

SERVED: February 11, 1998

NTSB Order No. EA-4633

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 February, 1998

JANE F. GARVEY,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-14422
v.)	
)	
ROBERT M. MEACHAM,)	
)	
Respondent.)	

OPINION AND ORDER

Respondent has appealed from the initial decision of Administrative Law Judge Patrick G. Geraghty, issued on May 14, 1996.¹ The law judge affirmed an order of the Administrator, on finding that respondent had violated 14 C.F.R. 91.151(a) and 91.13(a),² and declined to waive sanction pursuant to the

¹ A copy of the decision is attached.

² Section 91.151(a), as pertinent, provides:

(a) No person may begin a flight in an airplane under VFR
(continued...)

Aviation Safety Reporting Program (ASRP). The only issue before us is whether waiver should have been extended. We grant the appeal and waive application of the 30-day suspension.

Respondent flew a rented Cessna 150 on a visual flight rules flight from Shelton, WA to Puyallup, WA and return. On the return flight to Shelton, and within 4 miles of the airport, the aircraft ran out of fuel. The Administrator contends that respondent's failure to ensure adequate fuel, at the flight's initiation and again at Puyallup, demonstrates the kind of purposefulness that militates against sanction waiver. The law judge found that respondent should have visually inspected the tanks, and had two opportunities to do so. He further found that failure to do so was a purposeful choice, not an inadvertent act for which the ASRP waiver applies. We disagree with his reasoning.

As pertinent to this case, waiver is available if the violation was "inadvertent and not deliberate." "Inadvertence" is not merely the result of any purposeful choice. Conduct for which waiver of sanction will not be granted is that which

(continued...)

conditions unless (considering wind and forecast weather conditions) there is enough fuel to fly to the first point of intended landing and, assuming normal cruising speed - -

(1) During the day, to fly after that for at least 30 minutes[.]

Section 91.13(a) prohibits operating an aircraft in a careless or reckless manner so as to endanger the life or property of another.

"approaches deliberate or intentional conduct in the sense of reflecting a wanton disregard for the safety of others." Ferguson v. NTSB, 678 F.2d 821, 828 (9th Cir. 1982). See also Administrator v. Halbert, NTSB Order No. EA-3628 (1992) (ASRP not designed to protect those who exhibit a reckless disregard for safety).

In this case, the facts before us are as follows.³ Respondent, prior to these flights, had been the last person to fuel the aircraft, knew how much fuel he put in it, and knew how long the aircraft had been flown since the refueling. There are no facts in the record to demonstrate that, had there been the amount of fuel he believed to be in the tanks, respondent would have had difficulty completing the flight and satisfying the regulation's fuel margin requirements.

The Administrator focuses on respondent's failure visually to check the fuel when the left tank gauge read empty and the right tank gauge read $\frac{3}{4}$. However, respondent indicates that he knew the left tank gauge was not working properly and, as indicated above, he believed he knew how much gas remained (estimating fuel use at 6 gallons per hour, an assumption not challenged by the Administrator). The Administrator introduced no evidence to show that preflight requirements for this aircraft

³ In this motion for summary judgment, the Administrator has the burden of proof and we must accept the facts in the record before the law judge in a manner most favorable to respondent. Further, we may not and do not consider the new information respondent offered in his appeal.

included visual inspection of the fuel tanks.

The law judge's analysis addressed two issues: failure visually to check the tanks; and respondent's concession that he "fell into a trap" in trusting the fuel gauges of aircraft he flew regularly. Although we certainly agree with respondent's sentiment that good preflight procedure here would include a visual fuel check, we are not convinced that the factors cited by the law judge warrant a finding that respondent's failure to make a visual fuel check constituted reckless or wanton disregard for safety so as to deny his ASRP waiver.

First, and as noted earlier, there is no evidence here that the preflight check required a visual fuel check. While this may be common if not standard procedure with this aircraft, the Administrator introduced no evidence to show that visual inspection was required by the aircraft manual. Second, the law judge's recitation of respondent's admission omitted what we consider to be relevant discussion. Respondent stated (emphasis added):

This CFI [certified flight instructor] had allowed himself to fall into a trap. He had developed a bad habit of trusting the fuel gages of the aircraft that he regularly flew, *especially when they confirmed his fuel remaining calculations*. The fact that he was not completely familiar with this particular aircraft did not alter his procedure *and the possibility that someone might have siphoned fuel from the aircraft never entered his mind*.

This situation appears, to us, better to represent an incident of inadvertence (i.e., a mistake), than a purposeful, deliberate operation of an aircraft in reckless disregard of safety concerns.

We also find respondent's situation different from other cases where we have declined to waive sanction. For example, in Administrator v. Anderson, NTSB Order No. EA-3976 (1993), a mechanic and an FAA inspector notified the pilot of problems with the aircraft's door, yet the pilot chose to continue the flight. In Administrator v. Levine, NTSB Order No. EA-3880 (1993), the pilot flew the aircraft although he knew he was missing a wing tip.

In this case, respondent had more information than merely that the left fuel gauge was incorrect. The additional information (the Hobbs meter time and the knowledge that he had been the last to refuel the aircraft) led him to conclude that there was sufficient fuel to make the flights. Had the Administrator demonstrated that the preflight checklist required a visual fuel check, we would be more likely to agree that waiver would not be appropriate. However, in these unique circumstances, we cannot find that respondent exhibited a wanton or reckless disregard for safety in failing to make a visual check and wrongly assuming he had enough fuel.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is granted; and
2. The 30-day suspension is waived.

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