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NTSB Order No. EA-3795

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 5th day of February, 1993

JOSEPH M. DEL BALZO,)	
Acting Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-10271
v.)	
)	
MARK ALBERT JENSEN,)	
)	
Respondent.)	
)	

OPINION AND ORDER

Respondent has appealed from the oral initial decision issued by Administrative Law Judge William E. Fowler, Jr., at the conclusion of an evidentiary hearing held in this case on July 24, 1990.¹ In that decision the law judge affirmed the Administrator's order revoking respondent's airline transport pilot certificate based on his alleged operation of an aircraft

¹ Attached is an excerpt from the hearing transcript containing the oral initial decision.

within eight hours after consuming alcohol and when he was under the influence of alcohol, in violation of sections 91.11(a)(1), 91.11(a)(2) and 91.9 of the Federal Aviation Regulations (FAR), 14 C.F.R. 91.11(a)(1), 91.11(a)(2), and 91.9.²

On appeal, respondent argues that the evidence produced at the hearing was insufficient to support the law judge's findings and that the law judge failed to consider all of the testimony and evidence. The Administrator has filed a reply brief in which he argues that the respondent has not presented any basis to overturn the law judge's decision. As further discussed below, we deny respondent's appeal and affirm the initial decision.

On the evening of November 9, 1988, respondent (then a captain for Iowa Airways) ferried an aircraft to Dubuque Municipal Airport in Dubuque, Iowa for required maintenance. He checked in at the Midway Motor Lodge at 11:25 p.m. (Tr. 173,

² Sections 91.(a)(1) and (2) [now § 91.17(a)(1) and (2)] provided:

§ 91.11 Alcohol or drugs.

(a) No person may act or attempt to act as a crewmember of a civil aircraft --

(1) Within 8 hours after the consumption of any alcoholic beverage;

(2) While under the influence of alcohol;

Section 91.9 [now § 91.13(a)] provided:

§ 91.9 Careless or reckless operation.

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

Exhibit A-4.) A bouncer employed at the hotel bar (John Scott) testified at the hearing that he recalled seeing respondent in the bar when the lights came on at closing time (about 1:00 or 1:30 a.m.), sitting at a table with a beer mug in front of him.

He stated that when he asked respondent to leave the bar it looked as if respondent was having trouble standing up and "wasn't going to make it," so he came over to see if respondent needed any help. Mr. Scott testified that he escorted respondent from the bar and that respondent was "wobbly" and unsteady on his feet. Mr. Scott cleared several beer mugs from respondent's table after respondent left. (Tr. 150-153, 157.)

Respondent acknowledged that he was in the bar on the night of November 9, but denies that he consumed any alcohol there or that Mr. Scott had to help him out of the bar. He maintains that he sat at the bar (not at a table), had two soft drinks (served in "double rocks" glasses) and popcorn, stayed for only 15 minutes, and left no later than midnight. (Tr. 199-201.) Although Mr. Scott conceded that he did not actually see respondent drinking, and that he only assumed that the beer mugs on the table had contained beer and not something else, he was nonetheless of the opinion that respondent had been drinking heavily and was drunk. (Tr. 152, 159.) Mr. Scott testified that he was sure respondent was the person he escorted from the bar that night, noting that he remembered him because he had seen him in the bar two or three times previously. (Tr. 154-56.) The law judge made a credibility determination in favor of Mr. Scott's

testimony.

Mr. Scott could not remember the exact date of this incident, but he knew it was sometime around election day (November 8). (Tr. 148, 167.) What was purported by hotel personnel to be Mr. Scott's time card for the week in question showed that he did not work on November 9. However, both Mr. Scott and the hotel sales manager indicated that the computer used for timekeeping often gave confusing or incorrect information³ and sometimes did not print anything at all when an employee punched in or out. Mr. Scott maintained that such a computer malfunction must have occurred on November 9. (Tr. 162-66, 176-77.) Indeed, the guest records from the Midway Motor Lodge show (and respondent does not dispute) that November 9 was the only time respondent stayed there from September, 1988, to December, 1988. (Tr. 174.) Accordingly, we are convinced that the incident described by Mr. Scott must have occurred on the evening of November 9, 1988.⁴

³ We note that the time card showed the year as 1985, a clear error since Mr. Scott was not even employed there in 1985. Furthermore, the sales manager admitted she could not "definitely" say that the time card was in fact from the week in question. (Tr. 180)

⁴ After briefing in this case was completed, respondent submitted an affidavit stating that he recently remembered that he saw another individual who he recognized as a bouncer in the bar that night. Respondent has filed a motion requesting the issuance of a subpoena in order to obtain from the hotel manager the identity and work records of this other person. Respondent does not explain why he could not have sought information about which hotel employees were working in the bar on the night in question through normal pre-hearing discovery. (Since he apparently deposed Mr. Scott prior to the hearing, respondent cannot claim that he was unaware at that time of the potential

