

SERVED: May 5, 2011

NTSB Order No. EA-5583

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 4th day of May, 2011

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J. RANDOLPH BABBITT,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	
v.)	Dockets SE-18616
)	and SE-18607
)	
JAMES E. AUSTIN and)	
JANICE R. McCALL,)	
)	
Respondents.)	
)	
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OPINION AND ORDER

Respondents have appealed from the oral initial decision and order of Administrative Law Judge William R. Mullins, issued May 20, 2010, in this matter.¹ In May 2009, the Administrator issued Orders of Suspension against both respondents' airline

¹ A copy of the initial decision, an excerpt from the hearing transcript, is attached.

transport pilot (ATP) certificates, based on alleged violations of 14 C.F.R. §§ 121.629(b)² and 91.13(a).³ The law judge affirmed the Administrator's orders, which suspended Respondent Austin's ATP certificate for 180 days and Respondent McCall's ATP certificate for 90 days. Respondents both appeal the law judge's decision, and have raised several issues on appeal.⁴ We remand the case to the law judge for further proceedings.

The Administrator's orders, which served as the complaints before the law judge, alleged that Respondent Austin operated as pilot-in-command (PIC), with Respondent McCall as first officer, on a Southwest Airlines flight from Philadelphia, Pennsylvania, to Nashville, Tennessee, on December 5, 2007. The complaint charged respondents with violating §§ 121.629(b) and 91.13(a), based on respondents' decision to operate the Boeing 737-300 for

² Section 121.629, entitled, "Operation in icing conditions," provides as follows:

(b) No person may take off an aircraft when frost, ice, or snow is adhering to the wings, control surfaces, propellers, engine inlets, or other critical surfaces of the aircraft or when the takeoff would not be in compliance with paragraph (c) of this section. Takeoffs with frost under the wing in the area of the fuel tanks may be authorized by the Administrator.

³ Section 91.13(a) states that, "[n]o person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another."

⁴ The law judge consolidated the cases for hearing, but respondents have since filed separate appeal briefs.

the flight when the aircraft allegedly had frost, ice, or snow on some of its critical surfaces.

Respondents appealed the orders, and the law judge scheduled a hearing. Prior to the commencement of testimony at the hearing, the Administrator made a motion in limine to exclude any evidence regarding reports respondents submitted under the Southwest Airlines Aviation Safety Action Program (ASAP). Under the ASAP at Southwest, pilots have the option of submitting a voluntary report concerning a safety issue or incident, and the ASAP event review committee (ERC) may review the report, accept the reporting pilot into the ASAP, and cause the Administrator not to initiate a certificate action against the reporting pilot.⁵ In this case, both respondents promptly submitted an ASAP report. At the hearing, the Administrator's attorney argued that airlines' ASAP programs are distinctly separate from the Administrator's authority to bring certificate actions against certificate holders. The Administrator's attorney further cited previous Board cases indicating the Board does not read its statutory directive as providing the Board

⁵ The ERC is normally composed of a three-member panel, which usually includes the operator, the relevant labor union, and the FAA. See Advisory Circular 120-66B at ¶ 4.i (Nov. 15, 2002), available at [http://rgl.faa.gov/Regulatory_and_Guidance_Library/rgAdvisoryCircular.nsf/0/61c319d7a04907a886256c7900648358/\\$FILE/AC120-66B.pdf](http://rgl.faa.gov/Regulatory_and_Guidance_Library/rgAdvisoryCircular.nsf/0/61c319d7a04907a886256c7900648358/$FILE/AC120-66B.pdf).

with authority to question the Administrator's prosecutorial discretion.⁶ The Administrator's attorney also asserted that the Board lacked jurisdiction to review this issue, as the Administrator's decision to review a report under an airline's ASAP and determine whether the report should obviate the Administrator's pursuit of enforcement action always occurs prior to the initiation of any enforcement action. Respondents contested the Administrator's motion.

The law judge granted the Administrator's motion, based on his determination that reports under Southwest's ASAP were not subject to review by the Board's law judges. The law judge stated that such a review would render ineffectual the memoranda of understanding under which these programs operate. The law judge also stated that review of respondents' ASAP reports in the case at issue would serve as a distraction from the true issue of the case, which was whether the Administrator could prove respondents took off with frost, ice, or snow on the aircraft by a preponderance of the evidence. Tr. at 27.

At the hearing, the Administrator called Aviation Safety Inspector Jerry Griewahn, who investigated the December 5, 2007

⁶ The Administrator's attorney cited the following cases concerning the Board's reluctance to review the Administrator's exercise of prosecutorial discretion: Administrator v. McCullough, NTSB Order No. EA-4592 (1997); Administrator v. Nixon, EA-4249 (1994); and Administrator v. Hunt, 5 NTSB 2314 (1987).

flight, to testify. Inspector Griewahn stated that he did not interview respondents or the flight attendants on the flight at issue, but determined that respondents violated §§ 121.629(b) and 91.13(a) based on Southwest Airlines' irregularity reports (IRs) that all crewmembers submitted after the flight. Exhs. A-1 (Respondent Austin's IR) and A-2 (Respondent McCall's IR). Based upon a certified package from the National Oceanic and Atmospheric Administration (NOAA), Inspector Griewahn also testified the temperature at 12:38 pm at Philadelphia was 28 degrees Fahrenheit and snow began to fall at 10:54 am. Exh. A-5; Tr. at 71. Likewise, Inspector Griewahn identified a Weather Underground report that corroborated the NOAA report, and showed the precipitation was "light snow." Exh A-6; Tr. at 75. The flight departed at 1:24 pm EDT. Exh. A-4 (flight log); Tr. at 78. In addition to this information, Inspector Griewahn identified a Servisair log sheet showing three other Southwest Airlines flights took off from Philadelphia close in time to respondents' flight, and all three de-iced before taking off. Exh. A-8. The Administrator's counsel attempted to introduce a copy of Respondent Austin's violation history during Inspector Griewahn's testimony, but the law judge rejected the exhibit, as the Administrator's complaint did not allege any prior violation history.

The Administrator also called R. Timothy Leonard, the senior manager of flight training at Southwest Airlines, to testify. Mr. Leonard identified Southwest's Flight Operations Manual (FOM), which requires first officers who perform pre-flight inspections to advise the PIC of any irregularities concerning the aircraft. Mr. Leonard testified that, under Southwest procedures, if the aircraft has any "contamination," the PIC has no choice but to de-ice. Tr. at 159. Mr. Leonard opined that, based on the weather reports, icing conditions were present on the flight.

