

SERVED: December 18, 2013

NTSB Order No. EA-5694

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 17th day of December, 2013

_____	)	
MICHAEL P. HUERTA,	)	
Administrator,	)	
Federal Aviation Administration,	)	
	)	
Complainant,	)	
	)	Docket SE-19369
v.	)	
	)	
DENNIS C. DANGBERG,	)	
	)	
Respondent.	)	
_____	)	

OPINION AND ORDER

1. Background

Respondent appeals the Order Granting the Administrator's Motion to Dismiss Respondent's Appeal as Untimely of Chief Administrative Law Judge Alfonso J. Montaño, issued March 11, 2013.¹ By that order, the Chief Law Judge determined respondent failed to submit a timely notice of appeal of the Administrator's emergency revocation order, which the

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

Administrator issued for alleged violations of 14 C.F.R. of §§ 61.31(d),² 91.13(a)³ and 91.151(a)(1).⁴ We deny respondent's appeal.

A. Facts

The Administrator's order alleged respondent violated the regulations described above by flying a Beechcraft 95-B55 multiengine aircraft on a flight by himself on February 17, 2012. The order further alleged respondent performed a crash landing shortly after taking off, due to fuel starvation.

The Administrator issued the emergency order on September 14, 2012, revoking respondent's private pilot certificate, as well as any other certificates. Also, on September 14, 2012, the Administrator sent the order to respondent via certified mail, overnight delivery service, and regular mail. The overnight delivery service provider's records show the order was delivered to respondent's address of record on September 17, 2012. On that same day, the United States Postal Service (USPS) delivered notification to respondent stating the postal carrier attempted delivery of a certified letter for respondent, and notified respondent he could pick up the letter at a local USPS office. USPS records show respondent claimed and signed for the certified letter on September 25, 2012. Respondent, through counsel, filed a notice of appeal of the Administrator's emergency order on September 28, 2012.

² Section 61.31(d) requires each airman serving as a pilot-in-command have training in and hold the appropriate category, class, and type rating certificate for the aircraft he or she is flying.

³ Section 91.13(a) prohibits operation of an aircraft in a careless or reckless manner so as to endanger the life or property of another.

⁴ Section 91.151(a)(1) prohibits an airman's operation of an aircraft in visual flight rules (VFR) conditions unless the airman has sufficient fuel to fly to the first point of intended landing and fly thereafter for a period of 30 minutes. The regulation states this requirement is subject to considerations of wind and forecast weather conditions, as well as normal cruising speed.

B. *Procedural Background*

On October 1, 2012, the Administrator filed a motion to dismiss respondent's September 28 appeal as untimely under the Board's Rules of Practice. Section 821.53(a) of the Rules states as follows:

Time within which to file appeal. An 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 respondent shall simultaneously serve a copy of the appeal on the Administrator.

The Administrator's motion to dismiss stated § 821.53(a) required respondent to file his notice of appeal by September 24, 2012. Respondent filed a response to the Administrator's motion to dismiss on November 2, 2012, and included a brief in support of his response. The Administrator received leave from the Chief Law Judge to file a reply to respondent's brief.

C. *Law Judge's Order*

On March 11, 2013, the Chief Law Judge issued an order granting the Administrator's motion to dismiss. The order cites Administrator v. Corrigan⁵ and Administrator v. Carlos,⁶ in which the Board held where the Administrator transmits a certificate order by certified or registered mail, the Board considers the service of the order as the date on which the Administrator mailed the order to the certificate holder. In the case *sub judice*, the Chief Law Judge found the Administrator served the order on September 14, 2012, because the Administrator sent the order three ways: certified mail, regular mail, and overnight delivery service. Therefore, the Chief Law Judge concluded respondent's notice of appeal was due September 24, 2012, in accordance with § 821.53(a).

⁵ NTSB Order No. EA-4806 (1999).

⁶ NTSB Order No. EA-4936 (2002).

