

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

**In the Matter of: Schwaben Express, Inc.**

FAA Order No. 2009-7

Docket No. CP09EA0008  
FDMS No. FAA-2009-0075<sup>1</sup>

Served: July 13, 2009

**ORDER OF DISMISSAL**

On April 13, 2009, Administrative Law Judge (ALJ) Isaac D. Benkin issued an order granting Complainant Federal Aviation Administration's ("FAA's") motion for summary disposition based on the failure of Schwaben Express, Inc. ("Schwaben") to file an answer to the complaint. In his order, the ALJ assessed Schwaben a civil penalty of \$27,500 against Schwaben for violating the hazardous materials regulations alleged in the complaint.

Under 14 C.F.R. § 13.233(a), Schwaben had 10 days from the service of the ALJ's order of April 13, 2009, to file a notice of appeal.<sup>2</sup> Schwaben also had an additional 5 days under 14 C.F.R. § 13.211(e) to file a notice of appeal because the ALJ served his order on Schwaben by mail.<sup>3</sup> Hence, Schwaben's deadline for filing an appeal was April 28, 2009.

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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 at <http://www.regulations.gov>.

<sup>2</sup> "A party shall file the notice of appeal not later than 10 days after entry of the ... service of the written initial decision on the parties and shall serve a copy of the notice of appeal on each party." 14 C.F.R. § 13.233(a).

<sup>3</sup> "Whenever 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." 14 C.F.R. § 13.211(e).

On May 6, 2009, according to the Hearing Docket's date stamp and the date stamped on the express courier envelope, the Hearing Docket received a document dated February 3, 2009, from Schwaben indicating that Schwaben was appealing from the ALJ's order. Under the Rules of Practice, "[t]he date of service shall be ... 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." 14 C.F.R. § 13.211(d) (emphasis added).<sup>4</sup>

Schwaben's appeal document and envelope had no certificate of service or postmark. However, the Hearing Office's date stamp and the express courier envelope containing the document both read May 6, 2009. The document itself is dated February 3, 2009, but given that the ALJ did not issue his order until April 13, 2009, the February 3, 2009, date must be incorrect. Accordingly, May 6, 2009, is the date of the notice of appeal's service under the rules. Given that the evidence shows that Schwaben served its notice of appeal past the deadline of April 28, 2009, Schwaben's notice of appeal was late.<sup>5</sup>

Schwaben has failed to show good cause for the lateness of its May 6, 2009, appeal document. In its answer to the FAA's motion to dismiss, Schwaben argues that the FAA sent the January 16, 2009, Final Notice of Proposed Civil Penalty (FNPCP) to the wrong address. The issue, however, is not why Schwaben's answer to the FNPCP was late, but why the *notice of appeal* was late.

Schwaben also alleges that there was "justifiable confusion" on its part but does

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<sup>4</sup> "Mail" includes overnight express courier services. 14 C.F.R. § 13.202.

<sup>5</sup> The FAA also argues that Schwaben failed to serve its notice of appeal on the FAA, in contravention of 14 C.F.R. § 13.233(a), which provides, in pertinent part, that "[a] party shall serve a copy of the notice of appeal on each party."

not explain what it means or why. It is difficult to understand Schwaben's arguments, but one thing is clear – Schwaben has not shown good cause for the lateness of its appeal document.

*THEREFORE, IT IS ORDERED THAT:* Schwaben's appeal is dismissed.<sup>6</sup>

J. RANDOLPH BABBITT  
ADMINISTRATOR  
Federal Aviation Administration

[Original signed by Vicki S. Leemon]

VICKI S. LEEMON<sup>7</sup>  
Manager, Adjudication Branch, AGC-430

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<sup>6</sup> This order shall be considered an order assessing civil penalty unless Respondent files a petition for review within 60 days of service of this decision with the U.S. Court of Appeals for the District of Columbia Circuit or the U.S. court of appeals for the circuit in which the respondent resides or has its principal place of business. 14 C.F.R. §§ 13.16(d)(4), 13.233(j)(2), 13.235 (2009). See 71 Fed. Reg. 70460 (Dec. 5, 2006) (regarding petitions for review of final agency decisions in civil penalty cases).

<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.