

SERVED: September 22, 2015

NTSB Order No. EA-5757

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 22nd day of September, 2015

_____)	
MICHAEL P. HUERTA,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-19703
v.)	
)	
GREGORY B. BOYLAN,)	
)	
Respondent.)	
)	
_____)	

OPINION AND ORDER

1. Background

The Administrator of the Federal Aviation Administration (FAA) appeals the oral initial decision of Administrative Law Judge Patrick G. Geraghty, issued October 22, 2014, modifying the Administrator’s order of suspension against respondent.¹ The Administrator’s order, issued

¹ A copy of the law judge’s initial decision, an excerpt from the hearing transcript, is attached.

on August 15, 2014, alleged respondent violated 14 C.F.R. §§ 91.151(a)(1),² 91.103(a),³ and 91.13(a)⁴ and ordered a suspension of respondent’s airline transport pilot (ATP) certificate for a period of 120 days. We grant the Administrator’s appeal.

A. *Facts*

Respondent holds an ATP certificate and a flight instructor certificate. On January 27, 2014, respondent operated, as pilot-in-command (PIC), a Cessna 172N on a flight under visual flight rules (VFR) conditions, which departed McClellan-Palomar Airport (CRQ) near Carlsbad, California, at approximately 1400 local time.⁵ Respondent had a passenger on the flight to whom respondent provided flight instruction during the flight.⁶ Respondent planned the flight as a round-trip flight departing from CRQ with touch-and-goes⁷ at Torrance Airport-Zamperini Field

² Section 91.151(a)(1) prohibits any person from beginning “a flight in an airplane under VFR 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.”

³ Section 91.103(a) provides:

Each pilot in command shall, before beginning a flight, become familiar with all available information concerning that flight. This information must include— (a) For a flight under IFR 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.

⁴ Section 91.13(a) provides, “no person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.”

⁵ Compl. ¶ 2, Answer ¶ 2.

⁶ Tr. 110.

⁷ The Court of Appeals for the Ninth Circuit has defined a “touch and go” as a landing in which “the pilot allows the wheels of the plane to touch the runway and then applies full power so that the plane immediately takes off; it is a maneuver commonly used to practice landings and takeoffs.” Hamilton v. U.S., 497 F.2d 370, 373 n.7 (9th Cir. 1974); see also U.S. v. Miller, 303 F.2d 703, 705 n.4 (9th Cir. 1962).

(TOA) near Torrance, Santa Monica Municipal Airport (SMO) near Santa Monica, and Hawthorne Municipal Airport (HHR) near Hawthorne.⁸ Respondent was unable to return the aircraft to CRQ after performing the touch-and-go at HHR due to engine stoppage resulting from fuel exhaustion.⁹ Respondent terminated the flight in an off-field landing at the Marine Corps Amphibious Base near Oceanside, California.¹⁰

B. Law Judge's Oral Initial Decision

Following a hearing at which the law judge accepted the testimony of six witnesses and reviewed 13 exhibits, the law judge determined the Cessna's engine could no longer continue performing due to fuel exhaustion.¹¹ The law judge concluded respondent's preflight check was inadequate because respondent did not ensure the aircraft contained sufficient fuel; as a result, the law judge determined respondent violated 14 C.F.R. §§ 91.103(a) and 91.13(a).¹² However, the law judge concluded the Administrator did not sustain the burden of proof to show respondent violated 14 C.F.R. § 91.151(a)(1).¹³ The law judge reasoned "a touch-and-go is, in fact, a landing" and respondent's first point of intended landing was the touch-and-go at TOA.¹⁴ The law judge opined, "the aircraft did fly onto Santa Monica and apparently to the third airport and then did not run out of fuel until after that, there was obviously, I think on a reasonable

⁸ Compl. ¶¶ 4-5, Answer ¶¶ 4 -5; Tr. 110.

⁹ Tr. 15-16.

¹⁰ Compl. ¶ 6, Answer ¶ 6.

¹¹ Initial Decision at 164.

¹² Id. at 164-68.

¹³ Id. at 165-66.

¹⁴ Id. at 165.

inference at least enough fuel for 30 minutes to fly after Torrance.”¹⁵ The law judge considered the touch-and-go at TOA to be the first point of intended landing and opined the continuation of the flight to SMO and HHR, the next two touch-and-go locations, before the flight terminated due to fuel exhaustion was sufficient to satisfy the fuel reserve requirement of § 91.151(a)(1).¹⁶

In support of this determination, the law judge cited 14 C.F.R. § 61.57(b), which sets forth the requirements for flight experience. Section 61.57(b) requires a PIC to have made at least three takeoffs and landings within the past 90 days, but specifies for flights at night, a PIC must have made at least three takeoffs and “landings to a full stop.”¹⁷ The law judge stated the specific requirement of recent full-stop nighttime landings in § 61.57(b) indicates a touch-and-go would be considered a “landing” for the purpose of § 91.151(a)(1).¹⁸ The law judge based this conclusion on the notion that, if the intent of the regulation is to require a *landing*, and not merely a touch-and-go, then the regulation will state, “landings to a full stop” as § 61.57(b) states. Therefore, the law judge concluded the touch-and-go at TOA likewise satisfied the requirement that the aircraft have a 30-minute fuel reserve upon reaching the first point of intended landing.¹⁹

The law judge rejected respondent’s argument he was entitled to a waiver of sanction because he had filed a timely report pursuant to FAA’s Aviation Safety Reporting Program

¹⁵ Id. at 166.

