

UNITED STATES DEPARTMENT OF TRANSPORTATION  
FEDERAL AVIATION ADMINISTRATION  
WASHINGTON, DC

**In the Matter of: PETER HOUTENBOS**

FAA Order No. 2002-11

Docket No. CP00WP0033  
DMS No. FAA-2000-7868<sup>1</sup>

Served: April 17, 2002

**ORDER DENYING COMPLAINANT'S MOTION TO DISMISS  
AND COMPLAINANT'S ALTERNATIVE REQUEST FOR  
ADDITIONAL TIME TO FILE ITS REPLY BRIEF<sup>2</sup>**

Complainant filed a motion seeking dismissal of Respondent Peter Houtenbos' appeal, and in the alternative, an extension of time in which to file its reply brief.

Complainant argues in its motion that Houtenbos filed both his notice of appeal and appeal brief in an untimely fashion. Houtenbos argues in response that he filed both documents in accordance with the timeframes set forth in the Rules of Practice. As explained in this decision, Complainant's motion is denied in its entirety.

Complainant filed the complaint against Houtenbos on August 24, 2000, alleging that while a passenger on a TWA flight from New York to Los Angeles, Houtenbos violated 14 C.F.R. § 91.11 by assaulting, threatening, or intimidating a crewmember, or

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<sup>1</sup> Materials filed in the FAA Hearing Docket (except for materials filed in security cases) are also available for viewing through the Department of Transportation's Docket Management System (DMS). Access may be obtained through the following Internet address: <http://dms.dot.gov>.

<sup>2</sup> The Administrator's civil penalty decisions, as well as indexes of the decisions, the Rules of Practice in civil penalty actions, and other information, are available on the Internet at the following address: <http://www.faa.gov/agc/cpwebsite>. In addition, there are two reporters of the decisions: Hawkins' Civil Penalty Cases Digest Service and Clark Boardman Callahan's Federal Aviation Decisions. Finally, the decisions are available through LEXIS and Westlaw. For additional information, *see* the website.

interfering with a crewmember's performance of duties during a flight. On February 23, 2001, Administrative Law Judge Burton S. Kolko held a hearing in this matter. In his oral initial decision, rendered at the conclusion of the hearing, the ALJ held that Houtenbos assaulted, threatened and intimidated a flight attendant and interfered with the performance of the first officer's duties during the flight. In light of these findings, the ALJ assessed a \$3,300 civil penalty against Houtenbos. The ALJ explained to Houtenbos on the record that he had 10 days in which to file a notice of appeal and 50 days in which to file an appeal brief.

Houtenbos filed an undated, handwritten letter postmarked on March 1, 2001, explaining his intention to appeal from the ALJ's initial decision. Houtenbos did not indicate in the notice whether he had served a copy on the agency attorney.

Subsequently, Houtenbos filed a packet that he described as his "appeal." The packet consisted of a handwritten cover letter addressed to the Appellate Docket and dated April 13, 2002, a handwritten letter to the agency attorney dated March 10, 2001, seeking information, a copy of the undated notice of appeal, three annotated Boeing 767-ER Seat Configuration charts, plus a typed appeal brief dated April 2, 2001. Houtenbos sent this appeal packet to the Appellate Docket by Federal Express on April 16, 2001, and the Appellate Docket received it on the next day.<sup>3</sup> Houtenbos did not indicate whether he sent a copy of these documents to the agency attorney.

Complainant did not file a reply brief. On October 19, 2001, the Program Manager of the FAA's Litigation Division in Washington, D.C., responded to a request

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<sup>3</sup> Federal Express Airbill is dated April 16, 2001. The Federal Express priority overnight sticker affixed to the cardboard envelope is dated April 16, 2001. The sticker indicates that the package should be delivered by April 17, 2001. The Appellate Docket staff date-stamped the package as received on April 17, 2001.

from the agency attorney by sending a copy of Houtenbos' appeal brief by facsimile to the agency attorney's paralegal assistant.

On January 10, 2002, Vicki Leemon, Manager, Adjudication Branch,<sup>4</sup> requested that the Hearing Docket clerk contact the agency attorney assigned to this case to inquire whether he had filed a reply brief.<sup>5</sup> The Hearing Docket clerk left a message on the agency attorney's answering machine on January 11, 2002.

