ARBITRATION SUMMARY AND AWARD LOG

OCB AWARD NUMBER: 619

OCB GRIEVANCE NUMBER: 15-03-910212-0017-04-01

GRIEVANT NAME: WHEELER, ALLAN

UNION: FOP 1

DEPARTMENT: HIGHWAY PATROL

ARBITRATOR: DROTNING, JOHN

MANAGEMENT ADVOCATE: DEMAREE, CAPT. JOHN

2ND CHAIR: KIRSCHNER, PAUL

UNION ADVOCATE: COX, PAUL

ARBITRATION DATE: MAY 15, 1991

DECISION DATE: JUNE 21, 1991

DECISION: MODIFIED

CONTRACT SECTIONS AND/OR ISSUES: TWO DAY SUSPENSION FOR VIOLATION OF FAA RULES AND STATE OPERATING PROCEDURES (FAILURE TO MAINTAIN MINIMUM FUEL RESERVE). UNION ALSO ARGUED DISPARATE TREATMENT WHEREIN A PRIOR PILOT ONLY RECEIVED A VERBAL REPRIMAND FOR USING UP WHAT IS VIEWED AS UNUSEABLE FUEL.

HOLDING: WHEN WHEELER REFUELED AT OFF-PREMISE SITE, HE ADDED ONLY 20 GALLONS SO THAT HE WOULD ADHERE TO SUPERVISORY DIRECTIVE. WHEN HE LANDED IN COLUMBUS WITH ONLY 3 GALS. REMAINING, THERE WAS NO REAL SAFETY FACTOR INVOLVED EVEN THOUGH IT DID NOT MEET GUIDELINES. THE DEFICIT WAS NOT THAT GREAT AND DID NOT INDICATE NEGLIGENCE OR IRRESPONSIBILITY. SUSPENSION REDUCED TO A VERBAL WARNING AND GRIEVANT MADE WHOLE FOR THE TWO DAYS.

ARB COST: $752.50

#619

IN THE MATTER OF ARBITRATION

BETWEEN

OFFICE OF COLLECTIVE BARGAINING
OHIO STATE HIGHWAY PATROL

AND

FRATERNAL ORDER OF POLICE
UNIT #1

ARBITRATION AWARD

GRIEVANCE: 15-03-910212-0017-04-01
GRIEVANT: A.L. Wheeler
ARBITRATOR: John E. Drotning

I. HEARING

The undersigned Arbitrator conducted a Hearing on May 15, 1991 at the Office of Collective Bargaining, 65 E. State Street, Columbus, Ohio. Appearing for the Union were: Paul Cox, Esq., Renee Englebach, Ed Baker, Charles Linek, and the grievant, Allan Wheeler. Appearing for the Employer were: John Demaree, Anne Arena, Paul Kirschner, Capt. Jim Hedlesten and Sgt. Keith Haney.

The parties were given full opportunity to examine and cross examine witnesses and to submit written documents and evidence supporting their respective positions. No post hearing briefs were filed and the case was closed on 5/15/91. The discussion and award are based solely on the record described above.

II. ISSUE

The parties jointly asked:

> Was the grievant disciplined for "just cause" in accordance with Article 19, Section 19.01 of the Collective Bargaining Agreement between the parties? If no, what shall the remedy be?

III. STIPULATIONS

The parties jointly submitted the exhibits marked Joint Exhibits #1 through #8. They also stipulated to the following:

1. Trooper Ralph Nickels returned to the field (that is airport field) with seven minutes of gas left in his tank and he received a verbal reprimand.

2. Trooper has flown a Cessna 172, #5 recently and got 7.5 gallons per hour.

3. That specific airplane has gotten 8.5 gallons per hour and it flew 811 hours in 1990.

Haney testified that the Cessna 172 in question had long range tanks and the total fuel was 52 US gallons: useable fuel of 48 gallons and unuseable fuel about 4 US gallons.

Haney went on to say that Management Exhibit #3 talks about the fact that poor fuel management causes aircraft accidents and he indicated that unuseable fuel is fuel that cannot safely be used in flight.

Haney testified that there were three gallons of useable fuel when Wheeler landed the aircraft.

Fuel endurance, said Haney, is based on gallons per hour and it averages 9.7 gallons per hour so that it gives 21 minutes; that is 18.5 to 21.0 minutes of flight time were left in that aircraft. He went on to say that while a plane circles, one may use less fuel if one is at a lower power setting, say at 2000 RPM, so the fuel consumption in a airspeed check is less than when cruising.

