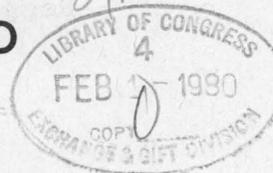


SERVED: December 17, 1979

NTSB Order No. EA-1358

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 December 1979.

LANGHORNE M. BOND, Administrator
Federal Aviation Administration

Complainant,

vs.

Docket SE-4198

CURTIS BATES,

Respondent.

ORDER DISMISSING APPEAL

On September 10, 1979, respondent filed a notice of appeal from the initial decision of Administrative Law Judge Jerrell R. Davis, issued September 5, 1979, affirming the Administrator's order suspending respondent's airline transport pilot certificate for 120 days. Respondent has not filed a brief, as required under the Board's Rules of Practice to perfect the appeal, which is therefore subject to dismissal.^{1/}

^{1/} Section 821.48(a) reads as follows:
"Sec. 821.48 Brief and oral argument.

(a) Appeal briefs. Each appeal must be perfected within 40 days after an oral initial decision has been rendered, or 30 days after service of a written initial decision, by the filing with the Board and the serving on the other party of a brief in support of the appeal. Appeals may be dismissed by the Board on its own initiative or on motion of the other party, in cases where a party who has filed a notice of appeal fails to perfect his appeal by filing a timely brief."

* * * * *

ACCORDINGLY, IT IS ORDERED THAT:

Respondent's appeal be and it hereby is dismissed.^{2/}

KING, Chairman, DRIVER, Vice-Chairman, McADAMS, GOLDMAN and BURSLEY, Members of the Board, concurred in the above order.

2/ In view of respondent's pro se status, we have examined the record and find that it fully supports the initial decision.

1 UNITED STATES OF AMERICA

2 NATIONAL TRANSPORTATION SAFETY BOARD



3 -----x
4 LANGHORNE M. BOND, Administrator,
Federal Aviation Administration,

5 Complainant,

6 v.

7 CURTIS A. BATES,

8 Respondent.
9 -----x

Docket SE-4198

10 San Jose, California
11 September 5, 1979

12 Karl B. Lewis , Esq. , for the Complainant.

13 Curtis A. Bates, Pro se.

14 INITIAL DECISION AND ORDER

15 Jerrell R. Davis, Administrative Law Judge:

16 On January 24, 1979, Complainant, pursuant to
17 Section 609 of the Federal Aviation Act of 1958, as amended,
18 issued an Order suspending Respondent's airline transport
19 pilot certificate for 120 days.

20 Respondent was charged with operating on June 16,
21 1978, as pilot-in-command, civil aircraft N48595 on a flight
22 from the vicinity of Santa Barbara, California to Santa Nella,
23 California, during which flight Respondent operated the
24 aircraft at an altitude of less than 200 feet above the
25 surface and within 500 feet of buildings and persons in Santa

1 Nella, California and within eight hours after the consumption
2 of ^{any} alcoholic beverages. Complainant contended that Respondent's
3 acts were violative of Sections 91.11(a)(1), 91.79(c) and
4 91.9 of the Federal Aviation Regulations (FAR). Section
5 91.11(a)(1) proscribes acting as a crew member of a civil
6 aircraft within eight hours after the consumption of any
7 alcoholic beverage. Section 91.79(c) proscribes operation
8 of an aircraft, when not necessary for takeoff or landing,
9 over other than a congested area below an altitude of 500
10 feet above the surface and closer than 500 feet to persons
11 and structures. Section 91.9 proscribes operation of an
12 aircraft in a careless or reckless manner so as to endanger
13 the life or property of another.

14 In appealing the Revocation Order, which was
15 subsequently filed and served as the Complaint herein
16 pursuant to Section 821.31 of the Rules of Practice,
17 Respondent admitted Paragraphs 1 through 4 of the Complaint
18 and denied Paragraphs 5 through 7 thereof. In essence, he
19 admitted violation of Section 91.11(a)(1), but denied viola-
20 tion of Sections 91.79(c) and 91.9.

21 An evidentiary hearing on the appeal was held
22 today in San Jose, California. Section 821.32 of the Rules
23 of Practice provides that, in proceedings under Section 609
24 of the Act, the burden of proof shall be upon the Complainant.

25

2.

