

UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

In the Matter of:

ERIC W. HERETH

FAA Order No. 95-26

Served: December 19, 1995

Docket No. CP92WP0444

DECISION AND ORDER

Respondent Eric W. Hereth has appealed from the written initial decision of Administrative Law Judge Robert L. Barton, Jr.,¹ holding that Mr. Hereth violated the Federal Aviation Regulations and assessing a \$3,000 civil penalty.² Because a preponderance of reliable, probative, and substantial evidence supports the law judge's decision, it is affirmed.

Mr. Hereth, holder of a private pilot certificate,³ rented a Piper Cherokee Model PA-28-180 airplane from a flying club to fly his family from Gillespie, California to Mariposa, California, for a wedding. On the return trip, just after midnight on July 14, 1991,⁴ the airplane ran out of fuel nine or ten miles short of its

¹ A copy of the law judge's decision is attached.

² Earlier in the proceedings, the law judge dismissed this case on the ground that the complaint was late-filed, and both parties appealed. On appeal, I reversed the law judge's dismissal and remanded the case to him for a decision on the merits. In the Matter of Eric W. Hereth, FAA Order 94-7 (March 10, 1994).

³ Mr. Hereth testified that he has logged over 500 hours of flying time in civil aircraft since the time he was a student pilot. (Tr. 168-69.) In the particular model of aircraft he was flying when the plane crashed, the Piper Cherokee PA-28-180, he had logged only about 7 or 8 hours prior to the incident. (Tr. 170.)

⁴ Because the alleged violations occurred before August 25, 1992, this case involving a pilot is before the FAA Administrator rather than the National Transportation Safety Board. See 49

destination (Tr. 136) and crashed into an unoccupied home in Ramona, California.

The aircraft struck a liquid propane tank, severing the tank's supply line.⁵

Mr. Hereth and one of the passengers suffered minor injuries, but the other passengers were not injured. (Tr. 17.) The airplane was destroyed. (Pre-Hearing Conference of December 2, 1992, at 7.)

The FAA inspectors who examined the aircraft and crash scene found no evidence of fuel leakage or mechanical abnormalities. FAA Inspector John White, a supervisory aviation safety inspector, testified that he was the first FAA inspector on the scene. (Tr. 15.) He met with Mr. Hereth, who said that the airplane had run out of fuel. (Tr. 17.) When Inspector White examined the airplane, he noted no strong aroma of fuel around the area to indicate that there had been any fuel spillage, and found no fuel in either of the fuel tanks. (Tr. 17-18).

Aviation fuel contains dyes that will leave a stain or residue on the skin of the aircraft. (Tr. 34.) The primary purpose of the dye is octane-level identification. (*Id.*) Eighty-octane fuel contains red dye, 100-octane fuel contains green dye, and 100-octane low-lead fuel contains blue dye. (*Id.*) However, the dye also aids in identifying leaks; as the fuel evaporates, the dye remains on the aircraft surface. (*Id.*) Inspector White testified that although investigating at night with limited lighting was difficult (Tr. 17), he saw no evidence of a fuel leak, either on the

U.S.C. § 46301(d)(9), stating that "[t]his subsection [providing for NTSB jurisdiction over cases involving pilots, flight engineers, mechanics, or repairers] applies only to a violation occurring after August 25, 1992."

⁵ Pre-Hearing Conference of December 2, 1992, at 6; Tr. 29.

At the hearing, Mr. Hereth claimed that it was not the aircraft that sheared off the propane tank, but flying debris. (Tr. 162.) It makes little difference. In either event, the crash of the plane Mr. Hereth was operating severed the propane tank's supply line.

airplane itself or on the ground. (Tr. 18.) When he returned the next day, Inspector White was able to observe the crash scene in daylight. (Tr. 19.) He again noted that there were no signs of any fuel leakage. (*Id.*) He saw no stains coming out of the fuel cap or the belly of the airplane. (*Id.*)