¹⁶ Id.

¹⁷ 14 C.F.R. § 61.57(a) and (b).

¹⁸ Initial Decision at 165-66.

¹⁹ Id.

(ASRP).²⁰ The law judge found respondent's failure to inspect visually the fuel tanks to be a deliberate act; therefore, the ASRP did not apply.²¹ However, the law judge reduced the 120-day suspension of respondent's ATP certificate to 105 days based on his dismissal of the § 91.151(a)(1) violation.²²

C. Issue on Appeal

The Administrator appeals the law judge's initial decision on the basis that the law judge erred in not finding a violation of § 91.151(a)(1) and in consequently reducing the sanction. The Administrator argued the law judge erroneously interpreted § 91.151(a)(1) when he determined a touch-and-go qualified as a landing under the regulation. The Administrator also argued the law judge erred in not deferring to the Administrator's interpretation of the FAA's own regulation.

2. Decision

We review the law judge's order *de novo*.²³ In addition, we apply rules of construction to interpret regulations.²⁴ If the language of a provision is clear and unambiguous on its face, the

²⁰ Under the ASRP, the Administrator may waive the imposition of a sanction, despite the finding of a regulatory violation, as long as certain requirements are satisfied. Aviation Safety Reporting Program, Advisory Circular 00-46E at 4, ¶ 9c (December 16, 2011). The Program involves filing a report with the National Aeronautics and Space Administration (NASA), which may obviate the imposition of a sanction by the FAA where: (1) the violation was inadvertent and not deliberate; (2) the violation did not involve a criminal offense, accident, or action found at 49 U.S.C. § 44709; (3) the person has not been found in any prior FAA enforcement action to have committed a regulatory violation for the past five years; and (4) the person completes and mails a written report of the incident to NASA within 10 days of the violation.

²¹ Initial Decision at 169. We note the respondent sought to appeal this determination; however, respondent's appeal was dismissed as untimely. As a result, this Opinion and Order does not address the law judge's determination concerning the ASRP in this case. Administrator v. Boylan, NTSB Order No. EA-5737 (2014), recon. denied, NTSB Order No. EA-5748 (2015).

²² Id. at 170-71.

²³ Administrator v. Dustman, NTSB Order No. EA-5657 at 6 (2013) (citing Administrator v. Smith, NTSB Order No. EA-5646 at 8 (2013), Administrator v. Frohmuth and Dworak, NTSB

language controls; if the language is ambiguous, we interpret the provision in reference to, among other factors, the context in which it appears.²⁵

In the case *sub judice*, the question before us is whether the phrase, “first point of intended landing” in § 91.151(a)(1) includes a touch-and-go landing. While the terms “landing” and “first point of intended landing” are not defined in Title 49 of the *United States Code* or in the Federal Aviation Regulations, we determine the “first point of intended landing” is the point at which the aircraft finally comes to rest. The plain language of the regulation is consistent with this interpretation.

Section 91.151 requires airmen operating airplanes and rotorcraft to have sufficient fuel to fly to the first point of intended landing with a 30-minute fuel reserve.²⁶ The Administrator could not achieve the safety purpose of reducing the risk of fuel exhaustion accidents if an operator only needed to have sufficient fuel to conduct a touch-and-go, as well as fly for an additional 30 minutes, notwithstanding the duration of the remaining flight before the aircraft finally comes to rest. The accident in case *sub judice* is precisely the type the Administrator

(.continued)

Order No. EA-3816 at 2 n.5 (1993); Administrator v. Wolf, NTSB Order No. EA-3450 (1991); Administrator v. Schneider, 1 NTSB 1550 (1972)).

²⁴ Exelon Generation Co., LLC v. Local 15, Int’l Bhd. of Elec. Workers, AFL-CIO, 676 F.3d 566, 570 (7th Cir. 2012), as amended (May 9, 2012) (stating, “[t]he same rules of construction apply to administrative rules as to statutes”).

²⁵ Robinson v. Shell Oil Co., 519 U.S. 337, 340-41 (1997); see also Administrator v. Holland, NTSB Order No. EA-5472 (2009); Administrator v. Glennon and Shewbart, NTSB Order No. EA-5411 at 19-22 (2008).

²⁶ The purpose of this provision is to “provide a more precise means to determine an adequate fuel reserve” to reduce the risk of fuel exhaustion accidents. 43 Fed. Reg. 46230, 46231 (Oct. 5 1978) (Final Rule). Section 91.22 was a predecessor of § 91.151(a) and also required an airman flying under VFR rules to have sufficient fuel to fly to the first point of intended landing and, assuming normal cruising speed during the day, to fly after that for at least 30 minutes.

intended § 91.151(a)(1) to prevent. In contrast, § 61.57 aims to ensure an airman acting as PIC of an aircraft carrying passengers or additional crew has recent experience conducting takeoffs and landings. What constitutes a “landing” or “landing to a full stop” under § 61.57 does not define what would constitute the “first point of intended landing” under § 91.151(a). The law judge’s reliance on § 61.57 was misplaced.

