

SERVED: December 12, 1997

NTSB Order No. EA-4609

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 17th day of November, 1997

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JANE F. GARVEY,		)	
Administrator,		)	
Federal Aviation Administration,		)	
	Complainant,	)	
		)	Docket SE-14369
	v.	)	
		)	
JAMES D. MONEY,		)	
	Respondent.	)	
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**OPINION AND ORDER**

Respondent has appealed from the oral initial decision of Administrative Law Judge Patrick G. Geraghty, issued on May 15, 1996, following an evidentiary hearing.<sup>1</sup> The law judge affirmed an order of the Administrator, on finding that respondent had violated 14 C.F.R. 91.103 and 91.13(a).<sup>2</sup> Sanction was waived

<sup>1</sup> The initial decision, an excerpt from the transcript, is attached.

<sup>2</sup> Section 91.103, Preflight action, provides, in part:

Each pilot in command shall, before beginning a flight,  
(continued...)

pursuant to the Aviation Safety Reporting Program (ASRP). We deny the appeal.

Respondent was the pilot in command of a 2-day cross country flight. On September 26, 1995, the second day of the flight, respondent began at Laughlin/Bullhead City, NV, destination Palomar Airport, Carlsbad, CA. He made an interim stop at Fallbrook, CA, to deplane a passenger. At that time, he made a visual check of the fuel in the left wing tank. A few miles outside Palomar, the aircraft engine began surging. In respondent's words, he made a "precautionary" landing on a roadway.

At the hearing, the Administrator offered the testimony of Jeffrey Reynolds, an air safety inspector who investigated the incident for the FAA. Mr. Reynolds testified that, at the scene, he removed approximately 4 ounces of fuel from the gasolator (to examine it for contaminants). Tr. at 48. He visually inspected the tanks and determined that there was a total of approximately 1½ gallons left in both tanks. Three-quarters of a gallon in

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become familiar with all available information concerning that flight. This information must include -

(a) for a flight under IFR [instrument flight rules] or a flight not in the vicinity of an airport, weather reports and forecasts, fuel requirements, alternatives available if the planned flight cannot be completed, and any known traffic delays of which the pilot in command has been advised by ATC [air traffic control]...

Section 91.13(a) prohibits careless or reckless operations endangering the life or property of another.

each tank was unusable fuel.<sup>3</sup> He saw no evidence of contamination or fuel leaks. Both fuel gauges read empty.

The next day, after the aircraft had been moved by truck to the FBO,<sup>4</sup> Mr. Reynolds supervised the draining of the fuel tanks. Approximately 1½ gallons of fuel were captured. The overall condition of the aircraft was again studied. No problems were located. Mr. Reynolds concluded by saying that "[t]he only abnormality I found was that I didn't believe there was enough fuel on the airplane." Tr. at 46.

Mr. Joey Crawford, an employee of the FBO, confirmed Mr. Reynolds' testimony. Mr. Crawford, who was also at the incident scene, denied seeing any evidence of a fuel leak. He accompanied Mr. Reynolds in the next day's inspection, and reiterated that no fuel leaks, gauge errors, or any other problems with the aircraft were identified.

Mr. Reynolds also testified to his conversation with respondent at the incident site. According to Mr. Reynolds, respondent said words to the effect of "there's no gas" and "I think I ran out of gas." Tr. at 10-12.

Respondent, on the other hand, denied making any such admission, suggesting that there might have been a fuel blockage. He testified that he had properly calculated fuel requirements as part of his preflight preparation at Bullhead City, and that he

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<sup>3</sup> The aircraft has a total capacity of 26 gallons, 13 in each tank, with 24.5 gallons usable.

<sup>4</sup> Fixed Base Operator.

saw approximately 3-5 gallons of fuel in the left tank when he observed it at Fallbrook (presuming an approximately equivalent amount in the right tank).<sup>5</sup> Respondent also testified that Mr. Reynolds removed approximately 32 ounces of fuel from the gasolator at the scene (compared to the 4 ounces Mr. Reynolds testified he removed). Respondent stated that the aircraft never lost power, but began to surge a few miles short of Palomar. He introduced a repair order, 1½ months after the incident, to replace the right fuel tank due to pinhole corrosion at its top.<sup>6</sup>

The law judge made implicit credibility findings in favor of the Administrator. He concluded that respondent had not made himself aware of all information pertaining to the safe completion of his flight. Tr. at 155-156. According to the law judge, respondent's action in checking the wing tank at Fallbrook demonstrated concern about the gauges and the fuel remaining. The law judge concluded that the visual inspection, without any more accurate method to gauge the fuel remaining, reflected inadequate measures to ensure adequate fuel. The resulting fuel exhaustion was, in the law judge's view, a failure to prepare adequately for the flight, in violation of § 91.103.