The Administrator concluded the case-in-chief by calling two flight attendants who were on the flight, as well as two Southwest Airlines pilots who were "deadheading" on the flight.⁷ All four of these witnesses testified that they observed it snowing outside. In addition, one of the flight attendants and both deadheading pilots testified they saw snow and ice on the aircraft's wings.⁸ The flight attendant further described a

⁷ The "deadheading" pilots were past their duty and time limits under the regulations, but needed to arrive in Nashville for the next flight sequence. Tr. at 263. Therefore, they were passengers, rather than crewmembers, on the flight at issue.

⁸ Tr. at 222-23, 225 (flight attendant's testimony that she looked out the window and saw the wings "covered completely with snow and ice"); 265-66, 270 (deadheading pilot's testimony that he saw one of the wings was 80 to 90 percent covered with approximately ¼ inch of snow and ice); 329 (deadheading pilot's testimony that most of the wing she saw was covered with snow and slush).

conversation she had with a passenger on the flight, who specifically asked her if the pilot would de-ice the aircraft before taking off. She testified she informed Respondent Austin of the passenger's question, and that Respondent Austin said, "we de-iced at the gate." Tr. at 226. The flight attendant recalled she told the passenger what Respondent Austin had said, but felt "horrible" for saying it, because she knew it was not true. Tr. at 227. Both flight attendants and one of the deadheading pilots recalled that Respondent Austin appeared to be in a hurry to leave Philadelphia. One flight attendant recalled Respondent Austin informing her that he had a meeting in Orlando later that day, and the deadheading pilot recalled Respondent Austin telling him to "hurry up" when Respondent Austin mistook him for the first officer on the flight. Tr. at 264.

All four eyewitnesses also described their surprise when hearing the takeoff chime, and stated that they did not know how to prevent the takeoff within the short period of time between hearing the chime and the aircraft taking off.⁹ One of the deadheading pilots identified four photographs of one of the wings that he took with his cell phone camera. Exh. A-11. He stated that he took three of the four photos within 5 to 7

⁹ The deadheading pilots indicated they were not concerned when the aircraft began to taxi, as they presumed the PIC was proceeding to the area in which de-icing would occur.

minutes of takeoff, and that he took the other photo 30 to 40 minutes after taking off. Tr. at 274. He further testified that he took the photos because he was concerned about Respondent Austin's decision not to de-ice, and anticipated needing the photos for an investigation into the circumstances of the flight.

Upon landing in Nashville, this deadheading pilot recalled approaching Respondent Austin and asking him why he did not de-ice. The deadheading pilot stated that Respondent Austin told him, "it was above freezing," and that Respondent Austin had taken off in worse conditions while flying in the United States Air Force. Tr. at 279-280. He stated that he told Respondent Austin, in response to Respondent Austin's question about whether the other deadheading pilot would "rat [him] out," that he would not lie on Respondent Austin's behalf, and advised Respondent Austin to complete an ASAP report. One deadheading pilot recalled going to a Southwest Airlines podium in the Nashville airport to research the weather in Philadelphia, as she was attempting to "figure out ... what happened." Tr. at 354. She testified that she confronted Respondent Austin to inquire about whether he had told the flight attendant to inform the concerned passenger that Respondent Austin had de-iced:

I was 98 percent sure you can't de-ice at the gate in Philly, and so I confronted him with that. I said, "So you de-iced at the gate?" And he looked down and

said, "I just told -- I just told the passengers that." I said, "Well, I've never seen that much snow on the wing, and I didn't know the airplane would fly like that."

Tr. at 333-34. The flight attendant testified that, while she had never reported any incidents or misconduct in her 19 years as a flight attendant at Southwest, she nevertheless felt compelled to report this flight based on her concerns for the passengers' safety, and, shortly thereafter, called the chief Southwest Airlines pilot in Houston, Texas, to discuss the incident.

In response to the Administrator's case, both respondents testified, and opined that they did not need to de-ice the aircraft before taking off. Respondent McCall identified portions of the Southwest FOM, which state that the PIC will make the decision concerning whether to de-ice, and that the PIC must ensure all critical components are free of frozen contaminants. Tr. at 368-69, 371; Exh. A-10 at §§ 4.3.5 (also stating flight crew must inspect all areas), 4.3.11. Respondent McCall stated that, before departing from Philadelphia, she inspected the exterior of the aircraft and saw no contamination. She also stated that she saw no accumulation of precipitation on the baggage cart nearby, which is typically a good indicator of precipitation that might have accumulated on the aircraft. Respondent McCall recalled a few snowflakes falling at the

airport, but no precipitation was accumulating; she also reviewed the NOAA weather report during her testimony, and stated that it indicated the snow that was falling was "amazingly dry."¹⁰ Respondent McCall's testimony corroborated the testimony of the flight attendants concerning the haste with which Respondent Austin sought to leave; Respondent McCall stated that, while she was walking through the Philadelphia airport, the scheduling office at Southwest Airlines called her to make sure she was on her way to the aircraft, after Respondent Austin requested the office determine her whereabouts.

Respondent Austin, who proceeded pro se at the hearing, testified in a narrative format. Respondent Austin recalled receiving a form from an operations agent at Philadelphia that mentioned de-icing, but nevertheless chose not to de-ice the aircraft, as neither he nor Respondent McCall saw any precipitation adhering to any representative surfaces of the aircraft. Respondent Austin stated that he and Respondent McCall agreed not to de-ice the aircraft, and that another aircraft from Spirit Airlines took off immediately before them without having de-iced. Respondent Austin recalled none of the flight attendants with whom he communicated on the flight

¹⁰ Tr. at 423-24. Respondent McCall testified that, after the flight at issue, she took an online NOAA training course in ground de-icing.

appeared concerned, and that the inquiry from the concerned passenger, which one of the flight attendants relayed to Respondent Austin, did not concern him. Respondent Austin further stated that the takeoff was uneventful, and that, after landing in Nashville, he discussed his decision not to de-ice with the deadheading pilots. Respondent Austin disputed the authenticity and accuracy of the photos taken during the flight, and stated that the pilot who operated the aircraft immediately before him told him it had stopped snowing. Respondent Austin stated that he believed the president of Southwest Airlines sought to terminate his employment before the incident, because Respondent Austin had "stood up to the company" on behalf of another employee in a previous incident. Tr. at 536-37.