Haney testified that the average gallon per hour of fuel used in this aircraft over one year was about 8.5. He went on to say that if 9.7 gallons per hour were used, Wheeler would be out of fuel in 18.5 minutes and if 8.5 gallons were used, he would be out in 21 minutes.

Management Exhibit #4, said Haney, is a FAA regulation stating that no person can fly unless there is enough fuel to fly for at least 30 minutes. Management Exhibit #5 is the Aviation Section operating guidelines talking about fuel requirements and it states that it is important that one does not fly with less

than 45 minutes of fuel in a fixed wing aircraft and 30 minutes of fuel in a helicopter.

Management Exhibit #6, said Haney, are pictures of the Cessna 172, #5 which identify the fuel filler cap and picture #2 notes the fuel cap is off and in pictures #3, #4, and #5, the cap is also off. Picture #6, said Haney, shows a ruler in the left wing and #7 identifies a fuel tank, and #8 is the fuel selector switch showing to the left, 24 gallons and to right, 24 gallons and #9 is the instrument panel showing the fuel gauges. He went on to say that normally the fuel selector switch is pushed in a north position, straight up. Haney said there are 24 gallons of useable fuel in each wing for a total of 48 gallons of useable fuel. He also testified that the wings of the Cessna 172 are not level with the horizon.

Haney said that Grievant Wheeler told him he was aware of the FAA regulations.

On recall, Haney testified that he interviewed Wheeler on 12/14/90 in which he asked Wheeler whether the latter was aware that the total useable fuel in the 76 Cessna 172 with long range tanks was 48 gallons and Trooper Wheeler responded by saying Yes.

Captain Jim Hedlesten, Aviation Section Commander, testified that he is a licensed flight instructor for airplanes and helicopters and became a private pilot in 1965.

Hedlesten testified that the Highway Patrol has fourteen aircraft; seven Cessna 182's, four Cessna 172's, one A36 (Bonanza), and two Bell 206 jet ranger helicopters. He noted that the Cessna 182's are a little wider than the 172's and have

230 HP engines whereas the 172's are 160 HP engines and the specific Cessna 172, #5 which is a 1976 Cessna is 150 HP engine.

Hedlesten testified that any pilot is responsible for all aspects of the flight. The pilot can check the fuel in the airplane before taking off, although the mechanics usually fill the fuel tanks. A pilot, however, said Hedlesten, can check the amount of gas by looking in the wing tank openings to see whether they are filled and if not, they can be filled by the pilot.

Hedlesten testified that an airplane which is defined as complex usually is one with an engine over 200 HP and one which has retractable landing gear.

New pilots usually get two months with a seasoned pilot but Hedlesten also said that new pilots normally know all the FAA regulations although they are given an operations manual.

Hedlesten said that he was told of the incident on December 14th by a maintenance supervisor who said that 45 gallons went into the tanks of the Cessna 172. Hedlesten said that he used to say that 40 gallons was the maximum useable fuel and essentially it is a verbal policy between himself and the chief mechanic to discuss the amount of fuel that goes into an airplane after it has been in the air.

Hedlesten said that he wrote Union Exhibit D which went into each pilot's mailbox. He said he wanted off-premise purchases to be limited to 20 gallons under normal circumstances because he was concerned about gas prices.

Hedlesten testified that he talked to Gary Peak of Cessna and he responded that 48 gallons is the maximum useable fuel.

Hedlesten said that he previously disciplined a pilot with a two day suspension for only have one gallon of useable fuel remaining. He pointed out that if there is no fuel in an airplane, it means that there is no place for a good landing and he went on to say that since 1976, there have been no accidents with over 125,000 hours of safe flying time. As a result, he said the State Police has received several awards from the FAA and the Airborne Police Association.

On redirect, Hedlesten said there is new management in the State Police and he noted a new director, a new supervisor, and a new aviation commander.

On recall, Hedlesten said that his conversation with Cessna was after a step 3 hearing in which Wheeler said he had talked to Gary Peak, the Cessna Service Engineer. He went on to say that Peak told him that the Cessna had 48 gallons of useable fuel and he also testified that Peak told him that the tank held 52 gallons for a total amount of fuel. Hedlesten went on to say that he asked Peak if it were possible to put more than 52 gallons of fuel into the airplane and the latter said that if one added fuel to the filler mech it would not increase the amount by a significant factor. He went on to say that the only way one could increase the fuel in the dihedral wings of the Cessna would be to lower the wings to an horizontal position in order to add fuel.