FAA Inspector Jeffrey Edwards, an air carrier inspector who was serving as standby accident investigator (Tr. 28), arrived at the scene at 3:30 a.m., several hours after the crash occurred. Inspector Edwards started his investigation by attempting to determine the amount of fuel on board the aircraft. (Tr. 32.) He removed the fuel caps and, using his flashlight, saw only a residual amount of fuel in the tanks. (*Id.*) He then examined the exterior of the aircraft for seeps or stains indicating fuel leakage. (Tr. 33.) He also took off the top panel and looked into the engine area, but saw no apparent mechanical abnormalities; there were no fuel stains and the fuel hoses were secure. (*Id.*) When Inspector Edwards tried to drain the fuel bolt low point drain, no fuel appeared. (Tr. 33.) Inspector Edwards cracked the fuel lines at the engine-driven fuel pump and the primer lines going from the flow divider, but was unable to find fuel at either of these points. (Tr. 33-34.) When asked about the possibility of a leak at the fuel strainer, Inspector Edwards testified, "I did not see any evidence of a leak in the engine cell of that aircraft. There was no evidence of fuel leakage. The lines were secured, the safety wire was in place. At no time did I find any presence of a fuel leak on that aircraft." (Tr. 97.)

Inspector Edwards testified that he removed the engine cover. (Tr. 82.) The strainer was inaccessible through the top compartment, but Inspector Edwards was able to get at the strainer because the cowling had been torn off on the side of the

aircraft in the crash. (Tr. 85-86.) Inspector Edwards testified that the safety wire on the strainer was intact. (Tr. 88.)

According to Inspector Edwards, if the strainer had leaked, green fuel stains would have been visible in the photographs admitted into evidence, but none were. (Tr. 91, 96.) The inspector testified that there would also have been fuel stains on the firewall and the smell of fuel in the cockpit. (Tr. 94.) Inspector Edwards noted that if the fuel strainer were going to leak, it would do so on installation, not 7 hours into a flight. (Tr. 92.)

Inspector Edwards testified that Mr. Hereth brought the PA-28-161 manual to their meeting two days after the accident and told Inspector Edwards that it was the manual he used to plan the flight. (Tr. 36; 59.) The flight manual is essential to proper flight planning; it contains information concerning the aircraft's fuel burn rate and other critical information. (Tr. 49.) According to Inspector Edwards, when he pointed out to Mr. Hereth that the flight manual Mr. Hereth brought with him was for a PA-28-161 aircraft, Mr. Hereth asked, "Well, wasn't I flying a 161?" to which Inspector Edwards replied, "No, you were flying a 180-horsepower engine." (Tr. 68.)⁶ Inspector Edwards testified that a comparison of the flight manuals for the PA-28-161 and the PA-28-180 aircraft shows that the PA-28-161 has a much lower fuel burn rate than the PA-28-180. (Tr. 58.)

About three weeks after the crash, Mr. Hereth called Inspector Edwards. According to the inspector's written record of the telephone call,⁷ Mr. Hereth stated

⁶ Aircraft in the 160-series have a 160-horsepower engine, while aircraft in the 180-series have a 180-horsepower engine. (Tr. 36.)

⁷ CX-J-1.

that fellow members of the flying club had told him that the aircraft was a PA-28-161 aircraft.

When the investigation was complete, the FAA inspectors concluded that the cause of the crash landing was not a fuel leak but Mr. Hereth's violation of several safety regulations. The FAA issued a complaint alleging that Mr. Hereth violated the following regulations:

1. Section 91.103,⁸ which requires pilots to become familiar with all available information concerning a flight, including fuel requirements, before beginning it;
2. Section 91.151(a)(2),⁹ which prohibits beginning a nighttime flight under VFR¹⁰ conditions unless there is enough fuel to fly to the first point of intended landing and, assuming normal cruising speed, to fly after that for at least 45 minutes; and
3. Section 91.13(a), which prohibits operating an aircraft in a careless or reckless manner so as to endanger the life or property of another.¹¹

⁸ Section 91.103(a), 14 C.F.R. § 91.103(a) (1991), provides, in pertinent part, as follows:

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 . . .

(Emphasis added.)

⁹ Section 91.151(a), 14 C.F.R. § 91.151(a) (1991), provides, in pertinent part, as follows:

No person may begin a flight in an airplane under VFR [Visual Flight Rules] 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-- . . .