In rebuttal, the Administrator again called Mr. Leonard, who testified that the FOM specifies the first officer must work with the PIC as a team. The Administrator also called in rebuttal Michael Garrett of the FAA Seattle Aircraft Evaluation Group, to testify concerning cold soaked fuel frost, which Mr. Garrett defined as a "phenomenon whereby the fuel in the tanks -- wing tanks of an aircraft essentially get so cold that it cools the skin of the wing and then through condensation and -- since the temperature has to be below zero freezing of that condensation into a frost on the wing structure." Tr. at 573. Mr. Garrett further stated cold soaked fuel frost requires

the skin temperature of the wing to be below zero degrees centigrade, and the skin temperature of the wing to be less than the dew point. Mr. Garrett opined that the accumulation on the top of the wings of the aircraft was not the result of cold soaked fuel frost, but instead was the result of precipitation that accumulated on the wings.

At the conclusion of the hearing, the law judge issued a detailed oral initial decision, in which he affirmed the Administrator's complaints. The law judge provided a detailed summary of the evidence, and stated that he believed the flight attendants and deadheading pilots provided more credible testimony than did respondents. Initial Decision at 635 (stating no evidence existed to show the flight attendants lied or conspired against respondents), 638 (stating credibility finding was the principal reason for affirming the Administrator's orders). The law judge affirmed the Administrator's choice of sanction, based on the fact that the PIC has the ultimate responsibility for safe flight. Id.

On appeal, Respondent Austin, who still proceeds pro se, raises several issues. In particular, Respondent Austin argues that the law judge improperly excluded evidence on and refused to consider the ASAP reports, and erred in believing the flight attendants' and deadheading pilots' testimony, because the FAA conspired with Southwest Airlines in bringing this case.

Respondent Austin further argues that the law judge improperly excluded the testimony of Captain Hefner.¹¹ Respondent Austin also contends that the law judge was biased, in that he allowed the Administrator more latitude with introducing evidence than he allowed respondents, and that the law judge inappropriately interpreted Southwest's FOM as requiring an inspection of the over-wing from the passenger cabin window over the window exit. Finally, Respondent Austin argues that the Administrator's choice of sanction is inappropriate, and that the law judge did not elaborate enough on his reasons for affirming the sanction.

Respondent McCall contends on appeal that the law judge erred in not considering respondents' affirmative defense that the Administrator should not have charged them with violating any regulations, because they submitted ASAP reports.¹² Respondent McCall also argues that the law judge erroneously credited the eyewitness testimony of the flight attendants and

¹¹ Respondent McCall issued a subpoena to compel the testimony of Jeff Hefner, a captain at Southwest Airlines whom Respondent McCall expected to testify concerning Southwest's ASAP program. Amended Hearing Witness List (May 4, 2010) at 4. Respondent Austin indicated at the hearing that he also sought to obtain Mr. Hefner's testimony, but did not issue a subpoena because he believed one was unnecessary, after Respondent McCall's subpoena for Mr. Hefner's testimony. In Respondent Austin's appeal brief, he indicates that he expected Mr. Hefner to opine that ice formed on the aircraft after takeoff.

¹² The record contains a motion in limine that Respondent McCall submitted, arguing the ERC had accepted her into the ASAP at Southwest Airlines.

deadheading pilots on the flight. The Administrator disputes respondents' arguments, and urges us to affirm the law judge's decision.

With regard to respondents' arguments concerning the ASAP, we believe the law judge should have allowed the ASAP reports into evidence. We first note that the FAA Advisory Circular governing ASAP programs specifically provides an ASAP report may not be used for any purpose in an FAA legal enforcement action, unless the report involves criminal activity, substance abuse, controlled substances, or intentional falsification.¹³ We read this protection, however, as one that prohibits the FAA from using ASAP evidence in an enforcement action. The Advisory Circular does not prohibit a pilot from waiving this protection to submit his or her own ASAP report into evidence.

Based on the fact that the law judge will be able to review the ASAP reports on remand as explained above, it is axiomatic that the law judge should consider whether either respondent's filing of their respective ASAP reports protects one or both of them from FAA enforcement action. The applicable FAA Advisory Circular appears inconsistent on this point.¹⁴ We instruct the

¹³ FAA Advisory Circular 120-66B at ¶ 11.c.(3), supra note 5.

¹⁴ Id. at ¶ 9(a) (stating, "[e]ach employee participating in ASAP must individually submit a report in order to receive the enforcement-related incentives and benefits of the ASAP policy"); compare ¶ 9(d) (stating non-reporting employees will

law judge to consider this issue in his review.¹⁵ In addition, we direct the law judge to determine whether the ERC accepted respondents into the ASAP, as the record is unclear on this point. Finally, the law judge should also consider whether respondents also filed reports under the aviation safety reporting program (ASRP).¹⁶

ACCORDINGLY, IT IS ORDERED THAT:

This case is remanded to the law judge for further proceedings consistent with this opinion and order, which may

(..continued)

have opportunity to submit ASAP reports) with ¶ 11(c)(3) (stating the FAA will not use an ASAP report for any purpose in FAA enforcement action) (emphasis added).

¹⁵ The law judge correctly acknowledged at hearing that this issue was one of first impression for the Board by stating that, "until my appellate body comes down and says, '[y]es, you will review [the ASAP issue],' I think this is an issue that needs to go before the full Board." Tr. at 27. We note the law judge's decision was detailed and well-reasoned, and note, as an ancillary matter, that this remand is limited to consideration of and findings concerning the ASAP evidence.

¹⁶ Pilots frequently file such reports in conjunction with ASAP reports. Under the ASRP, the Administrator may waive the imposition of a sanction, despite the finding of a regulatory violation, as long as certain other requirements are satisfied. Aviation Safety Reporting Program, Advisory Circular 00-46D at ¶ 9c (Feb. 26, 1997). Title 14 C.F.R. § 91.25 states, "[t]he Administrator of the FAA will not use reports submitted to the National Aeronautics and Space Administration under the [ASRP] (or information derived therefrom) in any enforcement action except information concerning accidents or criminal offenses which are wholly excluded from the Program" (emphasis added). If either respondent also filed a report under the ASRP, this regulation would apparently preclude the use of that report in "any" enforcement action, including the action at issue here against respondents.

include holding a hearing to invite evidence on the ASAP and ASRP issues discussed above.

HERSMAN, Chairman, HART, Vice Chairman, and SUMWALT, ROSEKIND, and WEENER, Members of the Board, concurred in the above opinion and order.