The Chief Law Judge also disposed of respondent's arguments concerning the Pilot's Bill of Rights, which became effective August 3, 2012.⁷ Respondent asserted the statute required the Administrator comply with Rule 4 of the Federal Rules of Civil Procedure (FRCP 4),⁸ which requires a summons, the service of which should occur "[o]n or after filing the complaint," and provides "the plaintiff may present a summons to the clerk for signature and seal. If the summons is properly completed, the clerk must sign, seal, and issue it to the plaintiff for service on the defendant."⁹

Respondent further argued he resides in Nebraska, and Nebraska law allows service of a complaint via certified mail, but considers the date of such service to be the date on which the recipient of the complaint *receives* the document, rather than the date on which the complainant sends it. Respondent stated he received the Administrator's emergency order on September 25, 2012; therefore, his September 28, 2012 notice of appeal was timely.

In his order granting the Administrator's motion to dismiss, the Chief Law Judge determined the Pilot's Bill of Rights did not obviate the Board's long-standing view that "49 C.F.R. [p]art 821 is not applicable prior to the filing of an appeal from an [Federal Aviation Administration] certificate order, and ... pertinent FAA rules determine when service of such a

⁷ Pub. L. No. 112-153, 126 Stat. 1159, 112th Cong. (2012). Section 2(a) of the statute states:

Any proceeding conducted under subpart C, D, or F of part 821 of title 49, Code of Federal Regulations, relating to denial, amendment, modification, suspension, or revocation of an airman certificate, shall be conducted, to the extent practicable, in accordance with the Federal Rules of Civil Procedure and the Federal Rules of Evidence.

⁸ Resp. to Mot. to Dismiss Appeal at 1. Later in his response to the Administrator's motion, respondent stated the Administrator "perfected" service on respondent on September 25, 2012. Id. at 2.

⁹ Fed. R. Civ. Proc. 4(b).

certificate order occurs.”¹⁰ As a result, the Chief Law Judge applied the Board’s principle articulated in Corrigan to the facts of the case at hand, to conclude the date of service of the Administrator’s emergency order was September 14, 2012.

After discussing his finding concerning the date of service, the Chief Law Judge considered whether respondent had good cause for his late-filed notice of appeal. The Chief Law Judge compared respondent’s argument to the circumstances in Administrator v. Croll,¹¹ in which the Board found good cause did not exist to excuse the respondent’s tardiness. In the instant case, the Chief Law Judge presumed respondent knew the FAA was investigating his February 2012 crash landing, and noted “respondent ... was away from home for 12 days without taking any steps to provide the FAA with information as to how he could be reached in order to be kept abreast of any important developments relating to this matter ... during that absence.”¹² Therefore, the Chief Law Judge determined respondent did not have good cause for failing to file his notice of appeal by the deadline provided in § 821.53(a).

D. Issues on Appeal

In his appeal of the Chief Law Judge’s order, respondent again contends the Pilot’s Bill of Rights requires application of FRCP 4 to this case; therefore, he argues the Administrator did not properly serve him with the emergency order. Respondent asserts under Nebraska law, the

¹⁰ Order Granting Administrator’s Mot. to Dismiss at 4.

¹¹ NTSB Order No. EA-5009 (2002). In Croll, the respondent was on a three-week vacation and stated he did not actually receive the Administrator’s emergency order until after the expiration of his deadline for filing his notice of appeal. The Board’s order disposing of the respondent’s appeal stated the respondent was aware of the Administrator’s ongoing investigation and likelihood of taking certificate action. The Board also observed the respondent did not immediately file a notice of appeal of the order after returning home. Based on these facts, the Board determined good cause did not exist to excuse respondent’s delay.

¹² Order Granting Administrator’s Mot. to Dismiss at 6.

date of service would be September 25, 2012. Respondent also argues 49 U.S.C. § 46103 indicates the date of service of an FAA order should be the date the certificate holder receives the order, and requires the Administrator to serve orders by “restricted delivery.”¹³ Respondent further argues the Administrator’s interpretation of 49 U.S.C. § 46103 and the Board’s precedent concerning § 821.53(a) amounts to a violation of his due process rights. Lastly, respondent contends, notwithstanding the foregoing arguments concerning service of process, good cause existed to excuse his late-filed notice of appeal.

