UNITED STATES OF AMERICA
BEFORE THE
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

STEPHEN M. DICKSON, ADMINISTRATOR, FEDERAL AVIATION ADMINISTRATION,	)	
Complainant	)	
v.	)	**NTSB Docket No. SE-30667**
ADMINISTRATIVE LAW JUDGE: JUDGE JOHN H. SCHUMACHER, JAMES K. KNIGHT,	)	
Respondent.	)	

AMICUS BRIEF OF
NATIONAL BUSINESS AVIATION ASSOCIATION, AIRCRAFT OWNERS AND PILOTS ASSOCIATION, AND NATIONAL AIR TRANSPORTATION ASSOCIATION OPPOSING THE COMPLAINANT'S APPEAL

INTERESTS OF AMICI CURIAE[1]

The three associations filing this Amicus Brief (the "Associations") all represent various sectors of the U.S. aviation industry:

The National Business Aviation Association (NBAA) is a nonprofit 501(c)(6) trade association founded in 1947 to promote the general aviation community, help make general aviation businesses more efficient, productive, and successful, and promote safety and best practices in the industry. The NBAA represents more than 12,000 companies and aviation professionals.

[1] Pursuant to 49 C.F.R. § 821.9(b), all parties have consented to NBAA, AOPA, and NATA filing an amicus brief in this case. Attach. 1 hereto.

The Aircraft Owners and Pilots Association (AOPA), founded in 1939, is the world's largest aviation membership association and represents the interests of more than 300,000 general aviation pilots and aircraft owners. AOPA's legal services plan assists 66,000 members with aviation legal matters, including FAA enforcement actions.

The National Air Transportation Association (NATA) is a nonprofit 501(c)(6) trade association founded in 1939 that serves as a voice for aviation businesses, including FBO (Fixed Based Operators), MROs (Maintenance, Repair and Operations), Part 135 and Part 125 Air Charter Operators, and Part 91k Fractional Ownership Operators. NATA's members employ approximately 12,000 pilots that serve on flight crews.

The Associations are filing this Amicus Brief because all three share a compelling interest in the FAA treating pilots fairly and enforcing its regulations in accordance with law by not creating a mandatory punishment (revocation of certificates) without regard to affirmative defenses and mitigating circumstances. Such action by the FAA essentially forces pilots to leave the profession, which is a significant concern at a time when there is an all-time shortage of qualified pilots. In this case, the FAA revoked all of Respondent's pilot certificates without considering the uncontested evidence of mitigating circumstances. This action was arbitrary and capricious; the Board should affirm the ALJ's reduction of the sanction to a 90-day suspension.

FACTUAL SUMMARY AND THE ALJ'S DECISION

The following facts were uncontested at the hearing.

In December 2018, Respondent, James K. Knight, was employed as a charter pilot by Channel Islands Aviation, Inc. (Tr. 49; Joint Stip. ¶ 2). Mr. Knight had a clean licensure record and no history of substance abuse. Mr. Knight mistakenly took his son's Attention Deficit Hyperactivity Disorder (ADHD) medication thinking it was his own prescription cholesterol medication. (Tr. 74, 71–72).

Following an evening flight on Sunday, December 16, 2018, Mr. Knight was finally able to go to bed after midnight on Monday, December 17. Sometime thereafter Mr. Knight was awakened by his wife, Ashley, and found that their 12-yr-old son, Kendall, was experiencing severe abdominal pain. They decided to take their son to a local hospital emergency room, arriving about 2:00 am. They did not leave the hospital until about 5:00 am. (Tr. 65–66).

Mr. Knight was scheduled to fly that Monday. Recognizing he did not have adequate rest, he called Channel Islands Aviation and took the day off. (Tr. 65 – 66). He stayed home and cared for his son throughout the day and following night. Mr. Knight was up much of Monday night trying to keep Kendall comfortable. Early Tuesday morning, December 18, Mr. Knight and Ashley discovered Kendall's pain had moved to his testicular region and that his testicles were swollen. (Tr. 66). After consulting with their son's primary care physician, Mr. Knight took their son to the emergency room again at 10:00 am Tuesday morning. (Tr. 67). Frantic, in a hurry, and sleep deprived, Mr. Knight grabbed what he thought were his own three prescription medication bottles. (Tr. 67–69). Mr. Knight later discovered that instead of taking his three medications, he had inadvertently taken two of his own medications plus his son's prescription Vyvanse pill. (Tr. 71–72). Kendall was prescribed Vyvanse, a medication that contains amphetamines and is used to treat ADHD. (Joint Stip. ¶ 3–5; Tr. 59–60). Mr. Knight did not feel any effects from the Vyvanse, which was at a dose intended for a 12 year old. (Tr. 73).

