

UNITED STATES DEPARTMENT OF TRANSPORTATION  
FEDERAL AVIATION ADMINISTRATION  
WASHINGTON, DC

In the Matter of:

**ROBERT LEE SUTTON,  
a/k/a ROGER L. SUTTON**

FAA Order No. 94-29

Served: 9/30/94

Docket No. CP93EA0370

**DECISION AND ORDER**

Respondent Robert Lee Sutton, also known as Roger L. Sutton,<sup>1</sup> has appealed from the written initial decision of Chief Administrative Law Judge John J. Mathias.<sup>2</sup> The law judge dismissed Respondent's request for hearing and assessed the \$1,000 civil penalty requested in the complaint based on Respondent's failure to file an answer.<sup>3</sup>

The complaint, which was served on October 6, 1993, advised Respondent of the requirement to file an answer within 30 days.<sup>4</sup> Thus, Respondent's answer was due by November 10, 1993.<sup>5</sup>

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<sup>1</sup> Apparently, Respondent goes by both names, as they are both found at various places throughout the record. For example, at the top of his appeal brief, the name "Robert Lee Sutton" appears. At the end of the brief, however, Respondent signs his name "Roger L. Sutton."

<sup>2</sup> A copy of the law judge's written initial decision is attached.

<sup>3</sup> In the complaint, it was alleged that Respondent, acting as pilot in command of a Learjet near St. John, New Brunswick, Canada, took off when the runway visibility was "below the minimum listed in the Canada Air Pilot, in violation of § 555(a) of the Canadian Air Regulations." It was also alleged in the complaint that Respondent violated 14 C.F.R. § 91.703(a)(2) by failing to comply with the flight and maneuver regulations in effect in a foreign country while operating a U.S. registered aircraft there. Finally, it was alleged that Respondent violated 14 C.F.R. § 91.13(a) by operating an aircraft "contrary to another regulation."

[Footnote continues on next page.]

By order dated October 27, 1993, the law judge issued an order containing basic information about the procedures to be followed in the case. In this order, the law judge included the following reminder to Respondent:

The Rules of Practice provide that Respondent must file a written answer to the Complaint within 30 days of receipt<sup>6</sup> of the Complaint. (§13.209(a)). A general denial is deemed a failure to file answer (sic) (§13.209(e)).

With regard to the need to file answer (sic), it should be noted that any letters or written communications previously provided to FAA personnel, in connection with the Notice of Proposed Civil Penalty, are not a part of the files of this proceeding. This is an entirely new proceeding, being conducted before an administrative law judge of the U.S. Department of Transportation. If Respondent wishes to rely upon some prior correspondence or communication as the answer to the Complaint, he must re-file it in the record of this case.

On November 3, 1993, the agency attorney submitted to the law judge and opposing counsel the "Agency's Statement on Location and Settlement," per the law judge's order of October 27, 1993. In this statement, the agency attorney stated as follows, in regard to settlement:

The Respondent, pro se, and Agency, by counsel, have had two telephone conversations, on October 7 and 12th, 1993. Agency counsel advised Respondent on settlements, inviting an offer if Respondent chose to so do.

Agency is ready, willing and able to negotiate a settlement at any time. However, as of this date, no proposals, or offers have been made.

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<sup>4</sup> Section 13.209(a) of the Federal Aviation Regulations (FAR), 14 C.F.R. § 13.209(a), provides in relevant part: "[a] Respondent shall file a written answer to the complaint ... not later than 30 days after service of the complaint."

The agency attorney stated in the complaint that Respondent must file a written answer within 30 days of the *receipt* of the complaint. This is incorrect. This error did not, however, appear to prejudice Respondent. Respondent's failure to file an answer was independent of the agency attorney's error.

<sup>5</sup> Thirty days from October 6, 1993, the date the complaint was served, is November 5, 1993. Respondent had an additional 5 days because the complaint was served by mail. Respondent had 5 additional days because the complaint was served by mail. See 14 C.F.R. § 13.211(e), which provides that "[w]hen a party has a ... duty to ... make any response within a prescribed period after service by mail, ... 5 days shall be added to the prescribed period." As a result, Respondent's answer was due on November 10, 1993.

<sup>6</sup> In his order, the law judge made the same mistake made in the complaint--he incorrectly states that the answer must be filed within 30 days of *receipt* of the complaint. As stated above, the answer must be filed within 30 days of *service* of the complaint.

