

SERVED: March 21, 2007

NTSB Order No. EA-5274

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 16<sup>th</sup> day of March, 2007

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|----------------------------------|--------------|---|-----------------|
| <hr/>                            |              | ) |                 |
| MARION C. BLAKEY,                |              | ) |                 |
| Administrator,                   |              | ) |                 |
| Federal Aviation Administration, |              | ) |                 |
|                                  |              | ) |                 |
|                                  | Complainant, | ) |                 |
|                                  |              | ) | Docket SE-17619 |
| v.                               |              | ) |                 |
|                                  |              | ) |                 |
| MICHELE S. LAVIGNA,              |              | ) |                 |
|                                  |              | ) |                 |
|                                  | Respondent.  | ) |                 |
|                                  |              | ) |                 |
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**OPINION AND ORDER**

Respondent appeals the written decision of Chief Administrative Law Judge William E. Fowler, Jr., served in this proceeding on February 6, 2006.<sup>1</sup> By that decision, the law judge granted the Administrator's motion to dismiss respondent's appeal of the Administrator's order of suspension as untimely filed.<sup>2</sup>

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

<sup>2</sup> The Administrator's order sought a 90-day suspension of respondent's airline transport pilot certificate for allegedly violating section 91.13(a) of the Federal Aviation Regulations, when, as president and chief pilot for Regional Air Charters,

We remand this case for further proceedings consistent with this opinion and order.

The Administrator mailed her order of suspension to respondent by certified mail on November 22, 2005. The Postal Service returned the certified mail to the Administrator as "unclaimed" on December 10, 2005. On December 15, 2005, respondent, through counsel, filed a notice of appeal of the Administrator's order.<sup>3</sup> The notice of appeal claimed that the Administrator did not serve her order upon respondent. In a supporting affidavit, respondent claimed:

During the period from November 29, 2005 through December 5, 2005, I was out of the State of Florida on business. Upon return, on or about December 7, 2005, I went to my mailbox, which is locate[d] one mile away from my home, and found the attached notice of attempted delivery of Certified Mail from the Post Office. The notice does not specify the name of sender and I had no knowledge that it was from the Federal Aviation Administration.<sup>4</sup> On December 10, 2005, the first opportunity that I had, I proceeded to the Post Office to retrieve the mail and was

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(..continued)

Inc., she operated a Cessna 310 on a revenue passenger flight with a pilot who was not qualified under Part 135 to conduct the flight.

<sup>3</sup> Respondent served her notice of appeal upon the Board's Office of Administrative Law Judges via overnight mail, and the office received it on December 16, 2005. Respondent served a copy upon the Administrator by regular mail that she sent on December 15, 2005.

<sup>4</sup> Attached to respondent's affidavit is a copy of PS Form 3849, dated "12/2/05," that indicates a certified letter addressed to "Lavigna [address omitted], is available to be picked up at the Post Office. The form also indicates it is a "final notice: article will be returned to sender on 12/10." The space on the form for "sender's name" is blank.

advised that it had already been returned to sender.

Respondent's Notice of Appeal at 3.

On December 22, 2005, the Administrator filed a motion to dismiss respondent's appeal as untimely. The Administrator argued that she served her November 22, 2005 order of suspension by certified mail upon respondent, and that, pursuant to Rule 30(a) of the Board's Rules of Practice,<sup>5</sup> respondent's appeal was due no later than December 12, 2005.<sup>6</sup> In support of her motion to dismiss, the Administrator presented a 12/20/2005 printout of online tracking information obtained from the Postal Service's website that indicates:

- Unclaimed, December 13, 2005, 9:27 am, Daytona Beach, FL
- Notice Left, November 25, 2005, 11:19 am, Daytona Beach, FL

Administrator's Motion to Dismiss, Exhibit (Ex.) 3.<sup>7</sup> The

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<sup>5</sup> See 49 C.F.R. § 821.30(a) ("[t]he appeal must be filed with the Board within 20 days after the date on which the Administrator's order was served on the respondent").

<sup>6</sup> The Administrator also argued, "[a] copy of the order was also mailed to respondent's counsel at the time ... by regular mail." However, there is no evidence in this record that respondent was represented by anyone at the time the Administrator mailed her certified letter, or that the attorney listed in the Administrator's certificate of service was ever authorized to receive service on behalf of respondent, or, indeed, represent, respondent in this enforcement matter. The name of the attorney listed in the Administrator's certificate of service is not the attorney who appears to be representing respondent in these proceedings before the Board.

<sup>7</sup> The Postal Service's records do not reflect the 12/2/05 notice that respondent attached to her notice of appeal affidavit.

