

SERVED: October 20, 2010

NTSB Order No. EA-5555

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 18th day of October, 2010

J. RANDOLPH BABBITT,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-18876
v.)	
)	
JAMES D. SHUMATE,)	
)	
Respondent.)	
)	

OPINION AND ORDER

The Administrator appeals the written order, denying the FAA's motion to dismiss for failure to file timely appeal, of Administrative Law Judge William R. Mullins, served June 21, 2010.¹ In that decision, the law judge determined that

¹ Copies of both the law judge's order denying the FAA's motion concerning timeliness and his order granting the Administrator's motion for judgment on the pleadings are attached.

respondent's deadline for filing his appeal was May 27, 2010. The law judge, however, also issued an order granting the Administrator's motion for judgment on the pleadings, thereby terminating the case.² The Administrator nevertheless appeals the law judge's order denying the Administrator's motion to dismiss based on respondent's lack of timeliness.³

The law judge, in his order denying the Administrator's motion concerning timeliness, stated that respondent's appeal was timely under 49 C.F.R. § 821.53(a), which provides that, "[a]n appeal from an emergency or other immediately effective order of the Administrator must be filed within 10 days after the date on which the Administrator's order was served on the respondent." The law judge stated that the Administrator, in the motion to dismiss, admitted that respondent "constructively received" the emergency order of revocation on May 17, 2010.

² The law judge's order was based on respondent's failure to file an answer to the Administrator's emergency order. The Board's Rules of Practice provide that a respondent's "failure ... to deny the truth of any allegation or allegations in the complaint may be deemed an admission of the truth of the allegation or allegations not answered." 49 C.F.R. § 821.55(b).

³ The Administrator's emergency order sought revocation of respondent's private pilot and third-class medical certificates, based on respondent's alleged failure to report his conviction for driving an automobile while under the influence of alcohol, and the suspension of his driver's license, which resulted from the conviction. The Administrator charged respondent with violating 14 C.F.R. §§ 67.403(a)(1) and 61.15(f). On or about June 22, 2010, respondent waived the applicability of emergency procedures to this case.

Order Denying Mot. Dismiss at 1. As a result, the law judge found respondent's deadline to file his notice of appeal was May 27, 2010. Given that respondent filed his notice of appeal on May 25, 2010, the law judge found that respondent's appeal was timely and denied the Administrator's motion.

The Administrator appeals the law judge's order, on the basis that the Administrator served the order on May 14, 2010, and that the order clearly instructed that, "you may appeal this Emergency Order within ten (10) days from the date of its service, which is May 14, 2010." The Administrator argues that respondent's filing of his notice of appeal on May 25, 2010, was therefore untimely, because the 10-day period began on May 15, 2010, and ended on May 24, 2010. The Administrator relies on 49 U.S.C. § 46103(b)(2) for the proposition that the date of service of an order is the date of mailing, when the order is sent via certified or registered mail. The first page of the emergency order indicates that it was sent by certified and regular mail, as well as Federal Express-Overnight.⁴ The Administrator also contends that respondent's earlier argument that his prior attorney was at fault for not adhering to the

⁴ Respondent does not contest that the Administrator sent the order via certified mail.

Board's Rules of Practice does not constitute an excuse for his failure to comply with the rules.⁵

The record indicates that the Administrator served the order, by sending it via certified mail, on May 14, 2010. The Administrator's order included a recitation of appeal rights, which informed respondent that he could appeal the order within 10 days of the date that the Administrator served the order, and provided contact information for the NTSB's Office of Administrative Law Judges. Given this 10-day deadline, respondent's appeal was due no later than May 24, 2010. Respondent's appeal was therefore untimely.

Title 49 U.S.C. § 46103(b)(2), which addresses service of notice, process, and actions, states that, "[t]he date of service made by certified or registered mail is the date of mailing." We have previously recognized this provision as applicable to the Administrator's service of orders.⁶

⁵ Respondent did not reply to the Administrator's appeal brief concerning the law judge's order regarding timeliness. On July 26, 2010, respondent filed a motion to dismiss his own appeal. We accept respondent's withdrawal of his appeal.

⁶ Administrator v. Ordini, NTSB Order No. EA-5160 (2005); see also, e.g., Administrator v. Corrigan, NTSB Order No. EA-4806 (1999) (holding that, where the Administrator has transmitted the order via certified mail, the date of service is the date of mailing); but see Administrator v. Carlos, NTSB Order No. EA-4936 (2002) (holding that, where the Administrator has transmitted the order by means *other than* certified mail, the date of service is the date on which the respondent actually or constructively received the document).