The law judge acknowledged his interpretation of “first point of intended landing” would mean that a touch-and-go landing would mark the termination of one flight (upon touch) and the departure of a new flight (upon go).²⁷ We have previously rejected this concept and cannot agree that a touch-and-go landing marks the termination of one flight and the commencement of new one.²⁸ Moreover, a pilot performing a touch-and-go landing does not have an opportunity to perform the preflight checklist or visually inspect the fuel tanks before departing because he or she does not exit the aircraft. Therefore, it is illogical to interpret “first point of intended landing” to include a touch-and-go.

Assuming, *arguendo*, we eschewed the plain language of the regulation and adopted the law judge’s interpretation, the fuel reserve requirement of § 91.151(a) would begin anew with each touch-and-go takeoff. In the case *sub judice*, respondent’s aircraft did not have enough fuel to return to CRQ after the touch-and-go at HHR. Applying the law judge’s interpretation, the preponderance of the evidence would still show respondent violated § 91.151(a)(1) because the

²⁷ See tr. 132.

²⁸ Administrator v. Herring, 2 NTSB 1180, n.13 (1974) (stating, “[w]e cannot agree that a touch-and-go landing marks the termination of one flight and the commencement of new one.”); cf. Administrator v. Stephens, 6 NTSB 1194, 1195-96 (1989) (expressing reservation about applying 14 C.F.R. § 91.22, the predecessor of § 91.151, to a local flight performing a series of touch-and-go landings in the vicinity of the same airport and did not entail travel between two or more different points).

fuel reserve requirement was not satisfied for the portion of the flight between HHR and CRQ resulting in respondent's fuel exhaustion and subsequent off-field landing.²⁹

3. Conclusion

The law judge erred in interpreting § 91.151(a). In the case *sub judice*, respondent planned a roundtrip cross country flight with three touch-and-go landings at different airports before returning to CRQ. Respondent does not dispute the aircraft's engine quit due to fuel exhaustion before he was able to return to CRQ and, therefore, he had to terminate the flight in an off-field landing at a Marine Corps base. Respondent also admitted he knew he needed to have a 30 minute fuel reserve for the entire flight, which he clearly did not have.³⁰ For these reasons, we conclude the plain language of § 91.151(a) and the only logical interpretation of the provision is it requires an airman to begin a flight with enough fuel to fly to the first point of intended landing, meaning the point at which the aircraft finally comes to rest, and, assuming normal cruising speed, to fly for at least 30 additional minutes.

The law judge reduced the Administrator's sanction based on the dismissal of the § 91.151(a)(1) violation. Because we disagree with the law judge's dismissal of the violation, we determine the law judge erred in reducing the sanction. A 120-day suspension period, in light of the facts of this case, is certainly reasonable.

ACCORDINGLY, IT IS ORDERED THAT:

²⁹ Respondent acknowledged he needed to have a 30 minute fuel reserve. Tr. 103-104. The Complaint alleges respondent did not have sufficient fuel for the roundtrip flight. Compl. ¶ 4.

³⁰ Tr. 103-04.

1. The Administrator's appeal is granted;
2. The law judge's initial decision is reversed, in part; and
3. The 120-day suspension of respondent's ATP certificate shall begin 30 days after the service date indicated on this opinion and order.³¹

HART, Chairman, DINH-ZARR, Vice Chairman, and SUMWALT AND WEENER, Members of the Board, concurred in the above opinion and order.

³¹ For the purpose of this order, respondent must physically surrender his ATP certificate to a representative of the Federal Aviation Administration pursuant to 14 C.F.R. § 61.19(f).

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
OFFICE OF ADMINISTRATIVE LAW JUDGES

* * * * *
In the matter of: *
MICHAEL P. HUERTA, *
ADMINISTRATOR, *
Federal Aviation Administration, *
Complainant, *
v. *
GREGORY B. BOYLAN, *
Respondent. *
* * * * *

Docket No.: SE-19703
JUDGE GERAGHTY

United States Federal Building
880 Front Street
Courtroom 4228
San Diego, California 92101

Wednesday,
October 22, 2014

The above-entitled matter came on for hearing, pursuant
to Notice, at 9:30 a.m.

BEFORE: PATRICK G. GERAGHTY
Administrative Law Judge

APPEARANCES:

On behalf of the Administrator:

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On behalf of the Respondent:

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ORAL INITIAL DECISION AND ORDER

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ADMINISTRATIVE LAW JUDGE GERAGHTY: This has been a proceeding before the National Transportation Safety Board on the appeal of Gregory B. Boylan, herein after referred to as Respondent, on his appeal from an Order of Suspension which seeks to suspend his airline transport pilot certificate or any other airman pilot certificate for a period of 120 days. And this would include, of course, his flight instructor certificate, as that is a pilot certificate.

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The Order of Suspension serves herein as the complaint and was filed on behalf of the Administrator, Federal Aviation Administration, herein the Complainant.

1 As noted, the Complainant seeks to suspend the
2 Respondent's airman pilot certificates for the period of 120 days
3 based upon his admitted flight of January 27, 2014 in a Cessna
4 aircraft N172FT, which was a trip originating from Palomar Airport
5 in or near Carlsbad, California.

6 That flight terminated in an off-field landing on a
7 United States Marine Corps outlying amphibious base due to engine
8 stoppage. It is alleged that the Respondent failed to properly
9 preflight the aircraft for the planned trip. And therefore,
10 because the engine quit, as admitted in paragraph 6, that he had
11 to make this off-field landing.

