

SERVED: February 7, 1996

NTSB Order No. EA-4422

UNITED STATES OF AMERICA  
**NATIONAL TRANSPORTATION SAFETY BOARD**  
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD  
at its office in Washington, D.C.  
on the 24th day of January, 1996

_____	)	
DAVID R. HINSON,	)	
Administrator,	)	
Federal Aviation Administration,	)	
	)	
Complainant,	)	
	)	Docket SE-13966
v.	)	
	)	
BARDY JOE SCHOLLMEYER,	)	
	)	
Respondent.	)	
_____	)	

**OPINION AND ORDER**

The respondent has appealed the oral initial decision issued by Administrative Law Judge William R. Mullins following a full evidentiary hearing held on May 2, 1995.<sup>1</sup> The law judge found by preponderant evidence that respondent, acting as pilot-in-command of a Mesa Airlines commuter flight, taxied a Beech 1900 aircraft

<sup>1</sup>An excerpt from the hearing transcript containing the initial decision is attached.

for takeoff while a passenger, who was attempting to buckle her six-month-old baby and the infant seat he was occupying onto a passenger seat, was still standing. The law judge found respondent in violation of sections 135.128(a) and 91.13(a) of the Federal Aviation Regulations (FAR).<sup>2</sup> As to the remaining charge in the Administrator's complaint, the law judge found section 135.87(c) inapplicable to this case, apparently concluding that the infant seat did not qualify as the kind of cargo that has to be secured during aircraft operation.<sup>3</sup> The law judge reduced the Administrator's original suspension of respondent's airline transport pilot certificate from thirty days to seven days.<sup>4</sup>

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<sup>2</sup>The applicable FAR sections state as follows:

**§ 135.128 Use of safety belts and child restraint systems.**

(a) Except as provided in this paragraph, each person on board an aircraft operated under this part shall occupy an approved seat or berth with a separate safety belt properly secured about him or her during movement on the surface, takeoff, and landing. ... Notwithstanding the preceding requirements, a child may:

- (1) Be held by an adult who is occupying an approved seat or berth if that child has not reached his or her second birthday; ...

**§ 91.13 Careless or reckless operation.**

(a) *Aircraft operations for the purpose of air navigation.* No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

<sup>3</sup>Section 135.87(c) lists several stowage requirements intended to ensure that cargo and baggage are properly secured so as to avoid possible injury to occupants.

<sup>4</sup>While opposing respondent's appeal, the Administrator did not appeal either the law judge's decision that section 135.87(c) did

At the hearing, the Administrator called Lydia Collins, the passenger who was traveling on the commuter flight with her six-month-old baby. She testified that upon boarding the aircraft she experienced difficulty buckling her son and his infant seat to the passenger seat. Before she could get the infant seat secured, and take her own seat across the aisle from her son's seat, the airplane took off.

Gregory Goodall, a passenger who was seated in the first seat on the right-hand side of the aircraft, testified that two to three minutes down the taxiway he saw the individuals up front look toward the rear. One looked back. Then the other one looked back. He identified these individuals to be the captain and the first officer. Mr. Goodall then turned and looked toward the rear of the aircraft. He saw Ms. Collins in the aisle hovering over the seat next to her which had her son in it, apparently being assisted by another passenger. The aircraft did not come to a stop.

Respondent testified as to his recollection of the incident. He indicated that the flight was initially held up so that the woman and her infant son could board the plane. Upon their boarding, the first officer assisted this passenger by carrying the car seat on board and putting it on the seat assigned to the child. He observed these passengers to be located in the back of the airplane in row seven. The boarding of these passengers

(..continued)  
not apply to this case, or the law judge's decision to modify the sanction. The validity of those decisions is therefore not before us.

delayed the flight by six minutes. Contrary to the Administrator's witnesses, the respondent testified that he looked back into the passenger cabin at the start of the taxi, and then before takeoff, but observed nobody standing.

On appeal, respondent raises three contentions in support of his position that the Board should reverse the law judge's decision. First, he argues that the requirements of safety belt usage during aircraft operation do not apply to this case because the baby in the infant seat did not have to be belted to a passenger seat, but could have been held in the adult passenger's lap. Second, the respondent contends that the law judge erred in his credibility determinations by giving more weight to the testimony of the Administrator's witnesses than to his testimony.

Third, respondent submits that he should not be held in violation of the FARs because he reasonably relied upon his first officer's advice that the cabin was secure and ready for takeoff.

Based upon our review of the entire record and the applicable case law, we find these contentions to be without merit.

Respondent's first contention is frivolous. In this case, whether the six-month-old baby had to be belted to a seat or not is beside the point because the evidence as found by the law judge established that the adult passenger, Ms. Collins, was standing throughout the taxiing of the aircraft. She was definitely required by regulation to be seated and secured by a seat belt during any type of surface movement by the aircraft. FAR section 135.128(a). Administrator v. Miranda, Logan, and

Tearney, 6 NTSB 353 (1988).