(2) At night, to fly after that for at least 45 minutes.

¹⁰ Visual Flight Rules.

¹¹ Section 91.13, 14 C.F.R. § 91.13(a) (1991), provides as follows: "No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another."

At the pre-hearing conference¹² and at the hearing, Mr. Hereth disputed that he believed he was flying a PA-28-161 aircraft. Mr. Hereth argued that although he mistakenly brought the wrong manual to his initial meeting with Inspector Edwards, he used the correct manual when planning the ill-fated flight.

(Pre-Hearing Conference at 21-22; Tr. 133-134; 172.) Mr. Hereth claimed he knew he was flying a "180-horsepower equipped Cherokee." (Tr. 171). He contended that he used the manual for the PA-28-181, although he was flying a PA-28-180, and that the PA-28-181 aircraft was essentially the same as the PA-28-180.

After a hearing, the law judge issued a written decision holding that Mr. Hereth violated the three regulations alleged in the complaint, and Mr. Hereth appealed.¹³ Mr. Hereth asserts on appeal, as he did below, that he had enough fuel and that a sudden, rapid leak in the fuel system at the fuel strainer must have caused the fuel exhaustion. (Appeal Brief at 29.) In essence, Mr. Hereth's argument on appeal is that a preponderance of reliable, probative, and substantial evidence does not support the law judge's findings of fact.¹⁴

¹² December 2, 1992.

¹³ Mr. Hereth filed an unauthorized reply to Complainant's Reply Brief. The Rules of Practice provide only for the filing of an appeal brief and a reply brief. 14 C.F.R. § 13.233(d) and (e). A party may not file an additional brief without the Administrator's express permission. The rules state that the Administrator will not grant such permission unless the party shows good cause for allowing additional argument. 14 C.F.R. § 13.233(f). Mr. Hereth has not shown good cause for allowing his additional brief. As a result, his unauthorized brief has not been considered in deciding this appeal.

¹⁴ See 14 C.F.R. § 13.233(b), which provides that a party may appeal only the following issues: (1) whether each finding of fact is supported by a preponderance of reliable, probative, and substantial evidence; (2) whether each conclusion of law is made in accordance with applicable law, precedent, and public policy; and (3) whether the law judge committed any prejudicial errors during the hearing that support the appeal.

Extra-Record Material

Many of the arguments and claims in Mr. Hereth's appeal brief have no foundation in the record.¹⁵ For example, Mr. Hereth claims that "Since Piper 7803N went down in July of 1991, coastal fliers [sic] (the owner of Piper 7803N) has had two other aircraft fall out of the sky with mysterious unexplained fuel problems." (Appeal Brief at 13.) There is no evidence in the record to support this claim.

In addition, Mr. Hereth cites throughout his appeal brief to exhibits attached to a document captioned "Notice of Lodgment." Mr. Hereth submitted his "Notice of Lodgment" to the docket after the law judge issued his initial decision. Although the law judge provided Mr. Hereth ample opportunity during the hearing to introduce evidence,¹⁶ Mr. Hereth failed to introduce the "Notice of Lodgment" or the attached exhibits. Some of the exhibits attached to the Notice of Lodgment duplicate exhibits introduced into evidence by Complainant;¹⁷ however, others have

¹⁵ Complainant argues that the Administrator should not consider Mr. Hereth's appeal brief because it fails to contain specific references to the record. To support this argument, the FAA cites 14 C.F.R. § 13.233(i), which provides that:

[t]he FAA decisionmaker is not required to consider any objection in an appeal brief or any argument in the reply brief if a party's objection is based on evidence contained in the record and the party does not specifically refer to the pertinent evidence from the record in the brief.

The more serious problem, however, is not that Mr. Hereth failed to provide specific citations to evidence in the record. Rather, it is that the evidence on which Mr. Hereth bases many of the arguments in his appeal brief is not in the record at all.

¹⁶ Tr. 138, 150, 152, 157, 160-162.