12 It is therefore alleged that the Respondent operated in
13 regulatory violation of Sections 91.151(a)(1), 91.103(a), and
14 91.13(a), all of the Federal Aviation Regulations. The specific
15 requirements of those sections will be referred to subsequently as
16 appropriate.

17 Complainant's case was made through the testimony of
18 several witnesses and exhibits. The first of the witnesses was
19 Mr. Victor Hutchings, who is an employee of the Federal Aviation
20 Administration. He's an aviation safety inspector, airworthiness.
21 Holds an airframe and powerplant and inspection authorization.

22 He actually went out and looked at this aircraft when it
23 was on the Marine Corps base the day after the incident, January
24 28th, and took the pictures which were received as Exhibit A-1.

25 He testified that he did a visual check of the aircraft,

1 looking for any wet spots on the ground, for any spillage of fuel.
2 He looked for any stains or other indications that fuel had been
3 leaking out from the fuel tanks on this particular aircraft.
4 Obviously, if there was siphoning of fuel out of the tanks, there
5 would be stains of the fuel, as the airstream would have caused
6 the fuel to run back along the aircraft surfaces. In any event,
7 according to this witness -- and it was not contradicted -- there
8 was no indication of anything as to a leakage or loss of fuel in
9 that manner.

10 He indicated that he checked the fuel on board by
11 looking at the gauges and that the right tank did indicate a half
12 tank of fuel when he climbed aboard the aircraft. He indicated he
13 also checked the fuel in the tanks itself, and he probed the tanks
14 with a ruler and found no evidence of any fuel on board. He then
15 checked the sump, was not able to drain any fuel. And therefore,
16 his ultimate conclusion was the aircraft, as he stated it, out of
17 gas.

18 On cross-examination, he reiterated that he had looked
19 in the tanks on the aircraft and that when one looks in, you can't
20 see the bottom of the tank, and that when he looked in, he saw no
21 fuel. And that's why he also used a ruler to stir around to make
22 sure that there was no fuel as to the conclusion that I've already
23 stated.

24 Mr. Jeffrey Holstein is also an employee of the Federal
25 Aviation Administration. He's a private pilot. I'm sorry. I

1 misstated that. He is a self-employed private pilot, holds an A&P
2 and an inspection authorization. He's held these, the A&P since
3 1993, the IA since 1996. He was the one assigned to recover the
4 aircraft. And because of where the aircraft was located, it
5 couldn't be flown out, so they had to dismantle it, removing the
6 wings. He indicated that he removed the wings, and that when he
7 had checked, the tanks were essentially empty and -- with about 6
8 ounces of fuel.

9 He was also called as a witness on behalf of the
10 Respondent, and he indicated that -- and it does state that in his
11 exhibit as to his logbook entry, that there was a malfunction in
12 one of the sending units, fuel indications to one of the fuel
13 gauges.

14 I would simply observe here that's one of the reasons
15 that you check the fuel by visually looking in the tanks because
16 you never know when a black box or a gauge may malfunction. So
17 here was an instance where a malfunction had actually occurred,
18 leading the Respondent, who on his testimony simply relied on the
19 gauges, to be led astray.

20 Mr. Scott Worthington is an employee with the Federal
21 Aviation Administration, operations inspector. He holds an
22 airline transport pilot rating, a Lear and Citation type ratings,
23 is a CFI. He was also, among other things, a chief pilot at a
24 Part 141 school with about 15 aircraft, including Cessna 172s and
25 Cessna 152s.

1 He testified that as part of the investigation, he spoke
2 with the Respondent and made a copy of the Respondent's pilot
3 logbook to the excerpt of the flight in question. And looking at
4 Exhibit A-2, it is clear that on January 27th, the Respondent did
5 indicate in his logbook a flight as delineated in the complaint in
6 paragraph number 5.

7 And if one follows over to the last page under type of
8 piloting time, the Respondent indicated cross-country, 1.9, and
9 quoting, "as flight instructor, 1.9." So contrary to the denial
10 in paragraph 3 of the complaint, I do find that the evidence does
11 establish by a preponderance of the reliable evidence that the
12 Respondent was, in fact, conducting flight instruction on this
13 flight. And admittedly, Mr. Cookman, who was the passenger on the
14 flight, was, in fact, a student pilot.

15 Mr. Worthington indicated that he has done numerous
16 preflights on Cessna 172, and in each instance, he would follow
17 the checklist for the particular make and model of the Cessna, and
18 that in instructing students, that he would instruct the students
19 to do exactly the same thing.

20 Exhibit C-3 is the checklist for the make and model of
21 aircraft that was being operated by the Respondent; that is, a
22 Cessna 172N. And in the preflight inspection, it's -- for the
23 cabin check, it says to check the fuel quantity indicators, check
24 the quantity. And the testimony is quite clear that you do this
25 by turning the master switch on, looking at the gauges, turn the

1 switch off, and then proceed with the rest of the checklist.

2 Dropping down to the preflight for the right wing, item
3 number 4, it's clearly called out fuel quantity. And in capital
4 letters, "CHECK VISUALLY for desired level." And with respect to
5 the left wing in item 3, it says the same words, "Fuel Quantity,"
6 large caps, "CHECK VISUALLY for desired level." That is the
7 requirement for the checklist.

