UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

In the Matter of: TOKYO AIRCARGO USA
FAA Order No. 2004-7

Docket No. CP01EA0027

Served: September 22, 2004

ORDER GRANTING RECONSIDERATION IN PART, AND REMANDING FOR FURTHER PROCEEDINGS

Complainant has petitioned the Administrator to reconsider FAA Order No. 2002-26, in which the Administrator reversed the default judgment and order assessing civil penalty issued by Administrative Law Judge Burton S. Kolko against Tokyo Air Cargo USA ("Tokyo").[1] In the petition, Complainant contends that Tokyo waived its defense that service of process was defective because Tokyo failed to assert it in a timely fashion. In the alternative, Complainant argues that if Tokyo did not waive its defective service defense, the Administrator should remand the case to allow Complainant to re-serve the complaint.[2] After consideration of the petition and the record as a whole, Complainant's petition is granted to allow Complainant to re-serve the

[1] The ALJ assessed a $4,400 civil penalty against Tokyo when it failed to file an answer to the complaint. The ALJ construed Tokyo's silence both as a constructive withdrawal of the request for a hearing and as an admission of the complaint's allegations, thereby making a hearing unnecessary. On appeal, Tokyo's attorney argued that neither his client nor he had received a copy of the complaint until after the ALJ issued the order of civil penalty. In FAA Order No. 2002-26, the Administrator reversed the ALJ's decision, finding that it could not be determined whether service of the complaint had been made. The Administrator dismissed the case against Tokyo.

[2] Tokyo did not file a response to Complainant's petition for reconsideration. According to the certificate of service attached to that petition, Complainant served a copy of the Petition for Reconsideration on Tokyo's attorney.

complaint. Complainant should re-serve the complaint no later than 20 days after the service date of this decision.[3]

On July 20, 2001, Tokyo's attorney responded to a Final Notice of Proposed Civil Penalty by sending a request for hearing on behalf of his client to the agency attorney. There is no evidence that he filed a copy of the request for hearing with the Hearing Docket.[4]

On August 1, 2001, Complainant filed its complaint with the Hearing Docket. Complainant sent a copy of the complaint to Tokyo by certified U.S. Mail, return receipt requested, but due to an oversight, failed to send a copy to Tokyo's attorney. Complainant did not receive the "green card" confirmation that Tokyo received the complaint.

The ALJ issued the Notice of Hearing on September 4, 2001, sending it to the agency attorney and to Tokyo. The ALJ did not send a copy to Tokyo's attorney.

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[3] This decision shall be served by mail to the parties, and as a result, the "mailing rule" set forth at 14 C.F.R. § 13.211(e) applies, thereby giving Complainant 5 extra days to serve the complaint.

[4] Under 14 C.F.R. § 13.16(e)((2)(ii) and 13.16(f), a person charged with a violation in a final notice of proposed civil penalty may request a hearing before an ALJ. The person requesting a hearing is required under 14 C.F.R. § 13.16(f) to file a written request with the Hearing Docket and mail a copy to the agency attorney. The agency attorney must file the complaint with the Hearing Docket no later than 20 days after receiving the request for hearing. 14 C.F.R. §§ 13.16(e)(2)(ii), 13.16(g) and 13.208(a).

In this case, Tokyo's attorney sent a request for hearing to the agency attorney. The Hearing Docket did not receive any request for hearing from Tokyo or its attorney. The agency attorney included a copy of the request for hearing, with a copy of the complaint, in a sealed envelope marked "Confidential." This envelope remained sealed until this decision was drafted. The agency attorney also provided the Hearing Docket with a redacted copy of the complaint for the public file but did not include a copy of the request for hearing along with this redacted copy of the complaint. The Hearing Docket clerk provided the ALJ with a copy of the redacted complaint, but not with a copy of the request for hearing.

On September 11, 2001, Complainant filed a Motion for Default Judgment[5] and served copies on both Tokyo and its attorney. Complainant argued that it had filed the complaint on August 1, 2001, and that although 40 days had passed since service of the complaint, Tokyo had not filed an answer.[6] Although Tokyo's attorney received the Motion for Default Judgment, he did not file a response to the Motion for Default Judgment on Tokyo's behalf.