¹⁷ For example, Exhibit A-3 and Exhibit D attached to Mr. Hereth's "Notice of Lodgment" ("Range v. Density Altitude Chart" and "True Airspeed and RPM v. Density Altitude Chart," both for the PA-28-180) are the same as FAA Exhibit CX-H-1. Likewise, Exhibit C-1 attached to the Notice of Lodgment ("Engine Performance Chart" for the PA-28-161) is the same as FAA Exhibit CX-I-1.

no independent basis in the record. Mr. Hereth has not shown why he could not present these documents at the hearing.

The Rules of Practice, like other rules of procedure, prohibit basing a decision on material outside the record.¹⁸ Exhibits are not part of the record unless the law judge has received them into evidence.¹⁹ Because the law judge never admitted into evidence the exhibits attached to Mr. Hereth's Notice of Lodgment, neither they nor any other extra-record material have formed the basis for this decision.²⁰ Nevertheless, the record has been examined carefully to ensure that a preponderance of reliable, probative, and substantial evidence supports the law judge's decision.

Section 91.103(a)

Section 91.103(a) prohibits pilots in command from beginning a flight without first becoming familiar with all available information concerning that flight, including fuel requirements. The law judge found that Mr. Hereth used the wrong flight manual to plan his flight (Initial Decision at 9) and concluded that Mr. Hereth violated Section 91.103(a). (Initial Decision at 14.)

¹⁸ Section 13.223, 14 C.F.R. § 13.223, provides that "the administrative law judge shall issue an initial decision or shall rule in a party's favor only if the decision or ruling is supported by, and in accordance with, the reliable, probative, and substantial evidence *contained in the record.*" (Emphasis added.)

¹⁹ Section 13.230(a) of the Rules of Practice, 14 C.F.R. § 13.230(a), which is entitled "Exclusive record," provides that "the transcript of all testimony in the hearing, all exhibits *received into evidence*, and all motions, applications, requests, and rulings shall constitute the exclusive record for decision of the proceedings and the basis for issuance of any orders in the proceeding." (Emphasis added.)

²⁰ Insofar as the exhibits attached to the Notice of Lodgment duplicate some of the exhibits received into evidence at the hearing, they have been considered.

The law judge found that Mr. Hereth used the PA-28-161 manual to plan his flight, although he was flying a PA-28-180 airplane. (Initial Decision at 8-9.) The law judge stated:

[O]n two occasions within a month after the accident, Respondent clearly indicated that he had used the 160-series manual in his flight planning. It was nearly 1½ years later, at the December 2, 1992, prehearing conference, that Respondent maintained that he had simply grabbed the wrong flight manual when leaving for the July 16, 1991, meeting with the FAA Inspectors.

The law judge found Mr. Hereth's assertions soon after the accident to be more reliable than his testimony at the hearing. (Initial Decision at 9.)

In his appeal brief, Mr. Hereth contests the law judge's finding regarding which flight manual he used. (Appeal Brief at 2.) According to Mr. Hereth, he simply picked up the wrong manual on the day of his meeting with Inspector Edwards. He claims he used the manual for the PA-28-181 rather than the PA-28-161 manual to plan his flight.

The law judge based his finding of a violation of Section 91.103(a) on a credibility determination. The law judge stated that Mr. Hereth's testimony regarding the manual was not credible. The Administrator accords special deference to a law judge's credibility determinations because the law judge is in the best position to evaluate the demeanor of the witnesses. In the Matter of James Park, FAA Order No. 92-3 at 8 (January 9, 1992). Mr. Hereth has offered no convincing reason to disturb the law judge's credibility determination.

Assuming, however, for the sake of argument, that Mr. Hereth used the PA-28-181 manual to plan his flight as he claims, he still used the wrong manual. (Tr. 133-134; 172.) Regarding why he used a PA-28-181 manual when he was flying a PA-28-180, Mr. Hereth said that the flying club told him that he could use the

same manual for either airplane. (Tr. 133.) He admitted, though, that as pilot-in-command, the ultimate responsibility for the flight was his. (Tr. 179.)