2. Decision

A. Federal Rule of Civil Procedure 4 and Nebraska Law

We find unavailing respondent’s contention that the Administrator did not properly serve him with the emergency order under FRCP 4, as well as his assertion that Nebraska law establishes the date of service of the emergency order was the date he received it.

The Board has long held it does not have jurisdiction to review the validity of the Administrator’s service of orders. The Pilot’s Bill of Rights did not expand our jurisdiction in this regard. The Board’s jurisdiction in aviation appeals cases commences when the respondent files a notice of appeal. The Board specifically articulated this principle in Administrator v. Hayes,¹⁴ and has applied it consistently since that time.¹⁵

¹³ Appeal Br. at 23.

¹⁴ 1 NTSB 1693 (1972).

¹⁵ Administrator v. Carlos, NTSB Order No. EA-4936 (2002); see also Administrator v. Lavigna, NTSB Order No. EA-5274 at 4 n.8 (2007). As the Board stated in Carlos, if the Administrator fails to serve a respondent by one of the means listed in § 46103(b), then the respondent may consider this failure to amount to good cause for the respondent’s failure to file a timely notice of appeal. However, the Board does not have authority over cases, and does not apply its Rules of Practice to cases, until the respondent files a notice of appeal. See Carlos at 3-4.

B. Applicability of 49 U.S.C. § 46103

Respondent argues the Board's failure to mention FRCP 4 in the Board's interim final rule implementing the Pilot's Bill of Rights means FRCP 4 must apply to all proceedings.¹⁶ This interpretation disregards the plain language of 49 U.S.C. § 46103, which specifically sets forth the permissible means for the Administrator to serve an order on a certificate holder, stating: "Service may be made ...(C) by certified or registered mail to the person to be served or the designated agent of the person." In addition, § 46103(b)(2) states "[t]he date of service made by certified or registered mail is the date of mailing." Neither the Pilot's Bill of Rights nor the Board's interim final rule changed the applicability of § 46103.

C. Due Process

Respondent contends the Administrator's reliance on certified mail as a means for serving an order amounts to a violation of due process. He suggests the Board's "strict limits" regarding the deadlines applicable to appeals are unfair to respondents. We disagree. As the Chief Law Judge noted in his order dismissing the appeal, circumstantial evidence shows respondent was aware he may be subject to FAA enforcement action as evidenced by the fact he refrained from opening the letters for several days, once he picked them up from the post office, as he assumed they contained "unpleasant news."¹⁷ Respondent's own failure to open the envelopes from the Administrator upon receiving them does not serve to deprive him of due

¹⁶ See 77 Fed. Reg. 63243 (Oct. 16, 2012).

¹⁷ Appeal Br. at 3 (stating, "[u]pon seeing the envelopes from the FAA [on September 25, 2012], [r]espondent reasonably assumed they bore unpleasant news, and further assumed he would have a reasonable time to respond to their contents. He returned to his residence with envelopes from the FAA which he opened on September 28, 2012."). Respondent also denies receiving a priority envelope from Federal Express, which the Administrator asserts was left outside respondent's residence on September 17, 2012. Mot. to Dismiss Appeal (Oct. 1, 2012) at Exh. A (overnight delivery service provider record stating envelope was left at back door of respondent's residence on September 17, 2012).

process. In a similar case, the Board disposed of this type of argument by stating, “a pilot who is absent from his address of record for an extended period without arranging for his mail to be forwarded or picked up—especially one involved in a pending enforcement matter—runs a risk of missing deadlines set forth in documents sent to him during that time.”¹⁸ Furthermore, we note the “strict limits” about which respondent complains function to protect due process rights of all respondents; without consistent rules of procedure concerning methods of service and filing deadlines, parties would be subject to arbitrary standards.

To the extent respondent contends the Administrator violated his due process rights by failing to consider the date he *actually* received the emergency order as the date of service, this argument is contrary to the plain language of 49 U.S.C. § 46103, as discussed above. In addition, the Supreme Court has held due process only requires notice that is “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.”¹⁹ The Administrator fulfilled this standard in the case *sub judice*.

D. *Good Cause*

Respondent also has not articulated a persuasive argument that good cause existed to excuse his late-filed notice of appeal. Without good cause to excuse a failure to file a timely notice of appeal, or a request to file one out of time before it is due, a party’s appeal will be

¹⁸ Administrator v. Ordini, NTSB Order No. EA-5160 at 6 (2005).

