

UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

Served: 12/21/92

FAA Order No. 92-76

In the Matter of:

SAFETY EQUIPMENT AND SIGN CO.,
LTD.

)
)
) Docket No. 90-226 (HM)
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)

DECISION AND ORDER

Respondent Safety Equipment and Sign Co., Ltd., appeals from the "Order Granting Complainant's Motion for Decision" issued by Administrative Law Judge Robert L. Barton, Jr., on May 22, 1992.^{1/} The complaint in this case alleged that Respondent violated Department of Transportation Hazardous Materials Regulations^{2/} on February 5, 1990, by knowingly offering a generator containing undrained gasoline as checked baggage on a passenger-carrying flight. According to the complaint, the shipment was not properly packaged, marked, and labeled as hazardous material. The gasoline allegedly leaked from the generator during the flight, resulting in a spill and fumes in the cargo bay.

^{1/} A copy of the law judge's order is attached.

^{2/} The complaint alleged violations of the following specific regulations: 49 C.F.R. §§ 171.2(a), 171.200(a), 171.202, 172.204, 172.300, 172.301(a), 172.312(a)(2), 172.400(a), 173.3(a), 173.22(a), 173.119, 173.6(b)(1), 173.24(a)(1), 173.24(a)(2), 173.1(b).

Respondent failed to file a timely answer to the complaint.^{3/} Fifteen days after the deadline for filing the answer,^{4/} Complainant filed a Motion for Decision. Complainant asked that the allegations in the complaint be deemed admitted under Section 13.218(f) of the Rules of Practice^{5/} due to Respondent's failure to answer the complaint.

Thirty days after the deadline for filing the answer,^{6/} Respondent filed a Motion for Leave to File an Answer to the Complaint, an Answer to the Complaint, and an Opposition to Motion for Decision.^{7/} Counsel asserted that he was unaware that a complaint had been filed until he received Complainant's Motion for Decision. He claimed that his paralegal had failed properly to receive and calendar documents in a number of other cases as well. In fact, at the time the complaint was served on him, he said, he was documenting his paralegal's deficiencies so that he could terminate her without fear of a lawsuit. Although he had instructed her not to file any mail

^{3/} Under the Rules of Practice, respondents must answer the complaint in writing within 30 days. 14 C.F.R. § 13.209(a). Respondent had an additional 5 days to respond because the complaint was served by mail. 14 C.F.R. § 13.210(e). Since the complaint was served on January 27, 1992, Respondent's answer was due on March 2, 1992.

^{4/} March 17, 1992.

^{5/} 14 C.F.R. § 13.218(f)(5).

^{6/} April 1, 1992.

^{7/} The briefs submitted by both parties incorrectly state that the answer was 21 days late.

until he had reviewed it, she had not complied, counsel asserted.

The law judge granted Complainant's Motion for Decision, assessing a civil penalty of \$30,000 as requested in the complaint. According to the law judge, counsel had a duty to operate his office efficiently so that he complied with the rules of practice. The law judge noted that counsel for Respondent had failed to cite any cases holding that a paralegal's failures constitute good cause for an attorney's non-compliance with procedural rules. He also noted that counsel should have been familiar with the rules of practice because he had appeared in other FAA cases.

Respondent appeals from the law judge's Order Granting Complainant's Motion for Decision.^{8/} Respondent requests that the Administrator reverse the law judge's order, schedule the case for further proceedings, and disqualify the law judge from presiding over the case.

The threshold issue in this case is whether the Administrator has jurisdiction. Respondent claims that the FAA has "incorporated hazardous materials cases on its own initiative into the [civil penalty] program without congressional authorization." This claim is without merit. The Federal Aviation Act of 1958, as amended by Congress, provides as follows:

The amount of any ... civil penalty which relates to the transportation of hazardous materials shall be

^{8/} Complainant's motion of September 30, 1992, to withdraw portions of its reply brief because they were misleading or erroneous has been granted.

assessed by the Secretary [of Transportation] or his delegate, upon written notice upon a finding of violation by the Secretary, after notice and an opportunity for a hearing.

49 U.S.C. App. § 1471(a)(1). (Emphasis added.) The Secretary of Transportation has delegated this power to the Administrator of the FAA. 49 C.F.R. § 1.47(k) (1991).

This case turns on whether Respondent had good cause for its failure to file a timely answer.^{9/} Default judgments have been upheld where good cause for failure to file a timely answer has not been shown. In the Matter of Barnhill, FAA Order No. 92-32 (May 5, 1992); In the Matter of Playter, FAA Order No. 90-15 (March 19, 1990), aff'd, Playter v. FAA, 933 F.2d 1009 (6th Cir. 1991).^{10/}

As a general rule, counsel are expected to know and meet procedural deadlines, and counsel are responsible for their employees' actions. Nevertheless, a close examination of all

^{9/} Under 14 C.F.R. § 13.209(f), good cause is required to excuse the late filing of an answer. Respondent disputes the fairness of § 13.209(f), arguing that this rule was drafted by the Administrator so that it can only result in a default against a respondent and never against Complainant. While it is true that § 13.209(f) imposes a duty solely on respondents, other rules impose corresponding obligations solely on Complainant. For example, under § 13.208(a), the agency attorney is required to file the complaint with the docket clerk within 20 days after the agency attorney receives the request for hearing. If the complaint were late without good cause, the case would be subject to dismissal.