On October 23, 2001, the ALJ issued an Order Assessing Civil Penalty against Tokyo, holding Tokyo in default for failing to file an answer. The ALJ construed Tokyo's failure to respond to the complaint and to the motion for default judgment as a withdrawal of its request for hearing and as an admission of the allegations in the complaint.[7] Tokyo's attorney filed an appeal, arguing for the first time that neither his client nor he had received a copy of the complaint until *after* he received the Order

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[5] In the Notice of Hearing, the ALJ warned Tokyo of the critical nature of filing a timely answer. He wrote:

> Respondent's detailed answer to the FAA's complaint has a due date of 35 days from the date of the complaint, with a copy to each address on the reverse side of this Notice. The answer being mandatory, without one there will be no hearing and a default judgment will issue for the FAA against Respondent. On the 40th day, if there is no answer FAA counsel shall move for default judgment.

Notice of Hearing, dated September 4, 2001.

[6] Under 14 C.F.R. § 13.209(a), a respondent shall file a written answer to the complaint, or may file an appropriate motion to dismiss under 14 C.F.R. §13.208(d) or §13.218(f)(1-4) instead of an answer, not later than 30 days following service of the complaint.

[7] Section 13.209(f) provides as follows:

> (f) Failure to file answer. 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.

14 C.F.R. § 13.209(f).

When good cause is not shown to excuse a respondent's failure to file an answer, it is appropriate for the ALJ to deem the facts alleged in the complaint as admitted and issue an order assessing civil penalty. *See e.g.*, In the Matter of Air Florida Express, FAA Order No. 2002-9 (April 16, 2002); In the Matter of Playter, FAA Order No. 1990-15 (March 19, 1990), *aff'd,* Playter v. FAA, 933 F.2d 1009 (6th Cir. 1991).

Assessing Civil Penalty which spurred him to contact the agency attorney and request a copy.[8]

By FAA Order No. 2002-26, the Administrator reversed the ALJ's order. The Administrator held that Complainant was at least on constructive notice that there may have been a failure of service because Complainant had not received the "green card" return receipt attached to the complaint sent to Tokyo. Despite such notice, the Administrator wrote, Complainant did nothing to protect its litigation position. The Administrator explained further:

> While a general presumption exists that a properly addressed letter that was placed in the U.S. Mail has been delivered, there is no such presumption of delivery when the sender did not receive the return receipt for a piece of certified mail. Moya v. United States, 35 F.3d 501, 504 (10th Cir. 1994); Mulder v. Commissioner of Internal Revenue, 855 F.2d 208, 215 (5th Cir. 1988). As a result, on the record as it now exists, it cannot be determined with certainty that the complaint was served properly.

FAA Order No. 2002-26 at 4. Noting that "there would be nothing to gain by remanding this matter for further proceedings," the Administrator reversed the order assessing civil penalty and dismissed the complaint. (*Id.*)

Complainant bases its request for reconsideration upon Federal Rule of Civil Procedure 12(h)(1), which provides in pertinent part that "[a] defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived ... if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof ...." Fed.R. Civ.

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[8] Tokyo's attorney, Robert W. Snyder, Esq., explained that he did not reply to the Motion for Default Judgment – and presumably raise any argument regarding defective service – because he thought that the motion was premature. He explained in the appeal brief that "[g]iven the close proximity of receiving both the Notice of Hearing and the Motion for Default Judgment, along with the fact that no Complaint had been received by Respondent, Robert W. Snyder [who had not been served with a copy of the complaint] was under the belief that a Default was premature." (Appeal Brief at 2.)

Pro. 12(h)(1)(B). Complainant argues that Tokyo waived its argument that it was not served properly because it did not assert it during the 49 days following the issuance of the Notice of Hearing and by not responding to the Motion for Default Judgment. Tokyo did not raise this defense until it filed its appeal brief.