8 And as testified to by the Complainant's witnesses, if
9 the inspectors were giving a check ride either to a flight
10 instructor for renewal of a flight instructor rating or for a
11 pilot seeking to obtain his private pilot or upgrade to a higher
12 rating, if failed to use the checklist as required, that would be
13 a failure at that point and a discontinuation of the check ride.

14 It is clear that the preflight checklist comes out of
15 the Pilot Operating Handbook and that the requirement is for a
16 visual check, which is complimentary to the check of the gauges.
17 You do both to check one against the other.

18 On cross-examination, Mr. Worthington indicated that the
19 checklist and the Pilot Operating Handbook is approved by the
20 manufacturer as part of the certification of the aircraft, and the
21 use of the checklist is a requirement.

22 He agreed also on cross-examination that there is no
23 marking within the Cessna 172 fuel ports to indicate what the fuel
24 level is, but that he did indicate that you can check the fuel
25 level either using a dipstick or by sticking your finger in. If

1 the fuel is almost full, you can certainly feel it on your finger.

2 In my view, if you stick your finger in and feel
3 nothing, you would then question as to whether or not the gauge
4 was telling you the correct thing if it was telling you that the
5 tank was, in the words of the Respondent in his direct testimony,
6 pretty full.

7 As to the dipsticks themselves, the dipsticks are
8 available for purchase. And while they may not be approved and
9 they may be after-market, at least that gives you some visual
10 indication. And you can make your own dipstick by simply draining
11 the tank and having the tank filled. You know how much the tank
12 will hold. You put in the amount of fuel for a quarter tank, pull
13 the stick out, mark it, fill it up to half, mark it, and you have
14 your own accurate dipstick.

15 Mr. Jeffrey Culligan also is employed by the FAA. He
16 was called as an expert witness and accepted as such. He is also
17 a certificated flight instructor and is, on his testimony,
18 familiar with the checklist for the model Cessna 172.

19 He testified that looking at the Exhibit A-3, this is
20 the appropriate checklist, and this is how he would instruct his
21 students to preflight an airplane. He testified that a reasonable
22 and prudent pilot would, in fact, follow the published checklist
23 as stated and that there is available for purposes of checking
24 visually on the fuel a step-up on the side of the fuselage and
25 also step on the strut itself to allow you to get up high enough

1 that you can open the fuel cap and either lean forward, if you're
2 tall enough, and look in or reach in or to use a dipstick.

3 As indicated, although you might not be able to tell how
4 much fuel accurately is in the tank, if the tank is full or very
5 close to the top, you can see that, and you can certainly feel it
6 by putting your finger in and feeling the gas fuel on your
7 fingertip.

8 He expressed the opinion that as a certificated flight
9 instructor with a student, as the Respondent was at that time,
10 that no reasonable and prudent pilot would rely solely upon the
11 gauges, which he testified are known to be unreliable, and that
12 such is general knowledge within the industry with respect to
13 gauges.

14 And to support his position, he referenced Exhibit A-5
15 and Exhibit A-9. A-5 is the *Airplane Flying Handbook*, and it is
16 clear on page 2-5, it clearly states -- and this is an official
17 publication of the Federal Aviation Administration, and I quote,
18 "Always confirm the fuel quantity indicated on the fuel gauges by
19 visually inspecting the level of each tank."

20 A-9 is the *Pilot's Handbook of Aeronautical Knowledge*.
21 And on page 6 of that exhibit, and I quote again, "Aircraft
22 certification" -- and this is what the witness testified to --
23 "rules require accuracy in fuel gauges only when they read empty.
24 Any other reading other than empty should be verified. Do not
25 depend solely upon the accuracy of the fuel gauge quantities.

1 Always visually check the fuel level in each tank during preflight
2 inspection and then compare with the corresponding fuel quantity
3 indication," closed quote.

4 And lastly on cross-examination, he indicated again in
5 questioning from me that failure to use an approved checklist
6 would be grounds for failure on a check ride.

7 The Respondent testified on his own behalf. He is self-
8 employed as a flight instructor, has 20,000 hours, been a CFI
9 since 1995. He stated during his testimony that he believed for
10 this flight that he had enough fuel for the flight.

11 And his testimony, in my view, was inconsistent because
12 in one statement he stated that when he checked the fuel gauges by
13 turning on the mag switch, that the fuel gauges indicated, quote,
14 "pretty much fuel," closed quote, and I relied upon them. And
15 then he went on to state that you cannot tell the amount of fuel
16 if the tanks are not full.

17 So it seems to me that what he is saying here, that the
18 tanks were pretty much full, so that in that instance, on the
19 weight of the testimony, if you got up on the wing, you could
20 stick your finger in and feel whether or not the tanks were pretty
21 much full.

22 He also testified with respect to Respondent's Exhibit
23 1, which is a timely filing of a NASA report, and that is received
24 as an exhibit. He acknowledged that there was a logbook entry in
25 R-3. With respect to that, this is a maintenance entry, and a

1 maintenance entry, as I've already discussed, that shows that
2 there was a malfunction in one of the gauges and that there was
3 only -- on the report, that whole exhibit does show the entry by
4 the dismantling, that there was only about 6 ounces of fuel on
5 board the aircraft.