The following morning, November 10, 1988, respondent acted as pilot in command of an Embraer EMB-110 PI Bandeirante on a repositioning flight (commencing at 6:00 a.m.) from Dubuque to Waterloo, Iowa, in preparation for a passenger-carrying flight operating as Iowa Airways 4220 (commencing at 6:30 a.m.) which he was to pilot from Waterloo back to Dubuque. Roger Hoyt, the Iowa Airways station manager, met the aircraft after it landed at Waterloo and spoke briefly to respondent in the cockpit of the plane. Susan Nelson, respondent's co-pilot for the passenger-carrying flight, was waiting inside the airport. Ms. Nelson testified that Mr. Hoyt stated to her, upon returning inside, that respondent "smells like a brewery." (Tr. 66.) Mr. Hoyt testified at the hearing that he smelled alcohol on respondent's breath when he spoke with him that morning, but did not recall whether he commented on this to Ms. Nelson. (Tr. 132, 135-38.)

Ms. Nelson stated that she took Mr. Hoyt's statement lightly, but nonetheless decided to watch respondent closely. (Tr. 66-67, 115-16.) Although she noticed nothing unusual when

(..continued)
significance of such information.) Nor does respondent offer any explanation for his failure to recollect the presence of this other hotel employee until approximately nine months after the hearing, and two and a half years after the incident.

The Administrator does not object to the affidavit or to the issuance of a subpoena. However, respondent's motion is not well taken, as there is no provision in our rules of practice for supplementation of the record at this stage of the proceedings. We also note that the information respondent seeks is not the type of "new matter" we would consider even if it were properly presented under 49 C.F.R. § 821.50 after the issuance of a Board order, because respondent has not shown why the information could not have been discovered by the exercise of due diligence prior to the date of the hearing.

she first encountered respondent inside the office at the airport that morning, she distinctly smelled alcohol on respondent's breath about 15 minutes into the flight (at about 6:45 a.m.) when he first turned to speak to her in the cockpit. (Tr. 74, 101.)⁵

She also noted that respondent's flying that morning was uncharacteristically erratic, and that he was slouched way down in his seat while he was flying the aircraft, although he normally sat very straight. (Tr. 77.)

Respondent was apparently known to be a proficient pilot with excellent flying ability. (Tr. 18, 112, 209.) However, Ms. Nelson stated that during this flight he was "all over the sky," deviating from his assigned altitude and course, and that he had trouble maintaining a direct VOR course to Dubuque. (Tr. 74-6.)

She also noted that as they approached Dubuque airport, respondent seemed not to know where they were and when she pointed out a landmark at the end of Runway 13 he made a "diving right turn" towards the runway. (Tr. 78, 88.) Further, respondent rejected as a "waste of time" a suggestion from the control tower and from Ms. Nelson that, because of the prevailing winds, landing on a different runway might be preferable. Instead, he landed on Runway 13 with a direct tailwind in excess of the maximum tailwind component listed in the aircraft manufacturer's manual. (Tr. 78, 85-7, see Exhibits A-3, R-2.)

⁵ Ms. Nelson acknowledged that in her deposition, under what she characterized as hostile questioning from respondent's attorney, she said she "couldn't tell" whether the alcohol was coming from respondent's breath, his clothes, or his seat. (Tr. 107, 118, 123)

According to respondent, the only unusual thing about the flight was his approach into Dubuque in that he was "late seeing the airport." (Tr. 209, 229-30.)

Ms. Nelson's account of respondent's landing at Dubuque was corroborated by another Iowa Airways pilot (Alan Pitcher) who was riding in the passenger section of the aircraft. He testified that he slept for most of the flight, but woke up just before landing and noted that respondent made a "downwind landing, very fast, very hot," on Runway 13. (Tr. 29.) Mr. Pitcher, who had served as respondent's co-pilot on the earlier repositioning flight from Dubuque to Waterloo that morning,⁶ testified that he did not recall smelling any alcohol on respondent or noticing any other signs of alcohol consumption. However, he also indicated that he had been doing aircraft maintenance all night long, and his sense of smell was impaired because he had been breathing various petroleum solvents. (Tr. 39.)