Preliminarily, it should be noted that while the Federal Rules of Civil Procedure are applicable to Federal district court litigation, these proceedings are governed by the Rules of Practice in Civil Penalty Actions, 14 C.F.R. Part 13, Subpart G. In the Matter of KDS Aviation, FAA Order No. 1991-17 at 5 (May 30, 1991). The Federal Rules of Civil Procedure are not binding in FAA civil penalty proceedings, and they do not supercede Part 13's provisions. In the Matter of James Horner, FAA Order No. 2000-19 at 6 (August 6, 2000); In the Matter of KDS Aviation, at 5. The Administrator has stated, however, that while the Federal Rules of Civil Procedure are not binding upon FAA civil penalty proceedings, the Administrator may look to the Federal Rules of Civil Procedure for guidance. In the Matter of KDS Aviation, at 5.

Under Federal case law, a court lacks jurisdiction in cases in which the complaint has not been served upon the defendant, unless the defendant waived its objections regarding defective service. Precision Etching v. LGP Gem, 953 F.2d 21, 23 (1st Cir. 1992). A court obtains jurisdiction over a defendant ordinarily either by proper service of process or by a defendant's waiver of defective service. *Id.*; Triad Energy Corp. v. McNell, 110 F.R.D. 382 (S.D.N.Y. 1986).

A defendant may waive its defense of ineffective service or lack of personal jurisdiction by making a voluntary appearance. Federal Rule of Civil Procedure 12(h) provides that a party will waive these defenses if, when it files its *first* pleading or

motion, it fails to raise the argument of failure of service. *E.g.*, McCurdy v. American Board of Plastic Surgery, 157 F.3d 191, 194-195 (3rd Cir. 1998). Rule 12(h), it should be noted, does not apply unless the defendant makes an appearance, Rogers v. Hartford Life and Accident Insurance Company, 167 F.3d 933, 937 (5th Cir. 1999), and as a result, a party who does not appear in a case does not waive these defenses under Rule 12(h).[9] It has also been explained that "Rule 12(h)(1) waivers do not come into play unless a defendant has been served." United States *ex rel.* Combustion Systems Sales v. Eastern Metal Products, 112 F.R.D. 685, 687 (M.D.N.C. 1986). Hence, under this case law, even if Rule 12(h)(1) applied in these proceedings, Tokyo's failure to file an answer or a motion attacking service would not have been deemed a waiver of that defense.[10]

Running afoul of Rule 12(h) is not the only way that a defendant can waive the defense of lack of personal jurisdiction due to defective service. A waiver may be implied from extensive participation by counsel in the proceedings by counsel. Participation by the defendant's counsel, even when the defendant filed neither an answer nor a motion, may constitute an appearance in the case so that the defendant may waive the defense of ineffective service. Trustees of Central Laborers' Welfare Fund v. Lowery, 924 F.2d 731 (7th Cir. 1991); Broadcast Music v. M.T.S. Enterprises, 811 F.2d 278 (5th Cir. 1987). Tokyo's counsel did not participate in any way between the dates that the complaint was sent and the default judgment was issued. As a result, Tokyo's attorney did not mislead the agency attorney into thinking that service had been

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[9] Ruddies v. Auburn Spark Plug Co, 261 F. Supp. 648, 651-652 (S.D.N.Y. 1966).

[10] Instead of raising the defense of failure of service via a responsive pleading or motion, a party may choose to "suffer a default judgment to be entered and may collaterally attack it in defense of actions to enforce that judgment." Broadcast Music, Inc. v. M.T.S. Enterprises, 811 F.2d 278, 281 (5th Cir. 1987).

accomplished or that Tokyo intended to defend itself despite the failure of service. Consequently, this line of cases, cited in Complainant's petition, does not advance its position that the default judgment should be reinstated.