Two days later, on Thursday, December 20, Mr. Knight returned to work. Though not scheduled for a flight that day, Mr. Knight was selected for a random drug test. (Tr. 74). The drug test eventually came back positive. (Tr. 76). At that point, Mr. Knight realized the Vyvanse must have caused the positive result. He reported the unintentional, inadvertent ingestion of his son's Vyvanse to his employer and Medical Review Officer (MRO). (Tr. 76–77).

Mr. Knight's testimony was corroborated by the testimony from his wife (Tr. 89–109) and the hospital medical records (Exh. R-9).

The FAA's only witness at trial, Ms. Lacey Jones, manager of the FAA Special Investigations Branch and the FAA investigator in this case, testified that she does approximately 100 to 250 such cases per year, and one hundred percent are forwarded to FAA Legal with a revocation recommendation. (Tr. 17–41, 22).

The ALJ in an oral decision on September 6, 2019, found the testimony of Mr. Knight compelling and credible, and decided to mitigate the Administrator's action from revocation to a 90-day suspension. (Tr. 193–94).

ARGUMENT

A. The FAA argues, contrary to case law and NTSB precedent, that it has unlimited discretion to disregard any or all mitigating factors in deciding to issue a revocation or suspension.

The FAA would stretch its authority to preclude NTSB review in cases of inadvertent ingestion,[2] essentially eliminating inadvertent ingestion as an affirmative defense. This goes too far. The FAA argues that its decision to impose revocation as a sanction instead of a lesser sanction, such as a suspension, even in the context of an inadvertent ingestion, is unreviewable by the NTSB. The FAA, though recognizing inadvertent ingestion as an affirmative defense at issue in this case,[3] claims mitigation is not relevant to the inquiry.[4] The FAA argues the NTSB should determine that, as a matter of law, any violation of § 120.33 automatically demonstrates a lack of qualifications,

[2] Inadvertent ingestion is also sometimes referred to as accidental, innocent or unknowing ingestion.
[3] *Adm'r's Appeal Brief,* NTSB Docket No. SE-30667, at *5 (filed October 28, 2019) (hereafter "Appeal Brief").
[4] Appeal Brief at *12.

which would make mitigation irrelevant.[5] This is contrary to the very existence of the affirmative defense of inadvertent or accidental ingestion.[6]

The NTSB is not bound by such a legal interpretation by the FAA. The NTSB instead defers only to the reasonable interpretations of the laws, regulations, and policies the Administrator carries out.[7] The NTSB has already recognized that inadvertent or accidental ingestion is an affirmative defense.[8] Judge Woody articulated the relevant inquiry in examining evidence of an inadvertent ingestion in *Adm'r v. Henry*, a case squarely on-point with Mr. Knight's, and also involving the inadvertent ingestion of Vyvanse.

> [H]aving determined that the Administrator established a prima facie case, the burden then shifts to the Respondent to establish any affirmative defenses by a preponderance of evidence.
>
> With respect to the asserted affirmative defense of inadvertent or unknowing ingestion, I must determine whether a preponderance of evidence establishes that the positive drug test resulted from Respondent's ingestion of his son's medication prior to the January 14th, 2014 flight, and if so, whether his consumption was inadvertent or unknowing.[9]

In *Henry*, Judge Woody found the pilot had established by a preponderance of evidence that his ingestion of his son's Vyvanse was inadvertent. Considering that and other factors in aggravation and mitigation, Judge Woody reduced the Administrator's revocation to a 180-day suspension.[10] The FAA accepted the *Henry* decision and has never appealed it to the Board.

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[5] Appeal Brief at *12–13.
[6] *See Adm'r v. Henry*, 2015 WL 3899410, at *6, *8 (N.T.S.B. ALJ April 5, 2015) (Judge Woody recognizing inadvertent ingestion as an affirmative defense and holding that Respondent had met his burden of proof to establish the defense).
[7] *See, e.g., Adm'r v. Decruz*, NTSB Order No. EA-5827 at 34 (Sept. 7, 2017) (*citing Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144 (1991)) (emphasis added).
[8] *See, e.g., Adm'r v. Gabbard*, NTSB Order No. EA-5293 at 7 & n.6.
[9] *Henry*, 2015 WL 3899410 at *5.
[10] *Henry*, 2015 WL 3899410 at *12.