CSA Reporting

The Evidence

The testimony and exhibits may be summarized as follows:

Kenneth Thurman, Deputy Sheriff in the Merced Police Department, on the night of June 16, 1978, around 11:40 p.m., was patrolling in a marked police car in the vicinity of Santa Nella, California. He had turned off Highway 33 onto Henry Miller Road in an easterly direction, at which time he heard the loud noise of an aircraft overhead. He stopped his vehicle and observed an aircraft coming from a southeasterly direction near Interstate 5 and continued to observe the aircraft as it flew over and between ~~an~~ 80 to 100-foot tower of Mission De Oro and a 65 to 75-foot Holiday Inn sign. He got out of the car and saw the aircraft continue its flight path over the El Rancho Bar and a cluster of Eucalyptus trees (estimated by another witness to be about 100 feet tall) behind the bar. He continued to observe the aircraft as it made a left turn and land on an airstrip just south of a mobile park community. He sketched a layout of the involved locality (Exhibit C-6) and depicted thereon the flight path of the aircraft, the altitude of which he estimated to be 125 feet AGL.

Sheriff Thurman then drove to the landing strip and confronted Respondent after he had alighted from the aircraft. He detected the odor of beer on Respondent's breath.

3.

CSA Reporting

Respondent conceded that he had consumed "four beers or so" and had a couple more enroute at Harrison Ranch. A sobriety test administered indicated slurred speech and slight incoordination. The Sheriff said Respondent was "very cooperative" and he concluded that Respondent was not drunk; consequently, did not prefer charges. The witness further testified that Respondent told him that he flew over the El Rancho Bar to alert a friend therein of his arrival in order to be picked up at the strip and proceed from there to a restaurant for dinner.

Richard Oules, Deputy Sheriff in the Merced County Sheriff's Office, testified that he had a conversation with Respondent at the Santa Nella Airstrip on July 4, 1978. During the course of this conversation, Officer Oules stated that Respondent discussed the July 16 incident and told him that he (Respondent) spilled beer on himself while executing a loop in the aircraft and that Respondent "dive-bombed the bar" in order to signal his approaching arrival at the strip.

Sam Carothers, Traffic Officer with the State Highway Patrol, testified that he was working the midnight shift on June 16, 1978 and was inside Denney's Restaurant (depicted on Exhibit C-6) having coffee, at which time he heard the noise of an aircraft overhead. He pressed his face to the windowpane inside the restaurant and, although he

could not see an aircraft, he gauged from the sound of the engine that the aircraft was nearby and at an estimated altitude of 100 feet AGL. He immediately left the restaurant and drove to the strip where he saw Sheriff Thurman conversing with Respondent. Assuming that the Sheriff had the situation in hand, Officer Carothers made no further attempt to investigate the matter.

Larry R. Perkins, Aviation Safety Inspector at the Fresno GADO, conducted an investigation of the incident in question and took color photographs of the locus ~~crab~~ ^{in ~~land~~.} (Exhibits C-1 through C-5).

The Inspector further testified that Respondent called him around June 27th and they got together for a discussion of the incident at the Fresno GADO. During that discussion, the Inspector stated that Respondent indicated he had landed at the Harrison Ranch and had drunk a couple of beers, at which time he called some friends at the El Rancho Bar and told them that he would be flying directly thereover for the purpose of alerting them to pick him up at the airport and thereafter go out for dinner.

Inspector Perkins indicated familiarity with the airstrip at Santa Nella, stating that it was in the category of an uncontrolled airport. He said that, according to the Airman's Information Manual, there is no specified pattern altitude at Santa Nella and the AIM suggested a pattern

1 altitude of 1,000 feet, minimum of 600 feet. The Inspector
2 expressed the view that Respondent's pattern entry should
3 have been well north of the El Rancho Bar and he depicted on
4 Exhibit C-6 the pattern Respondent should have flown. He
5 concluded that Respondent's flight path was intentional,
6 too low, and, consequently, a reckless operation.

7 Respondent disagreed with the flight path depicted
8 by Sheriff Thurman on Exhibit C-6 and he indicated thereon
9 the flight path flown on the night in question. He conceded
10 that he intentionally flew over the El Rancho Bar for the
11 purposes already stated. He was sure that his altitude was
12 higher than 200 feet. He was not sure whether his altitude
13 was higher than 300 feet. He conceded that his altitude
14 probably was not as high as 400 feet. He also depicted his
15 flight path on Exhibit C-5. Respondent has a prior violation
16 record of a 20-day suspension for flying at night without
17 navigation lights in July 1977.

