

SERVED: June 17, 1994

NTSB Order No. EA-4186

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 26th day of May, 1994

---

|                                  |   |              |
|----------------------------------|---|--------------|
| DAVID R. HINSON,                 | ) |              |
| Administrator,                   | ) |              |
| Federal Aviation Administration, | ) |              |
|                                  | ) |              |
| Complainant,                     | ) |              |
|                                  | ) | Docket CD-24 |
| v.                               | ) |              |
|                                  | ) |              |
| JOHN FRANCIS ROURKE,             | ) |              |
|                                  | ) |              |
| Respondent.                      | ) |              |
|                                  | ) |              |

---

**OPINION AND ORDER**

The respondent has appealed from an order issued by Chief Administrative Law Judge William E. Fowler, Jr., on December 28, 1992.<sup>1</sup> In that order, the law judge ruled that the Board lacks jurisdiction to review respondent's claims concerning the Administrator's refusal to rescind a 1986 order revoking respondent's airman certificates. For the reasons set forth below, we find that respondent's "Petition for Review" is an appeal under Section 609 of the Federal Aviation Act of 1958, 49

---

<sup>1</sup>A copy of the law judge's order is attached.

U.S.C. App. § 1429 ("Act"), and that his appeal must be dismissed as untimely.<sup>2</sup>

On January 22, 1986, the Administrator issued a Notice of Proposed Certificate Action, advising respondent that the Administrator intended to revoke his airline transport pilot and mechanic certificates because of respondent's conviction relating to a conspiracy to distribute marijuana.<sup>3</sup> The Notice was sent to the address contained in respondent's official airman records. The Notice was returned to the Administrator marked "unclaimed." See Attachment 3, Administrator's Reply Brief.<sup>4</sup>

On March 14, 1986, the Administrator received a letter from the attorney who had represented respondent in the criminal proceeding. The attorney indicated that he had received a copy of the Notice.<sup>5</sup> The attorney advised the Administrator's counsel that, in exchange for respondent's guilty plea, an Assistant United States Attorney (AUSA) had agreed to neither initiate nor

---

<sup>2</sup>The Administrator has filed a brief in reply. Respondent has also requested the opportunity to file an additional brief, claiming that the Administrator's reply brief contains misstatements of fact and law. Respondent's request is denied. The documents contained in the Board's file are sufficient to establish the facts necessary for a disposition of this case pursuant to our interpretation of Board precedent.

<sup>3</sup>In an excerpt of the hearing transcript containing respondent's guilty plea in Federal Court, attached as Appendix F to the "Petition for Review," respondent admits that he transported his co-conspirators and worked as a mechanic on aircraft used to distribute and import marijuana.

<sup>4</sup>At the time the Notice was issued respondent was incarcerated in a federal prison.

<sup>5</sup>Nothing in the record explains how the attorney received a copy of the Notice.

urge the Administrator to initiate revocation proceedings against respondent's airman certificates. An excerpt from the transcript of the criminal proceedings attached to respondent's Petition as Appendix A indicates that the AUSA said that "the government has agreed not to take any action with respect to Mr. Rourke's pilot's license."

On May 13, 1986, the same attorney wrote a letter to respondent advising him that he had received no response from the Federal Aviation Administration (FAA). On June 5, 1986, the Administrator's counsel advised the attorney that the FAA refused to be bound by a promise made by an AUSA, because the FAA was not a party to that agreement. On July 18, 1986, the Administrator issued an order revoking respondent's airman certificates.<sup>6</sup> The order was again sent to respondent's address of record.

On September 4, 1986, the Administrator sent, by regular mail, another copy of the order, this time correctly addressed to respondent at the Federal Correctional Facility in Anthony, New Mexico. See Attachment 5, Administrator's reply brief. In a cover letter, the Administrator's counsel explained that the original revocation order had been returned by the U.S. Postal Service marked "Addressee Unknown," and that the effective date

---

<sup>6</sup>The order alleged violations of §§ 61.15(c) and 65.12(c) of the Federal Aviation Regulations (FAR), 14 C.F.R. Parts 61 and 65, which provide for the revocation of an airman certificate and a mechanic certificate, respectively, for convictions relating to the possession, transportation, or importation of drugs. Contrary to respondent's claims, these regulations were promulgated prior to the acts which resulted in his conviction, see Administrator v. Rahm, 2 NTSB 988 (1974), aff'd Civil No. 74-1959 (CADC, filed September 19, 1975).

of the order had been extended to September 29, 1986. The Administrator asserts in his reply brief that, contrary to respondent's claim, an explanation of respondent's appeal rights was enclosed with the order. The order was not returned to the Administrator.

