

**UNITED STATES DEPARTMENT OF TRANSPORTATION  
FEDERAL AVIATION ADMINISTRATION  
WASHINGTON, DC**

**In the Matter of: D & M CUSTOM INJECTION MOLDING CORPORATION**

FAA Order No. 2013-3

Docket No. CP11GL0000  
FDMS No. FAA-2011-0679<sup>1</sup>

Served: July 18, 2013

**ORDER GRANTING COMPLAINANT'S MOTION  
TO DISMISS APPEAL**<sup>2</sup>

On December 13, 2012, Administrative Law Judge (“ALJ”) Richard C. Goodwin issued a written initial decision finding that Respondent D & M Custom Injection Molding Corporation (“Respondent”) violated the Hazardous Materials Regulations, as alleged in the Complaint, and assessed a \$110,000 civil penalty.<sup>3</sup> Respondent filed a document entitled “Response Brief to Initial Decision of Administrative Law Judge Richard C. Goodwin” on January 30, 2013. In this document, Respondent argued that the Administrator should reduce the \$110,000 civil penalty to \$25,000. Respondent argued that a lower civil penalty is warranted based upon the actions of the manufacturer of the

---

<sup>1</sup> Generally, materials filed in the FAA Hearing Docket are also available for viewing at <http://www.regulations.gov>. 14 C.F.R. § 13.210(e)(1). However, by order dated September 14, 2012, the ALJ sealed the exhibits because they contain sensitive financial and commercial information.

<sup>2</sup> The Administrator’s civil penalty decisions, along with indexes of the decisions, the rules of practice, and other information, are available on the Internet at the following address: [www.faa.gov/about/office\\_org/headquarters\\_offices/agc/pol\\_adjudication/AGC400/Civil\\_Penalty/](http://www.faa.gov/about/office_org/headquarters_offices/agc/pol_adjudication/AGC400/Civil_Penalty/). See 14 C.F.R. § 13.210(e)(2). In addition, Thomson Reuters/West Publishing publishes Federal Aviation Decisions. Finally, the decisions are available through LEXIS (TRANS library) and WestLaw (FTRAN-FAA database). For additional information, see the Web site.

<sup>3</sup> Respondent offered a hidden shipment of hazardous materials to Federal Express for transportation by air. The shipment consisted of a 5-box package including approximately 2,000 E-Mysticks, which are cigarette-like smoking substitutes. Each E-Mystic contained a lithium battery and 1.5 milliliters of a liquid that included ethanol and lobelia. The lithium batteries and the liquid constituted hazardous materials under the Hazardous Materials Regulations, 49 C.F.R. Parts 171-177. After the Federal Express aircraft carrying the shipment flew from Indianapolis and landed at Minneapolis-St. Paul International Airport, the E-Mysticks caught fire in a cargo container. The ALJ rejected the \$168,000 civil penalty sought by Complainant, and assessed a \$110,000 civil penalty instead. Complainant did not file an appeal regarding the civil penalty.

products that Respondent had assembled and offered for shipment. Respondent also argued that a lower civil penalty would be appropriate because it “was experiencing a significant downturn in its activities and revenues.” (Response Brief at 3.)

Complainant has filed a motion arguing that Respondent’s appeal should be dismissed. Complainant notes that Respondent did not file a separate notice of appeal, and argues that if the response brief is construed as a notice of appeal, it should be dismissed because it was late-filed. In the alternative, Complainant argues that the Rules of Practice, 14 C.F.R. § 13.16 and Part 13, subpart G, do not authorize the filing of a “response brief” to an initial decision, and therefore, the response brief should be stricken. Respondent did not reply to Complainant’s motion.

Under 14 C.F.R. §§ 13.233(a) and 13.211(e),<sup>4</sup> a party must file a notice of appeal no later than 15 days after service of the written initial decision on the parties.<sup>5</sup> The ALJ served the written initial decision on December 13, 2012. Accordingly, any notice of appeal was due to be filed no later than December 28, 2012. The only document that Respondent filed after the issuance of the initial decision was the response brief which Respondent filed on January 30, 2013.

It has been held that a late-filed notice of appeal shall be excused only if good cause is shown to excuse the delay in filing. *See e.g., Europex*, FAA 2000-11 at 4 (May 11, 2000) (document that was construed as a notice of appeal was 5 days late and no good cause for the late-filing was given; appeal dismissed); *Harry Allan Meronek*, 1995-2 (February 14, 1995) (appeal dismissed when respondent failed to explain why it had failed to file either a notice of appeal or a request for an extension of time in a timely fashion.) Even if the response brief filed by Respondent is construed as a notice of appeal, it was filed 33 days late under Sections 13.233(a) and 13.211(e). Respondent has failed to show, or even attempt to show, good cause for the delay, and no reason is apparent.

Under the circumstances, Respondent’s appeal is subject to dismissal under 14 C.F.R. § 13.233(a) and the ALJ’s written initial decision shall be considered an order assessing civil penalty under 14 C.F.R. §§ 13.16(d)(3), 13.232(d).

---

<sup>4</sup> Section 13.233(a) provides that “[a] party shall file the notice of appeal not later than 10 days after entry of an oral initial decision on the record or service of the written initial decision on the parties ....” Section 13.211(e), the “mailing rule,” provides that [w]henver a party has a right or a duty to act or to make any response within a prescribed period after service by mail, 5 days shall be added to the prescribed period.”

<sup>5</sup> The ALJ summarized the regulatory requirements for filing a timely notice of appeal, and for perfecting an appeal by filing a timely appeal brief in the written decision. (Initial Decision at 8, n.7)

*THEREFORE, IT IS ORDERED THAT:* Respondent's appeal is dismissed.

MICHAEL P. HUERTA, ADMINISTRATOR  
Federal Aviation Administration

[original signed by Vicki S. Leemon]

VICKI S. LEEMON<sup>6</sup>  
Manager, Adjudication Branch

---

<sup>6</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.