Management cross examined Union witnesses. Trooper Allan Wheeler, on cross, testified that he always walks around an aircraft to visually check the fuel by looking in the fuel tanks. He went on to say he thought there were four mechanics

who normally do the fueling and they top off the tanks. He testified that he saw that the tanks were topped off in the Cessna 172.

Wheeler said he flew 6.7 hours in the air and 4.7 of those hours were checking speeders. He said that between Columbus and Sandusky and back, he flew about 2.7 hours. He said that when he landed in Sandusky, he put 20 gallons of fuel in the plane on the basis of his calculations on the gas and the directive from Captain Hedlesten which notes that it is sensible to limit purchases to a maximum of 20 gallons (see Union Exhibit D).

Wheeler went on to say that he flew the 172, #5 at least 50 times. He noted that the fuel gauges are not too dependable but rather one has to deal with flight hours. He said he had never come in a landing with only three gallons of fuel in the tank.

On cross, Wheeler testified that he could have had the Sandusky Airport add more than 20 gallons.

Wheeler testified that he talked to Gary Peak of Cessna who told him that one could put an additional three gallons in each tank. He went on to say he was aware of the document identified as Management Exhibit #2 which indicated 48 gallons of useable fuel. He also said he was aware of Management Exhibit #5 which is the Aviation Section operating guidelines which talk about flying with less than 45 minutes of fuel for fixed wing aircraft or 30 minutes of fuel during daylight hours.

2. ARGUMENT

Management asserts that the facts indicate that its position is supported and therefore, a two day suspension is appropriate. Management notes that Wheeler was charged with a violation of FAA rules and State operating procedures. The Employer points out that the Union is arguing disparate treatment using a five-year old argument wherein the prior pilot only received a verbal reprimand for using up what is viewed as unuseable fuel.

Management also points out that just prior to this instance, another trooper received a similar violation for using what is viewed as unuseable fuel; four gallons in a Cessna 172.

Management asserted that it did not want injuries as a result of pilots flying airplanes with no gas.

Management claims this is a serious incident and that . Management follows Article 19.05 which talks about progressive discipline. In this case, the two day suspension was commensurate with the offense. Management notes the testimony of both Haney and Hedlesten as well as Wheeler. Wheeler viewed the tank on 12/13 before he took off and it was full and the documents indicate that the tank holds 52 gallons and the useable fuel is 48. Thus, when the mechanic filled it with 45 gallons, there were only 3 gallons left for flying for about 20 minutes and the Highway Patrol requires the pilot to have at least 45 minutes of available fuel.

The Management also pointed out that Hedlesten's discussion with Cessna indicated that the only way they could increase the total fuel in the long range tank would be to drop the wings.

The Employer goes on to say that Officer Wheeler averaged 9.7 gallons an hour in his flight on the 13th and Wheeler was aware of the limits. Thus, the rules of the Aviation Division were violated and, therefore, the discipline is commensurate with the offense. The Union failed in its burden and, therefore, just cause is supported and it cites the seven elements developed by Arbitrator Koven.

B. UNION

1. TESTIMONY AND EVIDENCE

Trooper Allan L. Wheeler testified that he had been with the State Highway Patrol for 11 years and had been with the Aviation Section for about one year and four months. He said that in pre-flight, he checked the aircraft and checked the fuel level and saw that both tanks were filled and it was right up to the filler neck. He testified he flew 6.7 hours on the day in question.

Wheeler testified that he was assigned to work the Turnpike and he flew to post 90, south of Sandusky and worked with the Turnpike units for 4.7 hours and then stopped at the Sandusky Airport and got 20 gallons and he indicated that he thought that was sufficient fuel as noted under the inter-office communication (Union Exhibit D).

Wheeler testified that Union Exhibit C, the cruise performance for the Cessna 172, came from the owner's manual for the airplane he used that day. He testified he flew at about 3500 to 4000 feet at 2500 RPM and he noted that the airplane redlines at 2600 RPM. He said that during the speed check, he operated the airplane at somewhere between 1900 and 2000 RPM and at an altitude of 3500 to 4000 feet and the use rate of fuel was 6.3 gallons per hour or less. He testified that when he landed at Sandusky, he could not tell how much fuel was in the tank without filling it right up to the top. He said he had no idea that he was using 9.7 gallons per hour prior to landing in Sandusky and therefore, he added 20 gallons as noted in the requirement from Captain Hedlesten (Union Exhibit D).

Wheeler said that he was in the air 6.7 hours and 4.7 of those hours were checking speeders and he calculated it was roughly a two hour flight from Columbus to Sandusky and Sandusky back to Columbus.

