

Eastern Airlines flight on March 9, 1990.² We deny the appeal.

There is no dispute regarding the facts leading up to the incident. Eastern Airlines flight 673, for which respondent was pilot-in-command (PIC), was arriving for a landing at Atlanta's Hartsfield Airport. Respondent was the flying pilot; his first officer, Anthony Peyou, was handling communication with ATC. The aircraft was first cleared to land on Runway 8-L, and had been cleared to an altitude of 14,000 feet. The runway was changed to 9-R, and soon after ATC cleared the aircraft to descend to 12,000 feet. A deviation from the clearance was picked up by ATC approximately 2 minutes later (Exhibit A-1 at 2), when the aircraft had descended 1,400 feet past its clearance, to 10,600 feet.

As the admitted facts constitute a violation, respondent offered as an affirmative defense the argument that he had reasonably relied on the first officer's proper performance of his responsibility. The burden of proving such a defense is on respondent. Respondent testified that, although he was on the

²§ 91.75(a) (now 91.123) provided, as pertinent:

(a) When an ATC [air traffic control] clearance has been obtained, no pilot in command may deviate from that clearance, except in an emergency, unless an amended clearance is obtained.

§ 91.9 (now 91.13(a)) provided:

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

Sanction against respondent was waived in accordance with the Aviation Safety Reporting Program.

ATC frequency at the time the clearance to 12,000 feet was given, he did not hear the clearance, and apparently was not listening, as he was studying the approach plates for the newly assigned runway. Tr. at 55-56. The first officer read back the 12,000-foot clearance but, rather than setting 12,000 feet in the altitude selector, he set it at 10,000 feet. This is admitted, and it forms the principal basis of respondent's reliance defense. Additionally, respondent testified that he twice queried the first officer as to the accuracy of the 10,000-foot clearance, because he recognized it as an unusual one for Hartsfield, and that both times he was advised that 10,000 feet was the cleared altitude.

There are several weaknesses in respondent's defense and we cannot fault the law judge for not accepting it. First officer Peyou testified that he was questioned by the captain about the altitude clearance only once, and then not until after ATC had announced the deviation. (The first officer further testified that, if he had been questioned earlier, he would have checked with ATC before answering.) Having had the opportunity to observe both witnesses and considering their distinctly different recollections, the law judge recognized the difficulty this testimony presented for respondent's defense.³

Moreover, Board precedent has established that reliance must

³The law judge acknowledged the differences in testimony and suggested what his credibility finding would be when he stated that "there are several questions raised by" the first officer's testimony. Tr. 154.

be reasonably based,⁴ but through his own testimony, respondent indicates that he was fully aware that 10,000 feet was the departure altitude for the sector in which he was flying. He recognized that it would be "most unusual" to be cleared to that same 10,000 feet altitude for arrival. Hence, a prudent transport pilot, who had not heard ATC's altitude instruction, would not reasonably rely on his first officer even if he told him that the altitude clearance was 10,000 feet and that figure had been entered in the altitude selector. Indeed, respondent's adamant testimony that he twice sought reassurance from his first officer is an admission that he had substantial uncertainty, and had that uncertainty despite the fact that "10,000" appeared in the altitude selector.⁵

⁴In Administrator v. Fay & Takacs, NTSB Order EA-3501 (1992) at 9, we summarized precedent dealing with reasonable reliance, noting that:

As a general rule, the pilot-in-command is responsible for the overall safe operation of the aircraft. If, however, a particular task is the responsibility of another, if the PIC has no independent obligation (e.g., based on operating procedures or manuals) or ability to ascertain the information, and if the captain has no reason to question the other's performance, then and only then will no violation be found.

⁵Even in his own version of events, respondent does not testify that his inquiries of the first officer occurred before the deviation. Respondent was asked repeatedly when he queried the first officer. He offered no direct answer. See Tr. at 38 (his first query of Peyou occurred after respondent looked at the altitude window and saw 10,000 set there; he asked Peyou the second time "while proceeding then from 14 to 10,000 feet"). See also Tr. at 51-54 (he had the thought that 10,000 feet was an unusual altitude "somewhere between the descent from 14,000 to

Respondent's questioning of his first officer, an admission of uncertainty, is an uncertainty which, given respondent's knowledge of the Atlanta environment, was well-founded, and should have been clarified by a call to ATC.⁶

The law judge at trial concluded that:

[A]n airline transport pilot must exercise the highest degree [of care] at all times, can have no doubt in his mind. If he has any doubt, then he should try to resolve that doubt . . . by verifying . . . the altitude clearance that he had doubt about from air traffic control.⁷

We adopt as our own the findings and conclusions of the law judge not inconsistent with the foregoing.

(..continued)

10,000 feet"). The only specific evidence on this point was provided by the first officer. As noted, he testified that respondent only questioned him once, and that occurred after the aircraft had descended well below 12,000 feet.

⁶See Administrator v. Chaille, NTSB Order EA-3643 (1992) at 3-4. The instant proceeding is readily distinguished from Administrator v. Leenerts, 6 NTSB 725 (1988). In Leenerts, three officers in the flight deck had heard what they believed to be a non-standard clearance, and the questioning within the cockpit was related, not to what clearance they had received, but to why that clearance was received -- a matter seemingly explained by severe weather that had recently closed the airport. Here, respondent does not claim to have heard 10,000 feet, there were no explanatory circumstances for the unusual clearance, and such questioning as there may have been began, on the evidence accepted, after the deviation.

⁷Tr. 155.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied; and
2. The initial decision is affirmed, as supplemented here.

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HAMMERSCHMIDT, and HALL, Members of the Board, concurred in the above opinion and order.