Respondent's deadline for filing the answer of November 10, 1993, for filing the answer, came and went, but Respondent did not file an answer. The law judge, however, gave Respondent an additional opportunity to file an answer. By order dated November 16, 1993, the law judge gave Respondent until December 1, 1993, to file an answer to the complaint or show cause why the request for hearing should not be dismissed and a \$1,000 civil penalty imposed.

In a letter to the agency attorney dated November 23, 1993, Respondent offered to pay a \$300 civil penalty, stating as follows:

After serious consideration I have elected to present a proposal for settlement to charges filed in a complaint by your office dated October 6, 1993.

I would be willing to pay a \$300 dollar civil penalty providing the FAA would issue a compromise order suspending the violation action in the complaint.

Thank you for your consideration in this matter.

The deadline of December 1, 1993, for Respondent either to file his answer or show cause why a \$1,000 civil penalty should not be imposed came and passed without Respondent filing anything with the law judge.

On December 7, 1993, the law judge issued an order dismissing Respondent's request for hearing and assessing a \$1,000 civil penalty.<sup>7</sup> The law judge's order advised Respondent of the requirements for filing an appeal with the Administrator under Section 13.233 of the Federal Aviation Regulations (FAR), 14 C.F.R. § 13.233.

On December 17, 1993, Respondent filed a notice of appeal with the Administrator.

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<sup>7</sup> The order was based on Section 13.209(f), 14 C.F.R. § 13.209(f), which provides as follows: "[a] person's failure to file an answer without good cause shall be deemed an admission of the truth of each allegation contained in the complaint."

The issue on appeal is whether there is good cause for Respondent's failure to file an answer. In his appeal brief, Respondent explained his failure to file an answer as follows:

The Respondent has been attempting to agreeably dispose of this very tenacious legal action, without counsel, due to monetary constraints. Unfortunately, a misunderstanding of legal procedures prevented the timely response as required. Respondent presented a settlement proposal to J.I.M. Choate, Office of the Assistant Chief Counsel, FAA/Eastern Region [the agency attorney handling this case] as agreed between the parties. It was understood by the Respondent that a compromise proposal was an alternative to further litigation, and precluded further response until otherwise advised. Unfortunately the settlement proposal was not received by the recipient, although Mr. Choate is now in receipt of and giving the same due consideration.

Respondent raises the possibility that he may have been misled, even if inadvertently, in his discussions with the agency attorney. If communications between Respondent and the agency attorney in this case led Respondent reasonably, but incorrectly, to believe that submitting a settlement proposal was a valid substitute for filing an answer, then in the interest of fairness, good cause may be found and Respondent should be permitted to file a late answer.<sup>8</sup>

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<sup>8</sup> The Administrator does not wish to discourage agency attorneys from engaging in settlement negotiations with respondents; to the contrary, the Administrator encourages the parties to engage in settlement negotiations whenever there is a possibility of reaching a reasonable settlement. Nevertheless, care should be taken so that nothing in the settlement negotiations misleads respondents or leads them unknowingly to forfeit their rights. If agency attorneys are not already doing so, it might be helpful for them to remind respondents, when settlement is discussed, that submitting a settlement proposal does not extend the time under the Rules of Practice for filing answers or other time-sensitive documents.

Complainant fails to address this issue in its reply brief, and there is not enough information in the record to resolve it satisfactorily. Accordingly, given the circumstances of this case, Complainant is directed to provide an additional brief. In its additional brief, Complainant should address whether Respondent may have been misled by Complainant's words or actions, and whether Respondent should be permitted to file a late answer. Complainant is directed to file its additional brief with the Appellate Docket Clerk and to serve Respondent with a copy of its additional brief, both within 30 days of the date of service of this order.

Respondent may file a reply to Complainant's additional brief, with affidavits or other evidence in support of his reply, not later than 20 days after Complainant's additional brief is served (*i.e.*, not later than 20 days from the date on the certificate of service attached to Complainant's additional brief). Respondent should file his reply with the Appellate Docket at the following address: Federal Aviation Administration, 800 Independence Avenue, SW, Room 924A, Washington, DC 20591, Attention: Appellate Docket Clerk. Respondent should also serve a copy of his reply on the agency attorney.



DAVID R. HINSON, ADMINISTRATOR  
Federal Aviation Administration

Issued this 30th day of September, 1994.