UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

In the Matter of: **LARRY'S FLYING SERVICE, INC.**	FAA Order No. 98-4 Served: March 12, 1998 Docket No. CP97AL0002

DECISION AND ORDER

Respondent Larry's Flying Service, Inc. (Larry's) of Fairbanks, Alaska, a Part 135 air carrier, has filed an appeal from Chief Administrative Law Judge Roy J. Maurer's entry of a default judgment assessing Larry's a $20,000 civil penalty. This decision affirms the law judge's decision.[1]

The complaint basically alleged as follows:

- On May 6, 1996, Larry's welded the oil scavenge line of a Cessna C-208 to repair a leak, even though the manufacturer's maintenance manual required replacement of the line.
- Larry's failed to enter the repair in the aircraft maintenance log.
- Afterwards, on May 6, 7, and 8, 1996, Larry's operated the aircraft in air commerce.
- Larry's has a history of safety violations.
- Under the circumstances, a $20,000 civil penalty was appropriate.[2]

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[1] The law judge's initial decision, captioned "Order Deeming Allegations Admitted and Assessing Civil Penalty," is attached.

[2] The specific regulations allegedly violated were:

- 14 C.F.R. § 43.9(a)(1)(2) & (3) (failing to enter in the maintenance records the work performed, date, and person performing the work);

Larry's filed its answer 16 days late,[3] and Complainant moved for a default judgment. When the law judge granted Complainant's motion, Larry's filed the instant appeal, asking the Administrator to set aside the default judgment. (Appeal Brief at 4.)

In its appeal brief, Larry's argues that the law judge's reluctance to construe the evidence in the light most favorable to Larry's is contrary to current law. Had Larry's filed its answer on time or if it had shown good cause for the late filing of the answer, the law judge would have been obliged to construe the evidence in the light most favorable to Larry's when ruling on any motion for decision. 14 C.F.R. § 13.219(f)(5). However, Larry's filed its answer late.

The Rules of Practice and the Administrator's precedent require the law judge to deem the allegations admitted unless Larry's shows good cause for the untimeliness of the answer. *See* 14 C.F.R. § 13.209(f), providing that "A person's failure to file an answer without good cause shall be deemed an admission of the truth of each allegation." The Administrator has held, based on Section 13.209(f),

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- 14 C.F.R. § 43.13(a) (failing to use acceptable methods, techniques, and practices of repair);
- 14 C.F.R. § 91.405(a) (failing to have discrepancies repaired as prescribed under Part 43);
- 14 C.F.R. § 91.405(b) (failing to ensure that personnel enter an approval for return to service in aircraft maintenance records); and
- 14 C.F.R. § 91.407(a)(1) & (2) (operating an aircraft when an authorized person had not approved it for return to service and a maintenance record entry had not been made).

[3] The complaint was served on February 11, 1997. Under the Rules of Practice (14 C.F.R. §§ 13.209(a) & 13.211(e)), Larry's answer was due 35 days after service of the complaint -- *i.e.*, by March 18, 1997. Larry's, however, did not file the answer until April 3, 1997 -- 16 days after the deadline.

that law judges are without authority to extend the deadline for filing an answer without a showing of good cause. In the Matter of Robinson, FAA Order No. 97-18 at 5, 1997 FAA LEXIS 1107 (May 23, 1997), citing In the Matter of Atlantic World Airways, FAA Order No. 95-28 at 3, 1995 FAA LEXIS 318 (December 19, 1995). As stated in Atlantic World Airways, FAA Order No. 95-28 at 4, "A showing of good cause is mandatory. Without it, failure to file an answer by the deadline may not be excused."

Larry's argues that imposing a default judgment in this case is too harsh, given the confusion resulting from how the complaint was served. (Appeal Brief at 4.) Counsel for Larry's explains:

> Respondent [Larry's] believed he had received the Complaint as a matter of courtesy, since it was attached to a letter addressed to the Hearing Docket clerk. Since the Complaint did not set forth a case number, nor did it contain an indication of which judge had been assigned to the case, the undersigned [counsel for Larry's Flying Service] did not believe that this constituted official service.

(*Id.* at 3.) Thus, Larry's suggests in its appeal brief that confusion on the part of Larry's counsel constitutes good cause for the untimeliness of Larry's answer.

In reply, Complainant argues that the contention that Larry's counsel was confused is a new matter which should not be considered for the first time on appeal. (Reply Brief at 6.) Complainant also objects because Larry's has failed to support its claim of confusion by affidavit or other evidence. (*Id.* at n.3.)

