were not exposed or if there was no electricity going to those wires, then why would there have been an increased risk of fire? On the other hand, even if there was no increased risk of fire when the circuit breaker was pulled, wasn't there nonetheless the possibility that someone would repower the lights? In other words, if power could be restored to the lights, then the potential for an increased risk of fire existed.

In light of the previous finding that the aircraft was operated when it did not conform to its type design, a violation of Section 121.153(a)(2) already has been established. Consequently, it is not necessary to resolve the issue whether the aircraft was in an unsafe condition when it was operated during these flights.

4. Is the $9,000 civil penalty assessed by the law judge appropriate?

Emery argues that no penalty is warranted because 1) the lens covers were always intact; 2) the mechanics at the San Diego line station were conscientious and 3) "this is not an air carrier who did not properly follow its MEL procedures." (Appeal Brief at 21.) Complainant argues that the $9,000 civil penalty is appropriate because Emery, "a large and successful corporation," operated this aircraft on 21 flights "in a manner that posed substantially enhanced risk to Emery's personnel and cargo, and to people and property on the ground." (Reply Brief at 11-12.)

Emery's arguments regarding the civil penalty must be rejected in light of the factual findings made earlier in this decision. Moreover, a substantial civil penalty is appropriate in light of the fact that the aircraft was operated on 21 flights in an unairworthy condition.[31] Consequently, the law judge's assessment of a $9,000 civil penalty is affirmed.

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[31] The $9,000 civil penalty assessed in this case is within the range of penalties assessed in other cases involving violations of Section 121.153(a)(2) by an air carrier. *See* In the Matter of Delta Air Lines, FAA Order No. 97-21 (May 28, 1997)(in which the Administrator affirmed $4,000 civil penalty for the operation (one flight) of an L-1011 with an inoperative # 2 bus galley power switch indicator light in the cockpit; the aircraft was improperly released under an inapplicable MEL provision); In the Matter of Horizon Air Industries, FAA Order No. 96-24, 1996 FAA LEXIS 2058 (August 13, 1996)(in which the Administrator affirmed the $10,000 civil penalty assessed by the law judge for a violation arising from an operation of an SA-227AC model aircraft on a passenger-carrying flight when the static ports were covered with tape, resulting in erroneous instrument readings and causing the crew to return to the airport; In the Matter of Horizon Air Industries, FAA Order No. 95-11, 1995 FAA LEXIS 345 (May 10, 1995)(in which a violation of 14 C.F.R. § 121.628(a)(5) was also found, and the Administrator reduced the civil penalty from $8,000 to $5,000 because of the respondent's reasonable, although ultimately inadequate, efforts to repair the aircraft, in light of the exceptionally difficult maintenance problem; the aircraft was returned to service on several occasions when the altitude pre-select controller was not operating properly.

Based upon the foregoing, the law judge's finding of a violation of Section 121.153(a)(2) is affirmed.[32] A $9,000 civil penalty is assessed.[33]

JANE F. GARVEY, ADMINISTRATOR
Federal Aviation Administration

Issued this 7th day of October, 1997.

[32] As discussed earlier, the law judge's finding of a violation of Section 43.13(a) is reversed. *See* note 5. .

[33] Unless Respondent files a petition for review with a Court of Appeals of the United States within 60 days of service of this decision (under 49 U.S.C. § 46110), this decision shall be considered an order assessing civil penalty. *See* 14 C.F.R. § § 13.16(b)(4) and 13.233(j)(2) (1994).