

SERVED: July 2, 1992

NTSB Order No. EA-3616

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 1st day of July, 1992

BARRY LAMBERT HARRIS,)	
Acting Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-12513
v.)	
)	
THOMAS FELIX COMBS,)	
)	
Respondent.)	

OPINION AND ORDER

The respondent has appealed from the oral initial decision Administrative Law Judge Patrick G. Geraghty issued in this proceeding on May 20, 1992, at the conclusion of an evidentiary hearing.¹ By that decision the law judge affirmed an emergency

¹Excerpts from the hearing transcript comprising what we believe the law judge intended to serve as his decision are attached. While it is reasonably clear in this case that the law judge's discussion of the evidence (pp. 163-182) after the parties gave their closing arguments should be treated as the analysis underlying his findings and conclusions, the only part

order of the Administrator to the extent it revoked respondent's Airline Transport Pilot certificate² for his alleged violations of sections 121.543, 121.537(f), and 121.333(c)(3) of the Federal Aviation Regulations (FAR, 14 CFR Part 121).³ For the reasons

(..continued)

of the transcript edited and signed by the law judge is the three page "Bench" decision appearing at pp. 183-85. Although we have at least twice "previously reminded [this] law judge of the requirements of our rules as to the proper form and format for an initial decision," see, e.g., Administrator v. Gallagher, NTSB Order No. EA-3171 (1990), at page 2, citing Administrator v. Brod, NTSB Order No. EA-3048 (1990) at n. 1, he still appears to be disinclined to comply. If this were not an emergency proceeding subject to severe time constraints, we would consider remanding the record to the law judge for a written initial decision that complied with Section 821.42(b), 49 CFR Part 821.

²The law judge concluded that because the alleged violations did not involve respondent's flight instructor certificate, that certificate should not be revoked. The Administrator has not appealed that determination.

³Sections 121.543, 121.537(f), and 121.333(c)(3) provide, in relevant part, as follows:

"§121.543 Flight crewmembers at controls.

(a) Except as provided in paragraph (b) of this section, each required flight crewmember on flight deck duty must remain at the assigned duty station with seat belt fastened while the aircraft is taking off or landing, and while it is en route.

"§121.537 Responsibility for operational control: Supplemental air carriers and commercial operators.

(f) No pilot may operate an aircraft in a careless or reckless manner, so as to endanger life or property.

"§121.333 Supplemental oxygen for emergency descent and for first aid; turbine engine powered airplanes with pressurized cabins.

(c)(3) Notwithstanding paragraph (c)(2) of this section, if for any reason at any time it is necessary for one pilot to leave his station at the controls of the airplane when operating at flight altitudes above flight level 250, the remaining pilot at the controls shall put on and use his oxygen mask until the other pilot has returned to his duty station."

discussed below, we will deny the appeal.⁴

The April 22, 1992 emergency order of revocation, as amended at the hearing, and which constitutes the complaint against the respondent in this proceeding, alleges, in part, as follows:

1. At all times material you were and are holder of Airline Transport Pilot Certificate No. 1499330 and Flight Instructor Certificate Number 1499330.

2. On or about February 25, 1992, you operated, as pilot-in-command, a MD-11-F civil aircraft, N601FE, on Federal Express Flight 12 from Hong Kong to Anchorage, Alaska, carrying property for compensation or hire under Part 121 of the Federal Aviation Regulations.

3. The other pilot crewmembers aboard N601FE on the above flight were as follows:

First Officer (FO) John D. Lewis
Relief First Officer (RFO) Leigh
Lewis

Also on board N601FE was Thomas R. Nelson, a mechanic and non-pilot.

4. During the course of the flight, at approximately 1800 GMT, FO John Lewis requested a relief period, which you granted him.⁵

⁴The Administrator has filed a reply brief opposing the appeal. Respondent's motion to file a response to the Administrator's reply brief, based on the fact that the Administrator had the benefit of a transcript that was not yet available when respondent drafted his brief, is denied.

⁵Respondent denied this allegation to the extent it states the time as 1800 GMT rather than 1830 GMT. The actual time in this connection seems to be significant to the respondent because use of the earlier time would suggest that he was the only pilot in the cockpit for an hour rather than a half hour, after the FO went aft for a rest. In any event, the law judge appears to have accepted the testimony of various witnesses that respondent's departure from the flight deck occurred about 30 minutes after the FO retired.

