

SERVED: August 9, 2016

NTSB Order No. EA-5788

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 8th day of August, 2016

_____	)	
MICHAEL P. HUERTA,	)	
Administrator,	)	
Federal Aviation Administration,	)	
	)	
Complainant,	)	
	)	Docket NA-30019
v.	)	
	)	
NICHOLAS R. OATES,	)	
	)	
Respondent.	)	
	)	
_____	)	

**OPINION AND ORDER**

**1. Background**

Respondent, who proceeds *pro se* appeals Chief Administrative Law Judge Alfonso J. Montañó’s July 8, 2016 Order Not Accepting Appeal.<sup>1</sup> By that order, the law judge did not accept respondent’s appeal and terminated the proceeding. We deny respondent’s appeal.

a. *Facts*

On June 24, 2016, the Administrator issued an emergency order revoking respondent's combined student pilot certificate and second-class medical certificate, and any other airman or

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

medical certificates he held.<sup>2</sup> The Administrator's Emergency Order of Revocation (EOR) included appeal instructions notifying respondent that he could appeal the EOR within 10 days from the date of its service, June 24, 2016. The appeal instructions directed respondent to our Rules of Practice and to the National Transportation Safety Board's (NTSB) website, and further informed respondent, "All documents submitted to the NTSB in a proceeding governed by 49 C.F.R. part 821, subpart I [Special Rules Applicable to Proceedings Involving Emergency and Other Immediately Effective Orders], must be filed with the Board by overnight delivery, facsimile, or electronic mail and simultaneously served on all other parties by the same means."<sup>3</sup> Respondent did not waive the procedures applicable to emergency cases. On July 1, 2016, respondent mailed his notice of appeal to the NTSB Office of Administrative Law Judges (OALJ) by certified mail using NTSB Form 2005.2 (Rev. 2/2012), Notice of Appeal.<sup>4</sup> The OALJ received respondent's notice of appeal on July 7, 2016.<sup>5</sup>

The law judge issued an Order Not Accepting Appeal on Friday, July 8, 2016, which was served the same day via United Parcel Service next-day delivery. OALJ staff inadvertently failed to designate the envelope for Saturday delivery, and, consequently, respondent did not receive the order until the afternoon of Monday, July 11, 2016, the same day an appeal of the law judge's order would have been due.<sup>6</sup> Respondent appealed the law judge's order the following day, July 12, 2016, by overnight delivery.

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<sup>2</sup> The Administrator's emergency order of revocation alleged respondent violated 14 C.F.R. § 67.403(a)(1), which states no person may make or cause to be made, a fraudulent or intentionally false statement on any application for a medical certificate.

<sup>3</sup> EOR at 6.

<sup>4</sup> Notice of Appeal (July 1, 2016).

<sup>5</sup> Order at 2.

<sup>6</sup> Email from OALJ to NTSB Office of General Counsel (July 13, 2016, 1:58 pm).

b. *Law Judge's Order*

The law judge stated that in an emergency proceeding, an appeal from an emergency order must be filed within 10 days after the date on which the Administrator's order was served and that all documents submitted by a party must be filed by overnight delivery, facsimile, or electronic mail.<sup>7</sup> The law judge explained that the Administrator served the EOR on June 24, 2016 and, therefore, respondent should have filed a notice of appeal with the Board by overnight delivery, facsimile, or electronic mail delivery by July 5, 2016.<sup>8</sup> The law judge determined that respondent's failure to comply with the required filing method resulted in the Board's delayed receipt of the appeal and that "[s]uch improper service, despite clear instructions to the [respondent], compels the undersigned to issue this order not accepting the appeal on procedural grounds."<sup>9</sup>

c. *Issues on Appeal*

Respondent argues we should accept his late-filed appeal of the law judge's July 8 order because he did not receive the order until the afternoon of July 11, the same day an appeal of the law judge's order was due.<sup>10</sup> With regard to the law judge's order, respondent argues the law judge's nonacceptance of his appeal does "nothing to further the cause of safety in air commerce and leaves open the likelihood that other unsuspecting, yet enthusiastic, student pilots will suffer the same fate."<sup>11</sup> In this regard, respondent contends the law judge erred by not accepting his

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<sup>7</sup> Order at 2.

<sup>8</sup> *Id.* July 4, 2016, 10 days after the EOR was served, was a Federal holiday, and in accordance with 49 CFR § 821.10, if the last day for doing an act falls on a Saturday, Sunday, or Federal holiday, that deadline extends to the next day that is not a Saturday, Sunday, or Federal holiday, which, in this case, was Tuesday, July 5, 2016.

<sup>9</sup> Order at 2.