On November 20, 1986, respondent wrote to the FAA<sup>7</sup> and asked that the revocation order be withdrawn because of the agreement with the AUSA. See Attachment 3, Administrator's Motion to Dismiss. On May 8, 1992, respondent again wrote to the FAA and asked that the revocation order be "rescinded." On June 10, 1992, FAA counsel replied that respondent's time for appeal had long passed. It is from this reply that respondent has appealed to the Board, claiming that the letter is in effect a denial by the Administrator and that the Board has jurisdiction to consider his claim under Section 602 of the Act. Section 602 provides, in pertinent part:

(b)(1) Any person may file with the Administrator an application for an airman certificate. If the Administrator finds, after investigation, that such person possesses proper qualifications for, and is physically able to perform duties pertaining to, the position for which the airman certificate is sought, he shall issue such certificate....[A]ny person whose application for the issuance or renewal of an airman certificate is denied may file with the Board a petition for review of the Administrator's action.

Section 602 cannot provide respondent a remedy. The statute's language is clear that the Board may only review

---

<sup>7</sup>Respondent did not appeal the revocation order to the Board.

denials of applications for certificates under Section 602, and there is no evidence that respondent has applied for re-issuance of his certificates. We agree with the Administrator that respondent's only remedy was the filing of a timely appeal to the Board under Section 609 of the Act, which specifically empowers us to review those orders of the Administrator that amend, modify, suspend, or revoke an airman certificate. Rule 30 of the Board's Rules of Practice, 49 C.F.R. Part 831, provides an airman 20 days to appeal an order of the Administrator. Clearly, respondent failed to appeal the revocation order in a timely fashion. Thus, the issue before us is whether the untimeliness of his current claim, which we view as an appeal under Section 609 of the Act, may be excused for good cause. Administrator v. Hooper, NTSB Order No. EA-2781 (1988).

In Administrator v. Dunn, NTSB Order No. EA-4126 (March 30, 1994), we were recently presented with a somewhat similar situation, in which an airman, upon applying to the FAA for reissuance of an airman certificate with a new address in 1990, claimed that he only then learned that his certificate had been revoked in 1978.<sup>8</sup> We ruled in Dunn that the question concerning the timeliness of his appeal under Section 609 rests upon a determination of the adequacy of service of the original order.

As a matter of general law, service may be actual or constructive. Administrator v. Hayes, 1 NTSB 1694 (1972), recon.

---

<sup>8</sup>Dunn's certificate was also revoked under FAR section 61.15 because of a drug conviction involving the use of an aircraft.

denied 1 NTSB 1693. In Administrator v. Hamilton, 6 NTSB 394, 396 (1988), we found that the Administrator's mailing of a notice by certified mail (returned unclaimed) or through regular mail, not returned to sender, may be construed as constructive service, depending on the circumstances as to why the airman did not receive the notice or order. In the instant case, with regard to the Notice, respondent failed to inform the FAA of his change of address. It is the airman's responsibility to keep the Administrator apprised of his current address. Administrator v. Thibodeaux, NTSB Order No. EA-4144 (1994).<sup>9</sup> Having failed to do so, an airman will not be heard to complain that he never received proper service.

As to the adequacy of service of the order of revocation, we think that the evidence that a copy of it was sent to respondent by regular mail, at his correct address, and never returned to the Administrator, is supportive of a finding that at least constructive service was effected. Accord Administrator v. Dunn, NTSB Order No. EA-4126 at 6 (Evidence that certified mail sent to correct address of record was not returned is sufficient to establish adequate service of notice and order). In any event, notwithstanding respondent's claims to the contrary, the fact that he wrote to the Administrator in November 1986, contending that the order should be rescinded is, we think, evidence that

---

<sup>9</sup>Under FAR § 65.21, a certificate holder is required to notify in writing the Airman Certification Branch of the FAA in Oklahoma City within 30 days after any change in his or her permanent mailing address.

actual service of the order was made. Absent any explanation as to why respondent could not file an appeal to the Board at that time, good cause for the delay has not been established, and respondent's appeal must be dismissed as untimely filed.

**ACCORDINGLY, IT IS ORDERED THAT:**

Respondent's appeal of the 1986 revocation order is dismissed, and these proceedings are terminated.

VOGT, Chairman, HALL, Vice Chairman, LAUBER and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.