Wheeler testified that he called Cessna and asked them about whether or not he could put in more than 45 gallons of fuel in his tank and they said up to 48 gallons. He said that Peak told him that if he filled to the bottom of the filler neck, it would be 48 gallons and if he went to the top of the filler neck, it would be 54 gallons.

Wheeler testified that he clearly did not plan to jeopardize his life by flying with low fuel. He said that he would have to be nuts to do that.

The Union cross examined Management witnesses. Sgt. Haney testified on cross that Wheeler told him that the tanks were full when he left the Don Scott field in Columbus. He testified he flew 2.8 hours before gassing up in Sandusky and that was followed by flying for 3.9 hours for a total of 6.7 hours.

Haney testified that as far as he knew Wheeler was doing airspeed checks.

Haney was asked whether the meters on the tank trucks which fill the airplanes were calibrated correctly and he said that they were and he always uses an instrument to measure the gallons in an airplane. He said he measured the gallons in this particular airplane about a week after interviewing Trooper Wheeler.

Management Exhibit #6, noted Haney, specifically picture #9, show the tanks almost empty and he said the instruments are not accurate. He testified that fuel gauges in the airplane are not the sole instruments to identify fuel.

Haney went on to say that different RPM rates affect fuel. He testified that 2400 or 2500 is a red line for that airplane and if a pilot was flying at 2000 RPM, he would use less fuel than if flying at a higher RPM. He testified that there are no instruments which show variation in the RPM. He went on to say that higher temperature and warmer air means higher fuel rate and that if one flies at a very high altitude in cooler conditions, a lower fuel rate. He also testified that of course wind has an impact on the fuel use.

Haney testified that Union Exhibit B is the endurance profile for Cessna's model 172. Haney testified, for example, that at an altitude of 8000 feet at 75% power, one would have maybe 5.25 hours of fuel and that at 8000 feet at 45% power, one would have 7.25 hours of fuel before one has only 45 minutes of fuel remaining. Union Exhibit C is the cruise performance and Union Exhibit D is the interoffice communication.

Haney said that he assumed that Wheeler used 65 gallons of fuel in flying the airplane.

Captain Jim Hedlesten said on cross that Trooper Nickels returned to Don Scott field with seven minutes of fuel remaining. He said he was not sure of whether that was the case or not.

2. ARGUMENT

The Union asserts that the issue of discipline in this case has not been proven by the Employer. Progressive discipline involves a verbal reprimand, written reprimand, suspension, and then demotion and/or removal. The Employer did not follow progressive discipline, argues the Union.

Management has the burden, asserts the Union, and it has not proven that the pilot violated the Collective Bargaining Agreement. The Union notes that in a prior situation, Trooper Nickels was much closer to the edge in that he had only 7 minutes of fuel left and, therefore, he received a two day suspension, but in this particular case, Wheeler had 20 or 21 minutes of fuel

remaining and therefore there is no basis for a two day suspension.

The purpose of discipline is to correct behavior and thus, in this case, the Employer's argument fails because it did not try to correct the grievant's behavior.

The Union argues that none of the rules were violated and it cites Management Exhibits #2, #3 and #5. The Union points that Wheeler was not operating an inefficient airplane. Secondly, it notes that he did not begin a flight with only enough fuel to fly for thirty minutes.

The Union argues there was disparate treatment in this case in that Trooper Nichels was treated differently and as a result of new management, Trooper Wheeler was inappropriately penalized.

Pilot Wheeler calculated his fuel useage based on his manual (see Union Exhibit B) at 48 gallons of useable fuel, notes the Union, and Union Exhibits B & C indicate Wheeler used 9 gal/hour and 6.3 gal/hours. The Union goes on to say that from Columbus to Sandusky and to Columbus, Wheeler used 15.8 gallons of fuel. If he cruised at 2000 RPM, he would use 6.3 gallons per hour.

Wheeler did nothing wrong, asserts the Union, and was not negligent but was disciplined for returning with three useable gallons.

Management must prove he had only twenty minutes of flying time at three gallons. Management must prove he was short nine minutes under FAA rules.

Management has not met its burden and the discipline is inappropriate. Therefore, the Union asks for back pay.

V. DISCUSSION AND AWARD

Did Trooper Wheeler fail to maintain the minimum fuel reserve as required and if so, is the two day suspension justified? Article 19.01 of the Collective Bargaining Agreement states:

> No bargaining unit member shall be reduced in pay or position, suspended, or removed except for just cause.