Administrator argued that respondent was negligent with regard to her mail:

[r]espondent acknowledges that she was not out of the State of Florida on November 25, 2005 when the initial attempt was made by [the Postal Service] to serve the Order ... [and] on December 7, 2005, two days after she returned, she found a notice from [the Postal Service], but failed to attempt to retrieve the Order until three days later[.]

\* \* \*

Respondent's tardiness was due to her own negligence in not looking at her mail before she left the state on November 29, 2005 and again when she returned on December 5, 2005. In addition, it was the [r]espondent's responsibility to make arrangements so that she could either receive mail while she was out [of] the state or so that her mail could be properly monitored. Therefore, the Respondent has failed to show good cause as to why the tardiness of her appeal should be excused.

Administrator's Motion to Dismiss at 2-3.<sup>8</sup>

In her reply to the Administrator's motion, respondent disavows receiving the November 25, 2005<sup>9</sup> notice of certified mail listed in the Postal Service records, and argues that she

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<sup>8</sup> The Administrator argued that, in accordance with Rule 8(d)(2), a presumption of service exists when a properly addressed envelope sent to the most current address of record has been returned as unclaimed. As the law judge correctly stated, this rule has no bearing on events prior to the appeal stage. See, e.g., Administrator v. Hayes, 1 NTSB 1693 (1972); Administrator v. Carlos, NTSB Order No. EA-4936 (2002).

<sup>9</sup> Respondent does not attach an affidavit establishing that she did not receive the November 25, 2005 notice, and statements of counsel are not evidence. Nonetheless, the affidavit respondent submitted with her notice of appeal indicates that the *only* notice respondent received was that which the Postal Service delivered to her mailbox on December 2, 2005.

was not negligent in checking her mail.<sup>10</sup> Respondent argued that, because the Administrator did not serve the order of suspension by certified mail, and the order was returned unclaimed, the Board's precedent regarding actual or constructive notice applies and her appeal was timely based on the facts of this case. Compare Administrator v. Carlos, supra at n.7, with Administrator v. Corrigan, NTSB Order No. EA-4806 (1999).<sup>11</sup>

The law judge's attached order sets forth the rationale for his decision in clear detail. For purposes of our discussion, it is only necessary to note that the law judge applied, *sua sponte*, the provisions of 49 U.S.C. § 46103(b)<sup>12</sup> and concluded that the

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<sup>10</sup> Respondent argues that, "[t]his action had been pending at that time for over a year and a half and the informal conference had concluded three months prior." Respondent's Reply to the Administrator's Motion to Dismiss at 2.

<sup>11</sup> Our decision in Corrigan recognized the applicability of 49 U.S.C. § 46103(b), which specifies that, "[t]he date of service made by certified or registered mail is the date of mailing." In the present case, the Administrator did not argue that section 46103(b) controls, but, as already mentioned, argued that the inapplicable provisions of Rule 8(d)(2) applied to service of her order of suspension.

<sup>12</sup> The law judge's order inadvertently cites 49 U.S.C. § 46103(a)(2), but it is clear that he intended to cite section 46103(b). Section 46103, "Service of notice, process, and actions," states, in pertinent part:

- (b) Service. - (1) Service may be made -
  - (A) by personal service;
  - (B) on a designated agent; or
  - (C) by certified or registered mail to the person to be served or the designated agent of the person.
- (2) The date of service made by certified or registered mail is the date of mailing.

Administrator's order of suspension was served on November 22, 2005; therefore, in accordance with the provisions of Rule 30(a), respondent's appeal was due no later than December 12, 2005. Having determined that the Administrator's order was served, and that respondent's notice of appeal was late, the law judge inquired whether respondent had demonstrated good cause for the untimeliness of her appeal. In his analysis, the law judge appears to assume, *arguendo*, that respondent did not receive notice from the Postal Service prior to receipt of the December 2, 2005 notice on December 7, 2005, and that respondent did not receive any notice that the Administrator was the sender of the certified letter for which she received notice to collect at the Post Office. Nonetheless, the law judge found respondent did not demonstrate good cause for her late notice of appeal because her failure to collect her certified mail sooner demonstrated a "lack of due diligence on the certificate holder's part in monitoring ... her mail." Order Dismissing Respondent's Appeal at 6.