^{10/} Respondent's argument that the Administrator lacks authority to assess a civil penalty by default is without merit. Although 49 U.S.C. App. § 1471(a)(1) makes assessment of a civil penalty dependent upon a prior hearing on the record, the right to a hearing is waived where good cause for a default has not been shown.

the circumstances of this case, viewed with a forgiving eye, leads to the conclusion that good cause is present. Counsel attempted to protect against the danger of default by asking his employee to let him see each document received in the mail before filing it, but his employee did not comply. Counsel acted promptly to cure the default upon learning of it,^{11/} and the default caused only minimal delay. Finally, Complainant has not claimed prejudice.^{12/} Although the showing of good cause here is marginal, it is sufficient to justify reinstating the case.^{13/} Wherever possible, cases should be disposed of on the merits after a hearing, rather than summarily because of a procedural defect. In the Matter of Cornwall, FAA Order No. 92-47 at 7 (July 22, 1992).

Respondent's argument that good cause exists because Complainant improperly served the complaint is rejected. In

^{11/} See United States v. Moradi, 673 F.2d 725 (4th Cir. 1982), where the defaulting party's prompt action in a civil libel suit to cure the default was viewed as a strong reason for granting the motion to set aside the default judgment.

^{12/} See FDIC v. Francisco Investment Corporation, 873 F.2d 474, 479 (1st Cir. 1989), considering whether the non-defaulting party had been prejudiced by the default, and stating that the issue was not mere delay, but rather its accompanying dangers: loss of evidence, increased difficulties of discovery, or an enhanced opportunity for fraud or collusion.

^{13/} The Administrator also found good cause for a respondent's late answer In the Matter of Cornwall, FAA Order No. 92-47 (July 22, 1992). In Cornwall, counsel acted quickly upon learning of his error to cure the default. Id. at 3. Respondent's late answer was filed early in the proceedings, and Complainant had not been prejudiced by the late filing. Id. at 5.

its appeal brief, Respondent claimed that the following actions on the part of Complainant constituted improper service:

(1) Complainant failed to have the complaint stamped "Filed" by the docket clerk before it was mailed to Respondent. (Respondent argues that if the complaint had been stamped "Filed," then his paralegal would have realized that an answer needed to be filed.)

(2) Complainant failed to use some sort of restricted service so that the complaint could be delivered only into the hands of Respondent's counsel himself, or the president of Respondent Safety Equipment & Sign Company. (Respondent alleges that it was improper for Complainant to serve the complaint by certified mail, return receipt requested, because this manner of service permitted delivery to counsel's employees.)

Contrary to Respondent's arguments, Complainant's filing and service of the complaint was proper. Nowhere do the Rules of Practice require that Complainant have the docket stamp Respondent's copy of the complaint "Filed" before mailing it. Section 13.208, the rule governing filing and service of complaints, does not provide that Respondent's copy of the complaint must be stamped "Filed." Nor do the general rules governing filing and service of documents, 14 C.F.R. §§ 13.210 and 13.211, respectively, require that documents be stamped "Filed" before being served on a party.

Furthermore, nothing in the Rules of Practice requires Complainant to serve respondents by some sort of restricted service that would exclude service upon counsel's own employees. Complainant sent the complaint to Respondent's counsel at the address supplied by him in his notice of appearance dated January 10, 1992. The notice of appearance did not indicate that counsel did not want his immediate office

staff accepting service on his behalf. The rules provide that a person may serve documents by personal delivery or by mail. 14 C.F.R. § 13.211. "Mail," as defined in the rules, includes U.S. certified mail, U.S. registered mail, and use of an overnight express courier service. 14 C.F.R. § 13.202. Complainant's service of the complaint on counsel for Respondent by certified mail, return receipt requested, fully complied with the Rules of Practice.

Finally, Respondent asks that the law judge be disqualified from this case because he allegedly sought to "personally vilify counsel for Respondent" and to "demean counsel's character and competence" in retaliation for counsel's criticism of the civil penalty program. Respondent's Appeal Brief at 16, 17.^{14/} Counsel's ad hominem attacks on the law judge are unsupported by any evidence in the record. Bias has not been shown. As the Supreme Court has held, "total rejection of an opposed view cannot of itself impugn the integrity or competence of a trier of fact." NLRB v. Pittsburgh S.S. Co., 337 U.S. 656 at 659 (1949). Counsel's

^{14/} Although counsel does not specify, he apparently bases this claim on statements in the law judge's order rejecting counsel's attempts to shift responsibility for the failure to file a timely answer to his paralegal.

request is denied. This case is remanded to the law judge for proceedings consistent with this decision.


THOMAS C. RICHARDS, ADMINISTRATOR
Federal Aviation Administration

Issued this 17th day of December, 1992.