On December 13, 1990, Trooper Wheeler flew the Cessna 172, #5 airplane to Sandusky, performed 4.7 hours of speed checks, and returned to Columbus for a total flying time of 6.7 hours. The plane contained 48 gallons of useable fuel upon take-off and was refueled around noon at Sandusky with 20 gallons. When a mechanic filled the plane upon its return, 45 gallons were needed. The Employer claims Wheeler landed the airplane with only 3 gallons of useable fuel remaining which violated FAA and the Highway Patrol's Aviation Section rules and regulations.

The FAA requirement is that a plane flying during the day should contain fuel to reach the intended landing plus reserve fuel "to fly after that for at least 30 minutes" (see Management Exhibit #4). The Aviation Section (see Management Exhibit #5) requires:

> 1. Fuel remaining
>
> Fuel stops shall be planned to prevent flying with less than 45 minutes of fuel remaining for fixed-wing aircraft and 30 minutes of fuel remaining for helicopters.

Three remaining gallons, no matter what gallon per hour usage figure, is not sufficient to fly for 45 minutes and falls short of the FAA 30 minute requirement. Management calculates three gallons of fuel equates to between 18.5 to 21.0 minutes of flying time. Flying time of 6.7 hours consumed 65 gallons of fuel which meant that 9.7 gallons per hour was the usage rate on December 13th and three gallons would mean about 18.5 minutes of flying time. The 1990 average usage rate for the 811 hours flown was 8.5 gallons per hour and that would mean 21 minutes for three gallons.

Did the Employer have just cause to discipline Wheeler for returning to Columbus with only three gallons of useable fuel remaining?

Wheeler testified that he put 20 gallons of fuel in the airplane at Sandusky and that he "thought" he had enough fuel presumably to continue doing speed checks and return to Columbus. He acknowledged that he could not tell how much was in the tanks, but he clearly thought there was sufficient fuel to return to Columbus as he testified that he would have to be "nuts" to fly with low fuel. At the same time, he agreed that he, as the pilot, is responsible for his own fuel reserve and obviously it was short if he had only 18 to 21 minutes of fuel remaining.

The best evidence is that when he filled the tank with 20 gallons at Sandusky, he was adhering to Captain Hedlesten's memo (see Union Exhibit D) to save fuel costs and Wheeler calculated there was sufficient fuel as required by FAA regulation to

continue speed checks and to fly back to Columbus with the required reserves left in the tank.

At Sandusky, he could have topped off both wing tanks, but such an effort is inconsistent with Management's memo. While, there is nothing in the memo which prohibited Wheeler from adding more than 20 gallons if needed, it is also apparent that Wheeler had no doubts that ten gallons per tank would do the trick and he attempted to meet his boss's requirements to save money for the State.

The fuel usage rate of 9.7 gallons per hour was calculated after the fact and Wheeler stated that he did not know he was using fuel at that rate. The testimony indicates that fuel consumption is determined by a number of variables and that there is no dependable indicator or gauge. Apparently, Wheeler did performance checks during flying and since the plane is flown differently for this test than normal flying conditions, the usage rate of 6.3 gallons per hour did not provide Wheeler any indication of the actual fuel use rate. All in all, there seems to be no way that his actual fuel use rate of 9.7 gallons per hour could have been accurately determined but an estimated usage rate is based on the pilot's experience. That Wheeler returned to Columbus with three gallons remaining may not have been a perfect assessment of all conditions, but there were a minimum of 18.5 to 21.0 minutes remaining and there are some considerations indicating this could be stretched to a greater time if necessary. In any event, while perhaps not a perfect assessment of fuel requirements, there was no indication that Wheeler's estimate was not based on sound professional experience.

Furthermore, the directive to save costs by trying to limit refueling at off-premise sites to 20 gallons obviously influenced the amount of fuel Wheeler put in the plane at Sandusky. Wheeler had never landed a plane with only three gallons of remaining fuel. Moreover, there was no real safety factor involved.

The facts indicate that the remaining fuel did not meet the guidelines, but that the deficit was not great and did not indicate negligence or irresponsibility. Given Union Exhibit D, Wheeler cannot be held totally at fault. It is concluded that the three remaining gallons was not as serious an infraction on the part of Wheeler as argued by Management. The two day suspension is excessive. Article 19.05 dealing with progressive discipline supports a verbal warning as a useful and rational penalty. He shall be made whole for the two day suspension.

John E. Drotning
Arbitrator

Cuyahoga County, Ohio
June 21, 1991