

SERVED: April 24, 1998

NTSB Order No. EA-4650

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 6th day of April, 1998

JANE F. GARVEY,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-14816
v.)	
)	
ROBERT J. SOMERS,)	
)	
Respondent.)	
)	

OPINION AND ORDER

Respondent has appealed from the oral initial decision of Administrative Law Judge Patrick G. Geraghty, issued on July 23, 1997, following an evidentiary hearing.¹ The law judge affirmed an order of the Administrator, on finding that respondent had violated 14 C.F.R. 91.7(a), and 135.65(b) and (c) in connection

¹ The initial decision, an excerpt from the transcript, is attached. The Administrator did not appeal the law judge's sanction reduction, from a 120- to a 70-day suspension.

with a Part 135 flight on September 19, 1995.² We deny the appeal.³

On September 19, 1995, respondent was the pilot in command of a passenger-carrying, Part 135 flight from Stoney River to Anchorage, AK. According to the testimony of his one passenger, Mr. Mailer, before takeoff respondent pointed out that the co-pilot seat (which Mr. Mailer occupied) could not be placed in an upright position, and that the door on the co-pilot side of the aircraft "tended to pop open in turbulence." Tr. at 12. During the flight, Mr. Mailer's seat was in a reclining position, so that to sit up straight he had no seat support. The aircraft encountered severe turbulence, making it extremely difficult to remain stable in his seat. Mr. Mailer testified that the door popped open by itself and he was unable to close it. He further testified that he had to hold onto the seat bottom to keep from bumping into either the pilot or the (partially) open door. There is no dispute in the record that, were the facts as Mr.

² Section 91.7(a) prohibits operation of unairworthy aircraft. Sections 135.65(b) and (c), as pertinent here, require the pilot in command to enter or have entered in the aircraft maintenance log all mechanical irregularities that come to his attention during flight, and require each person deferring action concerning an observed failure or malfunction to record that action in the maintenance log.

³ The exhibit attached to respondent's appeal is stricken as improper new evidence. See 49 CFR 821.50. Also, respondent has filed a reply to the Administrator's reply brief, arguing that the Administrator has raised new issues to which he is entitled to respond. The Administrator agrees, in part, with respondent's claims. We do not, and respondent's reply of October 16, 1997 is rejected. That respondent had not anticipated the substance of the Administrator's response is no reason to permit further

(continued...)

Mailer testified, the cited violations would have been established.

In his testimony, however, respondent denied making the statements Mr. Mailer attributes to him, and denied that there were any problems with the seat. As to the door, he claimed that Mr. Mailer caused the door to open by leaning on the door's armrest (near to where the handle was located). According to respondent, there was nothing wrong with the door either before or after the flight. In his decision, the law judge noted the diametrically opposed statements, and explained his credibility finding in favor of the passenger.

On appeal, respondent claims that the law judge misunderstood and misapplied the evidence regarding the door. However, as the Administrator points out, respondent does not challenge the law judge's finding regarding the seat. No do we see any basis to overrule the law judge's finding in that regard, in light of the extreme deference we pay to his credibility findings. Administrator v. Smith, 5 NTSB 1560, 1563 (1986), and cases cited there (resolution of credibility issues, unless made in an arbitrary or capricious manner, is within the exclusive province of the law judge). The Administrator is correct that this evidence independently supports findings that respondent violated the cited regulations, and independently supports a 70-day suspension. See cases cited by the Administrator, especially

(continued...)
briefing.

Administrator v. Yarsley, 6 NTSB 524 (1988).

Even need we consider respondent's challenges to the door-related findings, we would find no merit to them. Respondent argues that the law judge erroneously concluded that post-flight repair of the outer door handle hinge pin supported the Administrator's case. Respondent may well be correct that the outer door handle hinge pin is not related to the inside door locking mechanism and it was error for the law judge to suggest that it was, but that is not the issue (and, thus, at most would be harmless error in the initial decision). The issue is a broader one: whether the door opened by itself during turbulence, and whether respondent knew of a problem in this regard before this flight. The law judge decided this issue primarily on Mr. Mailer's testimony, which as noted earlier was found more credible than respondent's.

Respondent's other claim on appeal -- that the law judge erred in failing to find that Mr. Mailer inadvertently opened the door -- also does not persuade us. We have reviewed Mr. Mailer's testimony and the law judge's discussion of it. Respondent's cross-examination of Mr. Mailer convinces us not that Mr. Mailer himself caused the door to open (the most it would show is that he thought it was open when it was closed, and vice versa), but that he was attempting to the best of his recollection to testify to what happened. His failure to remember with certainty all the details on these points and his willingness to question his recollection of events almost 2 years earlier does not provide

reason for us to overturn the law judge's credibility finding. Further, this argument does not address Mr. Mailer's testimony that respondent told him, *before the flight*, that the door popped open during turbulence.

ACCORDINGLY, IT IS ORDERED THAT:

1. The exhibit attached to respondent's appeal is stricken and respondent's motion to accept his reply to the Administrator's reply brief is denied;
2. Respondent's appeal is denied; and
3. The 70-day suspension of respondent's airman certificate(s) shall begin 30 days from service of this order.⁴

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

⁴ For the purpose of this order, respondent must physically surrender his certificate(s) to a representative of the Federal Aviation Administration pursuant to 14 C.F.R. 61.19(f).