On January 16, 2002, the agency attorney filed "Complainant's Motion to Dismiss Late-Filed Appeal And, In The Alternative, Motion For Extension Of Time To File Reply Brief." The agency attorney argues in this motion that Houtenbos filed his notice of appeal more than 10 days after the entry of the ALJ's oral initial decision, and as a result, the notice of appeal was late-filed. The agency attorney argues further that Houtenbos also filed his appeal brief in an untimely fashion because it was filed more than 50 days after the entry of the oral initial decision. As a result, the agency attorney argues, Houtenbos' appeal should be dismissed as untimely. The agency attorney argues further that Houtenbos failed to comply with 14 C.F.R. § 13.233(d) because he failed to serve a copy of the appeal brief on Complainant. The agency attorney requests additional time in which to file a reply brief if the Administrator denies the motion to dismiss the appeal as untimely.

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<sup>4</sup> Under the separation of functions in the FAA's civil penalty program, the manager of the Adjudication Branch, as a member of the Litigation Division, serves as an advisor to the Administrator, and does not participate in the prosecution of a civil penalty action by the agency attorney. See 14 C.F.R. § 13.202 (definition of agency attorney) and § 13.203.

<sup>5</sup> Ms. Leemon was concerned that if the agency attorney had filed a reply brief in October or November, 2001, the reply brief may not have been delivered to the Hearing Docket due to difficulties with the United States Postal Service during that time period.

Complainant's motion to dismiss Houtenbos' appeal is denied because Houtenbos filed both his notice of appeal and appeal brief in a timely fashion. Under 14 C.F.R. § 13.233(a), "[a] party shall file the notice of appeal not later than 10 days after entry of the oral initial decision on the record ...." The ALJ entered his oral initial decision on February 23, 2001, and, as a result, 14 C.F.R. § 13.233(a) required Houtenbos to file his notice of appeal no later than March 5, 2001. Under 14 C.F.R. § 13.210(b), "[a] document shall be considered to be filed on the date of personal delivery; or if mailed, the mailing date shown on the certificate of service, the date shown on the postmark if there is no certificate of service, or other mailing date shown by other evidence if there is no certificate of service or postmark." Houtenbos did not include a certificate of service with his notice of appeal. The envelope in which he mailed the notice, however, was postmarked March 1, 2001. Houtenbos, therefore, filed his notice of appeal on March 1, 2001, as reflected on the postmark, four days prior to the deadline.

Under Section 13.233(c), a party is required to perfect its appeal by filing an appeal brief within 50 days of the ALJ's entry of his oral initial decision on the record. 14 C.F.R. § 13.233(c). In this case, 50 days after February 23, 2001, was Saturday, April 14, 2001. When the last day of a time period is a Saturday, the time period runs until the end of the next day that is neither a Sunday nor a holiday. 14 C.F.R. § 13.212(c). Houtenbos, therefore, was required to file his appeal brief no later than Monday, April 16, 2001. Federal Express accepted the package containing the appeal brief on April 16, 2001.<sup>6</sup> Houtenbos, therefore, filed his appeal brief in a timely fashion.

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<sup>6</sup> Section 13.202 defines "mail" as including "U.S. certified mail, U.S. registered mail, or use of an overnight express courier service." 14 C.F.R. § 13.202 (definition of mail).

Houtenbos did not serve his appeal brief on Complainant, and as a result, the agency counsel had good cause for failing to file a timely reply brief – at least until he received a copy of the appeal brief from the Litigation Division. Once Complainant had a copy of the appeal brief, however, Complainant was obligated in a reasonable length of time to seek an extension of time to file its reply brief. Instead, Complainant did not file its motion until approximately 3 months later, and in essence, only after having been prompted to do so by the Hearing Docket clerk's inquiry.

Complainant did not mention in its motion that the Litigation Division had provided it with a copy of the appeal brief in October 2001. Complainant wrote only that Houtenbos had not complied with Section 13.233(d) and had not served it with a copy of the appeal brief. Complainant offered no explanation for the delay between its receipt of the copy of the appeal brief and the filing of its motion for additional time in which to file its reply brief. Complainant, therefore, failed to show any good cause for its delay in requesting additional time.

In light of the foregoing, Complainant's motion to dismiss Houtenbos' appeal, and in the alternative, for additional time in which to file its reply brief, is denied.

JANE F. GARVEY, ADMINISTRATOR  
Federal Aviation Administration



VICKI S. LEEMON  
Manager, Adjudication Branch

Issued this 17<sup>th</sup> day of April, 2002.

<sup>7</sup> Issued under authority delegated to the Chief Counsel and the Assistant Chief Counsel for Litigation by Memorandum dated October 27, 1992, under 49 U.S.C. § 322(b) and 14 C.F.R. § 13.202 (see 57 Fed. Reg. 58,280 (1992)) and redelegated by the Assistant Chief Counsel for Litigation to the Manager, Adjudication Branch, by Memorandum dated August 6, 1993.