Mr. Hereth claimed that the PA-28-180 and PA-28-181 models are virtually identical except for differences in paint, upholstery, and trim. He further claimed that the PA-28-181 manual was better because it was "far more complete and thorough" than the PA-28-180 manual. (Tr. 133-134.) On cross-examination, however, Mr. Hereth conceded that the PA-28-181 manual did not list the serial number of the particular airplane he was flying²¹ as one of the serial numbers to which the PA-28-181 manual applied. (Tr. 177.) Mr. Hereth also conceded that a comparison of the manuals showed that the two models of aircraft differed in more than just their paint, upholstery, and trim. For example, Mr. Hereth admitted that one model was capable of carrying more weight than the other. (Tr. 177.)

Complainant's cross-examination of Mr. Hereth revealed that the figures in the charts containing fuel burn rates in the PA-28-180 and PA-28-181 manuals are different. (Tr. 178.) In fact, as the following chart illustrates, the fuel burn rates of both the PA-28-161 and the PA-28-181 are lower than that of the PA-28-180:

²¹ Serial number 28-5253. (CX-H-8.)

FUEL BURN RATES, IN GALLONS PER HOUR (GPH)
(Best Economy, or Leanest Mixture)

	<u>PA-28-161²²</u>	<u>PA-28-181²³</u>	<u>PA-28-180²⁴</u>
55% power	6.6 GPH	6.3 GPH	7.2 GPH
65% power	7.5 GPH	7.6 GPH	8.7 GPH
75% power	8.5 GPH	8.8 GPH	10 GPH

Thus, even if Mr. Hereth's claim that he used the PA-28-181 manual to plan his flight is correct, his appeal of the Section 91.103(a) violation would still fail. He still used the wrong manual, and one that contained fuel burn rates lower than those for the aircraft he was operating. A preponderance of the reliable, probative, and substantial evidence supports the law judge's holding that Mr. Hereth violated Section 91.103(a).

Section 91.151(a)(2)

Complainant also alleged that Mr. Hereth violated Section 91.151(a)(2), which required Mr. Hereth to ensure that he had enough fuel to fly for 45 minutes after his first point of intended landing. The law judge found that Mr. Hereth inadequately fueled the plane and held that Mr. Hereth violated Section 91.151(a)(2). According to the law judge, Mr. Hereth's claim that a fuel

²² CX-I-1.

²³ Notice of Lodgment Exhibit C-2. Although the Notice of Lodgment and the attached exhibits are not part of the record (see the discussion beginning on page 7 above concerning extra-record material), the fuel burn rates contained in Exhibit C-2 are included to show that even if Mr. Hereth's extra-record exhibits were in evidence and the law judge had accepted Mr. Hereth's claim that he used the PA-28-181 manual, it would not alter the outcome of this case.

²⁴ CX-H-1.

strainer popped loose in flight, causing the fuel exhaustion, was "simply speculation for which there was no adequate support in the record." (Initial Decision at 15.)

On appeal, Mr. Hereth claims that the facts do not support the law judge's decision. Mr. Hereth testified that he believed that it was not physically possible for the FAA inspectors to have checked the fuel strainer given the positioning of the aircraft at the crash scene. (Tr. 207.)

In addition, Mr. Hereth argues that the FAA inspector "rushed to judgment." Mr. Hereth testified that Inspector Reynolds telephoned him several days after the crash to tell him that he had released the aircraft so that a salvage crew could remove it from the crash scene. During this telephone conversation, according to Mr. Hereth, Inspector Reynolds indicated that he believed that Mr. Hereth had flown from Marysville Airport rather than Mariposa. (Tr. 208-209.) Marysville would have been well out of the aircraft's range. In Mr. Hereth's opinion, Inspector Reynolds had obtained erroneous information, leading him to prejudge the case and fail to carry out a proper investigation. Furthermore, by the time the inspector got the correct information, the salvage crew had removed the aircraft from the crash scene. (Tr. 208.)

Despite Mr. Hereth's claims of error, a preponderance of the reliable, probative, and substantial evidence supports the law judge's holding regarding Section 91.151(a)(2). By his own admission, Mr. Hereth used the wrong flight manual. In planning the amount of fuel he would need, he used a flight manual that contained significantly lower fuel burn rates than those for the aircraft he was flying.²⁵

²⁵ This is true even if one accepts Mr. Hereth's claim that he used the PA-28-181 manual, which the law judge did not credit. See the discussion above at p. 10.