¹⁹ Dusenbery v. United States, 534 U.S. 161, 168 (2002) (quoting Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314, 319 (1950)).

dismissed. The Board has strictly adhered to this standard since its decision in Administrator v. Hooper.²⁰

Respondent argues a reasonably prudent person would have acted as he did—have USPS hold his mail until he returned from his trip. Under our jurisprudence, respondent’s failure to monitor receipt of his mail and deliveries does not amount to good cause.²¹ In addition, respondent asserts his crash landing occurred more than six months prior to his trip; therefore, he believed the Board’s stale complaint rule precluded the Administrator from taking action.²² However, respondent fails to address whether the case at issue involved an alleged lack of qualification. Respondent has not persuaded us the stale complaint rule provides good cause for his failure to timely file a notice of appeal. Overall, respondent has not established good cause excuses his failure to file a timely notice of appeal.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent’s appeal is denied;
2. The law judge’s order is affirmed; and
3. The Administrator’s emergency revocation of respondent’s private pilot certificate, and any other certificates respondent holds, is affirmed.

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

²⁰ 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).

²¹ Administrator v. Noroozi, NTSB Order No. EA-4284 (1994); Administrator v. Coombs, NTSB Order No. EA-3609 (1992); Administrator v. Bakker, NTSB Order No. EA-3681 (1992).

²² The stale complaint rule, codified at 49 C.F.R. § 821.33, precludes the Administrator from pursuing a case more than six months after the discovery of an alleged violation, unless the Administrator presents an issue involving the certificate holder’s alleged lack of qualifications to hold a certificate.

Served: March 11, 2013

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

MICHAEL P. HUERTA,
ADMINISTRATOR,
FEDERAL AVIATION ADMINISTRATION,

Complainant,

v.

Docket SE-19369

DENNIS C. DANGBERG,

Respondent.

**ORDER GRANTING ADMINISTRATOR'S MOTION
TO DISMISS RESPONDENT'S APPEAL AS UNTIMELY**

Served: George T. Babcock, Esq.
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On September 28, 2012, respondent, through counsel, filed with this office an appeal from an order, issued on an emergency basis on September 14, 2012, by which the Administrator of the Federal Aviation Administration ("FAA") revoked his private pilot certificate with instrument and single engine land ratings, for alleged violations of §§ 61.31(d), 91.13(a) and 91.151(a)(1) of the Federal Aviation Regulations ("FAR," codified at 14 C.F.R.), stemming from a flight he conducted on February 17, 2012.¹

Thereafter, on October 1, 2012, the Administrator submitted a motion to dismiss respondent's appeal as untimely-filed under Rule 53(a) of the Board's Rules of Practice in Air Safety Proceedings (codified at 49 C.F.R. § 821.53(a)), on the basis that it was not filed within 10 days after the date on which the revocation order was served on him. Respondent then filed a reply to that motion on November 2, 2012, and the Administrator, with leave of the undersigned, later submitted a response to that reply. Accordingly,

¹ Subsequently, on October 9, 2012, respondent waived the applicability of the Board's rules governing emergency proceedings in this matter.

consideration of the Administrator's motion to dismiss will now be undertaken. Having thoroughly reviewed the aforesaid filings of the parties and the record in this proceeding as a whole, the undersigned will, for the reasons set forth below, grant the Administrator's motion and terminate this proceeding on that basis.

Under Rule 53(a), "an appeal from an emergency or other immediately effective order of the Administrator must be filed [with the Board] within 10 days after the date on which the Administrator's order was served on the [certificate holder]." An appeal filed beyond that 10-day time limit must be dismissed, unless good cause is shown for the delay in its submission.²

In this case, the Administrator's order of revocation was transmitted to respondent, at 85197 – 571st Avenue, Winside, Nebraska 68790-5032, which respondent has acknowledged is his address of record on file with the FAA,³ by overnight delivery service, certified mail and regular mail, on September 14, 2012.⁴ That order (at 5) included a recitation of appeal rights, which informed respondent that (emphasis original):

You may appeal from this Emergency Order within ten 10 days from the date of its service, which is **September 14, 2012**, by filing a Notice of Appeal with the Office of Administrative Law Judges, National Transportation Safety Board, Room 4704, 490 L'Enfant Plaza East, SW., Washington, DC 20594 (telephone (202) 314-6150). The National Transportation Safety Board's (NTSB's) Rules of Practice in Air Safety Proceedings, 49 C.F.R. [P]art 821, [S]ubpart I, apply to appeals of Emergency and Other Immediately Effective Orders.