<sup>10</sup> Notice of Appeal to the Full Board at 2.

<sup>11</sup> *Id.*

appeal of the Administrator's EOR because the Administrator's appeal instructions were ambiguous.<sup>12</sup> Respondent also argues he made a good-faith effort to comply with the appeal instructions and that he complied with the instructions from the NTSB website and with NTSB Form 2005.2 in filing his notice of appeal by certified mail.<sup>13</sup>

## 2. Decision

### a. *Timeliness of Respondent's Appeal from the Law Judge's Order*

In an emergency proceeding, § 821.57(a) of our Rules of Practice imposes a two-day deadline, from the date of service, for filing an appeal from a law judge's appealable order. In the case *sub judice*, the OALJ served the Order Not Accepting Appeal on Friday, July 8, 2016. To comply with § 821.57(a), respondent should have filed his appeal by overnight delivery, facsimile, or electronic mail by Monday, July 11; however, respondent filed his appeal on Tuesday, July 12 by overnight delivery. We acknowledge that a clerical error made by staff in OALJ resulted in respondent receiving the law judge's order on the afternoon of Monday, July 11, mere hours before expiration of the two-day deadline, rather than on Saturday, July 9.<sup>14</sup> We determine, given the specific facts before us, that the NTSB's error constitutes good cause to excuse respondent's untimely appeal of the law judge's Order Not Accepting Appeal.

We now turn to the law judge's Order Not Accepting Appeal. We review the law judge's decision *de novo*, as our precedent requires.<sup>15</sup>

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<sup>12</sup> Appeal Br. at 1.

<sup>13</sup> Id.

<sup>14</sup> *Supra* at p. 2.

<sup>15</sup> Administrator v. Smith, NTSB Order No. EA-5646 at 8 (2013); Administrator v. Frohmuth and Dworak, NTSB Order No. EA-3816 at 2 n.5 (1993); Administrator v. Wolf, NTSB Order No. EA-3450 (1991); Administrator v. Schneider, 1 N.T.S.B. 1550 (1972) (in making factual findings, the Board is not bound by the law judge's findings).

b. *Timeliness of Respondent's Appeal from the Administrator's EOR*

Our statutory mandate for appeals governed by the expedited procedures applicable to emergency cases is to make a final disposition of an appeal not later than 60 days after the date on which the appeal is filed.<sup>16</sup> Given the time constraints applicable to emergency cases, we determined that imposing requirements to ensure our expedited receipt of filings would be advantageous to all parties.<sup>17</sup> Consequently, our Rules of Practice governing emergency proceedings state explicitly that the only acceptable methods by which a party may file documents with the Board, including a notice of appeal, are “overnight delivery, facsimile, or electronic mail,” which would guarantee our expedited receipt of party filings within one business day.<sup>18</sup> We require strict adherence to this provision because, *inter alia*, the commencement of our 60-day statutory mandate begins on the date the appeal is filed.<sup>19</sup>

In the case *sub judice*, we agree with the law judge that respondent needed to file his notice of appeal by overnight delivery, facsimile, or electronic mail by July 5, 2016 to comply with §§ 821.52(e) and 821.53(a). Respondent, however, did not comply with § 821.52(e) and, instead, mailed his notice of appeal by certified mail. Respondent’s failure to comply with one of our required filing methods resulted in an unacceptable delay in OALJ’s receipt of the appeal. In Administrator v. Briggs, involving an emergency proceeding, we stated:

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<sup>16</sup> 49 U.S.C. § 44709(e)(4).

<sup>17</sup> See Rules of Practice in Air Safety Proceedings, 77 Fed. Reg. 63245, 63249 (October 16, 2012) (preamble to final rule stating, “Given the time constraints applicable to emergency cases, the NTSB has determined adopting such a requirement [electronic filing] would be advantageous to all parties”).

<sup>18</sup> 49 CFR § 821.52(e).

<sup>19</sup> Documents are deemed filed on the date of personal delivery; on the send date shown on the facsimile or the item of electronic mail; and, for mail delivery service, where permitted, on the mailing date shown on the certificate of service, or the date shown on the postmark if there is no certificate of service. 49 CFR § 821.7(a)(4).