Mr. Hereth failed to provide any evidence to support his claim that a fuel leak, rather than his errors, caused the fuel exhaustion. At the hearing, Mr. Hereth stated that when he looked at the aircraft after workers moved it to the salvage yard, he found a fuel strainer hanging loose. (Tr. 225.) Assuming, for the sake of argument, the truth of this statement,²⁶ there is no assurance that the strainer did not pop loose in transit or that someone did not disengage it after Inspector Edwards' investigation. Moreover, as Complainant points out, even Mr. Hereth did not testify that he saw fuel stains or other evidence of a fuel leak on the aircraft. (Reply Brief at 8.) Mr. Hereth speculated that the avocado trees the aircraft sheared off in the crash landing could have wiped off any fuel stains on the belly of the aircraft. However, this does not explain why there were no fuel stains on other parts of the aircraft such as the firewall and the wings. Inspector Edwards testified that stains on the firewall and the wings would have been present had there been a fuel leak. (Tr. 94, 96.)

Inspector Edwards also testified that if there had been a fuel leak, there would have been a fuel smell in the cockpit. (Tr. 94) At no time did Mr. Hereth indicate that he smelled fuel in the cockpit; nor is there any other evidence in the record of a cockpit fuel smell.

Mr. Hereth brought a fuel strainer to the hearing, (Tr. 154), but it was not from the aircraft at issue and had little probative value. Mr. Hereth testified that all the flights that he flew on the same route before and after the accident required less fuel. However, he admitted on cross-examination that his pre-crash and post-

²⁶ Technically, this statement is not in evidence. Mr. Hereth made the statement during closing argument, after his testimony.

crash flights were not in the same type of aircraft (Tr. 175; 201); rather, they were in aircraft that had lower fuel burn rates than the airplane he was flying at the time of the crash. As agency counsel pointed out on cross-examination, the pre-crash and post-crash flights differed from the flight that crashed in other significant respects affecting fuel consumption as well. For example, the following were different: the number of people on board, the weight of the baggage, the weight of the fuel, and the wind and the temperature at the time of the flights. (Tr. 200-203.)

Mr. Hereth challenged Inspector Edwards' fuel calculations, and it is true that Inspector Edwards' qualifications as an expert are in aircraft maintenance rather than aircraft operations.²⁷ Even without the inspector's calculations, however, strong circumstantial evidence supports the law judge's decision.

Moreover, assuming, for the sake of argument, that Mr. Hereth accurately calculated the amount of fuel he would need for his trip, it is still unclear exactly how much fuel was in the tanks at the beginning of the trip. Mr. Hereth's testimony that the fuel tanks were full appears to be based on nothing more than an assumption. Mr. Hereth stated at the hearing that "the club policy is, always fill the aircraft as -- as you're finished with it, so -- to be courteous to the next pilot and start with full tanks."²⁸ (Tr. 101.) It would be a grave mistake to assume that pilots always follow flying club policies about refilling fuel tanks when their flights are

²⁷ Note that at the close of its case, Complainant did offer to make available to Mr. Hereth an operations inspector qualified to testify as to the proper fuel calculations (Tr. 128), but Mr. Hereth declined Complainant's offer.

Complainant made the operations inspector available to Mr. Hereth, even though the Rules of Practice do not require Complainant to do so. Section 13.227 of the Rules of Practice, 14 C.F.R. § 13.227, provides that a party other than the FAA may not call an FAA employee to testify as an expert or opinion witness.

²⁸ Technically, this statement is not in evidence, as it was made when Mr. Hereth was cross-examining Inspector Edwards, before Mr. Hereth was sworn in.

complete. Notably absent from Mr. Hereth's testimony is any indication that he ensured that the fuel tanks were full by some reliable method before he began his trip--e.g., by "topping off" the fuel tanks. As Inspector Edwards testified, "We have never determined, nor will we ever be able to determine, how many gallons of fuel were actually on that aircraft on the first flight to Mariposa." (Tr. 70, 79.) For this reason, too, the law judge did not err in finding that Mr. Hereth failed to ensure that he had sufficient fuel to reach his destination.