In general, if the court issues a default judgment in a case in which service of process was not made and the defendant did not waive its defense regarding ineffective service, then the default judgment is void due to the court's lack of personal jurisdiction over the defendant. Combs v. Nick Garin Trucking, 825 F.2d 437, 442 (D.C. Cir. 1987). Some courts have held that a failure of service – despite constructive or actual notice – deprives a court of personal jurisdiction over the defendant, and any default judgment rendered in such instances is void. In this line of cases, the courts have held that they had no discretion but to vacate any judgment that is void due to invalid service. Triad Energy Corp v. McNell, 110 F.R.D. 382, 386 (S.D.N.Y. 1986); Leab v. Streit, 584 F. Supp. 748, 760 (S.D.N.Y. 1984); Ruddies v. Auburn Plug Co., 261 F. Supp. 648 (S.D.N.Y. 1966).[11]

Thus, for example, in Leab v. Streit, the court held that the defendant did not waive his defense of defective service by not filing an answer or a motion. The court held that it had no choice but to vacate the void default judgment under Rule 60(b)(4) because it did not have *in personam* jurisdiction. In this case, the defendant knew that the complaint had been delivered to his former place of business, which was owned by his father and brother and represented by his uncle, an attorney. The court vacated the

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[11] *See* discussion and cases listed in Milton Roberts, Annotation, *Lack of Jurisdiction or Jurisdictional Error, as Rendering Federal District Court Judgment "Void" for Purposes of Relief under Rule 60(b)(4) of Federal Rules of Civil Procedure*, 59 A.L.R. Fed. 831, § 6-7.

judgment despite its finding that the defendant had knowingly and willfully failed to file an answer or a motion to contest service. *Id.*, at 760.[12]

Other courts, however, have held that even if service is defective technically, a defendant who has actual notice of the action and is not prejudiced by the defect may not be entitled to ignore the pleadings that he has received. These courts have examined the type and extent of the defect in the service and the notice received by the defendant when deciding whether the judgment is void.[13] For example, a court held that the defendant was not entitled to ignore the pleadings in a case in which service was deemed to be sufficient even though it was made to the defendant's former residence, Karlsson v. Rabinowitz, 318 F.2d 666, 669 (4th Cir. 1963).[14] Also, in a case in which a summons

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[12] The court, however, was quite displeased by the waste of judicial resources resulting from the failure of defendant, who had actual notice of the litigation, to raise the argument about defective service. The court wrote:

> The defendant is "entitled to ignore" service in the sense that no valid judgment will ensue his default; however, judicial economy is not served by giving a defendant carte blanche to ignore service that is actually received and which can properly be attacked within the channels prescribed by the Federal Rules of Civil Procedure. Rule 12(b)(5) would be a hollow rule, indeed, if it were not anticipated that insufficient service would be attacked by motion pursuant thereto.

Leab, at 761. As a result of that willful conduct, the court directed the defendant to bear the costs incurred by the plaintiffs in obtaining the default judgment. *Id.*, at 762.

[13] Thus it has been explained by one court:

> [A] ... requirement for inferring waiver of defective service by suffering entry of default judgment is that the defendant have actual notice of the commencement of the action and his duty to defend. This notice requires more than vague, general knowledge that a lawsuit will be or has been filed. Defendant must have knowledge that an action has in fact been commenced and sufficient notice so that it can be inferred that he knows of his duty to defend against the action. A defendant should not be permitted to close his eyes against that which all reasonable people would see. However, if the process is not sufficiently served and defendant does not have actual notice of the claim, a waiver may not be inferred.

United States *ex rel.* Combustion Services v. Eastern Metal Products, 112 F.R.D. at 689 (specifically rejecting Leab and Ruddies.)

[14] Service had been made to the defendant's former home where his wife, who was planning to join him shortly, still lived; the defendant had moved recently to another state ahead of his family. The court held that the service of the complaint was sufficient, and upheld the court's jurisdiction.

with a minor defect – missing return date – was actually received by the defendant, the court held that the defendant was obligated to respond and, by failing to do so, the defendant waived his defense of defective service. Sanderford v. Prudential Insurance Co., 902 F.2d 897 (11th Cir. 1990).[15]

It cannot be determined on the record before us whether Tokyo actually received the complaint. Although Complainant was not required to serve Tokyo's counsel under the Rules of Practice,[16] had Complainant served Tokyo's attorney, Complainant might not have found itself in this predicament. It would appear that under the case law discussed above, the ALJ had no jurisdiction over Tokyo because there is no proof that Tokyo received the complaint. The mere mentioning of the filing of the complaint in the Motion for Default Judgment would not suffice to correct any failure of service. Hence, the ALJ's issuance of a default judgment was not proper.