6 Respondent in his testimony never explained the
7 discrepancy between his claim that he was not flying as a flight
8 instructor and the fact that he logged in his logbook that the
9 flight time was as a flight instructor. So I would take it that
10 he really was a flight instructor, because otherwise we're talking
11 about an inappropriate, maybe, entry in a required record, which
12 would be the pilot logbook, which would be utilized to show
13 currency.

14 On cross-examination, he again acknowledged that, on his
15 testimony, the tanks were nearly full based upon the gauges, but
16 that he had never looked in the tanks. And again, going back to
17 what I already stated, to me it is somewhat of a circular argument
18 saying that the tanks were nearly full or pretty full, and then
19 claiming that you couldn't check visually. Because if they are,
20 on his testimony, pretty full, you should be able to check them
21 simply by sticking your finger into the port or refueling.

22 I found his testimony to be confused and, in fact,
23 evasive with respect to how he actually preflighted this aircraft
24 for this flight. As I understood his testimony, after going
25 through it several times, he did the cabin check by turning on the

1 master switch and looking at the gauges and turning off the master
2 switch. But then when he got to the section on the checklist --
3 and even on his Exhibit R-4, which was an abbreviated checklist,
4 what he did was, when he got to that item, check fuel quantity,
5 was to go back to the cockpit, turn on the master switch and look
6 at the gauges again and then apparently turn off the master
7 switch, continue the preflight, go around to the point on the left
8 wing where it calls for checking the fuel again. He went back to
9 the cockpit, turned on the master switch and looked at the gauges.

10 This is circular reasoning. All you're doing with that
11 is confirming your original reading on the gauges when you did the
12 cabin check. You've garnered no additional information as to the
13 actual fuel status on the aircraft other than what the gauges have
14 told you. And in fact, it does not comply with the requirement on
15 Exhibit A-3, which says check visually. Visual means to look.

16 And even in Respondent's Exhibit R-4, it is the same
17 thing. And the cabin check, it says to check the fuel gauge. It
18 says, checked, and then turn the master switch off. And then when
19 you get down to the right wing, to the item fuel level, it says,
20 checked. And it says the same thing again over on the left wing.

21 That has to mean more than simply going back and turning
22 the master switch on again, because otherwise, you're going around
23 in a circle. And in any event, on the abbreviated list as Exhibit
24 R-4, it clearly states this was just for reference only and you
25 should consult the POH, the Pilot Operating Handbook. But simple

1 logic would indicate that they're asking you to do two separate
2 checks. One is to check the gauges with the master switch, and
3 the other is to check the fuel level visually. I think that is
4 the only logical interpretation.

5 Mr. Monserrat testified as an expert on behalf of the
6 Respondent. In his opinion, the Respondent is a careful pilot.
7 However, he indicated that in his preflight, that he thought
8 gauges were reliable, which is the same testimony that the
9 Respondent gave. However, Mr. Monserrat also said that he would
10 look inside the fuel tanks whenever possible.

11 And, of course, on cross examination, since he is also a
12 flight instructor, he indicated that if he was flight instructing
13 with a student, he would tell the student to use the checklist.
14 And the checklist clearly calls out for a visual check. Again, I
15 thought Mr. Monserrat's testimony was not entirely forthcoming.

16 To me, that is the pertinent evidence in the case. The
17 burden of proof rests with the Complainant throughout and must be
18 carried by a clear preponderance of the reliable and probative
19 evidence. In this case, listening to the testimony of the
20 Complainant's witnesses with respect to reliability of the gauges
21 and also the publications that I've had reference to, Exhibit A-9
22 and Exhibit A-5, that I believe the testimony and weight of the
23 evidence is in favor of the Complainant on an issue of
24 credibility.

25 I found the Respondent's testimony at best confusing,

1 and at worst evasive, as to how he was checking the fuel level for
2 purposes of this flight. And I particularly found that it was
3 egregious that he would not follow the checklist in the presence
4 of a student, as the student is following the instruction of the
5 flight instructor. And if the flight instructor is not insisting
6 on proper use of the checklist, the student is probably going to
7 follow in those unacceptable footsteps.

8 I find, therefore, that on a preponderance of the
9 evidence that the Complainant has established, and I so find, the
10 Respondent was providing flight instruction during the flight
11 referenced in the paragraph. I also -- and I simply assert here
12 that in light of the admission in the answer to the allegations in
13 paragraph 6, which states that the aircraft's engine quit, the
14 definition of "quit" in the dictionary definition is simply to
15 discontinue or to cease to function, to stop. If something quits,
16 it is no longer working.

17 On the evidence here, contrary to the argument that the
18 engine simply was running rough, as was indicated to
19 Mr. Hutchings, I believe, and also in discovery, I believe the
20 evidence is that the engine, in fact, did quit because of lack of
21 proper fuel.

22 I find, therefore, that on the evidence in front of me,
23 the failure to follow the checklist, that to rely simply upon the
24 fuel gauges without visually checking is not what a reasonable and
25 prudent pilot would do, and certainly not what a reasonable and

1 prudent flight instructor should do in the presence of a student.

2 Turning then to the regulatory charges. Section
3 91.151(a) (1) provides, to me in the pertinent part, that it is
4 required to determine there is enough fuel to fly to the first
5 point of intended landing and assuming normal cruising speed
6 during the day to fly for 30 minutes thereafter.