The FAA cites three NTSB orders and one court of appeals opinion for the proposition that the FAA policy of revoking airman certificates for violation of 14 C.F.R. § 120.33(b) is longstanding and has been supported by the NTSB and the courts of appeals.[11] None of those cases, however, stand for the proposition that the FAA may exercise unlimited and unreviewable discretion in its enforcement of § 120.33.

In *Gabbard,* the airman was found to have flown a jet aircraft on a Part 135 flight with cocaine metabolites in his system. Gabbard claimed to have accidentally smoked a cigarette laced with crack cocaine. The law judge in *Gabbard* did determine "that the significant amount of cocaine metabolites present in respondent's urine sample led to the determination that the Administrator had proven by a preponderance of the evidence" that Gabbard had violated the regulation.[12] However, in addition, the law judge specifically found that Gabbard's testimony "was not credible."[13] Further, Gabbard did not provide corroborating evidence other than testimony.

Here, Respondent provided testimony and hospital records to support the timeline of events leading to his inadvertent ingestion, which included taking his son to the hospital, arriving at approximately 2:30 am and departing about 5:00 am.[14] Judge Schumacher, unlike the law judge in *Gabbard*, observed Mr. Knight's demeanor while testifying and found him credible.

> I listened very carefully to him as he testified and for the record I want to note he was seated approximately 6 feet from where I am seated. I had a chance to observe him and a chance to listen carefully to every word that he said. I note that he made eye contact with me every time he was talking to me and I found nothing in his testimony that would indicate to me he was attempting to be evasive in any way or to falsify his testimony in any way.

(Tr. 193).

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[11] Appeal Brief at *9–11 (*citing Adm'r v. Gabbard*, NTSB Order No. EA-5293 (2007), *Adm'r v. Zumarraga*, NTSB Order No. EA-5618 (2012), *Adm'r v. Magro*, NTSB Order No. EA-5515 (2010), and *Gabbard v. FAA*, 532 F.3d 563 (6th Cir. 2008)).
[12] *Gabbard*, NTSB Order No. EA-5293 at *6.
[13] *Gabbard*, NTSB Order No. EA-5293 at *7 (emphasis added).
[14] *See* Exh. R-9 and Tr. 64–66.

Thus, *Gabbard* is distinguishable because the law judge found Gabbard's testimony to be "not credible," while Judge Schumacher found Mr. Knight to be credible. The Sixth Circuit Court of Appeals noted, in denying Gabbard's petition to overturn the FAA's revocation of his certificates and the Board's affirmance thereof, that "in particular: an adverse-credibility finding undermines Gabbard's explanation of when and why he consumed the cocaine."[15] The adverse credibility determination in *Gabbard* was a key factor before the Board and the Court of Appeals.

In *Zumarraga,* the Respondent, a first officer for Shuttle America, tested positive for metabolite of cocaine.[16] Zumarraga claimed he frequently drank coca tea, beginning as a child in Ecuador, and did not know the tea could contain cocaine."[17] At trial in *Zumarraga*, like in *Gabbard*, "the law judge made a credibility determination adverse to respondent."[18] The NTSB affirmed the law judge, citing the judge's credibility determination.[19]

In *Magro*, the respondent tested positive for marijuana, leading the FAA to revoke his mechanic and medical certificates.[20] Magro stipulated that he had smoked marijuana while on vacation up to a week prior to performing maintenance on a Bell helicopter and two weeks before his random drug test.[21] In *Magro*, a primary issue was whether the detection of marijuana metabolites, as opposed to marijuana itself, was sufficient to find a violation of § 120.33(b), as distinguished from other Board holdings addressing § 91.17(a)(3). While in *Magro*, the Board noted, "§ 120.33(b) only requires that the Administrator prove that the certificate-holder had a prohibited drug in his or her system," not impairment,[22] inadvertent ingestion as an affirmative

[15] *Gabbard v. FAA*, 532 F.3d 563, 565 (6th Cir. 2008).
[16] *Adm'r v. Zumarraga*, NTSB Order No. EA-5618 *2 (2012).
[17] *Id.* at *4.
[18] *Id.* at *6.
[19] *Id.* at *7–8, 11.
[20] *Adm'r v. Magro*, NTSB Order No. EA-5515 *2 (2010).
[21] *Id.* at *2–3.
[22] *Id.* at *12–13.

defense and whether it can be considered as a mitigating factor in determining a sanction were not at issue.