Nonetheless, the Administrator does not condone Tokyo's failure to notify the ALJ and the agency attorney of the insufficient service once Tokyo's attorney received the Motion for Default Judgment. While Tokyo's attorney's gamble that a default judgment would not be entered against his client was successful ultimately, his failure to respond to the Motion also, unfortunately, has wasted the time and resources of the ALJ, the agency attorney and the Administrator.

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[15] It was held that the district court had jurisdiction over the defendant and "that by his studied indifference and deliberate inaction to subsequent notices, he was not prejudiced by the defect in the summons." Sanderford v. Prudential Life Insurance Co., at 901. The court held, as a result, that the entry of the default judgment was proper.

[16] "An agency attorney shall personally deliver or mail a copy of the complaint on the respondent, the president of the corporation or company named as a respondent, or a person designated by the respondent to accept service of documents in the civil penalty action." 14 C.F.R. § 13.208(b).

The question remains whether it was necessary for the Administrator to dismiss the case. When service of process is insufficient, but there is a reasonable possibility that proper service can be accomplished, the court should retain the case but quash the service. Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure, Federal Rules of Civil Procedure 3d § 1083, n.4 (1973 & Supp. 2004); Montalbano v. Easco Hand Tools, Inc., 766 F.2d 737, 740 (2d Cir. 1985); Daley v. Alia, 105 F.R.D. 87, 89 (E.D.N.Y. 1985); Leab v. Streit, at 762. It has been held that "[w]hen the gravamen of defendant's motion is insufficiency of process, ... the motion must be treated as one to quash service, with leave to plaintiffs to attempt valid service." Daley v. Alia, 105 F.R.D. at 89; Leab v. Streit, 584 F. Supp. at 762.

In light of the above, it appears that it was not necessary for the Administrator to have dismissed the case. The Administrator could have directed Complainant to re-serve the complaint upon Tokyo and its attorney and remanded this matter to the ALJ for further proceedings. Under the circumstances, that would appear to have been the better course of action. No reason has been presented that would indicate that Complainant could not successfully and properly make service upon Tokyo and its attorney. Moreover, in light of Tokyo's apparent practice of not responding to motions and petitions, the waste of resources resulting from Tokyo's ignoring of the Motion for Default Judgment, and the evidence of Complainant's good faith attempt to serve Tokyo with the complaint in accordance with the Rules of Practice,[17] this outcome appears just and reasonable.

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[17] *See* Affidavit of Service of Notice by Lisa Hooks, Paralegal Specialist, Office of the Assistant Chief Counsel for the Eastern Region of the FAA.

Consequently, this matter is remanded to the ALJ for further proceedings in accordance with this decision. Furthermore, while the complaint will be deemed as timely filed on August 1, 2001,[18] Complainant shall re-serve the complaint upon Tokyo and its attorney within 20 days of the service date of this decision.[19] Complainant shall provide a copy of the complaint with an updated certificate of service to the Hearing Docket and to the ALJ. Tokyo's answer will be due within 30 days of the new date of service of the complaint.[20]

Marion C. Blakey

MARION C. BLAKEY, ADMINISTRATOR
Federal Aviation Administration

Issued this 21st day of September, 2004.

[18] Complainant was required to file the complaint with the Hearing Docket no later than 20 days after receiving Tokyo's request for hearing. 14 C.F.R. § 13.208. Complainant filed the complaint within the 20-day period following its receipt of the request for hearing.

[19] *See* n.3 *supra* regarding the effect of the "mailing rule" on the due date of the complaint

[20] *See* 14 C.F.R. § 13.211(e) regarding the "mailing rule" to determine the due date of the answer.