7 The testimony in this case is that the first point of
8 landing was Torrance. This was touch-and-goes. There were touch-
9 and-goes made there. A touch-and-go is, in fact, a landing. The
10 *Airman's Information Manual* in its glossary defines touch-and-go
11 as an operation by an aircraft that lands and departs on a runway
12 without stopping or exiting the runway. So a touch-and-go is a
13 landing.

14 On the evidence in front of me, it is reasonable, and
15 that's the evidence, that this was intended to fly first to
16 Torrance and then to Santa Monica and then to a third airport, I
17 think Hawthorne. But the first point of intended landing and the
18 first point that a landing was made was Torrance. That is what
19 the regulation says.

20 And I think that also follows pretty much the logic of
21 FAR 61.57, when it talks about recent flight experience. Because
22 when it's talking about recent flight experience, it simply says
23 at least three takeoffs and three landings within the preceding 90
24 days. But then when it gets down to nighttime, it says that it
25 has to be three takeoffs and landings to a full stop during night.

1 So the regulation is discriminating between a touch-and-go type
2 landing daytime and a requirement for full stop landings at night.

3 In my view, the evidence here, reading the regulation as
4 it is worded, although this was intended as a long round-trip, the
5 first point of intended landing was Torrance. And since the
6 aircraft did fly on to Santa Monica and apparently to the third
7 airport and then did not run out of fuel until after that, there
8 was obviously, I think on a reasonable inference, at least enough
9 fuel for 30 minutes to fly after Torrance.

10 And therefore, I do conclude that on the preponderance
11 of the evidence in front of me, that the Complainant has not
12 sustained its burden of proof in finding that there was a
13 violation of Section 91.151(a) (1) of the Federal Aviation
14 Regulations.

15 Turning then to the charge of violation of Section
16 91.103(a) of the regulations, that regulation requires in subpart
17 (a) for a flight not in the vicinity of an airport to have all the
18 available information as to fuel requirements. In this case, this
19 regulation is speaking as to the flight in total, or it is a
20 flight not in the vicinity of the airport. That's what the
21 Respondent was doing. He was doing a series of touch-and-goes at
22 other airports, not in the vicinity of his departure airport.

23 And on the evidence in front of me, he did not make
24 himself familiar with all the available information, in that he
25 relied solely upon the indication on the fuel gauges and never

1 followed the checklist requirements of visually checking the fuel
2 for the accuracy of the readings on the fuel gauges. I therefore
3 find on the preponderance of the reliable evidence that the
4 Respondent did operate in regulatory violation of Section
5 91.103(a) of the Federal Aviation Regulations.

6 I come then to the charge of violation of Section
7 91.13(a) of the regulations, which states essentially that a pilot
8 may not fail to exercise a degree of care, judgment and
9 responsibility to operate an aircraft in a careless or reckless
10 manner so as to endanger the life or property of another.

11 As the Board has clearly held and been informed by
12 various Courts of Appeal, potential endangerment is enough. To
13 operate an aircraft not knowing how much fuel is aboard because
14 you didn't do the checklist, is at least potentially hazardous to
15 the people on the aircraft, in this case a student pilot, and to
16 others on the ground, since the aircraft could be in a position
17 where a safe off-field landing could not have been made.

18 In this case, the Respondent successfully made an off-
19 field landing, much to his credit, but the off-field landing was
20 necessitated by his failure to properly preflight the aircraft.
21 That was a deliberate choice on his part. The checklist called
22 for a visual check. And a reasonable interpretation of even R-4,
23 the abbreviated check, would lead to the conclusion that you
24 needed to make a check other than just of the fuel gauges.

25 In my view, since there was a student aboard, the fact

1 that he was exercising his flight instructor certificate and it
2 was a deliberate choice not to follow the checklist, this was a
3 reckless decision. A careless operation is one that's
4 inadvertent. This was not inadvertent. This was a deliberate
5 choice on the part of the Respondent not to follow the checklist
6 and to rely solely upon the gauges.

7 I find, therefore, that this is not a residual offense,
8 but really a separate offense because it was a reckless operation
9 in violation of Section 91.13(a) of the federal regulations. And
10 I so hold.

11 And I would simply observe that Board precedent is to
12 that effect. For example, in the case of *Administrator vs.*
13 *Easton*, which is EA-4732, a 1998 case, the Board held that failure
14 to perform a proper preflight inspection is an unsafe practice,
15 amply supporting the charge of a violation of Section 91.13(a) of
16 the regulations. And that is also cited in the case of
17 *Administrator vs.* -- and I'll spell the name -- B-e-h-n-k-e-n and
18 Cox, C-o-x, which is EA-4604, a 1997 case.

19 And lastly, as held in the case of *Administrator vs.*
20 *Faber*, which is EA-3473 at 4-5 pages, the Board held that evidence
21 of failure to check the fuel tanks before takeoff was sufficient
22 to support a violation of Section 91.9, which was the predecessor
23 to the recodification, which is now 91.13 Federal Aviation
24 Regulations.

25 I turn then to the affirmative defenses, the advisory

1 circular with respect to a timely filing of a NASA report. And a
2 NASA report was timely filed. However, in section (c) of the
3 advisory circular, it clearly states that for the waiver to apply,
4 the violation must be inadvertent and not deliberate.

5 Without beating the horse here, the violation was
6 deliberate. It was a deliberate choice by the Respondent. And
7 therefore, I find that the NASA report is not effective for that
8 reason.