As to respondent's next contention, the Board generally will not disturb a law judge's rulings based upon witness credibility.

Respondent's belief that an adverse credibility assessment was warranted by the failure of the Administrator's witnesses to complain to the respondent before leaving the aircraft does not establish error in the law judge's determination that their testimony was credible.<sup>5</sup> Weighing the credibility of witnesses and resolving conflicts in testimony are tasks within the exclusive province of the fact finder.<sup>6</sup> See e.g. Administrator v. Kunkel, 5 NTSB 1400, 1401 (1986). See also Administrator v. Klayer, 1 NTSB 982 (1970). These cases stand for the proposition that the Board will reverse a credibility determination only if the testimony is inherently incredible or inconsistent with the overwhelming weight of the evidence.

Respondent's last contention is that he should not be held in violation of the FAR because he reasonably relied upon his first officer who advised him that the cabin was secure. We

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<sup>5</sup>Ms. Collins indicated she did not verbally complain at the time because she was embarrassed by her inability to secure the seat. Mr. Goodall indicated that he did not verbally complain because he thought such a confrontation would be a violation of the FARs to "interrupt a flightcrew."

<sup>6</sup>Respondent further argues that the testimony of the FAA inspector investigating this incident should be given no weight. Because the law judge clearly based his decision upon the eyewitness testimony of the two passengers aboard the aircraft, and not the inspector's, we need not address respondent's complaint as to this witness's credibility, nor do we need to address his complaint that this witness, in effect, was misinformed as to his interpretations of the law.

disagree. As a general rule, the pilot-in-command (PIC) 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 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. Administrator v. Fay and Takacs, NTSB Order EA-3501 (1992).

First, respondent in essence asserts that he had the authority to completely delegate to the first officer the responsibility of ensuring that the passengers were safely seated and secured.<sup>7</sup> We see it differently. At the hearing, referring to excerpts of the Mesa Airlines Operations Manual, respondent testified that as pilot-in-command his duties and responsibilities included supervising the safe loading and distribution of passengers (underscore added). But, as conceded by respondent, this manual also notes that the pilot-in-command is ultimately responsible for the safety of his passengers and crew. Furthermore, although he may delegate functions to other personnel, under the manual the pilot-in-command retains ultimate responsibility. Accordingly, it would appear that both the first officer and respondent bore the responsibility for ensuring that

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<sup>7</sup>Respondent argues that he delegated the responsibility of ensuring that the passengers were safely boarded to the first officer. At the same time, we note that Mr. Goodall questioned the first officer about the aircraft being operated with Ms. Collins still standing. The first officer apologized and pointed out that he was not the captain of the aircraft. Tr. at p. 53.

the passengers were safely seated and secured before the aircraft was taxied. Id.

Additionally, respondent fails to meet another condition of the reasonable reliance defense. Specifically, the record is clear that respondent could have easily ascertained for himself whether anyone was standing in the cabin given the relatively small size of this aircraft.<sup>8</sup> Thus, this case is clearly distinguishable from those cases in which an airman had to rely upon the advice of another in the performance of his responsibilities.

Lastly, respondent fails to meet the final condition of the reasonable reliance test. Based upon our review of the record, we are unpersuaded by respondent's contention that he had no reason to question the first officer's statement that the cabin was secure. Respondent testified that the flight was held up so that Ms. Collins and her baby could board. While the record is unclear as to how the first officer's assistance was initially obtained, it is clear that the first officer left his seat and assisted Ms. Collins, by carrying the infant seat for her back to their assigned seats in the rear of the aircraft. At the time, Ms. Collins was carrying the baby. Their boarding led to the flight being delayed. Thus, this was not the usual passenger

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<sup>8</sup>Respondent's recollection was that Ms. Collins was assigned to a seat in row 7 towards the back of the airplane. While respondent did testify that he looked back twice during the taxi, and saw nobody standing, we also note that the law judge did not accept respondent's version of the incident. Instead, he found credible the testimony of the passengers who said that Ms. Collins was standing throughout the taxi of the aircraft.

boarding situation, and accordingly, respondent had ample reason to verify any statement that the cabin was secure. See Administrator v. Barker, NTSB Order EA-4295 (1994). Respondent's obligation to ensure that the cabin was secure before taxiing the aircraft should have been completed in addition to any of his other duties. Consequently, for all the reasons noted, we reject respondent's reasonable reliance defense.

**ACCORDINGLY, IT IS ORDERED THAT:**

1. Respondent's appeal is denied; and
2. The 7-day suspension of respondent's airline transport pilot certificate shall begin 30 days from the date of service of this order.<sup>9</sup>

HALL, Chairman, FRANCIS, Vice Chairman, HAMMERSCHMIDT and GOGLIA, Members of the Board, concurred in the above opinion and order.

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<sup>9</sup>For the purposes of this order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to FAR § 61.19(f).