[A]ll briefs must be served via overnight delivery or facsimile confirmed by first class mail. The respondent did not comply with this requirement in serving his appeal brief on October 31; he utilized first class mail alone. As a result, the Board did not have his appeal brief, which we should have received no later than November 1, until November 6. Any unjustified delay, in a review process as compressed as this one can be for both the parties and the agency alike, is unacceptable. We therefore give notice that the Board will hereafter treat any brief whose receipt by us is delayed through lack of compliance with our rule on service as untimely and, absent good cause for the failure to comply, subject to dismissal on the motion of the other party or on the Board's own initiative.<sup>20</sup>

While Briggs involved a respondent's noncompliance with our Rules of Practice when filing an appeal brief, our requirement that parties in emergency cases utilize overnight delivery, facsimile, or electronic mail applies to all documents, including notices of appeal. In an emergency proceeding, we treat as untimely a notice of appeal or appeal brief submitted by a party in a manner that does not comply with our acceptable filing methods, irrespective of the service date shown on the certificate of service or postmark.<sup>21</sup> It is immaterial that respondent mailed his notice of appeal on July 1, which was well within the 10 days allotted for appealing the EOR, because he did not comply with § 821.52(e). The OALJ did not receive the notice of appeal until July 7, after the 10-day period expired, when it would have been received within one business day had respondent complied with our Rules.<sup>22</sup> Therefore, respondent's appeal of the EOR is subject to dismissal absent respondent's showing of good cause to excuse his noncompliance with our Rules.

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<sup>20</sup> NTSB Order No. EA-4502 at 1 n.4 (1996).

<sup>21</sup> Id.; see also, Administrator v. Cogbill, NTSB Order No. EA-5182 at 1 (2005) (treating as untimely an appeal brief that respondent did not file by overnight delivery or facsimile, even if respondent transmitted the appeal brief by first class mail that had not yet been received).

<sup>22</sup> The facts of this case do not raise the issue of whether an appeal would be dismissed if the filing method was improper, but timely received. The Board, therefore, declines to address it.

The Board strictly adheres to the standards of timeliness set out in our Rules of Practice, only excusing procedural defects upon a showing of good cause.<sup>23</sup> We reject respondent's argument that good cause exists to excuse his untimely appeal from the Administrator's EOR. In accordance with our precedent, respondent's *pro se* status and his purported confusion about our Rules and about the Administrator's appeal instructions do not establish good cause to excuse his late-filed notice of appeal.<sup>24</sup> Parties are responsible for knowing our Rules of Practice.<sup>25</sup> Both our Rules and the Administrator's appeal instructions stated unambiguously that documents submitted to the NTSB in a proceeding governed by 49 C.F.R. part 821, subpart I, must be filed with the Board by overnight delivery, facsimile, or electronic mail.<sup>26</sup> We find no reason to depart from our jurisprudence in the case *sub judice*.

We also find unavailing respondent's argument that he complied with instructions on the NTSB's website and with the filing methods listed on NTSB Form 2005.2. Guidance on the NTSB's website advises respondents to use NTSB Form 2005.3 (rev. 4/2016), Emergency Notice of Appeal, which states on its face that it must be submitted by overnight delivery, facsimile, or electronic mail.<sup>27</sup> Respondent, however, did not use NTSB *Form 2005.3*, but rather used NTSB

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<sup>23</sup> 49 C.F.R. § 821.11(a) (stating the Board may grant an extension of time to file any document upon a showing of good cause); see also 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).

<sup>24</sup> See Administrator v. Ocampo, NTSB Order No. EA-5113 at 6 (2004) (stating [T]he fact that respondent is acting *pro se* does not excuse him from his obligation to file a timely answer.); Administrator v. Diaz, NTSB Order No. EA-4990, at 2 n.3 (2002) (stating “[I]gnorance or misreading of our rules does not constitute good cause.”).

<sup>25</sup> Administrator v. Bruington, NTSB Order No. EA-5335 at 2 (2007).

<sup>26</sup> 49 CFR § 821.52(e); EOR at 6.

<sup>27</sup> See NTSB website, *FAQs On The Airman Appeals or Answers Process*, at [http://www.nts.gov/legal/alj/Pages/process\\_faq.aspx](http://www.nts.gov/legal/alj/Pages/process_faq.aspx); see also NTSB Form 2005.3 (rev. 4/2016), Emergency Notice of Appeal, at <http://www.nts.gov/legal/alj/Documents/Emergency-Notice-of-Appeal.pdf>. Use of the NTSB Forms 2005.2 and 2005.3 is optional.

*Form 2005.2*, Notice of Appeal, which is for non-emergency appeals and which provides for submission by certified mail.<sup>28</sup> Respondent's reliance on the wrong NTSB form does not constitute good cause to excuse his late-filed appeal. To the extent we liberally construe respondent's argument to be that his reliance upon the wrong form constitutes excusable neglect, we have "expressly refused to adopt the more lenient standard of excusable neglect in cases involving untimely appeals."<sup>29</sup>

**ACCORDINGLY, IT IS ORDERED THAT:**

1. Respondent's appeal is denied; and
2. The law judge's Order Not Accepting Appeal is affirmed.

HART, Chairman, DINH-ZARR, Vice Chairman, and SUMWALT AND WEENER, Members of the Board, concurred in the above opinion and order.

