

SERVED: September 15, 2009

NTSB Order No. EA-5479

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 15th day of September, 2009

J. RANDOLPH BABBITT,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Dockets SE-18571
v.)	and SE-18572
)	
RAYMOND A. LEDBETTER and)	
EDWARD T. JESZKA,)	
)	
Respondents.)	
)	

ORDER DENYING PETITION FOR REHEARING

Respondents seek rehearing concerning our decision in this proceeding, NTSB Order No. EA-5458, served June 17, 2009. In that decision, we affirmed the Administrator's order and the law judge's initial decision, finding that respondents violated 14 C.F.R. § 61.59(a)(2), by making or causing to be made a fraudulent or intentionally false entry on a temporary airman flight instructor certificate for Respondent Jeszka. In particular, the Administrator alleged that respondents indicated that Respondent Jeszka completed a flight check on March 28, 2008, under the supervision of Respondent Ledbetter, when no such flight occurred.

The law judge denied respondents' appeal of the revocation order, principally based on his determination that respondents' testimony was not credible; the law judge found that the testimony of Joseph Sanders, a friend of both respondents who owns and operates Sanders Aviation, Inc., a fixed-base operator (FBO) at Walker County Airport in Jasper, Alabama, was more credible. The law judge's oral initial decision contained a detailed summary of the facts, and found that the Administrator proved that respondents violated § 61.59(a)(2). Respondents appealed the law judge's decision, and we denied the appeal, on the basis that the law judge's credibility findings were legitimate, and that other evidence in the record corroborated the determination that respondents violated § 61.59(a)(2) when they did not complete the check ride, as they had stated. We affirmed the law judge's initial decision and the emergency order of revocation of respondents' airline transport pilot certificates, flight instructor certificates, mechanic certificates, and any other airman certificates they may hold.

Respondents filed a petition for rehearing. Title 49 C.F.R. § 821.57(d) provides that the Board will consider such petitions only when they are based on the discovery of new matter. Section 821.57(d) further states that such petitions must:

- (1) Set forth the new matter;
- (2) Contain affidavits of prospective witnesses, authenticated documents, or both, or an explanation of why such substantiation is unavailable; and
- (3) Contain a statement explaining why such new matter could not have been discovered in the exercise of due diligence prior to the date on which the evidentiary record closed.

Moreover, the new matter must be such that would materially affect the case; in Administrator v. Moore, 3 NTSB 55, 56 (1977), we stated that newly discovered evidence "must be more than impeaching in nature and must be such as would probably produce a different result." As such, new matter that a petitioner attempts to introduce in the context of § 821.57(d) must be matter that would likely affect the outcome of the case.

Respondents request a rehearing so that the Board may hear the testimony of Jack Gray, who also operates an FBO at Walker County Airport. Respondents attached a brief affidavit from

Mr. Gray, which states that he would testify that, on March 28, 2008, he heard Respondent Ledbetter's voice on the radio frequency, indicating that Respondent Ledbetter was likely flying on March 28, 2008. Respondents state that they did not consider that Mr. Gray could provide such testimony until after the evidentiary record was closed because the case proceeded on an expedited timeline as an emergency case, and because 11 months elapsed between March 28, 2008, and the issuance of the emergency orders. Respondents further contend that Mr. Gray's testimony would be significant because he is the only witness other than Mr. Sanders who could testify concerning the events of March 28, 2008.

Respondents' petition does not provide an adequate reason for their failure to discover, until recently, that Mr. Gray was at the airport on March 28, 2008. Given the small size of Walker County Airport and the fact that only two FBOs operate at the airport, we do not find respondents' contention that they could not have discovered Mr. Gray's testimony persuasive. While we recognize that the deadlines in emergency cases may present challenges, we do not find that they excuse a party's failure to conduct complete discovery. Moreover, respondents have not established that the testimony would materially affect the case; we previously rejected respondents' challenges to the law judge's credibility findings, and Mr. Gray's testimony could not alter such findings and the corroborating evidence.

ACCORDINGLY, IT IS ORDERED THAT:

Respondents' petition for rehearing is denied.

HERSMAN, Chairman, HART, Vice Chairman, and SUMWALT, Member of the Board, concurred in the above order.