The Administrator's motion to dismiss is accompanied by copies of: (1) a Federal Express ("FedEx") tracking document for Item 866344929100, having a "Ship date" of September 14, 2012, which reflects that it was "Delivered" at 11:32 a.m. on September 17, 2012 and, in the space provided for reporting delivery details, relates "Left at back door. Package delivered to recipient address – release authorized;"⁵ (2) a United States Postal Service ("USPS") tracking document for Certified Mail Article 70072680000213086378, which indicates that there was a "Notice Left" for that article at "WINSIDE, NE 68790" at 8:49 a.m. on September 17, 2012, and that it was "Delivered" at "WINSIDE, NE 68790" at 2:25 p.m. on September 25, 2012;⁶ and (3) Domestic Return Receipt (USPS Form 3811) for that item of certified mail, which shows that it was delivered to and signed for by respondent on September 25, 2012.⁷

² In this regard, see Rule 11(a) of the Board's Rules of Practice (codified at 49 C.F.R. § 821.11(a)), and *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).

³ Respondent's Brief attached to Reply to Administrator's Motion to Dismiss at 2.

⁴ Administrator's Order at 1.

⁵ Ex. A attached to Administrator's Motion to Dismiss. September 14, 2012 fell on a Friday, and this would appear to be the reason why delivery of that item was not accomplished by FedEx overnight delivery service until Monday, September 17, 2012.

⁶ Ex. B attached to Administrator's Motion to Dismiss.

⁷ *Id.*

The Board has previously held that, where the Administrator transmits a certificate order by certified or registered mail, the date of service of the order is the date on which it was mailed to the certificate holder, but, where the order is transmitted solely by other means (e.g., regular mail or overnight delivery service, such as FedEx), the date of service is the date on which the certificate holder actually or constructively received the order. Compare *Administrator v. Corrigan*, NTSB Order EA-4806 (1999), and *Administrator v. Carlos*, NTSB Order EA-4936 (2002).

There is a historical reason for this dichotomy. The *Corrigan* decision represented a departure from prior practice — rooted in an earlier Board decision, *Administrator v. Hayes*, 1 NTSB 1693 (1972) — under which the Administrator's order was considered served when it was first actually or constructively received by the certificate holder. In *Hayes*, the Board held that its own rules on service in air safety proceedings do not apply until the matter reaches the stage of an appeal, and that applicable FAA rules would, thus, govern until that time.⁸ However, no specific FAA rule on service was then identified by the Administrator, and the Board, therefore, found that principles of general law, which look to actual or constructive receipt, determined when service of the order occurred.⁹ In connection with the *Corrigan* case, however, the Administrator identified § 1005(c) of the Federal Aviation Act of 1958, as amended (and subsequently recodified at 49 U.S.C. § 46103(b)(2)), as an applicable FAA rule of law governing service. Under that statutory provision, “[t]he date of service made by certified or registered mail is the date of mailing.” The Board subsequently held in *Carlos* that, where service is accomplished “by a method other than one specifically enumerated in the statute . . . the statute does not apply and is not dispositive in determining the date of service.”¹⁰ For this reason, in cases where the method of service of the Administrator's order does not include certified or registered mail, the date of the order's service continues to be the date of the certificate holder's actual or constructive receipt of the order.

Thus, in this case, *Corrigan* would require respondent to be deemed served with the Administrator's order of revocation on September 14, 2012. This would, in turn, make September 24, 2012 his Rule 53(a) deadline for filing an appeal from that order and render the submission of his appeal on September 28, 2012 untimely.

