

UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

In the Matter of: RONALD BURGER

FAA Order No. 2002-8

Docket No. CP98NM0025

Served: April 16, 2002

ORDER DISMISSING APPEAL¹

On May 11, 2001, Administrative Law Judge Burton S. Kolko issued an order assessing a \$15,000 civil penalty (attached) against Respondent Ronald Burger due to his failure to file an answer to the complaint. Burger filed a notice of appeal, and the Administrator subsequently construed that notice as both a notice of appeal and an appeal brief.² After due consideration, Burger's appeal is denied.

On December 29, 2000, the FAA issued a Notice of Proposed Civil Penalty proposing to assess a \$15,000 civil penalty for a violation of 49 U.S.C. § 46318. On January 26, 2001, Burger mailed his reply denying that he violated the statute to the agency attorney. The agency attorney issued the Final Notice of Proposed Civil Penalty on February 1, 2001, and Burger then filed his request for a hearing on February 8, 2001. The agency attorney filed the complaint on March 12, 2001. On page 3 of the complaint,

¹ 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.

² Burger did not file a separate appeal brief. The Administrator, in FAA Order No. 2001-9, issued on September 6, 2001, determined that the notice of appeal was sufficiently detailed to be construed also as an appeal brief.

agency attorney summarized the Rules of Practice requiring the filing of an answer to the complaint:

Answer

Section 13.209(a)³ of the Rules of Practice in FAA Civil Penalty Proceedings states, "A respondent shall file a written answer to the complaint, or may file a written motion pursuant to Section 13.208(d)⁴ or Section 13.218(f)(1-4)⁵ instead of filing an answer, not later than 30 days after service of the complaint.

Section 13.209(f)⁶ states, "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 ALJ issued an initial order on April 9, 2001. The first paragraph of the ALJ's order explained in bold print:

Respondent's answer to the agency's complaint is due on April 16, 2001 If none is filed we can assume that the complaint's allegations are true. In that case no hearing is necessary, and an order assessing a civil penalty will issue.

On April 24, 2001, Complainant filed a Motion for Order Assessing Civil Penalty.

Complainant argued that the ALJ should deem the allegations of the complaint as admitted and issue an order assessing civil penalty against Burger because he had not filed an answer. Attached to Complainant's motion was a copy of the return receipt "green card" indicating that the complaint had been delivered to Burger on March 15. The signature of the individual who signed for the delivery was illegible.

On May 2, 2001, the law judge issued a brief order in which he wrote:

³ 14 C.F.R. § 13.209(a).

⁴ 14 C.F.R. § 13.208(d).

⁵ 14 C.F.R. § 13.218(f)(1)-(4).

⁶ 14 C.F.R. § 13.209(f).

The FAA has moved to default Respondent for failing timely to answer its Complaint. The motion will be granted promptly if by 15 days from its date we have not received Respondent' (sic) answer. If an answer is received within 15 days from the FAA's motion, the hearing will be held in St. Louis, MO on July 11, 2001 But Mr. Burger's clock is ticking, and is soon to run out if he does not answer the FAA's complaint

Order Contingently Scheduling Hearing.

The ALJ issued an Order Assessing Civil Penalty on May 11, 2001, explaining that Burger had not filed an answer to the complaint or a response to Complainant's motion for default.⁷ The ALJ construed Burger's failure to file an answer or a response to the motion for default as a constructive withdrawal of his request for a hearing and as an admission of the complaint's allegations, explaining "either conclusion renders the holding of a hearing unnecessary." The ALJ assessed a \$15,000 civil penalty against Burger.

By letter dated May 15, 2001, Burger explained that he was "apparently confused in regards to the process in which I am required to answer and respond." He stated that he thought that he had responded in a timely fashion when he requested a hearing. Burger attached a copy of his letter, dated January 26, 2001, responding to the Notice of Proposed Civil Penalty and his letter dated February 28, 2001, responding to the Final Notice of Proposed Civil Penalty, both of which were filed prior to the issuance of the complaint by the agency attorney.

Under Sections 13.209(a) and 13.211(e) of the Rules of Practice, a respondent is required to file a written answer or a motion to dismiss under 14 C.F.R. § 13.208(d) or § 13.218(f)(1)-(4) instead of filing an answer, no later than 35 days after service of the

⁷ The ALJ also wrote that Burger did not respond to an order to show cause. The Hearing Docket file does not include any document entitled "Order to Show Cause."

complaint.⁸ It has been held that responses to pre-complaint documents, such as a letter of investigation or a notice of proposed civil penalty, do not satisfy the requirement for an answer. In the Matter of Beck, FAA Order No. 92-75 at 5-6 (December 21, 1992) (response to a NPCP does not constitute an answer); In the Matter of Barnhill, FAA Order No. 92-32 at 6 (May 5, 1992) (response to an inspector's letter of investigation does not constitute an answer.). If Burger wanted to use the responses that he had submitted to the agency attorney in response to the NPCP and the FNPCP as his answer to the complaint, then he needed to file them as attachments to a document filed with the FAA Hearing Docket within 35 days *after* service of the complaint. In the Matter of Misserlian, FAA Order No. 97-19 at 2-3 (May 23, 1997). Burger, however, did not file any document after the complaint was issued, despite numerous notifications by the ALJ and the agency attorney that unless an answer to the complaint was filed, Burger's request for a hearing would be dismissed. Under these circumstances, it was reasonable for the ALJ to construe Burger's post-complaint silence as a withdrawal of his request for

⁸ Section 13.209(a) of the Federal Aviation Regulations provides:

Writing required. A respondent shall file a written answer to the complaint, or may file a written motion pursuant to § 13.208(d) or § 13.218(f)(1-4) of this subpart instead of filing an answer, not later than 30 days after service of the complaint. The answer may be in the form of a letter but must be dated and signed by the person responding to the complaint. An answer may be typewritten or may be legibly handwritten.

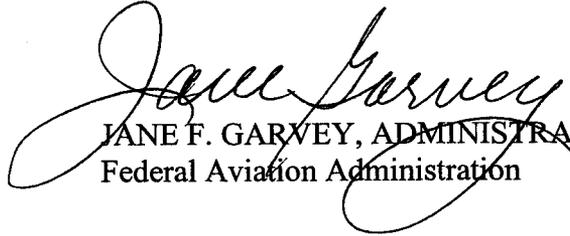
14 C.F.R. § 13.209(a). Section 13.211(e) of the Federal Aviation Regulations provides:

Additional time after service by mail. Whenever a party has a right or a duty to act or to make any response within a prescribed period after service by mail, or on a date certain after service by mail, 5 days shall be added to the prescribed period.

14 C.F.R. § 13.211(e).

hearing, or, in the alternative, as an admission of the allegations set forth in the complaint under 14 C.F.R. § 13.209(f).

In light of the foregoing, Burger's appeal is denied, and the law judge's Order Assessing Civil Penalty is affirmed.⁹


JANE F. GARVEY, ADMINISTRATOR
Federal Aviation Administration

Issued this 15th day of April, 2002.

⁹ Unless Respondent files a petition for review with a Court of Appeals of the United States under 49 U.S.C. § 46110 within 60 days of service of this decision, this decision shall be considered an order assessing civil penalty. *See* 14 C.F.R. §§ 13.16(b)(4) and 13.233(j)(2).