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
OFFICE OF ADMINISTRATIVE LAW JUDGES

* * * * *

J. RANDOLPH BABBITT, *
 Administrator, *
 Federal Aviation Administration, *
 *
 Complainant, *
 *
 v. * Docket No.: SE-18616
 * Docket No.: SE-18607
 JAMES E. AUSTIN and * JUDGE MULLINS
 JANICE R. MCCALL, *
 *
 Respondents. *
 * * * * *

U.S. Tax Court
U.S. Courthouse, 7th Floor
515 Rusk Street
Houston, Texas 77002

Thursday,
May 20, 2010

The above-entitled matter came on for hearing, pursuant
to notice, at 9:01 a.m.

BEFORE: WILLIAM R. MULLINS
Administrative Law Judge

APPEARANCES:

On behalf of the Administrator:

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On behalf of Respondent Janice R. McCall:

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On behalf of Southwest Airlines and Certain Witnesses:

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Also Present:

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ORAL INITIAL DECISION AND ORDER

ADMINISTRATIVE LAW JUDGE MULLINS: This has been a proceeding before the National Transportation Safety Board, held under the provisions of Section 44.709 of the Federal Aviation Act of 1958, as amended, on the appeal of James E. Austin and Janice R. McCall from Orders of Suspension that have suspended their airman certificates. In the case of Mr. Austin, it was -- the Administrator is seeking a 180-day suspension; and Ms. McCall, it's a 90-day suspension.

There were two cases here. The Austin case, the Board docket number is SE-18616 and the McCall case is 18607 and those two cases have been consolidated for hearing.

The complaints were filed on behalf of the Administrator through Regional Counsel of the Southwest Region. The matter has been heard before me, William R. Mullins. I'm the administrative law judge for the National Transportation Safety Board; and as is provided by Board rules, I will issue a decision at this time.

The matter came on for hearing, pursuant to notice that was given to the parties, here in Houston. The hearing commenced on May 18th, 2010, on Tuesday, and continued through Tuesday and yesterday, the 19th; and today is the 20th. It's about 2:00, 10 till 2:00.

The Administrator was present throughout these

1 proceedings and represented by counsel, Ms. Yolanda Bernal,
2 Esquire, of the Regional Counsel's Office, Southwest Region, and
3 also by Ms. Cynthia Dominik, Esquire, of the General Counsel's
4 Office in Washington, D.C.

5 Ms. McCall was present throughout these proceedings and
6 represented by her attorney, Mr. Noah Radbil, of Camara & Sibley
7 in Houston.

8 And Mr. Austin was present throughout the proceedings
9 and represented himself.

10 A couple of the witnesses that were called were
11 represented by Mr. Dane Jaques, of the law firm of Dombroff,
12 Gilmore, Jaques & French, in McLean, Virginia; and Mr. Jaques has
13 been here and present throughout these proceedings, although he
14 did not represent one of the parties.

15 The parties were afforded a full opportunity to offer
16 evidence, to call, examine, and cross-examine witnesses. In
17 addition, the parties were afforded an opportunity to make
18 argument in support of their respective positions.

19 DISCUSSION

20 The Administrator had six witnesses: Mr. Jerry Griewahn,
21 Mr. Tim Leonard, Ms. Pam Griffin, Ms. Cindi Schneider, Mr. Craig
22 Vezina, and Ms. Mercedes Balin.

23 Respondent McCall had one witness, herself.

24 And Respondent Austin had three witnesses. He recalled
25 or he called again Mr. Vezina. He also called Ms. McCall, and

1 then he testified himself.

2 The Administrator had Exhibits A-1 through 14. Let's go
3 off the record just a minute.

4 (Off the record.)

5 (On the record.)

6 ADMINISTRATIVE LAW JUDGE MULLINS: Let's go back on the
7 record.

8 The Administrator had, according to my notes, 14
9 exhibits. I'll go through them just -- I won't elaborate on them.
10 I may during the discussion of the testimony.

11 Exhibit A-1 was an incident report or Irregularity
12 Report and I'm not sure which one it was but it was an IR and this
13 was submitted by Respondent Austin after the incident.

14 A-2 was the incident or Irregularity Report submitted by
15 First Officer McCall.

16 A-3 is the Southwest Airline Air Carrier Certificate.

17 A-4 was a flight log of the aircraft, both a page of the
18 inbound flight into Philadelphia that day and the outbound flight.

19 A-5 was the Blue Ribbon copy of the weather during the
20 period of time of this flight on December 5th of 2007.

21 Exhibit A-6 was an Underground Weather report and there
22 were a couple of times missing on the Blue Ribbon copy and this
23 sort of filled that in, but they were both consistent.

24 A-7 was the report showing arrival and departure time
25 for Southwest Airlines that day at Philadelphia.

1 A-8 was the Southwest Airlines de-ice log for that date.
2 A-9 was a copy or portions of the Sanction Guidance
3 Table.

4 A-10 was the Southwest Airline Flight Operations Manual.

5 A-11 were pictures taken by First Officer Vezina.

6 A-12 was not allowed. That was a -- well, I don't need
7 to refer to that. It was not allowed.

8 Then A-13 was an additional portion of the Southwest
9 Airlines Flight Operations Manual.

10 And A-14 was also a portion of that flight operations
11 manual.

12 The Respondents had exhibits. M-1, -2, and -3 were the
13 irregularity incident reports, first, from Captain Balin, Mercedes
14 Balin; the second was from Flight Attendant Cindi Schneider; and
15 the third was from a flight attendant, Erma Bennett.

16 M-5 was with a safety alert.

17 M-14 was an airport diagram.

18 M-25 was part of the compliance and it was a Federal
19 Aviation -- not a regulation but a bulletin or advisory circular,
20 8900.1, Change 62, and it was offered to show that an enforcement
21 action against the proper crew member on a multicrew aircraft
22 should be the one placed responsible.

23 M-30 was an e-mail -- two e-mails stapled together, one
24 from Captain Hunt and one from Captain Repper. And Captain Hunt
25 was the aircraft commander when it flew into Philadelphia that

1 day, and Captain Repper flew out of Philadelphia that day on
2 another flight.

3 Those are the -- well, no.

4 M-19 was the irregularity incident report of Mr. Vezina.

5 And then M-21 was the amended IR or an addendum filed by
6 Mr. Austin with, I guess, Southwest Airlines.

7 And M-27 was an e-mail about pictures and about
8 some .jpg, some -- as I said at the time, I admitted it; but it
9 really didn't add anything or detract anything from the picture.

10 Now, I've talked about the witnesses and exhibits. Let
11 me briefly discuss the Orders of Suspension that have been issued
12 here and the allegations that brought us here today.