Contrary to Complainant's assertions, however, Larry's confusion argument is not new. Larry's raised the argument in its opposition to Complainant's motion for a default judgment, though it did not use the words "confused" or "confusion."[4]

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[4] On this subject, Larry's stated as follows:

In fact, the law judge considered and rejected Larry's confusion argument, calling it "wholly misguided." (Initial Decision at 4.) For the following reasons, the law judge was correct in rejecting Larry's argument that its untimeliness should be excused due to its counsel's confusion:

- Neither Section 13.208 nor Section 13.211 of the Rules of Practice (14 C.F.R. §§ 13.208, 13.211) provides for service of the complaint upon a respondent by the Hearing Docket Clerk or by the law judge. On the contrary, these rules provide for service of the complaint upon the respondent by the agency counsel. Section 13.211(d) provides further that the date of service of a mailed document is the mailing date on the certificate of service.[5]

- Larry's counsel received the complaint with its cover letter by certified mail, return receipt requested. The type of service alone should have alerted counsel to the importance of the document.

- Larry's counsel fails to cite any rule of practice or other authority indicating that service is not official unless the complaint includes the docket number and the law judge's name. There is no such rule of practice in 14 C.F.R. Part 13, Subpart G.

- Larry's counsel has represented Larry's in two previous FAA civil penalty cases. (Docket Nos. CP93AL0267 and CP93AL0268, which were consolidated for hearing; *see* Initial Decision at 5.) Indeed, the previous cases were like the instant case in that Larry's ran the risk of a default judgment due to its failure to file a timely answer, though in the earlier cases, Larry's was *pro se* at the time the answer was due. Even so, the previous cases should have alerted counsel to the danger presented by the failure to file a timely answer.

> On February 12, 1997, the Respondent [Larry's Flying Service] received a copy of the Complaint, together with a letter from Mr. Brown, the Complainant's counsel. Mr. Brown's letter said nothing of answering the Complaint within 30 days, nor who the assigned Judge was and where to file pleadings with your honor.

Respondent's Opposition to Complainant's Motion to Deem the Facts Admitted and for an Order Assessing Civil Penalty, at 1.

[5] In this case, the complaint's certificate of service indicated that agency counsel served the complaint on Larry's on February 11, 1997.

- The complaint contained a reminder -- emphasized by shading -- of both the deadline for filing an answer and the consequences of failing to comply.

- The record does not indicate that the law judge or opposing counsel said or did anything that would have misled a reasonable person regarding the deadline for filing the answer.

- Larry's counsel has failed to support his claim of confusion with an affidavit or some other type of evidence.

For these reasons, any confusion on counsel's part was unwarranted and cannot be considered good cause.

This case is distinguishable from other cases in which the Administrator found that good cause was, or at least might be, present. For example, the complaint included a reminder concerning the answer requirement. *Cf.* In the Matter of Cornwall, FAA Order No. 92-47, 1992 FAA LEXIS 293 (July 22, 1992) (where the complaint did not contain a statement of the requirement to file an answer). Larry's was represented by counsel and did not file at least some type of post-complaint document contesting the allegations within the time period for filing an answer. *Cf.* In the Matter of Metz, FAA Order No. 90-3, 1990 FAA LEXIS 167 (January 29, 1990) (where Complainant failed to respond to a *pro se* respondent's argument that he was not served with the Rules of Practice and the respondent filed, *after* service of the complaint, at least some document indicating that he was contesting the allegations). Larry's counsel did not indicate that he had taken any specific precautions to avoid the risk of default. *Cf.* In the Matter of Safety Equipment & Sign Co., FAA Order No. 92-76, 1992 FAA LEXIS 280 (December 21, 1992) (where counsel attempted to protect against the danger of default by asking his employee to let him see each document received in the mail before filing it, but

the employee did not comply). The law judge did not say or do anything that would mislead a reasonable person. *Cf.* In the Matter of Columna, FAA Order No. 94-30, 1994 FAA LEXIS 277 (September 30, 1994) (where a statement by the law judge in the notice of hearing could have inadvertently misled reasonable persons about the answer requirement). Nor did agency counsel say or do anything that would mislead a reasonable person. *Cf.* In the Matter of Sutton, FAA Order No. 94-29, 1994 FAA LEXIS 276 (September 30, 1994) (where respondent, acting *pro se*, raised the possibility that the agency counsel led him to believe that his submission of a settlement proposal was a valid substitute for an answer). Furthermore, Larry's has not claimed that it sent the answer, on time, to agency counsel, if not to the law judge, nor does counsel for Larry's appear to have difficulty understanding English. *Cf.* In the Matter of Perez, FAA Order No. 94-43, 1994 FAA LEXIS 270 (December 20, 1994) (where Complainant had not responded to respondent's contention that he had sent his answer to agency attorney, and respondent appeared to have difficulty understanding English). Thus, the Administrator's previous decisions containing findings of good cause do not support Larry's appeal.