5. You allowed FO John Lewis to leave the cockpit, leaving you as the only pilot crewmember in the cockpit. You did not instruct RFO Leigh Lewis at that time to assume the first officer's duty station.

6. At approximately 1900 GMT, while RFO [sic] John Lewis was still out of the cockpit, you left your assigned duty station to use the lavatory, without insuring that an assigned relief pilot or second-in-command was at their assigned duty station. As a result, no pilot crewmember was in the cockpit until you returned from the lavatory some time later.

7. While on flight deck duty, and during the enroute portion of the above flight, you did not remain at your assigned duty station with seat belt fastened.

8. While on flight deck duty, and during the enroute portion of the above flight, you left your assigned duty station without an assigned relief pilot or second-in-command at their assigned duty station.

9. During the course of the flight, you operated N601FE above flight level 250 (25,000 feet) at a time when no one was occupying the other pilot station, and you did not put on and use your oxygen mask.

Respondent essentially admits all of these allegations, with the exception of that portion of paragraph 6 that asserts that he left his duty station as pilot-in-command "without insuring that an assigned relief pilot or second-in-command was at their assigned duty station." The law judge, however, whose decision thoroughly discusses all of the testimony relevant to respondent's contention that he had reasonably assumed that the RFO would enter the cockpit and occupy a pilot duty station once he left, did not agree that respondent had done all that he

should have, in the circumstances, to avoid the aircraft's having been pilotless during his absence of about 30 seconds from the flight deck. We concur in that judgment.⁶

It may well be that respondent, as he testified, fairly anticipated that the RFO, who was standing just outside the open doorway to the cockpit, would take over for him at the controls as soon as he had departed for the lavatory, despite any awareness he may have had that the RFO did not care for him personally or may have still been upset with him over his seating assignment in the cockpit. However, as the law judge properly recognized, respondent's failure to unambiguously communicate his expectations to the RFO or to satisfy himself before proceeding to the lavatory that the RFO would react as he thought he would demonstrated a seriously deficient judgment that created a hazardous situation that could have been easily avoided if respondent had clearly advised the RFO what he expected of him.⁷

⁶Although we agree with the Administrator that the limited right of a crewmember under §121.543(b)(2) to leave the cockpit "in connection with physiological needs" should not logically be read to permit such a departure when there is no other pilot crewmember present in the cockpit, our view of the seriousness of the factual allegations against respondent would be no different if a violation of §121.543(b)(1) had not been shown, for respondent's careless or reckless conduct would, in our judgment, warrant no less a sanction under §121.537(f).

⁷While the record suggests that the RFO was unhappy with his seat assignment on this flight, it does not disclose the origin of, or reasons for, his pre-existing dislike of respondent. In any event, although the fate of the RFO is not clear from this record, he appears to have succeeded, by deliberately refraining from entering the cockpit after the respondent left, in having respondent fired from his employment with Federal Express after a 25-year violation-free career.

An ATP certificate holder exercising the highest degree of safety must, of course, be aware of all factors that may have a bearing on the effective and efficient coordination of personnel resources and should not leave to chance the performance of vital or necessary duties by crewmembers who may not, for whatever reasons, accomplish them without prompting or express direction.

We are persuaded that respondent's failure to eliminate that risk of misadventure in this instance demonstrates that he does not appreciate the high standard of care his certificate imposes on him.

For the foregoing reasons we adopt the findings and conclusions of the law judge and find that safety in air commerce or air transportation and the public interest require the affirmation of the Administrator's emergency revocation order.⁸

⁸We have reviewed all of respondent's contentions on appeal and find in them no basis for disturbing the law judge's conclusions that the violations alleged were proved on the record by a preponderance of the reliable, probative, and substantial evidence. Further, we find no merit in respondent's contention that the law judge, in commenting on one of the risks that leaving a cockpit pilotless, but on autopilot, could entail, improperly considered extra-record matters. Even if the accident referred to by the law judge was not caused by an unnoticed disengagement of an autopilot, we see no reason why the law judge could not take into account the potential for the occurrence of such an accident in the context of assessing the seriousness of leaving a cockpit without a pilot to monitor all flight equipment and systems.

ACCORDINGLY, IT IS ORDERED THAT:

1. The respondent's appeal is denied, and
2. The initial decision and the emergency order of revocation are affirmed.

COUGHLIN, Acting Chairman, LAUBER, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order. Member KOLSTAD did not concur.