13 First -- and I'm going to paraphrase -- not even
14 paraphrase. I'm just going to generalize what those Orders of
15 Suspension refer to. The specific paragraphs, I'm not going to
16 get into. I will talk about the regulatory allegations at the
17 end.

18 Apparently on this date in question, which was December
19 5th of 2007, the Respondent Austin was the captain and Respondent
20 McCall, the first officer, on Southwest Airlines Flight 3839 that
21 departed Philadelphia that day bound to Nashville, Tennessee.

22 At the time -- it's alleged at the time that the
23 aircraft came in from wherever it came in from -- and that's not
24 important. It was a one-hour and one-minute flight -- when it
25 landed, that at the time it landed, it was snowing, light -- it

1 varied, the description of it, from light snow to heavy snow and
2 some of the testimony said "dusting," but, anyway, there was some
3 precipitation falling.

4 The aircraft was on the ground in Philadelphia 30
5 minutes before taking off again; and the aircraft, based on the
6 allegations of flight attendants and the deadheading flight crew,
7 the allegations state that the aircraft took off with ice and snow
8 adhering to the wings, which gave rise to the regulatory
9 violations of FAR 91.13(a), careless and reckless, and also FAR
10 121.629(b), which states that "No person may take off an aircraft
11 when frost, ice, or snow is adhering to the wings, control
12 surfaces, propellers, engine inlets, or other critical surfaces of
13 the aircraft."

14 Basically, both orders state -- had those allegations;
15 and as I said previously, the Administrator is seeking a 90-day
16 suspension of Respondent McCall's airman certificate and a 180-day
17 suspension of Respondent Austin.

18 The first witness called by the Administrator was
19 Mr. Griewahn, who has been assigned for the last four years, I
20 think his testimony was, in the Southwest Airlines Certificate
21 Management Office. He holds an ATP and is type rated in a Lear,
22 Westwind, DC-9, and 737; and he's a flight engineer in the 727.

23 Basically, he testified that he was assigned to do the
24 investigation; and when he finished, he had completed the EIR. He
25 identified the first nine exhibits. He did testify on cross-

1 examination -- he was asked about that, whether he had interviewed
2 any of the witnesses; and he testified that he did not. He felt
3 that the incident reports filed by the flight attendants and the
4 deadheading flight crew -- he also reviewed the weather reports at
5 the time and also the de-icing reports from Southwest Airlines,
6 and he felt that that was sufficient to submit the EIR to Regional
7 Counsel; and he did.

8 The second witness called by the Administrator was
9 Mr. Tim Leonard. He's a senior manager of flight training and has
10 been since June of '07. He started out with Southwest -- I think
11 he was an assistant -- excuse me. He started out as a first
12 officer in 1994 and was a first officer up until 1999, becoming a
13 captain then, and was a captain until -- well, he continued to be
14 a captain and became assistant chief pilot in Orlando in 2001 to
15 2007, and he has been up until the time he became the senior
16 manager of the flight training.

17 His background, he's a graduate of UND and having -- I
18 don't know whether he's here in the room but I've been to UND and
19 I'm always amazed that they can house 120 airplanes, 365 days a
20 year, and they drag them out and put them back in and it's a
21 pretty amazing operation up there with all those little airplanes
22 but, anyway, that's an aside. Anyway, after graduation from UND,
23 he flew with SkyWest. He has about, he testified, 15,000 hours;
24 he has an ATP rating; and he's type rated in the 737 and the
25 Metroliner. And he particularly testified and identified the

1 flight operations manual for Southwest Airlines and, more
2 specifically -- and that was Exhibit A-10 and, more than that,
3 specifically covered cold weather operations and responsibilities
4 of the crew and he identified the Black Letter warnings and so
5 forth that's set forth in there. And, also, it was
6 identified -- I think it was page 4.3.11 of that document -- the
7 clean aircraft concept and the responsibility that that places
8 with the captain.

9 The third witness called by the Administrator was Pam
10 Griffin. Ms. Griffin is a 21-year flight attendant with Southwest
11 Airlines and was onboard the flight that day. She said she came
12 in on the aircraft from wherever it came in from, and she said it
13 was snowing heavily. She went out to meet the new captain and
14 said he was on the cell phone and he either mentioned to her or
15 she heard him say something about he had a meeting in Orlando and
16 she testified that the captain seemed to be in a hurry.
17 During -- or as they were boarding or -- and I never -- and I
18 don't think it's important; but at some point in time before they
19 pushed back or shortly after pushback, the other flight attendant,
20 Ms. Schneider, mentioned to her about the concern of a passenger,
21 stating that he wanted to make sure that they were going to de-ice
22 the airplane. Otherwise, he was going to call someone on his cell
23 phone.

24 And Ms. Griffin testified that she advised Ms. Schneider
25 to talk to the captain and she was standing there when

1 Ms. Schneider talked to the captain and she heard Ms. Schneider
2 say, "We de-iced at the gate?" and then hung up and then said
3 Ms. Schneider had told her that the captain -- she asked about it
4 and the captain said, "We de-iced at the gate," and both of them,
5 in both of their testimony, they knew that that was a lie because
6 they had been on the airplane and the airplane had not been de-
7 iced at the gate.

8 She did testify on cross-examination that she never
9 looked at the wing.

10 The next witness, Witness 4, was Ms. Cindi Schneider.
11 She's been a flight attendant for 29 years and said it was snowing
12 in Philadelphia when they arrived and it snowed the entire time.
13 She did testify that she never left the aircraft; but she did
14 mention about the passenger asking her about the de-ice and said
15 that if they weren't going to de-ice, he was going to make some
16 phone calls. She then testified that she talked to the captain,
17 and the captain told her that they had de-iced at the gate. She
18 was -- she testified that she was upset that she was going to have
19 to lie to the passenger and ultimately did tell the passenger what
20 the captain told her, although she said that she knew when she
21 told the passenger that that it was a lie but that's what the
22 captain told her.

23 She also testified that when the flight attendant chime
24 went off, she sat down, she was facing the passenger cabin, and
25 that she was not only frightened for her own life but she was

1 concerned about the passengers and her responsibility to those
2 passengers because she thought they were in extreme danger of not
3 being able to take off with that ice on the wings; and she said
4 that she was praying.

5 She did testify that she had looked at both wings and
6 both wings were entirely covered and testified that after they
7 took off, that the first officer -- deadheading First Officer
8 Vezina came back to her and he was upset and said that he couldn't
9 believe what just happened, and she asked about, "Are we in
10 danger?" and he said, "No, not anymore. We're in the air now,"
11 but apparently -- and there was that implication in the testimony
12 that he thought they were in danger at the time they took off.