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<sup>28</sup> Notice of Appeal (July 1, 2016).

<sup>29</sup> Administrator v. Jimenez, NTSB Order No. EA-5779 at 5 (2016) (citing Administrator v. Horna, NTSB Order No. EA-5720 (2014)).

Served: July 8, 2016

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

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In the matter of \*  
\*  
NICHOLAS R. OATES, \*  
\*  
Appellant. \*  
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Docket NA-30019

**ORDER NOT ACCEPTING APPEAL**

Service: Nicholas R. Oates  
1421 Dearborn Street  
Caldwell, Idaho 83605  
*(UPS OVERNIGHT DELIVERY)*

Fatimah Stokley, Esq.  
Federal Aviation Administration  
Enforcement Division  
Western Team, Mail Stop AWP-7.5  
P.O. Box 92007  
Los Angeles, California 90009-2007  
*(FAX)*

On June 24, 2016, the Administrator of the Federal Aviation Administration (FAA) issued an emergency order revoking appellant's combined Student Pilot and Second Class Airman Medical Certificate for alleged violation of §67.403(a)(1) of the Federal Aviation Regulations (FAR, codified at 14 CFR), stemming from his purported intentional falsification of statements on his application for a medical certificate in that he answered "no" in response to the question asking whether he had ever in his life had any history of:

(1) any arrests and/or convictions involving driving while intoxicated by, while impaired by, or while under the influence of alcohol or a drug; or

(2) history of any arrests and/or convictions and/or administrative actions involving offenses which resulted in the denial, suspension, cancellation, or revocation of driving privileges, or which resulted in attendance at an educational or a rehabilitation program.

The Administrator further alleged that appellant:

- was convicted of reckless driving in the Boise, Idaho City Traffic Court on September 7, 2006, and that his Idaho driving privileges were suspended as a result on October 5, 2006, by the Idaho Transportation Department, Division of Motor Vehicles

- was convicted of a violation I.C. 49-1232-Motor Vehicle Financial Responsibility, in the Canyon County Court on June 25, 2007, and that as a result his Idaho driving privileges were suspended by the Idaho Transportation Department, Division of Motor Vehicles, on July 12, 2007
- had his Idaho driving privileges suspended on August 15, 2008, by the Idaho Transportation Department, Division of Motor Vehicles, for failure to maintain proof of financial responsibility insurance
- was convicted of reckless driving in the Boise City Traffic Court on October 29, 2008, resulting in the suspension of Idaho driving privileges by the Idaho Transportation Department, Division of Motor Vehicles on November 17, 2008
- was arrested and cited on October 26, 2012 for being under the influence of alcohol, drugs, or other intoxicating substance by the Caldwell Police Department, resulting in the October 26, 2012 suspension by the Idaho Transportation Department, Division of Motor Vehicles, of his driving privileges for "Failing Evidentiary Testing"
- was convicted of inattentive or careless driving on December 28, 2012 in the District Court of Canyon County and was ordered to attend an alcohol treatment program

On July 1, 2016, appellant mailed his appeal to this office by certified mail. Rule 53(a) of the Board's Rules of Practice (codified at 49 CFR 821.52(e)) provides that an appeal from an emergency order of the Administrator must be filed within 10 days after the date on which the Administrator's order was served. Rule 52(e) further provides that "[a]ll documents submitted by a party in a proceeding governed by this subpart [emergencies] must be filed with the Board by overnight delivery, facsimile or electronic mail...." The appeal rights attachment of the emergency order of revocation issued by the Administrator informed appellant of this requirement, and also directed appellant to the Board's Rules on our website. In order to be timely, appellant should have filed his appeal (by expedited means) on or before July 5, 2016 (due to the July 4 Federal holiday). As a result of appellant's failure to submit his appeal by the proper means, the Board did not receive his appeal until July 7, 2016.

In view of this, the undersigned must find that appellant's emergency appeal was not properly served on the Board, and that such improper service delayed the appeal's receipt by the Board. Such improper service, despite clear instructions to the appellant, compels the undersigned to issue this order not accepting the appeal on procedural grounds.

THEREFORE, IT IS ORDERED that appellant's appeal is NOT ACCEPTED, and that this proceeding is hereby TERMINATED on that basis.

Entered this 8<sup>th</sup> day of July, 2016, at Washington, D.C.



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Alfonso J. Montañó  
Chief Administrative Law Judge