Furthermore, we have long stated that we adhere 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 these documents have not been filed."⁷ We have also held that unfounded mistakes regarding the calculation of procedural deadlines do not allow for the acceptance of untimely notices of appeal, nor do they constitute good cause for noncompliance.⁸

We acknowledge that the law judge's granting of the Administrator's motion to dismiss based on respondent's failure to answer the complaint terminated the case, and we agree with that disposition. However, we nevertheless grant the Administrator's appeal concerning the timeliness issue, to ensure that our application of the rule concerning service by certified mail, pursuant to 49 U.S.C. § 46103(b), is unambiguous and consistent.

⁷ Administrator v. Hooper, 6 NTSB 559, 560 (1988) (on remand from Hooper v. Nat'l Transp. Safety Bd., 841 F.2d 1150 (D.C. Cir. 1988)).

⁸ Administrator v. Graham, NTSB Order No. EA-5337 (2007); Administrator v. Smith, NTSB Order No. EA-4485 (1996); Administrator v. Slay & Knowles, NTSB Order No. EA-3956 (1993).

ACCORDINGLY, IT IS ORDERED THAT:

The Administrator's appeal is granted.

HERSMAN, Chairman, HART, Vice Chairman, and SUMWALT, ROSEKIND, and WEENER, Members of the Board, concurred in the above opinion and order.

SERVED 6/21/2010

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
OFFICE OF ADMINISTRATIVE LAW JUDGES

J. RANDOLPH BABBITT,
Administrator
Federal Aviation Administration,
Complainant,

v.

JAMES D. SHUMATE,
Respondent.

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Docket No. SE-18876
JUDGE MULLINS

SERVICE: BY FAX & REGULAR MAIL

JOSEPH STANDELL, ESQ.
FAA/AERONUTICAL CENTER
P. O. BOX 25082
OKLAHOMA CITY, OK 73125

SERVICE: BY FAX & OVERNIGHT DELIVERY

BRENT CREWS, ESQ.
603 WEST MATTHEWS
JONESBORO, AR 72401

**ORDER DENYING MOTION TO DISMISS
FOR FAILURE TO FILE TIMELY APPEAL**

On May 28, 2010, Complainant moved to dismiss Respondent's Appeal for failure to file an appeal within the ten-day time requirement of 49 C.F.R § 821.53(a). As of this date, Respondent has not filed a Response. Because Respondent's Appeal was timely under 49 C.F.R § 821.53(a), Complainant's Motion is denied.

According to 49 C.F.R § 821.53(a), "[a]n appeal from an emergency or other immediately effective order of the Administrator must be filed within 10 days after the date on which the Administrator's order was served on the respondent." Complainant, in his Motion to Dismiss, admits that Respondent constructively received the Emergency Order of Revocation on May 17, 2010. Therefore, Respondent had until

May 27, 2010 to file an appeal. Respondent filed his appeal on May 25, 2010. Accordingly, his appeal was timely and Complainant's Motion to Dismiss is denied.

IT IS SO ORDERED.

ENTERED this 21st day of June 2010.

WILLIAM R. MULLINS
ADMINISTRATIVE LAW JUDGE

SERVED 6/21/2010

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FAA/AERONUTICAL CENTER
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JONESBORO, AR 72401

ORDER GRANTING MOTION
FOR JUDGMENT ON THE PLEADINGS

On June 10, 2010, Complainant filed a Motion for Judgment on the Pleadings of the Complaint based on Respondent's failure to file an Answer to the Complaint. As of this date, Respondent has not filed an Answer. Accordingly, Complainant's Motion is granted.

According to 49 C.F.R § 821.55(b), "[t]he respondent shall file with the Board an answer to the complaint within 5 days after the date on which the complaint was served by the Administrator Failure by the Respondent to deny the truth of any allegation or allegations in the complaint may be deemed an admission of the truth of

the allegation or allegations not answered.” Respondent appealed the Emergency Order of Revocation on May 25, 2010. On May 25, 2010, the Administrator filed his Complaint in answer to the Respondent’s appeal. Respondent’s attorney received the Complaint on May 27, 2010. Therefore, Respondent had until June 1, 2010 to file his Answer. Respondent failed to file an Answer. Moreover, the NTSB Office of Administrative Law Judge in Arlington, Texas, attempted to reach Respondent’s attorney to determine why an Answer had not been filed. The secretary of Respondent’s attorney assured the NTSB Office, on more than one (1) occasion, that he would contact the NTSB Office, but Respondent’s attorney never did so.

Because Respondent has not filed an Answer in accordance with 49 C.F.R § 821.55(b), Complainant’s Motion for Judgment on the Pleadings of the Complaint is GRANTED and Respondent’s Appeal is dismissed and the Hearing now scheduled for June 24, 2010, in Little Rock, AR is canceled.

IT IS SO ORDERED.

ENTERED this 21st day of June 2010.

WILLIAM R. MULLINS
ADMINISTRATIVE LAW JUDGE