Although Larry's argues that its request for a hearing indicated that it was denying the complaint allegations (Appeal Brief at 3), the Administrator has held that pre-complaint documents do not satisfy the requirement to file an answer to the complaint. *See, e.g.*, In the Matter of Missirlian, FAA Order No. 97-19 at 2, 1997 FAA LEXIS 1108 (May 23, 1997), citing In the Matter of Barnhill, FAA Order No. 92-32 at 6, 1992 FAA LEXIS 285 (May 5, 1992). The Rules of Practice provide that a general denial, like Larry's request for a hearing, is deemed a failure to file

an answer. 14 C.F.R. § 13.209(e). A respondent must specifically deny or admit each numbered paragraph of the complaint. (*Id.*)

Larry's also argues that the law judge deprived it of due process by failing to comply with the requirement in 5 C.F.R. § 185.110(b) that the law judge serve Larry's with a notice that he was going to issue his initial decision. (Appeal Brief at 3.) 5 C.F.R. Part 185 deals with allegations of program fraud committed by civil service members and is inapplicable here. The applicable rules of practice for the instant case are found in 14 C.F.R. Part 13, Subpart G,[6] and nowhere do they require the law judge to serve notice before issuing his or her initial decision.

Finally, Larry's contends that Complainant has not shown any prejudice from the untimeliness of the answer. (Appeal Brief at 3, 4.) In this regard, Larry's notes that it filed its answer prior to Complainant's motion for default judgment and long before the initial decision became final. (*Id.* at 3.) The Rules of Practice do not, however, require Complainant to show prejudice. Rather, Larry's must show good cause for an untimely answer if it wishes to avoid a default judgment. 14 C.F.R. § 13.209(f). While Larry's is correct that the law does not favor default judgments,[7] the Rules of Practice still require Larry's to show good cause, which it has failed to do.

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[6] It was noted in the complaint that the complaint was filed pursuant to 14 C.F.R. § 13.208, which is one of the rules of practice found in Subpart G of 14 C.F.R. Part 13. (Complaint at 1.) Larry's has not argued that it was not provided a copy of 14 C.F.R. Part 13, Subpart G.

[7] *See* In the Matter of Safety Equipment and Sign Co., FAA Order No. 92-76 at 5, 1992 FAA LEXIS 280 (December 21, 1992) ("[w]herever possible, cases should be disposed of on the merits after a hearing, rather than summarily because of a procedural defect), citing In the Matter of Cornwall, FAA Order No. 92-47 at 7, 1992 FAA LEXIS 293 (July 22, 1992).

The law judge did not err in deeming the allegations admitted and assessing the $20,000 civil penalty sought in the complaint. As stated in the past, "Procedural rules must be enforced in a non-arbitrary manner to ensure the integrity of the civil penalty process, even where this results in severe consequences." In the Matter of Harkins, FAA Order No. 94-22 at 4, 1994 FAA LEXIS 279 (June 22, 1994). Both sides must file timely pleadings or risk default. Just as an untimely complaint is dismissed absent good cause (14 C.F.R. § 13.208(b)(1)), so too is an untimely answer dismissed absent good cause (14 C.F.R. § 13.209(f)).

Although at first blush the $20,000 penalty may seem severe, not only did Larry's fail to show good cause, but Larry's was no stranger to the requirement to file a timely answer, having narrowly escaped a default judgment in two previous cases (CP93AL0267 and CP93AL0268). In addition, Larry's has a record of prior violations of the safety regulations, an aggravating factor for purposes of setting the sanction. *See* In the Matter of Larry's Flying Service, FAA Order No. 95-17 at 1, n.3 and 6, 1995 FAA LEXIS 339 (August 4, 1995) (affirming the law judge's assessment of a $15,000 civil penalty and noting that Larry's had been assessed civil penalties on two prior occasions as well).

Although Larry's stated in its late-filed answer that it could not afford the $20,000 civil penalty, it waived any and all defenses, including financial hardship, by failing to file a timely answer without good cause. Larry's also waived the issue of financial hardship when it failed to raise the issue in its appeal brief. *See* 14 C.F.R. § 13.233(i) (providing that a party waives any objection to an alleged error if it fails to object to the alleged error in the appeal or reply brief).

For the reasons stated above, the law judge's initial decision is affirmed and a $20,000 civil penalty is assessed.[8]

JANE F. GARVEY, ADMINISTRATOR
Federal Aviation Administration

Issued this 16th day of March, 1998.

[8] Unless Larry's files a petition for review with a Court of Appeals of the United States within 60 days of service of this decision (under 49 U.S.C. § 46110), this decision shall be considered an order assessing civil penalty. *See* 14 C.F.R. §§ 13.16(b)(4) and 13.233(j)(2) (1997).