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NTSB Order No. EA-5023

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 24th day of February, 2003

MARION C. BLAKEY, Administrator, Federal Aviation Administration, Complainant, v. F. TODD POLINCHOCK, Respondent.	Docket SE-16766

OPINION AND ORDER

Respondent appeals the oral initial decision of Chief Administrative Law Judge William E. Fowler, Jr., rendered in this emergency revocation proceeding, after an evidentiary hearing, on January 30, 2003.[1] By that decision, the law judge upheld the Administrator's allegation that respondent violated section 121.458(b) of the Federal Aviation Regulations ("FARs") and

[1] An excerpt from the hearing transcript containing the law judge's decision is attached.

affirmed revocation of all airman and medical certificates held by respondent.[2] We deny respondent's appeal.

Prior to the Administrator's emergency order of revocation respondent held an Air Transport Pilot Certificate and a First Class Medical Certificate, and was an employee of Atlas Air, Inc. ("Atlas").[3] Atlas operates a fleet of Boeing 747 aircraft in worldwide cargo service under a Part 121 operating certificate. During the relevant time period, respondent, a qualified line pilot for Atlas, was employed as a simulator-based flight instructor and check airman at Atlas's Miami training facility.

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[2] FAR section 121.458 (14 C.F.R. Part 121) states, in relevant part:

> **§ 121.458 Misuse of alcohol.**
>
> (a) *General.* This section applies to employees who perform a function listed in appendix J to this part for a certificate holder (*covered employees*). For the purpose of this section, a person who meets the definition of covered employee in appendix J is considered to be performing the function for the certificate holder.
>
> (b) *Alcohol concentration.* No covered employee shall report for duty or remain on duty requiring the performance of safety-sensitive functions while having an alcohol concentration of 0.04 or greater. No certificate holder having actual knowledge that an employee has an alcohol concentration of 0.04 or greater shall permit the employee to perform or continue to perform safety-sensitive functions.
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> * * * * *

The definition of a "safety-sensitive function" set forth in Appendix J to Part 121 includes, inter alia, any employee who performs "flight crewmember duties" and "flight instruction duties." Part 121, App. J, Sec. II.

[3] Atlas terminated respondent as a result of the events giving rise to the Administrator's complaint. The record reflects that respondent is appealing Atlas's action.

On October 14, 2002, respondent was on duty at Atlas's training facility when he was advised that he had been randomly selected for DOT drug and alcohol testing. He complied, and, subsequently, two Breathalyzer-type tests administered at 15-minute intervals revealed blood-alcohol concentrations of .121 and .094, or, in other words, above the proscribed 0.04 level for employees engaged in safety-sensitive functions.

When he was informed that he was to be tested, respondent was in a briefing for two pilots who were going to fly a "warm-up" session in a full-motion simulator in preparation for a simulator-based proficiency check the next day. Respondent had not originally been scheduled to be on duty on October 14th, but had been asked by the fleet manager the previous afternoon to come in to observe another Captain conduct the warm-up session. Respondent had previously trained the Captain on how to operate the simulator, and the Captain was signed off to operate the simulator but was not yet designated as a simulator instructor. It was respondent's understanding that the fleet manager wanted him to observe the other Captain so as to render an informal opinion to Atlas training management as to whether the Captain was ready to be designated as a simulator instructor, and because it was Atlas's policy to always have a qualified instructor present during any simulator session. At the time he was notified that he had been randomly selected for testing, respondent was observing the other Captain conduct the 2-hour briefing in preparation for the 2-hour simulator warm-up session.

As was the case during the hearing, respondent focuses predominantly on the issues of whether he was performing a safety-sensitive function within the meaning of FAR Part 121, Appendix J, and, if he was, whether the regulatory guidance provided adequate notice that he was subject to random alcohol testing. We discern no basis to disturb the law judge's affirmance of the Administrator's Emergency Order of Revocation.

We turn first to the issue of whether respondent was performing a safety-sensitive function within the meaning of FAR Part 121. FAA Inspector David Lithgow, who is responsible for oversight of Atlas's training program, testified that flight instruction conducted in a simulator is "flight instruction" for purposes of Appendix J. Inspector Lithgow also testified that even though Atlas can provide "extra" warm-up sessions to its pilots at Atlas's discretion, those sessions are required to be documented by Atlas's FAA-approved training program. Inspector Lithgow further testified that because the Captain respondent was observing in the simulator was not a qualified instructor, respondent was, in fact, the "instructor of record responsible for the flight instruction." Transcript ("Tr.") at 56. John Bloom, a senior Atlas training Captain and designated pilot examiner who testified on behalf of respondent, also agreed that under the provisions of the Atlas flight training manual, a qualified flight instructor was required in order to perform a proficiency check warm-up session. The Administrator also presented the testimony of James Duffy, the FAA's Eastern

Compliance and Performance Center manager for the Drug Abatement Division, Office of Aerospace Management. Mr. Duffy testified that in August 1995, the FAA produced a policy paper that specifically stated that simulator-based flight instruction duties are covered safety-sensitive functions within the meaning of Appendix J and, therefore, subject to mandatory random alcohol testing.[4] Tr. at 105. Respondent testified that simulator