9 As to a reasonable reliance, the case of *Fay and Takacs*,
10 *Administrator vs. Fay and Takacs*, the Board clearly held that for
11 a reasonable reliance, the duty must be clearly defined to be that
12 of someone else, and that the individual trying to exert that
13 waiver must show that he has no independent means of confirming
14 whatever it is to be checked.

15 In this case, the Respondent had an independent duty as
16 pilot in command and as a flight instructor to follow the
17 checklist. He had ample opportunity to do that himself. And I
18 would not, in fact, simply rely upon a student telling you that he
19 did it unless you were standing there watching him. So therefore,
20 I reject the claim of reasonable reliance on the fuel gauges,
21 particularly in light of the weight of the evidence in this case
22 that fuel gauges are not to be relied upon, but that the fuel
23 should be checked visually.

24 And I reject that it is, as stated in Affirmative
25 Defense 4, which states, and I quote, "It is not possible to

1 determine the amount of fuel on board a Cessna 172 by visually
2 looking into the fuel tanks." That is too broad a statement. If
3 the tank is pretty full or full, you can certainly discern the
4 level of the fuel by looking in the tank or by sticking your
5 finger in it.

6 So I reject that affirmative defense because the fuel
7 can be determined in this instance on the Respondent's testimony
8 that the tank was pretty near full. And the fact that the right
9 fuel tank indicated that the gauge off of that tank indicated it
10 was half full after the off-field landing simply underscores, as
11 I've already indicated, why it is important to follow the
12 checklist and to visually check the amount of fuel. Because the
13 fuel gauge can malfunction or have malfunctioned before you check
14 it, that's why it says visually check. So for those reasons, I
15 reject the affirmative defenses as stated.

16 With respect, then, as to sanction, I would simply
17 observe that the economic situation of a particular respondent is
18 not a matter that the Board takes into consideration on sanction.
19 The public interest in aviation safety is the paramount concern.

20 In this case, however, as I have found that the
21 Complainant has failed to establish the violation of Section
22 91.151, I do not believe that deference needs to be shown to the
23 amount of sanction sought in the complaint. And I do agree that
24 despite argument to the contrary, that deference still needs to be
25 shown to the Administrator.

1 However, in this case, since the 120 days was obviously
2 based upon the conclusion by the Complainant that violations had
3 occurred as to all three of the cited sections of the Federal
4 Aviation Regulations, in that I find that only two of those
5 charges, Sections 91.103(a) and 91.13(a) have been established, I
6 feel it is appropriate to modify the period of suspension.

7 And taking into account all of the factors here,
8 particularly that this was an instructional flight, the Respondent
9 holds an ATP, and on his own testimony, he failed to follow the
10 approved checklist, that it would be appropriate to reduce the
11 period of suspension from 120 days to that of 105 days. And with
12 that modification, I will affirm the Order of Suspension, the
13 complaint herein.

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ORDER

IT IS THEREFORE ORDERED THAT:

1. The Complaint, the Order of Suspension, be, and hereby is, modified to provide for a period of suspension of 105 days rather than 120 days.

2. That the Order of Suspension, the Complaint herein, as modified, be, and the same hereby is, affirmed.

3. That the Respondent's airline transport pilot certificate and any other pilot certificate held by him is hereby suspended for a period of 105 days.

Entered this 22nd day of October 2014 at San Diego, California.

PATRICK G. GERAGHTY

Judge

1 APPEAL

2 ADMINISTRATIVE LAW JUDGE GERAGHTY: Counsel, would you
3 come up, please, Mr. Runkel.

4 And the record will reflect that I'm giving Mr. Runkel
5 two copies of a printed form giving the appeal provisions to the
6 parties from an oral initial decision. And I request that you
7 give one copy to Respondent's counsel.

8 And the record will reflect that Mr. Runkel has
9 furnished a copy of that form to Respondent's counsel.

10 Is there anything further for the record from the
11 Complainant?

12 MR. RUNKEL: Yes, Your Honor. Briefly. The
13 Administrator would like to preserve for appeal and move that you
14 reconsider your decision on 91.151. The Administrator --

15 ADMINISTRATIVE LAW JUDGE GERAGHTY: You can appeal that
16 to the Board.

17 MR. RUNKEL: The Administrator asserts that he has
18 provided sufficient notice that under either of the
19 interpretations that we've argued, 91.151(a)(1) was violated in
20 this case.

21 ADMINISTRATIVE LAW JUDGE GERAGHTY: Well, I've already
22 decided it. That's your argument. You have the appeal
23 provisions. The Board will do what it decides. I am not God.
24 That is my view. The Board may or may not agree with me.

25 MR. RUNKEL: Thank you, Your Honor.

1 ADMINISTRATIVE LAW JUDGE GERAGHTY: Okay? Anything else
2 for the record?

3 Nothing further. The proceeding is closed. Thank you.

4 (Whereupon, at 3:30 p.m., the hearing in the above
5 matter was concluded.)

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CERTIFICATE

This is to certify that the attached proceeding before the
NATIONAL TRANSPORTATION SAFETY BOARD

IN THE MATTER OF: Gregory B. Boylan
DOCKET NUMBER: SE-19703
PLACE: San Diego, California
DATE: October 22, 2014

was held according to the record, and that this is the original,
complete, true and accurate transcript which has been compared to
the recording accomplished at the hearing.

Shonna Mowrer
Official Reporter