

SERVED: February 20, 2009

NTSB Order No. EA-5431

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Issued under delegated authority (49 C.F.R. 800.24)
on the 20th day of February, 2009

| | | |
|----------------------------------|---|-----------------|
| LYNNE A. OSMUS, |) | |
| Acting Administrator, |) | |
| Federal Aviation Administration, |) | |
| |) | |
| Complainant, |) | |
| |) | Docket SE-18338 |
| v. |) | |
| |) | |
| TIMOTHY E. McCABE, |) | |
| |) | |
| Respondent. |) | |
| |) | |

ORDER DISMISSING APPEAL

On January 8, 2009, after the deadline, respondent, through counsel, filed his appeal brief, along with a motion to accept late-filed appeal brief.¹ Respondent's motion to accept a late-filed brief, to which the Administrator did not respond, is denied.

The record establishes that respondent filed a timely notice of appeal from the law judge's November 13, 2008 oral initial decision. However, we find that respondent has not provided good cause for his failure to perfect his appeal by filing the appeal

¹ Respondent's appeal brief was due no later than January 2, 2009.

brief by the deadline.² Safety Board precedent is clear that a party must establish that good cause existed for his or her inability to meet the deadline in 49 C.F.R. § 821.48(a). See, e.g., Administrator v. Hooper, 6 NTSB 559 (1988).

Respondent asserts that good cause exists for his failure to file an appeal brief before the deadline. In particular, he contends that he was confused as to the due date of the appeal brief, citing the Board's Rules of Practice in Air Safety Proceedings, specifically 49 C.F.R. § 821.48(a), and suggesting that this rule provides "alternative" dates for when the appeal brief is to be served. The rule states, in pertinent part, that "each appeal must be perfected, within 50 days after the date on which the oral initial decision was rendered, or 30 days after the date on which the written initial decision ... was served." Title 49 C.F.R. § 821.42, however, explains, in pertinent part, that the law judge "may render his or her initial decision orally at the close of the hearing, or in writing at a later date." As one can see, the law judge provides either an oral decision at the close of the hearing, or the law judge provides a written decision at a later date. The fact that an oral initial decision is reduced to written form for purposes of the transcript of the proceedings does not transform that decision into a written initial decision. When the law judge orally renders an initial decision at the close of a hearing, he has rendered an oral initial decision as provided in the Board's rules, and an appeal brief is then due 50 days from the rendering of that decision. Only if the law judge does not orally render a decision at the close of the hearing do the provisions regarding a written initial decision come into play. Furthermore, parties are responsible for knowing our Rules of Practice.³

² 821.48(a) **Briefs and oral argument.**

(a) Appeal brief ... each appeal must be perfected, within 50 days after the date on which the oral initial decision was rendered, or 30 days after the date on which the written initial decision or appealable order was served, by the filing, and simultaneous service on the other parties, of a brief in support of the appeal. An appeal may be dismissed by the Board, either on its own initiative or on motion of another party, where a party who has filed a notice of appeal fails to perfect the appeal by filing a timely appeal brief.

³ See, e.g., Administrator v. Hamilton, NTSB Order No. EA-3496 (1992) (counsel expected to know and abide by deadlines); and Administrator v. Sanderson, 6 NTSB 748, 749 (1988) (lack of counsel does not excuse failure to follow rules).

Respondent's counsel also mentions that his "efforts to communicate with colleagues and client have been frustrated" by the "interven[tion]" of "three significant national holidays." Respondent's counsel further asserts that he "does not know if the accompanying brief is late," but he had, in fact, been previously informed by the staff of the Office of General Counsel that the brief was already late. None of respondent's arguments constitute good cause.

Finally, on January 13, 2009, respondent submitted a motion to amend his appeal brief in order to correct several citations.⁴ We deny the motion to amend as moot.

In the absence of a demonstration of good cause to excuse respondent's failure either to file a timely appeal brief or to submit a timely extension request for filing the brief after the deadline, Board regulations and precedent require the dismissal of respondent's appeal.

ACCORDINGLY, IT IS ORDERED THAT:

Respondent's appeal is dismissed.

Gary L. Halbert
General Counsel

⁴ The Administrator has not responded to this motion.