[4] Respondent argues that he was prejudiced by the surprise testimony of Mr. Duffy, and also by the last-minute production by the Administrator of the policy document referred to in Mr. Duffy's testimony. The Administrator's counsel stated at the hearing that he only learned of the existence of the document the day prior to trial, and appears to have acted responsibly in providing it to respondent's counsel as soon as practicable (albeit the night before the start of the hearing). Although it is unfortunate that the Administrator's counsel previously indicated in response to discovery requests that no policy guidance existed, we nonetheless discern no actual prejudice to respondent's case, for, notwithstanding his arguments to the contrary, it could hardly have been a surprise, given the Administrator's charges, that the FAA would attempt at the hearing to prove that respondent was subject to the provisions of Appendix J on October 14, 2002. And, more importantly, as we have repeatedly stated, if respondent believed he needed more time to effectively cross-examine Mr. Duffy or to prepare his case in light of the additional, corroborating evidence of the FAA's interpretation of simulator flight instruction being a safety-sensitive function, the proper recourse would have been to seek a continuance to the hearing (and, if necessary, waive the expedited schedule applicable to emergency enforcement proceedings). Finally, respondent also attempts on appeal to make an issue out of the Administrator's admission, prior to the hearing, that simulator instruction at Atlas is ground instruction, and argues that the law judge erred in not admitting these admissions into evidence. We discern no error in the law judge's exercise of his control over the hearing, and, more importantly, we note that respondent is clearly attempting to elevate an issue of semantics into a substantive issue, for it seems clear to us that the Administrator never intended to indicate that it was her view that simulator-based flight instruction is analogous to ground instructors (e.g., classroom instructors), upon whom the FAA has declined to impose safety-sensitive alcohol testing.

instruction was not “flight instruction” within the meaning of Appendix J, and he also submitted numerous affidavits from other Atlas pilots and instructors, as well as testimony from Captain Bloom, who concurred with respondent’s view. Finally, we note that all flight instruction conducted by Atlas takes place in Atlas’s full-motion flight simulators.

Under the FAA Civil Penalty Administrative Assessment Act, 49 U.S.C. § 44709(d)(3), the Board is “bound by all validly adopted interpretations of law and regulations" of the Administrator, unless we find that such interpretation is "arbitrary, capricious, or otherwise not in accordance with law.” Although we do not believe it to be the case here, it is also certainly the prerogative of the Administrator to define FAA regulations by adjudication, provided she provides an adequate evidentiary foundation for her interpretation of a regulation. Here, the Administrator has produced evidence of a consistent and rational interpretation and, therefore, we are constrained to apply the facts of this case to her interpretation that simulator flight instructors are performing safety-sensitive functions within the meaning of FAR Part 121, Appendix J. As Inspector Lithgow testified, respondent, as the instructor responsible for the simulator instruction on October 14th, was responsible for the safety of the airline’s operations by making evaluations regarding its trainees’ performance and judgment, and, in the process, making constant assessments of the effectiveness of the airline’s overall training program. We therefore conclude that

the Administrator has demonstrated her interpretation of Appendix J -- i.e., that respondent was subject to random alcohol testing and the alcohol-related proscriptions in FAR Part 121 when he reported for duty to conduct simulator flight instruction –- is neither arbitrary nor capricious.

We find no merit in respondent's arguments that he was given insufficient notice by the Administrator that his duties as a simulator-based flight instructor were considered a safety-sensitive function. Indeed, consistent with the explanations of Inspector Lithgow, we find no rational basis for respondent's asserted belief, concurred with by other Atlas pilots, that only flight instruction in an actual airplane can be considered a safety-sensitive enterprise. The Administrator clearly put respondent on notice that "flight instruction duties" were a safety-sensitive function subject to mandatory DOT alcohol testing. Respondent's election to report for duty as a flight instructor responsible for training a Part 121 flight crew with a blood-alcohol level above the proscribed 0.04 level was unprofessional. So, too, is his narrow view of what constitutes a safety-sensitive function, and, to us, an interpretation that he freely chose to make at his own risk.[5]

[5] Respondent raises several Constitutional issues regarding the FAA's promulgation and interpretation of its regulations, and those arguments are preserved for any appeal he chooses to make to the United States Court of Appeals. See, e.g., Administrator v. Lloyd, 1 NTSB 1826, 1828 (1972) (Board has no authority to review constitutionality of FAA regulations); and Administrator v. Ewing, 1 NTSB 1192, 1194 (1971) ("[I]t is well settled that the Board does not have authority to pass on the reasonableness or validity of FAA regulations, but rather is limited to

In sum, we discern no basis to overturn the law judge's decision upholding the Administrator's emergency revocation of respondent's airman and medical certificates.[6]

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied; and

2. The law judge's decision upholding the Administrator's Emergency Order of Revocation of respondent's airman and medical certificates is affirmed.

HAMMERSCHMIDT, Acting Chairman, and GOGLIA and CARMODY, Members of the Board, concurred in the above opinion and order.

(..continued)
reviewing the Administrator's findings of fact and actions thereunder.").

[6] Respondent also complains that the Administrator improperly "sought to punish" respondent by revoking his medical certificate(s). He does not provide us, however, with any basis to disturb the Federal Air Surgeon's determination that respondent's misuse of alcohol while on duty in a safety-sensitive position renders him unqualified, pursuant to FAR sections 61.107(b)(3), 61.207(b)(3), and 61.307(b)(3), for a medical certificate. *See* Tr. at 207-209; Exhibit A-10; *see also* Administrator v. Taylor, NTSB Order No. EA-5003 at 5-6 (2002) ("Respondent's opinion in this respect, which can be distilled to a belief that the Federal Air Surgeon must give an airman more than one chance to show that he will not misuse alcohol in a way that adversely affects aviation safety, does not outweigh the Federal Air Surgeon's interpretation that a single occurrence of substance abuse is sufficient under the regulation [to warrant revocation of his medical certificate]").