13 She then testified that after they got on the ground,
14 she was still upset about it. She heard the conversations with
15 the deadheading flight crew. And she finally called a Mike Penn,
16 who she had traveled with; and she knew Mike Penn to be either the
17 chief pilot in Houston or one of the chief -- in the office of the
18 chief pilot in Houston. To me, it wasn't clear but, in any event,
19 she called him that evening after the flight and asked him what
20 she should do and Mr. Penn advised her that she didn't really have
21 a choice. She needed to report this incident.

22 There was some talk about -- and she testified, at least
23 in cross-examination, there was some testimony about a US Air
24 pilot that was onboard the flight, a US Air captain; but she
25 testified that he was asleep from the time he got on the airplane

1 until after they took off and he was asleep during the taxi.

2 The fifth witness called by the Administrator was Craig
3 Vezina. He was the deadheading first officer and, also, the next
4 witness was Captain Balin and both Captain Balin and First Officer
5 Vezina were the crew that was supposed to take this flight. And,
6 to a certain extent, I -- this has something to do with the case,
7 not anything to do with my decision; but there -- these were
8 people that were supposed to take that flight. Apparently they
9 had gotten in late the night before. They were past their time in
10 duty or right at -- they couldn't -- they weren't legal to fly
11 that day but they were deadheading on and I guess they were going
12 to -- at some point in time that day, they would be legal again
13 and then they could start and take up the trip.

14 And apparently and their testimony was -- and I can talk
15 about the testimony of the first officer and the captain, McCall
16 and Austin, that they had to come in. They were on standby duty
17 that week or that month or however that works and they were called
18 to come to Philadelphia to take this flight and there was some
19 problems, I guess because of the weather and delayed or canceled
20 flights, on how they got there.

21 But, in any event, I thought it was interesting that
22 these two deadheading pilots were supposed to be the crew on that
23 particular flight that day. Anyway, Michael Craig Vezina says he's
24 been a first officer since 2002 and he said when he was coming
25 down the jetway that Captain Austin -- and he had flown with

1 Captain Austin prior to that date but as he was coming down the
2 jetway, that the captain said, "Hurry up and get onboard," and
3 First Officer Vezina thought that the captain thought he was going
4 to be his first officer and he pointed out to him that he was not
5 legal to fly and he was just deadheading and he went ahead and got
6 onboard.

7 But he did observe that the wing was 80 to 90 percent
8 covered and I think there was some conversation with Captain
9 Balin -- or perhaps there wasn't -- but, in any event, his
10 testimony was, and Captain Balin, that they both believed that the
11 aircraft was taxiing to the de-ice pad and that the only -- that
12 they weren't aware that they weren't going to de-ice until they
13 heard the chime for the flight attendants and getting ready to
14 take off, that they were about to take off.

15 And then there was some comment from Captain Balin back
16 to the first officer and his response was, "We can't do anything
17 now because" -- and his testimony was he thought they had started
18 the takeoff roll almost immediately. It turns out they were back-
19 taxiing for a little ways; but, in any event, the aircraft did a
20 180 and then took off.

21 He was so concerned about it that he testified that he
22 got up and, I guess with his cell phone, that he took some
23 pictures that were admitted as A-11 and the pictures show in all
24 four instances the aircraft was clear -- apparently clear of
25 clouds -- so it was above whatever overcast there was in the

1 Philadelphia area -- and it continued to show some contamination
2 on the rear portion of the wing and that's what's depicted in each
3 of those four pictures.

4 He testified that the upper left, upper right, and
5 bottom right pictures of that exhibit were taken just a few
6 minutes after takeoff and then the bottom left picture was taken
7 sometime after they had been at altitude or at cruise flight.

8 He testified that he asked the flight attendant -- I
9 think it was Flight Attendant Schneider -- that he wanted to talk
10 to the captain after the flight. She communicated that to the
11 captain and then after the flight was over he went up and -- out
12 in the jetway in Nashville and told the captain, you know, "Why
13 did you take off when we had something adhering to the wing?" and
14 the Captain said, "Well, the temperature was up and" -- So then on
15 cross-examination, he was asked about the pictures, at length
16 about the pictures; and he testified that he never mentioned the
17 pictures to either of the Respondents in this case. The sixth
18 witness was Captain Mercedes Balin. Captain Balin is a 17-year
19 captain with Southwest Airlines and she also was deadheading, as
20 I've previously described, and I think her comment when she heard
21 the chimes go off, she turned to First Officer Vezina -- she was
22 on the right side of the aircraft, facing the front. She was on
23 the right side on the window, and I think First Officer Vezina was
24 behind her in the middle seat in the row behind her. But, anyway,
25 at the time the chimes went off, she turned and said, "We can't be

1 taking off" and then her thoughts were -- then as they started to
2 the takeoff roll, she thought that they were going to be like the
3 Air Florida crash which occurred back in, I guess, 1980 or '81 in
4 the Washington, D.C., area that, because of snow, went into the
5 Potomac. And one of the other witnesses -- and it might have been
6 one of the flight attendants -- also had thought about that flight
7 when they started their takeoff; and I -- that was fairly
8 dramatic, I thought.

9 But, in any event, she testified on cross-
10 examination -- and all of these witnesses were asked, "Well, why
11 didn't you do something about it? Why didn't you go tell" -- she
12 testified that she didn't -- she thought that they were going to
13 the de-ice pad and at the time the chimes went off for takeoff, it
14 was too late to say anything about it.

15 That concluded the Administrator's case in chief.

16 The first witness for First Officer McCall was First
17 Officer McCall and she talked at length about her preflight and
18 after she talked about all that, I asked counsel to inquire about
19 her ratings, because I wasn't sure that she was even trained to do
20 all that, but, in any event, First Officer McCall does have 7,000
21 hours of flight time, she has an ATP rating, and she's a certified
22 flight instructor and an instrument flight instructor in both
23 single and multiengine land.

24 She testified that she did a thorough preflight, that as
25 she walked around, she didn't see any ice or snow adhering to any

1 of the parts.

2 She got on the aircraft and she did talk about -- I
3 think she lives in the St. Louis area -- about the trouble she had
4 getting to Philadelphia that day because one of the flights -- the
5 flight that Southwest Airlines had scheduled her on had been
6 canceled and they were still trying to get her there. And so she
7 got there just -- she was literally -- and the testimony was
8 earlier that Captain Austin was looking for her because he was
9 down there and, as suggested by the flight attendants, Captain
10 Austin was in a hurry to go. I was never sure about the reason he
11 seemed to be in a hurry. I don't know whether it was because
12 Southwest Airlines encourages everybody to hurry or whether he had
13 some personal business that he needed to get on to but, in any
14 event, she -- and they both commented about there seemed to be a
15 little bit of friction when she, First Officer McCall, got there
16 but after she did her walk-around and got to the cockpit,
17 apparently everything was okay.