Thus *Zumarraga* and *Magro*, like *Gabbard*, do not support the FAA's arguments for unreviewable discretion in deciding the sanction of revocation when the burden of proving the affirmative defense of inadvertent ingestion is met by a respondent.

Mr. Knight's case is distinguishable from cases in which the timeline of events is not established by corroborating evidence or in which an ALJ or the Board find an airman's assertions to be not credible. The Board and ALJs have not had difficulty distinguishing between inadvertent ingestion cases warranting application of mitigating factors, such as in *Henry*,[23] which is remarkably similar to Mr. Knight's situation, and other less credible claims, *e.g.*, *Gabbard*[24] and *Zumarraga*.[25] Nor has the judge herein had such difficulty. Judge Schumacher noted this is the first time he has not supported revocation as a sanction.[26]

Additionally, the FAA's position that revocation is the only sanction option in a case alleging lack of qualification is contrary to its own guidance. Order 2150.3C specifically provides that "[t]he FAA may revoke any certificate when the certificate holder lacks the qualifications to hold the certificate."[27] The Order goes on to state "[a] certificate holder may lack the qualifications to hold the certificate because of . . . a lack of the care, judgment, or responsibility required of a certificate holder.[28] The use of "may" clearly indicates that the decision to revoke and a determination of lack of qualification are not mandatory in all cases.

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[23] *Henry*, 2015 WL 3899410.
[24] NTSB Order No. EA-5293.
[25] NTSB Order No. EA-5618.
[26] Tr. 193.
[27] FAA Order 2150.3C, Ch. 9, Section 8(a)(1) at 9-12 (emphasis added).
[28] *Id*. (emphasis added).

The Order also states "[c]onduct demonstrating a lack of care, judgment, or responsibility generally warrants the revocation of all certificates."[29] Again indicating that although revocation may be appropriate "generally," the Order stops short of stating revocation is "always" warranted. By ignoring both Mr. Knight's inadvertent ingestion affirmative defense, as well as its own guidance, the FAA is attempting to transform violation of § 120.33 into a strict liability offense. However, unlike other regulations that specifically mandate revocation as a sanction for violation,[30] § 120.33 does not include any language requiring revocation of certificates as a sanction for violation.

Although the FAA cites a positive drug test as a "single act generally warranting revocation," it omits its own guidance stating that sanctions other than revocation (*e.g.* a punitive sanction) may be imposed for such a violation.[31] And rather than considering and evaluating mitigating evidence as Order 2150.3B implies it is able to do, the FAA ignored the mitigating circumstances, ignored its own guidance, and now asks the Board to defer to this exercise of unfettered discretion.

Fortunately, the complete discretion argued for by the FAA is not the accepted standard under case law or Board precedent. Similarly, the FAA's disregard of its own guidance is arbitrary and unreasonable. The Board should affirm Judge Schumacher's oral initial opinion with regard to the appropriateness of weighing mitigation factors in considering the sanction when inadvertent ingestion is at issue, and Judge Schumacher's ultimate conclusion of an appropriate sanction.

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[29] FAA Order 2150.3C, Ch. 9, Section 8(a)(2)(i) and Figure 9-5 at 9-13 (emphasis added).

[30] *See* 14 C.F.R. § 67.403 (requiring revocation of all certificates for making a fraudulent or intentional false statement); *also* 14 C.F.R. § 61.59 (requiring revocation or suspension of Part 61 certificates for making a fraudulent or intentional false statement); 14 C.F.R. § 61.15(b)(2) (violation of §§ 91.17(a) or 91.19(a) is grounds for revocation or suspension of Part 61 certificates).

[31] FAA Order 2150.3B, Ch. 9, Section 8(a)(5) ("Enforcement counsel coordinates any decision to seek a sanction other than revocation with the Assistant Chief Counsel for Enforcement and documents the basis for the decision in the case file. If it is necessary to impose a punitive sanction for such a violation…")(emphasis added).

B. The Law Judge Erred in Finding Respondent did not show by a Preponderance of the Evidence that Respondent's Ingestion was Inadvertent.

Though reaching the correct conclusion in this case, the law judge erred in not finding Respondent had proved by a preponderance of the evidence that his ingestion of Vyvanse was inadvertent.[32] The preponderance of the evidence standard is met if the proposition is more likely to be true than not true.