However, respondent, in connection with his reply to the Administrator's motion to dismiss, argues that the enactment of Public Law 112-153 (the Pilot's Bill of Rights) — which was signed into law on August 3, 2012, and provides (at § 2(a)) that “[a]ny proceeding conducted under [S]ubpart C, D, or F of [P]art 821 of [T]itle 49, Code of Federal Regulations relating to denial, amendment, modification, suspension, or revocation of an airman certificate [(49 C.F.R. Part 821 is the Board's Rules of Practice in Air Safety Proceedings)], shall be conducted, to the extent practicable, in accordance with the Federal Rules of Civil Procedure [(‘FRCP’)] and the Federal Rules of Evidence [(‘FRE’)]” — abrogates such an analysis, and requires the application of Rule 4 of the FRCP to

⁸ “Service of the Administrator's order of suspension . . . is governed by the rules covering FAA service and is not subject to the National Transportation Safety Board (NTSB) regulations, unless and until the stage of an appeal to the NTSB is reached.” 1 NTSB at 1694.

⁹ 1 NTSB at 1694-95.

¹⁰ NTSB Order EA-4936 at 4.

determine when he was served with the Administrator's revocation order. In this regard, he maintains that "[a] proceeding, pursuant to 49 CFR [P]art 821, [S]ubpart C, D, or F commences when the FAA serves a pilot with an enforcement order," and that, "[a]s service of summons and complaint in a civil action [in Federal District Court] triggers the right to respond for a defendant, . . . and the concomitant time limit to do so, . . . so too does service of the FAA order on a pilot trigger the right to respond by filing an appeal with the NTSB."¹¹ Respondent contends that "[t]he method of service used by the FAA, though not explicitly authorized by Rule 4 of the [FRCP], is derivatively authorized by Rule 4 under Nebraska law,"¹² that, under Nebraska law, certified mail is deemed served upon receipt, and not mailing;¹³ and that, because he did not receive the Administrator's revocation order until September 25, 2012,¹⁴ his submission of an appeal in this matter three days after such receipt must be considered timely.

Such an analysis, however, ignores the Board's longstanding view, enunciated in *Hayes, supra*, that *49 C.F.R. Part 821 is not applicable prior to the filing of an appeal from an FAA certificate order*, and that *pertinent FAA rules* determine when service of such a certificate order occurs. Nothing in the Pilot's Bill of Rights appears to abrogate this, and the undersigned, therefore, believes that *Corrigan* remains applicable here.¹⁵ Accordingly,

¹¹ Respondent's Brief attached to Reply to Administrator's Motion to Dismiss at 6-7.

¹² *Id.* at 5.

¹³ *Id.*

¹⁴ *Id.* at 2.

¹⁵ Respondent attests, in an affidavit attached to his reply to the Administrator's motion (¶¶ 1-8, 14), that he flew his aircraft to Denver, Colorado, on September 13, 2012, and did not return home until September 25, 2012; that he placed a hold on the delivery of mail to his residence with the Winside, Nebraska, Post Office before departing; that he retrieved copies of the order of revocation that were sent to him by both certified and regular mail from the Winside Post Office on September 25, 2012; and that he received no actual or constructive notice of the order's issuance before that date. In the reply to the Administrator's motion (at 3), respondent asserts that the Administrator "at all times pertinent hereto possessed the unique information that [he] is a pilot and is therefore likely to travel away from home," and, in the brief attached to that reply (at 16), he challenges the validity of the Administrator's methods of service of the order on him as a deprivation of due process, citing *Yi Tu v. Nat'l Transp. Safety Bd.*, 470 F.3d 941 (9th Cir. 2006) as "a case where the FAA attempted service on an airman by certified mail, even though it knew he would be unlikely to receive certified mail," and the court found that the airman had been deprived of due process because he was not, under the circumstances, served by a means reasonably calculated to apprise him of the certificate action.

