

UNITED STATES DEPARTMENT OF TRANSPORTATION  
FEDERAL AVIATION ADMINISTRATION  
WASHINGTON, DC

**In the Matter of:**

**INSTEAD BALLOON  
SERVICES**

FAA Order No. 98-23

Served: November 24, 1998

Docket No. CP97WP0047

**ORDER DISMISSING APPEAL**<sup>1</sup>

On July 15, 1998, Administrative Law Judge Burton S. Kolko held a hearing in this matter in Reno, Nevada. Although Respondent Instead Balloon Services (IBS) is located in Reno, no one appeared at the hearing to represent IBS. The agency counsel called IBS by telephone and spoke with IBS's president, Clyde Blincoe, who had represented IBS during the prehearing stage of these proceedings. According to agency counsel, Mr. Blincoe stated that it was a foregone conclusion that IBS would not prevail at the hearing and that IBS would be fined. (Tr. 4.) Agency counsel made a motion for the law judge to construe IBS's failure to appear at the hearing as a constructive withdrawal of its request for hearing and to enter a default judgment against IBS. (Tr. 3.) The law judge granted the motion, and assessed a \$1,500 civil penalty, as was sought in the complaint, against IBS. (Tr. 5.)

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<sup>1</sup> The Administrator's civil penalty decisions are available on LEXIS, Westlaw, and other computer databases. They are also available on CD-ROM through Aeroflight Publications. Finally, they can be found in Hawkins's Civil Penalty Cases Digest Service and Clark Boardman Callaghan's Federal Aviation Decisions. For additional information, see 63 Fed. Reg. 57,729, 57,7743 (October 28, 1998).

IBS subsequently filed a timely notice of appeal from the law judge's oral initial decision. However, to this date, IBS has not perfected that appeal by filing a separate appeal brief. Parties must perfect their appeals by filing an appeal brief within 50 days of the issuance of the oral initial decision. 14 C.F.R. § 13.233(c). As a result, IBS's appeal brief was due on September 3, 1998.

Complainant filed a motion for dismissal of IBS's notice of appeal, arguing that IBS has failed to perfect its appeal by filing a separate appeal brief. Complainant's motion is denied. IBS's notice of appeal contains sufficient information and argument to constitute an appeal brief. *See, e.g., In the Matter of Atlantic World Airways*, FAA Order No. 95-23 (October 13, 1995) (where a notice of appeal contains sufficient detail, it may meet the requirements for an appeal brief). Consequently, IBS's notice of appeal is construed to be both a notice of appeal and an appeal brief.

Ordinarily, once a respondent's notice of appeal is construed as both a notice and an appeal brief, Complainant is given additional time in which to file a reply brief. However, a reply brief is not necessary in this case. While the Administrator has construed the notice of appeal as an appeal brief, thereby saving IBS's appeal from dismissal for failure to perfect, IBS's appeal nonetheless must be denied.

The only question before the Administrator on appeal is whether it was error for the law judge to construe IBS's failure to appear at the hearing as a constructive withdrawal of its request for hearing. IBS's only excuse for not attending the hearing is that the law judges<sup>2</sup> showed clear bias against it during the pre-hearing proceedings, and as a result, it would have been a waste of time for IBS to participate at the hearing.<sup>3</sup>

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<sup>2</sup> Originally, this case was assigned to Administrative Law Judge Ann Cook. Subsequently, the case was reassigned to Administrative Law Judge Burton S. Kolko.

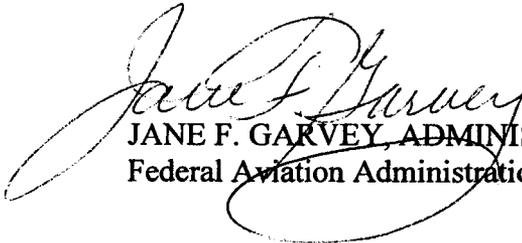
IBS has failed to point to any particular instance of "clear bias" by the law judges, and after careful consideration of the record, the Administrator can find no such example. Failure to appear at a hearing, moreover, does not constitute an acceptable means of protesting rulings by a law judge. If a party feels that a law judge has shown that he or she is biased against the party, the party may file a motion for disqualification of the law judge under 14 C.F.R. § 13.218(f)(6). In certain instances, a party may seek review of a law judge's prehearing rulings by filing a motion for interlocutory appeal. 14 C.F.R. § 13.219. However, failure to appear at a hearing, after the law judge, as well as the other party and its witnesses have traveled to the hearing location, rarely can be excused.<sup>4</sup> By failing to appear at the hearing for no good reason, IBS failed to: 1) preserve any arguments that it may have had concerning any of the prehearing rulings, and 2) in effect, withdrew its request for a hearing. The bottom line is that if IBS still wanted a hearing, it should have attended the hearing that was provided for it. Because IBS constructively withdrew its request for hearing, the law judge was correct in construing the allegations in the complaint as admitted and assessing a civil penalty.

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<sup>3</sup> At no point did IBS argue that it was unaware of the scheduled hearing date. Also, the law judge mentioned at the hearing that he had the signed return receipt "green card" indicating that IBS had received the notice of hearing. (Tr. 6.)

<sup>4</sup> The law judge traveled from Washington, D.C., to Reno, Nevada, for this hearing, and the agency attorney traveled from Los Angeles, California, to Reno. In addition, the agency attorney's witnesses traveled significant distances to the hearing as well. Complainant's three witnesses came from Sacramento, California, Wellington, Nevada, and Woodland, California, respectively. (Tr. 3-4.)

This case represents a terrible waste – a waste of Federal resources and a squandering of due process rights. It is the Administrator's hope that other parties will read this decision and heed its warning.

  
JANE F. GARVEY, ADMINISTRATOR  
Federal Aviation Administration

Issued on this 24th day of November, 1998.