18 She did relate to the captain and they -- she said they
19 talked about the ice and snow and thought that they were good to
20 go, and they did. Then Captain Austin -- she did say -- and this
21 was interesting, because it -- she obviously was wrong about that.
22 She said there was no mandate for her to check the wing from the
23 cabin on her walk-around; and that was later pointed out that it
24 was specifically mentioned in the flight operations manual, which
25 is either -- I think it was A-14 that specifically states that in

1 that kind of weather, the first officer is required to go into the
2 cabin and look at the wing from the cabin viewpoint.

3 Captain Austin's first witness was, again, First Officer
4 Vezina, and the question -- he asked him some questions about the
5 pictures and I'm -- beyond that -- we'll go on beyond that.

6 The second witness, he called Captain -- I mean First
7 Officer McCall and she talked about talking to someone who said
8 there was a possibility that it might have been a delaminated wing
9 that caused this ice buildup and it was her opinion -- and I'm not
10 sure if the opinion came then or prior in her case in chief but
11 she opined that the ice reflected in A-11, the pictures, was a
12 buildup during flight as opposed to something that was on the wing
13 at the time of the takeoff rotation.

14 And then the third witness, Mr. Austin, Captain Austin,
15 took the stand; and he gave a fairly, I thought, detailed comment
16 about what happened that day.

17 First of all, he did a -- what I would call a mini walk-
18 around; and his testimony was he went down the stairs, was walking
19 around and looking for the first officer. So apparently he was in
20 a hurry; but, in any event, he said in that walk-around, he didn't
21 see any ice or snow adhering to the wing. And then he talked
22 about his problems of getting from his home outside of
23 Tampa -- and he was based in Orlando at the time -- into
24 Philadelphia to take this flight. So both he and the first
25 officer had some problems getting up there to take that flight,

1 and apparently they just got there as they were walking -- as they
2 got to the airplane, it was time to go right then.

3 In his testimony, he stated that he was in a hurry,
4 that -- and at one point in time, he believed they were, quote,
5 behind the power curve, whatever that means, but it would indicate
6 that he -- at least he had the mind-set that he was in a hurry.

7 And he said that the first officer came in after her
8 walk-around and said there wasn't anything adhering to any of the
9 surfaces and he believed they had a clean aircraft.

10 He did admit on cross-examination that he had lied about
11 the de-icing comment; and that -- of course, that testimony's come
12 on early on from the flight attendants.

13 And then there was some testimony about his reputation
14 at Southwest Airlines and being the most hated pilot at Southwest
15 Airlines and, again, that -- you know, his reputation at Southwest
16 Airlines has nothing to do with why I'm here today, but it did
17 open the door for the Administrator to talk about the prior
18 violation history, which was not alleged and which I previously
19 precluded from coming into the evidence because it had not been
20 alleged.

21 In rebuttal, the Administrator -- then Mr. Austin rests.

22 In rebuttal, Mr. Leonard was recalled and he identified
23 A-13 and he did specifically say that he had checked the records
24 and when this aircraft landed, it had like a little over 12,000
25 pounds of fuel and they added 8,000 pounds of fuel in

1 Philadelphia, that it brought it up to 20,000-something, and then
2 he talked about A-13 and -14, which was the flight ops manuals,
3 and this cold soaked fuel frost phenomenon.

4 And then the second witness in rebuttal was Mike
5 Garrett, and Mike Garrett is from Seattle. He's with the -- he's
6 the chairman of the flight standards something up there. Let me
7 see. He's the flight standards -- flight standardization board
8 chairman for the FAA in Seattle and works with Boeing and
9 apparently has a pretty vast background in flight operations and
10 he talked about this fuel contamination frost -- cold soaked fuel
11 frost phenomenon that came up and I felt we probably spent way too
12 much time on that because the witnesses, including Mr. Garrett,
13 said that the ice that's reflected in A-11 was not this phenomenon
14 because it was behind the fuel tanks. So I never was too
15 concerned about that.

16 But he did testify specifically as to the opinion
17 offered by First Officer McCall that this had developed -- this
18 ice had developed during flight, that's reflected in A-11; and he
19 said he had never seen or heard of that sort of contamination
20 buildup during flight because of the airflow and so forth over the
21 wing and those things.

22 That's the evidence that I've received here. Let me
23 make some general comments.

24 I felt like we were here for a great length of time
25 about both Respondents challenging the flight attendants' and the

1 deadheading crew's failure to come up and kick the door down and
2 pull the throttling back on this airplane.

3 Well, first of all, that doesn't happen in my experience
4 but, more importantly, the flight attendants had an absolute
5 legitimate reason about why they didn't go for it, because they
6 had already brought it to this captain's attention that, "You've
7 got some ice and snow back here. We've got a passenger back
8 here," and at that time, instead of assuring them -- this flight
9 attendant, that there wasn't a problem, the captain lied to the
10 flight attendant and said, "We de-iced at the gate," and she knew
11 that that was a lie.

12 And certainly in my experience, when you -- when you're
13 in that sort of a work environment and the guy who heads up that
14 work environment demonstrates that sort of attitude, I think it's
15 legitimate that those folks just set back and say, "We've done
16 what we can do." But they didn't go up and kick the door down,
17 but they did advise him and in response to that, they got this lie
18 about de-icing at the gate.

19 Also, there was some attempt to take issue with the
20 deadheading flight crew and both of those individuals testified
21 that they thought they were going to the de-ice pad and they
22 looked out -- one or both of them said they saw airplanes being
23 de-iced.

24 The exhibit -- I think it was A-8 -- shows that all of
25 the Southwest Airlines flights that day de-iced except this one.

1 There was some comment there might have been one other flight
2 several hours afterwards, by Mr. Griewahn. But, in any event,
3 this deadheading flight crew said, "We thought we were going to
4 the de-ice pad," and they weren't familiar with the de-ice pad in
5 Philadelphia and the next thing they knew, the chime went off and
6 they were on the takeoff roll and they both went forward and
7 brought it to the attention of Captain Austin at the conclusion of
8 the flight.