Mr. Hereth presented no testimony other than his own to support his claim that there was a fuel leak and that his fuel calculations were correct. The hearing was an opportunity for Mr. Hereth to call qualified witnesses and to introduce other reliable evidence in support of his claims, but Mr. Hereth failed to do so. Bare claims and speculation do not suffice; parties who hope to prevail need to provide evidence to support their claims.

Complainant established a *prima facie* violation of Section 91.151(a)(2) by introducing evidence to support a reasonable inference that Mr. Hereth failed to ensure that he had sufficient fuel when he began the flight. Once Complainant had done so, it was up to Mr. Hereth to overcome Complainant's *prima facie* case by producing evidence to rebut Complainant's case. As the National Transportation Safety Board (NTSB) stated in a similar case involving a claim by the pilot that a fuel leak rather than fuel mismanagement caused his engine failure:

... We recognize that the FAA's investigation into this incident may not provide all the answers. However, in order to make out a *prima facie* case, the Administrator was only required to present evidence sufficient to support a reasonable inference that the engine failure was due to respondent's fuel mismanagement. In our judgment, the Administrator presented a *prima facie* case of carelessness, which respondent failed to overcome.

Administrator v. Redfern, Order EA-3857, 1993 NTSB LEXIS 63, at *8 (April 6, 1993).²⁹ Similarly, in this case, although some unanswered questions remain,³⁰ Complainant presented a *prima facie* case that Mr. Hereth failed to overcome. As a result, the law judge did not err in holding that a preponderance of the evidence established that Mr. Hereth violated Section 91.151(a)(2).

Section 91.13(a)

Section 91.13(a) prohibits operating an aircraft in a careless or reckless manner and endangering the life or property of another. 14 C.F.R. § 91.13(a). As discussed above, a preponderance of the reliable, probative, and substantial evidence supports the following findings of the law judge:

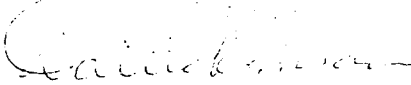
1. that Mr. Hereth used the wrong flight manual to plan his flight;
2. that the flight manual Mr. Hereth used to plan his flight contained lower fuel burn rates than the manual for the aircraft he was operating;
3. that Mr. Hereth failed to ensure he would have sufficient fuel; and
4. that the resulting plane crash caused both injury to those aboard the aircraft and damage to property.

²⁹ See also Administrator v. Tsegaye, NTSB Order EA-4205, Docket SE-13021, 1994 NTSB LEXIS 213, *4, (June 23, 1994), *review denied*, Tsegaye v. NTSB, 51 F.3d 268 (4th Cir. 1995), in which the pilot, as in the instant case, claimed that mechanical failure was the cause of the incident. In Tsegaye, the pilot claimed that the reason he failed to establish radio communication with air traffic control and to obtain a clearance was that his radios failed. The NTSB held that once the FAA made out a *prima facie* case of a violation, the burden then shifted to the pilot. According to the NTSB, the pilot must then show that the FAA's evidence was unreliable or that the violation should be excused for some good reason, but the pilot in Tsegaye had failed to do so.

³⁰ For example, the exact amount of fuel that Section 91.151(a)(2) required Mr. Hereth to have in the PA-28-180 when he began his flight was not established. It is also unclear whether Mr. Hereth properly leaned the fuel mixture. Mr. Hereth testified that he leaned the engine by sound although the proper method is by observing the REM and EGT gauges. (Tr. 203.)

Consequently, the law judge's finding that Mr. Hereth violated Section 91.13 by operating an aircraft carelessly, thereby endangering the life and property of others, is affirmed.

The law judge assessed a \$3,000 civil penalty. That amount is not too high given the circumstances of this case, in which Mr. Hereth's actions damaged property and endangered his own life as well as the lives of others. The law judge's decision is affirmed.³¹


DAVID R. HINSON, ADMINISTRATOR
Federal Aviation Administration

Issued this 19th day of December, 1995.

³¹ Unless Respondent files a petition for review with a Court of Appeals of the United States within 60 days of service of this decision (under 49 U.S.C. § 46110), this decision shall be considered an order assessing civil penalty. See 14 C.F.R. §§ 13.16(b)(4) and 13.233(j)(2) (1995).