> The burden of showing something by a "preponderance of the evidence," the most common standard in the civil law, "simply requires the trier of fact 'to believe that the existence of a fact is more probable than its nonexistence before [he] may find in favor of the party who has the burden to persuade the [judge] of the fact's existence.'"

Concrete Pipe & Prod. of California, Inc. v. Constr. Laborers Pension Tr. for S. California, 508 U.S. 602, 622, (1993) (*citing In re Winship*, 397 U.S. 358, 371–72 (1970) (Harlan, J., concurring) (brackets in original) (citation omitted)). Where no evidence is presented by a party with the burden of proof, especially against some credible evidence, courts have consistently held no evidence fails to meet the burden of proof.[33]

Mr. Knight presented evidence and credible testimony of both himself and a corroborating witness.[34] In addition, the hospital records for the emergency room visit for Mr. Knight's son provide corroborating evidence consistent with his account.[35] And, the law judge specifically found Mr. Knight's testimony to be credible.[36] In contrast, the FAA did not present any evidence undermining the inadvertence of Mr. Knight's ingestion of his son's Vyvanse. Consistent with its refusal to consider mitigating circumstances in choosing revocation as a sanction, the FAA simply

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[32] *See* Tr. 192.
[33] *See, e.g., Rea v. Michaels Stores Inc.*, 742 F.3d 1234, 1239 (9th Cir. 2014) (finding District Court holding clearly erroneous); *Sparks v. Office of Pers. Mgmt.*, 679 F. App'x 1011, 1015 (Fed. Cir. 2017) (affirming the MSPB where Sparks presented no evidence).
[34] Tr. 65–77, ,89–109.
[35] *See* Exh. R-9 and Tr. 64–66.
[36] Tr. 193.

ignored Mr. Knight's inadvertent ingestion affirmative defense when it failed to present any evidence whatsoever on this issue.

Credible testimony and documentary evidence clearly outweighs no evidence. The Board should thus overturn the Judge's finding that Mr. Knight did not prove his affirmative defense of innocent or unknowing ingestion by a preponderance of the evidence.

CONCLUSION

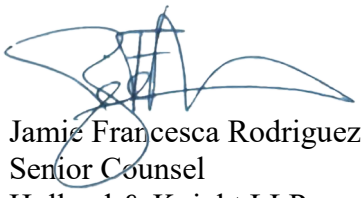
For the foregoing reasons, the Board should:

1. affirm Judge Schumacher's decision to reduce the Administrator's revocation of Respondent's pilot certificates to a 90-day suspension; and

2. find the Judge's conclusion that Respondent did not establish his ingestion of his son's Vyvanse was inadvertent by a preponderance of the evidence was erroneous.

Date: November 27, 2019

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of November, 2019, copies of the Amicus Brief of National Business Aviation Association, Aircraft Owners and Pilots Association, and National Air Transportation Association Opposing the Complainant's Appeal were served upon the following:

The original and three copies, via email and via overnight delivery, postage prepaid, to:

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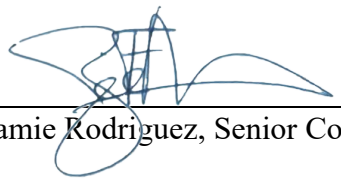

Jamie Rodriguez, Senior Counsel

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To: Elizabeth A. Vasseur-Browne; Rodriguez, Jamie (WAS - X75261)
Subject: RE: Amicus Brief in Amd'r v. Knight, NTSB Docket No. SE-30667

[External email]
Ms. Rodriguez,

The FAA does not object, as long as the brief complies with the limitations in the Board's rules for amicus filings (49 C.F.R. 821.9).

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Good morning Ms. Rodriguez,

The respondent does not object.

v/r

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Ms. Baxter & Ms. Vasseur-Browne,

I represent the National Business Aviation Association (NBAA) for the submission of an amicus brief addressing the FAA's Appeal in the subject aviation enforcement case currently before the NTSB. The amicus brief is joined by the NBAA, the Aircraft Owners and Pilots Association (AOPA), and the National Air Transportation Association (NATA), and is limited to two issues addressed by the FAA in the Administrator's Appeal Brief dated October 28, 2019.

Would you each please respond by close of business today confirming whether you intend to oppose the filing of the NBAA/AOPA/NATA amicus brief?

I am happy to discuss the matter with either of you if you would like to call me on my cell phone, 202.480.0303.

All the best,

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