However, this case differs from *Yi Tu*. There, the Ninth Circuit determined that the Administrator's service of two orders of suspension upon the airman, which were sent to him solely by means of certified mail — both of which were returned by the Post Office as unclaimed — was insufficient, in view of previous certified mailings relating to those matters that were also returned unclaimed, when follow-up and/or exclusive first-class mailings sent to the same address had consistently been received and responded to by the airman. Here, there is no evidence in the record to show or even suggest that the FAA had previously attempted without success to transmit any items to respondent by *any* of the three means by which the order of revocation were sent to him. Respondent's contention that the means of service of the order upon him were inappropriate because the Administrator knew that he was "likely to travel away from home," in that he is a pilot, has no merit, since he is a private — *i.e.*, a recreational, not a professional — pilot. Moreover, given that certificate

respondent's appeal must be deemed late-filed, and good cause must be established for his delay in submitting the appeal in order for him to avoid its dismissal.

It is the view of the undersigned that good cause generally requires a showing that circumstances beyond the certificate holder's control prevented the certificate holder from either knowing of the Administrator's order or acting upon it within the prescribed time limit for filing an appeal, and up until the time of the appeal's belated filing, despite the exercise of due diligence.

Here, respondent relates that, "[u]pon seeing the envelopes [containing the copies of the revocation order that had been sent to him by certified and regular mail] from the FAA, [he] reasonably assumed they bore unpleasant news."¹⁶ However, he "assumed he would have a reasonable time to respond to their contents,"¹⁷ and did not open either envelope until September 28, 2012, on which date he telephoned the FAA Office of Regional Counsel from which the order was issued, "took from [that] discussion . . . that he was outside the time to file an appeal," and, "[l]ater that same day . . . met with his attorney," who immediately filed an appeal on his behalf.¹⁸

Here, even if respondent could be viewed as having good cause for not filing an appeal from the Administrator's order prior to his actual receipt of the order on September 25, 2012, he concedes that, although he assumed the contents of the unopened envelopes "bore unpleasant news," he nevertheless refrained from opening them for several days, as he was under the impression that "he would have a reasonable time to respond to their contents." This clearly reflects a lack of diligence that weighs against any finding of good cause subsequent to his receipt of those items from the Post Office.¹⁹

In a case involving quite similar facts, *Administrator v. Croll*, NTSB Order EA-5009 (2002), the Board found good cause lacking. In *Croll*, an emergency order of revocation

actions are undertaken following investigations, of which affected certificate holders are routinely informed by the FAA, it would have been prudent for respondent to have notified the FAA of any planned absences from home, and either provided the FAA with a temporary address or arranged for his mail to be monitored or forwarded, in order to avoid any unnecessary delay in receiving pertinent information from the FAA concerning the matter (see discussion *infra*).

¹⁶ Respondent's Brief attached to Reply to Administrator's Motion to Dismiss at 2-3.

¹⁷ *Id.* at 3.

¹⁸ *Id.* See also ¶¶ 5-8, 11-13 of respondent's affidavit attached to his reply to the Administrator's motion to dismiss.

¹⁹ The Board has previously held that miscalculations of due dates — however genuinely arrived at by the party in question — do not constitute good cause for a late filing. See *Administrator v. Browning*, 6 NTSB 500 (1988); *Administrator v. Slay and Knowles*, NTSB Order EA-3956 at 2 (1993), and cases cited therein; *Administrator v. Dirksen*, NTSB Order EA-4699 at 2 (1998); *Administrator v. Cornish*, NTSB Order EA-5079 (2004), reconsideration denied NTSB Order EA-5090 (2004), affirmed 429 F.3d 806 (8th Cir. 2005). The Board has also held that the act of filing an appeal is essentially a *pro forma* task. *Administrator v. Harris*, NTSB Order EA-5110 at 2-3 (2004); see also *Administrator v. Ehl*, 5 NTSB 569 (1985). Thus, had respondent immediately opened one or both of the envelopes bearing the Administrator's revocation order that he retrieved from the Post Office on September 21, 2012, there was nothing to prevent him from sending an appeal from that order to this office without further ado.

was mailed to the respondent at his address of record on September 23, 2002, but he did not actually receive it until October 11, 2002, which was eight days after the expiration of his 10-day Rule 53(a) appeal period, and he did not file an appeal from that order with the Board until five days later, on October 16, 2002. In that case, the respondent related that he was on a three-week vacation at the time of the order's issuance, and did not return home until October 9, 2002. In finding that good cause did not exist for the belated filing of an appeal in that case, the Board observed:

At the time the revocation order was served, respondent had already had several meetings with the FAA concerning the issues which became the allegations of violations cited in the order. . . . He was thus aware, or should have been, . . . that correspondence from the Administrator concerning the matter could be sent to him at any time, and that it might require a prompt response. Despite this, he departed on an extended leave without so much as advising the FAA office he knew was conducting the investigation that he would be away, much less taking any steps to put in place some mechanism that would ensure his timely receipt of any communications that might be sent to him while he was gone. We discuss these factors here not because we believe that respondent had some absolute duty, given his knowledge of a pending investigation, to be continuously reachable by the Administrator in short order, but, rather, because we think they demonstrate that respondent's delay in learning of the certificate action was a predictable consequence of his own making.

Nevertheless, assuming, 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 have only warranted an extension of the deadline through the date, *i.e.*, October 11th, that he actually became aware of the order and its expired deadline for filing an appeal.²⁰

Likewise, respondent here was away from home for 12 days without taking any steps to provide the FAA with information as to how he could be reached in order to be kept abreast of any important developments relating to this matter — which he presumably knew was under investigation — during that absence. Thus, as was the case in *Croll*, respondent's failure to become aware of the issuance of the Administrator's revocation order until September 25, 2012 was a "predictable consequence of his own making." Further, as was also the case in *Croll*, respondent's subsequent delay in filing an appeal from the Administrator's order until three days after he was in actual receipt thereof was, in its own right, reflective of a lack of due diligence on his part.

²⁰ NTSB Order EA-5009 at 4-6 (footnotes omitted). See also *Administrator v. Beissel*, NTSB Order EA-5153 at 2 (2005); *Administrator v. Ordini*, NTSB Order EA-5160 at 6-7 (2005); *Administrator v. Kasper*, NTSB Order EA-5267 at 7-8 (2007); *Administrator v. Warfel*, NTSB Order EA-5418 at 5 (2008).

THEREFORE IT IS ORDERED that the Administrator's motion to dismiss respondent's appeal as untimely is GRANTED, and that this proceeding is hereby TERMINATED on that basis.

Entered this 11th day of March, 2013, at Washington, D.C.

Alfonso J. Montaña
Chief Administrative Law Judge

APPEAL (DISPOSITIONAL ORDER)

Any party to this proceeding may appeal this order by filing a written notice of appeal within 10 days after the date on which it was served (the service date appears on the first page of this order). An original and 3 copies of the notice of appeal must be filed with the:

National Transportation Safety Board
Office of Administrative Law Judges
Room 4704
490 L'Enfant Plaza East, S.W.
Washington D.C. 20594
Telephone: (202) 314-6150 or (800) 854-8758

That party must also perfect the appeal by filing a brief in support of the appeal within 30 days after the date of service of this order. An original and one copy of the brief must be filed directly with the:

National Transportation Safety Board
Office of General Counsel
Room 6401
490 L'Enfant Plaza East, S.W.
Washington, D.C. 20594
Telephone: (202) 314-6080
FAX: (202) 314-6090

The Board may dismiss appeals on its own motion, or the motion of another party, when a party who has filed a notice of appeal fails to perfect the appeal by filing a timely appeal brief.

A brief in reply to the appeal brief may be filed by any other party within 30 days after that party was served with the appeal brief. An original and one copy of the reply brief must be filed directly with the Office of General Counsel in Room 6401.

NOTE: Copies of the notice of appeal and briefs must also be served on all other parties to this proceeding.

An original and one copy of all papers, including motions and replies, submitted thereafter should be filed directly with the Office of General Counsel in Room 6401. Copies of such documents must also be served on the other parties.

The Board directs your attention to Rules 7, 43, 47, 48 and 49 of its Rules of Practice in Air Safety Proceedings (codified at 49 C.F.R. §§ 821.7, 821.43, 821.47, 821.48 and 821.49) for further information regarding appeals.

ABSENT A SHOWING OF GOOD CAUSE, THE BOARD WILL NOT ACCEPT LATE APPEALS OR APPEAL BRIEFS.