On appeal, respondent argues that he did not violate section 103 because the fuel exhaustion finding was in error and, in any

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<sup>5</sup> The parties appear to agree that, had this amount been in the aircraft, it should have been enough to fly to Palomar.

<sup>6</sup> Respondent also denied having told Mr. Reynolds, as Mr. Reynolds had testified, that rocking the wings had worsened the surging (as could be expected with low fuel in wing tanks).

case, his preflight was adequate. Respondent's new argument that the aircraft could not have experienced fuel exhaustion because Mr. Reynolds found gas in the gasolator ignores all Mr. Reynolds' testimony, accepted by the law judge, concerning the amount of usable and unusable fuel remaining, as well as Mr. Reynolds' unrebutted explanation for finding gas in the gasolator. See Tr. at 48 (pushing aircraft on ground allows fuel to feed into the system).<sup>7</sup>

Absent a reasonable, evidence-based alternative for the fuel exhaustion, it was not error for the law judge to have found fuel mismanagement. We are unpersuaded by respondent's claim on appeal that the aircraft manual's guidance regarding usable and

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<sup>7</sup> The law judge admitted into evidence the ASRP receipt that is returned to the airman and used to verify timely filing (so as to qualify for sanction waiver consideration). That receipt contains a block titled "TYPE OF EVENT/SITUATION." Respondent had written "Emergency landing due to fuel exhaustion." The law judge admitted the receipt, over respondent's objection, as an admission against interest, noting that the text of the report was not included. Respondent testified that his phrase simply indicated "what he was being accused of," Tr. at 124. On appeal, respondent again argues that the FAA violated its own rules and the law judge undermined the ASRP process when he accepted the receipt in evidence.

We need not reach this issue. The law judge does not discuss this matter in reaching his decision, and it does not otherwise appear that the law judge relied on respondent's written description on the receipt. The record contains more than enough evidence to support the initial decision without considering this evidence. We will note, however, that respondent voluntarily provided the receipt to the FAA, with the contested language included. That language could have been omitted; it was not relevant to the necessary demonstration that the report was timely filed. Further, the filing of an ASRP report is public information in any enforcement proceeding in which such a report is submitted to obtain sanction waiver, as it is part of the public record of the proceeding. The report

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unusable fuel should be ignored in favor of assuming that fuel the manufacturer considered unusable could have gotten the aircraft to its destination. The forced landing, absent proof of any mechanical failure, supports the opposite conclusion. It is but a short step from fuel mismanagement to a finding of inadequate preflight preparation, regardless of whether you view the "flight" as from Bullhead City to Palomar or from Fallbrook to Palomar.<sup>8</sup>

Respondent also argues that the section 91.13(a) finding must be reversed because there was no actual or potential endangerment, and that precedent supports dismissal of that charge. Respondent misconstrues case law. Administrator v. Pritchett, NTSB Order EA-3271 (1991) at fn. 17, and cases cited there, as well as many other more recent Board decisions, establish that a violation of an operational regulation is sufficient to support a finding of a "residual" or "derivative" carelessness violation. Respondent's citation to Administrator v. Holderman, 2 NTSB 414 (1973), is inapposite, as in that case carelessness was not a derivative violation but was the only

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itself is not part of the record.

<sup>8</sup> Respondent also argues that he may not be found to have violated section 103 because the Administrator did not prove that the flight was "in the vicinity of an airport." (It is clear that respondent means to argue that the Administrator did not prove that the flight was not "in the vicinity of an airport." The regulation requires adequate preflight fuel management information when the flight will not be in the vicinity of an airport.) We believe that this fact was established in the record and through the obvious meaning and intent of the

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charged violation.

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regulation itself.

**ACCORDINGLY, IT IS ORDERED THAT:**

Respondent's appeal is denied.

HALL, Chairman, FRANCIS, Vice Chairman, HAMMERSCHMIDT, GOGLIA, and BLACK, Members of the Board, concurred in the above opinion and order.