18 Discussion and Conclusions

19 The disposition of low-flying cases inevitably
20 turns on the credibility of the witnesses. As the trier of
21 fact and having carefully observed the demeanor of the
22 witnesses, I accept the witnesses testifying for the
23 Complainant as credible and supportive of a conclusion that
24 Respondent violated Section 91.79(c) of the FAR. The Board
25 has held that a flight below the minimum altitudes prescribed

1 by Section 91.79 is considered inherently and potentially
2 dangerous, thus violative of Section 91.9.

3 As previously noted, Respondent has admitted
4 consumption of ^{an} alcoholic beverages within eight hours prior
5 to the involved flight. I feel that such admission appears
6 amply ^{supported} by the evidence of record; consequently, the factual
7 circumstances need not be detailed herein.

8 In weighing sanction, I am mindful of the Board's
9 opinion and order in Administrator v. Aadland, EA-506,
10 September 27, 1973. In that case, as here, Respondent was
11 charged with a violation of Section 91.11(a)(1). A four-
12 month suspension was imposed in that case. On Pages 5 and 6,
13 the Board said:

14 "As the Administrator pointed out, violations
15 of Section 91.11(a)(2) (piloting while under the
16 influence of alcohol) have generally been viewed as
17 sufficiently serious to warrant revocation, although
18 sanctions in such cases have ranged as low as a 90-
19 day suspension. In the immediate case, it has neither
20 been alleged or shown that Respondent piloted the
21 aircraft while under the influence of alcohol but
22 only that he committed the lesser, albeit serious,
23 offense of flying an aircraft after having consumed
24 alcoholic beverages within the proscribed period.
25 In weighing sanction, the Board also notes that
Respondent, who has an otherwise violation-free
record and uses his certificate for his livelihood,
exhibited a cooperative, positive, and remorseful
attitude to the FAA representatives following the
incident."

23 During the course of this hearing, Complainant's
24 Counsel moved to modify the suspension order by providing
25 for revocation in lieu of a 120-day suspension.

1 The motion did not include the addition of Section 91.11
2 (a) (2) (2). I certainly have no authority to increase sanctions,
3 and it seems to me basically unfair for the Complainant to
4 move for revocation in lieu of sanction on the day of hearing,
5 ~~itself~~. At any rate, taking all of these circumstances into
6 consideration, it is my conclusion that, on balance, the
7 Complaint should be affirmed as drafted, and I can discern
8 no valid reason to depart from Board precedent with
9 respect to a violation of Section 91.11(a) (1) (1).

10 Contentions of the parties as to facts or law which
11 have not been discussed hereinabove have been given due
12 consideration and are found to be either not materially
13 significant or not justified.

14 Findings and Order

15 Upon consideration of all evidence of record, it
16 is found that (1) a preponderance of ^{the} substantial, reliable,
17 and probative evidence establishes the facts alleged in the
18 complaint and shows that Respondent violated the Sections
19 of the FAR cited therein, and (2) safety in air commerce or
20 air transportation and the public interest require affirmation
21 of the Order of Suspension.

22 It is ordered, That the Order of Suspension be,
23 and it is hereby, affirmed.

24 It is further ordered, That, unless stayed by the
25 timely filing of a Notice of Appeal, this Order shall become

1 effective September 25, 1979, and Respondent shall physically
2 surrender his ATP certificate to an appropriate representative
3 of Complainant.

4 Dated at San Jose, California this 5th day of
5 September, 1979.

6 *Edited*
10/19/79
gno

7 
8 Jerrell R. Davis
Administrative Law Judge

9 appeal

10 An appeal from the decision and order herein may
11 be made by filing with the National Transportation Safety
12 Board, Docket Section (LJ-10), P. O. Box 2369, L'Enfant Plaza
13 Station, Washington, D. C. 20024, and serving upon the other
14 party a notice of appeal within ten days from today, perfected
15 by the filing and serving of a brief in support thereof within
16 forty days from today. The procedure on appeal is set forth
17 in detail in Sections 821.43, 821.47 and 821.48 of the Rules
18 of Practice.

19 Off the record.

20 (brief off-the-record period)

21 JUDGE DAVIS: Back on the record.

22 There being no further matters to come before the
23 bench in connection with this matter, I declare this hearing
24 closed.

25 (WHEREUPON, at 2:00 p.m., the hearing in the above

entitled and numbered matter was closed.)

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