

SERVED: November 2, 2001

NTSB Order No EA-4925

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 2nd day of November, 2001

_____)	
)	
In the matter of)	
)	
DAVID ANTONIO MARTINEZ,)	Docket NA-39
)	
Appellant.)	
)	
_____)	

OPINION AND ORDER

On September 24, 2001, Administrative Law Judge William E. Fowler, Jr., served an order that declined to accept appellant's appeal from an emergency order of the Administrator revoking his mechanic certificate.¹ Because we find, as discussed below, no error in the law judge's determination that the appeal was untimely under the Board's Rules of Practice, appellant's request that we reverse the law judge's decision will be denied.²

The law judge's ruling fully recounts all of the relevant

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

²The Administrator has filed a reply opposing the appeal.

facts. Appellant's counsel certified the 29th of August, 2001, as the date he had mailed, and faxed, an appeal to the Board from the Administrator's order.³ In fact, the appeal appears to have simply been placed at an office location⁴ where Postal Service personnel would eventually collect it on the following day, Thursday, the 30th.⁵ Before such a pickup occurred, however, counsel's legal assistant, according to her affidavit, removed the mail, for both the Board and the Administrator's counsel, from the bin, so that she could take it with her to Atlanta, where she was traveling for personal reasons later that day, and mail it from that location. The appeal had to be filed by Friday, August 31st, to be timely. She claims to have deposited the appeal in a mailbox in Atlanta on the 31st.⁶ The appeal to the Board and the copy sent to the Administrator bear a Tuesday,

³The certification also specifies service by mail on counsel for the Administrator in Atlanta, Georgia, on the 29th.

⁴Although counsel for appellant characterizes this location as having a "U.S. Mail bin," it appears to have been no more than an open container for outgoing mail, not a locked U.S. Postal Service box from which mail, once deposited, cannot be retrieved.

⁵The appeal was put in the bin "after the mail had already been picked up for the day." See the unsworn "Affidavit" of Allison B. Price, a legal assistant employed by appellant's counsel.

⁶For reasons that are not given in her affidavit, the mail was apparently not deposited until *after* the last pickup time on the next day, the 31st. This fact is curious, given the legal assistant's assertion that she removed the mail from the office bin in Ft. Lauderdale, Florida, on the 30th, so that she could speed its delivery to counsel for the Administrator in Atlanta. In any event, since the mail was not deposited before the last collection on Friday, the 31st (the deadline for timely filing of the appeal) and September 3rd was a Federal holiday, the earliest the appeal could be postmarked was Tuesday, the 4th of September.

September 4th postmark.

The foregoing facts came to light because the law judge, in a telephone conference, questioned counsel for appellant as to why the appeal was postmarked six days after the date on the certificate of service.⁷ The law judge subsequently found, in his written order, that since the explanation provided by appellant's counsel established that the certificate of service was not accurate, the date of the postmark on the envelope containing the appeal was controlling on the issue of whether the appeal had been filed on time, under Rule 7(a) of the Board's rules, 49 C.F.R. 821.7(a). As a result, the appeal, late by four days, was not accepted. We agree with the law judge's assessment.

Although the appellant does not argue that the law judge misread Rule 7(a), he suggests that, notwithstanding the evidence that the appeal was taken out of the bin on the 30th and carried to Atlanta for mailing there, the law judge misapplied the rule by finding the August 29th certificate of service to be inaccurate. We find no merit in appellant's position.⁸ Even if

⁷Counsel for the Administrator had called the law judge on September 5th, after receiving a copy of the appeal, to find out whether the Board had received the original. Contrary to the August 29th certificate of service, neither counsel nor the Board had received a facsimile copy of the appeal, a circumstance counsel for appellant on appeal here has attributed to possible malfunction of his fax machine. The assertion of counsel for the appellant that counsel for the Administrator acted improperly by contacting the law judge is frivolous. Counsel for any party is free to contact the Board for information on the status of a matter. See Section 821.60.

⁸Much of appellant's brief is filled with extraneous

we were to assume, for purposes of argument, that placing the appeal in the law office mail bin on the 29th, to be picked up the next day, amounted to a mailing that constituted a filing of the appeal on the 29th, the removal of the envelopes the next day, before they were actually collected by the Postal Service, for redeposit at a later time, invalidated the certificate for the earlier date.⁹ A new certificate of service reflecting the correct date that the appeal would be placed in the custody and control of the U.S. Postal Service should have been prepared.¹⁰ In the absence of a certificate forthrightly so indicating, the law judge properly determined that the postmark must be used as the filing date.

We also agree with the law judge that good cause for the tardy filing was not established. The issue is not, as counsel for appellant suggests, whether he was so busy with other legal work that his failure effectively to monitor the activities of

(..continued)

argumentation concerning the timeliness of the Administrator's substantive charges. We have no occasion here to address such arguments.

⁹Moreover, we think the certificate would be inaccurate if counsel knew when he placed the appeal in the office bin that the Postal Service would not take possession of the mail until the next day.

¹⁰The certificates of service attached to appellant's appeal brief and a supplemental brief filed a week later show additional evidence of a lack of concern by counsel and his legal assistant for the accuracy of certifications for their mailings. Both recite service on the 28th of July, 2000. These obvious errors are all the more remarkable, and disturbing, because they are appended to documents seeking to have us overturn the law judge's refusal to accept the certificate of service accompanying appellant's appeal as dispositive on the issue of the timeliness of the filing.

his legal staff should be excused.¹¹ Appellant's counsel is plainly responsible for the actions or omissions of his employees. Rather, the issue, assuming the truth of the assertion that the appeal was put in the mail on the 31st,¹² is simply whether legal justification exists to excuse the failure to ensure that a certificate of service attesting to that date accompanied the appeal filed on appellant's behalf. On that point, we have no hesitancy in holding that such justification is not supplied by the possibility that the legal assistant may have lacked the knowledge or training either to avoid invalidating the first certificate of service or to create a correctly dated replacement for it.

ACCORDINGLY, IT IS ORDERED THAT:

1. The appeal is denied; and
2. The law judge's September 24, 2001 order is affirmed.

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

¹¹Indeed, given counsel's insistence that the certificate of service for the appeal should not be considered inaccurate despite the circumstances set forth in his assistant's affidavit, it is far from clear to us that counsel would have instructed her to handle the matter any differently, if she had bothered to ask him whether taking the appeal to Atlanta for mailing was appropriate.

¹²In the context of having participated in filing what could reasonably be termed a fraudulent certificate of service, the verity of the legal assistant's assertion that the appeal was deposited in a mailbox on the 31st, as opposed to on Saturday, the 1st or Sunday, the 2nd, when she was still in Atlanta, is open to question.