On appeal, respondent argues that the law judge erred in applying Corrigan, supra, and its progeny applying the service provisions for certified mail set forth in section 46103(b), since the Administrator did not argue for the applicability of section 46103(b). Moreover, respondent argues that section 46103(b) does not specify a presumption of service, and, therefore, it is inapplicable where service by certified mail was ineffective because it was returned unclaimed. Respondent

reiterates her argument before the law judge that, "where no specific FAA rule of service is identified ... general principals of law looking to actual or constructive receipt," as we discussed in Carlos, supra, should apply. Respondent's Br. at 4-5. Respondent also argues that the law judge erred in finding she did not have good cause for her late filing, because, essentially, she had no notice that the Administrator was seeking to send her a certified letter.<sup>13</sup> The Administrator has filed a reply brief that generally urges us to affirm the law judge's ruling.<sup>14</sup>

The questions that we must resolve in this proceeding are: (1) whether the Administrator achieved service by certified mail even though it was returned unclaimed; (2) if not, whether the Administrator otherwise served respondent with a copy of the

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<sup>13</sup> Respondent also notes, as did the law judge, that the Administrator did not provide a clear indication in her order of suspension of either the service date or when respondent's appeal was due. We admonished the Administrator for such practices in a recent case, and urged her to provide such information to avoid confusion in the future. As the law judge correctly observed, however, the order in the present case contained even *less* information from which respondent could try to discern her allotted time to file her appeal. See Administrator v. Decuir, NTSB Order. No. EA-5048 (2003).

<sup>14</sup> The Administrator notes, in particular, that respondent "failed to state any legitimate reasons as to why she was unable to retrieve her mail during the days before and after her trip." The Administrator also argues that, notwithstanding her counsel's failure to invoke the provisions of section 46103(b), our opinion in Corrigan applies to the facts of this case. Id. The Administrator argues that the Board's admonishment in Decuir is not a "binding [requirement] that such specific information [(i.e., the date of service and the period within which to file an appeal)] always be provided [to respondents.]" Administrator's Reply Br. at 5-7.

order; (3) if the Administrator did serve respondent with the order, when such service occurred so as to determine whether respondent's notice of appeal was timely filed; and (4) if respondent's appeal was untimely filed, whether she has demonstrated good cause for her tardiness.

Recently, the United States Supreme Court held that, where a state relies on certified mail to deliver notice to a homeowner of an impending tax sale of property, and the certified mail notice is returned "unclaimed," the state, as a matter of due process, must take additional reasonable steps to provide notice to the property owner before selling the property. Jones v. Flowers, 126 S.Ct. 1708 (2006). We are also mindful of our long-standing precedent on this issue:

In the context of late-filed notices of appeal and appeal briefs, the Board consistently follows the good cause policy established on remand from Hooper v. NTSB and FAA, 841 F.2d 1150 (D.C. Cir. 1988). That is, "[the Board] intends to adhere uniformly to a policy requiring the dismissal, absent a showing of good cause, of all appeals in which timely notices of appeal, timely appeal briefs or timely extension requests to submit those documents have not been filed." Administrator v. Hooper, 6 NTSB 559, 560 (1988).

Administrator v. Beissel, NTSB Order No. EA-5153 at 4 (2005). We are also mindful of Corrigan, supra, and its progeny.

Nonetheless, the relevance of Jones to the facts of this case is presently unclear. For example, on this record, it appears that the Administrator solely relied upon certified mail to provide respondent with notice of her order of suspension. Moreover,

without evidence of any other efforts by the Administrator to provide notice to respondent, or evidence regarding the timing and method of respondent's receipt of actual notice of the Administrator's order, we are also unable to assess accurately the relevance of Carlos, supra, and our pre-Corrigan precedent regarding actual or constructive service to the facts in this case.<sup>15</sup> Under the circumstances here, we therefore remand this case to the law judge for further proceedings regarding the timeliness of respondent's notice of appeal, and, if necessary, whether despite an untimely notice of appeal respondent nonetheless acted with due diligence after receiving such notice so as to demonstrate good cause for her tardy filing.

**ACCORDINGLY, IT IS ORDERED THAT:**

The law judge's order is vacated and this case is remanded to the law judge for further proceedings consistent with this opinion and order.

ROSENKER, Chairman, SUMWALT, Vice Chairman, and HERSMAN, HIGGINS, and CHEALANDER, Members of the Board, concurred in the above opinion and order.

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<sup>15</sup> As we said in Administrator v. Croll:

[A]ssuming, for purposes of argument, that respondent's absence from home during the period within which an appeal needed to be filed would have justified an extension of time to file one, it would only have warranted an extension of the deadline through the date ... he actually became aware of the order and its expired deadline for filing an appeal.

NTSB Order No. EA-5009 at 5-6 (2002); see also Administrator v. DeLuca, NTSB Order No. EA-5158 at 4-5 (2005).