Ms. Nelson was so concerned about respondent's behavior, particularly the downwind landing at Dubuque, that she decided it

⁶ Mr. Pitcher described several things which concerned him about respondent's handling of the repositioning flight. Specifically, he was concerned that respondent did not obtain any weather reports prior to the flight (respondent denies this, claiming he called for a report from his hotel room that morning); that respondent did not ask him whether he had preflighted the aircraft; that respondent did not inquire as to fuel reserves; and that respondent did not obtain a radar fix for their approach into Waterloo (although it turned out one was not necessary since respondent was ultimately able to make a visual approach). (Tr. 23-4) Finally, Mr. Pitcher noted that respondent asked for flaps at an airspeed higher than that specified by the company policy and by the manufacturer's manual, and that he landed at a higher than normal speed. (Tr. 25, 47)

was not safe to fly any further with respondent. She notified Iowa Airways management that she believed respondent was under the influence of alcohol, and an airport security officer was summoned. (Tr. 184.) The security officer (Rita Hicks) spoke briefly with respondent, who was by this time sitting in the airport cafeteria drinking coffee. Ms. Hicks testified that respondent looked tired and his eyes were red,⁷ but that she did not smell alcohol on his breath and did not believe he was under the influence of alcohol. (Tr. 184-6.) Several hours later another Iowa Airways pilot was called in to take respondent's place on the remaining flights that day. Respondent was "laid off" by Iowa Airways the following day. (Tr. 213.)

In crediting Ms. Nelson's testimony, the law judge recognized that there was "a good deal of animosity and friction" between her and respondent and, accordingly, she was not a "totally disinterested witness." (Tr. 266-67.) Ms. Nelson acknowledged that she disliked respondent personally, had made numerous complaints about him, and felt he should have been fired. (Tr. 62, 95-6.) Nonetheless, the law judge concluded that he could not reject Ms. Nelson's testimony. (Tr. 267.)

Respondent asserts on appeal that Ms. Nelson's testimony lacks credibility. However, as we said in Administrator v. Calavaero, Inc., 5 NTSB 1099, 1100 (1986):

Our law judges have broad discretion to accept as a

⁷ Respondent testified that his eyes are watery and bloodshot almost all the time because he wears hard contact lenses. (Tr. 207)

matter of credibility the testimony, self-serving or otherwise, of any witness over the testimony of any other witness or witnesses as to their factual observations. Consistent with that authority, so long as the interests and motivations which could influence or color a witness' testimony are reasonably apparent on the record, the law judge's credibility assessments, made within his exclusive province as trier of the facts, are presumed to reflect a proper balance of all relevant considerations, including witness demeanor, and will not be disturbed on appeal absent extraordinary circumstances not present in this case.

It is clear from the initial decision that the law judge was aware of the interests and motivations which might have influenced Ms. Nelson's testimony. Accordingly, since this case presents no extraordinary circumstances, we will not disturb the law judge's credibility findings.

Respondent correctly points out in his brief that we have affirmed violations of FAR 91.11 in several cases involving indicia of alcohol consumption or impairment not present here (e.g., slurred speech, staggering, glassy eyes, clothes in disarray).⁸ However, the factors present here (e.g., the smell of alcohol on respondent's breath, atypical slouching in his seat, red eyes, and uncharacteristically erratic flying behavior), are equally valid indicia. Moreover, "[t]here is no particular means by which a section 91.11 violation must be established -- each case must be considered on its own circumstances." Administrator v. Pierce, 4 NTSB 1655, 1657

⁸ See e.g., Administrator v. Goodyear, 2 NTSB 1264 (1975), Administrator v. Sorenson, 3 NTSB 3456 (1981), aff'd, Sorenson v. NTSB, 684 F.2d 683 (10th Cir. 1982), Administrator v. Klock, NTSB Order No. EA-3045 (1989).

(1984).

Upon review of the entire record in this case, and keeping in mind that the Administrator need only prove the charges by a preponderance of the reliable, probative, and substantial evidence (see 49 C.F.R. 821.49(a)), we are convinced that the record adequately supports the law judge's findings that respondent piloted an aircraft within eight hours after consuming an alcoholic beverage and that he piloted that aircraft while under the influence of alcohol, in violation of FAR 91.(a)(1), (a)(2) and 91.9.⁹

Moreover, we find no support in the record for respondent's contention that the law judge did not consider all of the evidence and testimony in this case, especially that presented by respondent. To the contrary, the transcript indicates that the law judge was attentive to both parties during the hearing, and we are satisfied that his initial decision was based on all of the evidence.¹⁰

⁹ We have long held that piloting an aircraft while under the influence of alcohol is inherently reckless conduct, and thus in violation of FAR 91.9. See Administrator v. McGee, 3 NTSB 4074, 4076 (1981) and Administrator v. Butner, 2 NTSB 2289, 2291 (1976)(citing cases).

¹⁰ We agree with the Administrator that the FAA's designation of respondent as a check airman after the hearing in this case has no bearing on our decision and does not preclude a finding that he lacks the care, judgment, and responsibility to hold an airman certificate. Since respondent was entitled under section 609(a) of the Federal Aviation Act (49 U.S.C. § 1429(a)) to exercise the privileges of his ATP certificate pending the Board's resolution of this case, the Administrator may well have believed that he was also entitled to hold a check airman designation pending the outcome of his appeal to the Board.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;
2. The initial decision is affirmed; and
3. The revocation of respondent's airline transport pilot certificate shall commence 30 days after the service of this opinion and order.¹¹

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

¹¹ For the purpose of this order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to FAR § 61.19(f).