9 There was -- there was a lot of testimony, conversation
10 attempts, to somehow discredit the pictures taken in A-11; and I
11 thought it was very reasonable. Obviously First Officer Vezina
12 was upset that they had taken off with those conditions, and those
13 conditions persisted even after they had climbed up -- and, also,
14 Captain -- or excuse me -- First Officer McCall testified that
15 she -- it was a low layer of clouds. This precipitation and this
16 weather environment was low level. And that would be confirmed by
17 these pictures that he said just a few minutes after takeoff, he
18 got up and took the pictures; and they were already in the blue
19 sky. You can see that, although the bottom right picture shows
20 clouds -- as I look at it, it would appear that he's standing up,
21 taking the picture more in a down angle than he was the other two
22 pictures, but, in any event -- three pictures. In any event,
23 there was a lot of attempt on the part of these Respondents to
24 discredit that; and there's no reason to discredit that that I can
25 see.

1 The baseline, as I can see it, is that the Respondents'
2 position here was that I should assume that the flight attendants
3 who came forward and filed these reports and these deadheading
4 flight crews were lying and somehow conspiring against this flight
5 crew; and there's no evidence of that. There is simply no
6 evidence that that's what happened.

7 There was -- in fact, I'm not even sure that there would
8 have been a report filed except Ms. Schneider testified that she
9 had a lot of faith and trust in this Captain Penn that she had
10 flown with previously and knew he was one of the chief, if not the
11 chief pilot at Houston and she called him and he told her, "You
12 have to do that. That's part of the safety process. You must
13 file this report."

14 And I'm not sure that it would have even gone beyond
15 that except for her notification to Captain Penn. It wasn't clear
16 in the evidence, and it's not an important issue.

17 But, finally, one of the -- well, let me say this. The
18 Administrator has the burden of proving these cases and
19 establishing this evidence by a preponderance of the evidence.
20 Now, there has been a lot of talk here about this chain of
21 evidence. Well, a chain-of-evidence issue is a criminal
22 proceeding. It's not really something that you get concerned
23 about unless you're trying to keep some document out; but it's not
24 something that the Court gets involved in or worried about,
25 particularly given the fact -- and this chain-of-evidence issue

1 went to the pictures; but, here, the author, the person who took
2 the pictures, was here. He testified. He said those are the
3 pictures he took. So, you know, that -- that is the kind of an
4 issue that would be if you had a beyond-a-reasonable-doubt
5 environment. This is a preponderance-of-the-evidence environment
6 that we're working in, and that simply wouldn't apply.

7 Under the precepts of evaluating evidence, the first
8 thing you do is any statement made by anyone close in time to the
9 incident is to be given more weight than one that's made a long
10 ways away. The statement made by First Officer McCall was that
11 she didn't look at the wing -- that's in her incident
12 report -- and she wasn't sure whether the captain did or not and
13 it was very clear under the flight operations manual that the
14 first officer -- part of that walk-around in cold weather
15 operations has to be -- should be an inspection of the wings from
16 the cabin -- inside the cabin area. So -- and then that works
17 against her position in this case.

18 And, of course, Captain Austin, he's lied to a flight
19 attendant and he presumed, I think, that that lie would be passed
20 on to the passengers in his airplane and there was no reason to do
21 that except he was in a hurry, which probably precipitated this
22 event.

23 Finally, let me say this as a general observation -- and
24 I know certainly from what -- First Officer McCall and Captain
25 Austin, that they're trying to understand how this happened. I

1 thought it was interesting that no one has presented the
2 fact -- and as I indicated earlier, I've been hearing these cases
3 for many years; and many years ago, I heard a case similar to this
4 in Chicago involving a Boeing 727 operated by Kiwi Airline. And
5 it was alleged by the Administrator that the Kiwi pilots, all
6 three of them, were in violation of taking off -- or at least two
7 pilots. There was a flight engineer onboard. I don't think he
8 was -- any allegation was made against him. But, anyway, there
9 was -- as I recall, there was a lot of testimony; but I believe
10 there was expert testimony about a, quote, cold soaked airplane.
11 It comes in off a flight from 35,000 feet or 30,000 feet or
12 whatever, you know, in that time of year. That airplane is going
13 to be a lot colder than the 28 degrees on the ground and when they
14 taxi up to the gate, it's going to be clean, but because of the
15 temperature of the aircraft, everything that falls on it,
16 particularly on those wings, is going to adhere and probably
17 freeze right there if it's real close to the freezing point.

18 There hasn't been any evidence presented here today, and
19 I just -- I throw that out because everybody's wanting to know
20 what happened that day. As I sit here and I thought about that
21 other case, I thought, "Well, maybe that's what happened." The
22 other interesting thing about that -- well, two other things about
23 that; and I'll just suggest this to you: Kiwi Airline -- that
24 probably tells you how old I am, but the Kiwi Airline was all
25 piloted by old laid-off Eastern Airlines. So all three of this

1 flight crew had about -- I think they had a total of about 45,000
2 hours of flight time among the three of them and they were all
3 three captains from -- previously had been captains with Eastern
4 Airlines but they testified they got out and got on the ladder
5 reached up there and felt the wing and there wasn't anything
6 adhering to the wing.

7 And then the other aspect of the case that made it
8 interesting is that these two pilots were represented by a
9 gentleman that later became the Administrator of the Federal
10 Aviation Administration -- or at least the acting Administrator.

11 In any event, having said that, the credibility of the
12 flight attendants, the deadheading flight crew here today is just
13 paramount in my decision to find in favor of the Administrator and
14 affirm both of these Orders of Suspension.

15 I will say that I was troubled, at least in part, by the
16 sanction the Administrator sought against Captain Austin, simply
17 because there was some attempt to bring on his prior violation
18 history and if you're going to use that to enhance the sanction, I
19 think our rules -- our precedent would require that that be
20 alleged in the pleadings and it was not.

21 However, after hearing the evidence, I certainly
22 believe, and under the flight operations manual, that the captain
23 is the person who is absolutely ultimately responsible; and the
24 circumstances and the evidence that day has convinced me in both
25 cases that the sanction sought is appropriate.

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ORDER

IT IS THEREFORE ORDERED that safety in air commerce and safety in air transportation requires an affirmation of the Administrator's Order of Suspension as issued in both of these cases.

And, specifically, I find that there has been established by a preponderance of the reliable and probative evidence the regulatory violations of FAR 91.13(a) and 91.121.629(b) as to both pilots and that the sanction of 180 days' suspension of Captain Austin's certificate and the suspension of First Officer McCall's certificate for 90 days is appropriate and will be affirmed.

EDITED ON
June 14, 2010

WILLIAM R. MULLINS
Administrative Law Judge