

SERVED: August 15, 1997

NTSB Order No. EA-4577

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 28th day of July, 1997

_____)	
JANE F. GARVEY,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-14559
v.)	
)	
PATRICK HEIDENREICH,)	
)	
Respondent.)	
_____)	

OPINION AND ORDER

Respondent has appealed from the initial decision of Administrative Law Judge Patrick G. Geraghty, issued on August 20, 1996, and the law judge's subsequent (September 9, 1996, corrected September 16, 1996) denial of respondent's request that he reconsider his August decision.¹ In his orders, the law judge granted the Administrator's motion for summary judgment based on respondent's failure timely to file an answer to the

¹ Copies of the three decisions are attached.

Administrator's emergency revocation order, as well as respondent's failure to reply to the Administrator's motion. We deny the appeal.

On June 25, 1996, the Administrator served his Emergency Order of Revocation on respondent. That order noted that any appeal was due at the NTSB within 10 days, and that if an appeal were filed, the order would be filed with the NTSB as the complaint in the case. On July 3rd, respondent sent his appeal to the NTSB, and it was received by the FAA on July 5th. By letter of July 8th, the Administrator filed his Emergency Order as his complaint.

Under the Board's rules for emergency proceedings, 49 CFR 821 Subpart I, respondent's answer to the complaint was due within 5 days of service of the complaint, *i.e.*, July 13. On July 10, the Board called respondent's counsel to inquire whether respondent intended to waive the emergency timetable and proceed instead under the more expansive time limits in Subpart D (for example, the answer is due in 20, rather than 5, days). Respondent did not answer the question at that time. The due date for his answer passed with no filing by respondent and no response to the Board's inquiry. According to respondent, "on or about" July 15th, he advised the Board that he would waive the emergency procedures. He subsequently received the Board's standard, pre-printed information regarding procedures under the normal, Subpart D, schedule. On July 26th, the Administrator filed his motion for judgment on the pleadings based on

respondent's failure to answer. As noted, respondent also failed to reply to this motion.

Respondent's counsel, on appeal, argues that he should be excused procedural failures due to his confusion in late July as to the emergency versus the regular pleading schedule, applicable due dates, and the relevance of the Administrator's motion after respondent had waived the emergency. He suggests that, based on information his staff allegedly obtained orally from the Board, he was justified in taking no action, but instead awaiting the filing by the Administrator of another copy of his order as a new complaint. However regrettable respondent's confusion in late July, the events critical to our disposition of this matter occurred much earlier: respondent failed to file the required answer or any other pleading in response to the complaint by July 13.

Respondent cannot ignore this requirement based on his later, untimely offer to waive the emergency procedures or his later professed confusion (confusion the law judge did not credit). His choice was to waive the emergency before the answer's due date of July 13, or to seek and obtain an extension of time to file the answer until he had determined whether to waive the emergency. His failure to file an answer by July 13, absent good cause shown, justified the Administrator's filing of a motion for summary judgment. The lack of an answer, and the lack of a response to the Administrator's motion, required the law judge to grant the Administrator's motion and affirm the

Administrator's order. We cannot find that this conclusion was error. See 49 CFR 821.11. Cf. Administrator v. Hooper, NTSB Order EA-2781 (1988) on remand from Hooper v. NTSB and FAA, 841 F.2d 1150 (D.C. Cir. 1988) (Board intends to adhere to policy requiring dismissal, absent showing of good cause, of all appeals in which timely notices of appeal, timely appeal briefs or timely extension requests have not been filed). Nor, as noted, has respondent ever offered any reason, in an attempt to demonstrate good cause, why he was unable to file an answer between July 8 and July 13.²

² Respondent has filed an "objection" to that part of the Administrator's reply in which the Administrator stated that respondent's answer to the complaint (if the regular, 20 day, schedule applied, was due on or before July 28). The objection is moot. Respondent's answer would have been due July 29, as respondent argues, but only if he had timely waived the emergency and had not already been in default.

Respondent has also filed a letter indicating that a jury in California acquitted him in a criminal case involving the same allegations as the Administrator's complaint here (one incident of low flight and one incident of a near-miss with a police helicopter). The letter states, in part:

Although factual innocence is not at issue in his appeal (which deals with a procedural default) Mr. Heidenreich believes that the Board should be aware that his innocence has in fact been proven in a trial by jury before the Board decides whether to allow him the opportunity [to] have the identical charges determined on the merits in relation to his airman's certification.

The Administrator asks that this letter be stricken from the record. Respondent has replied in opposition, stating that "the jury verdict in California is a clear indication that he would be severely prejudiced if the Board sustains a procedural default in this matter ... the only reasonable inference is that the charges against respondent are groundless."

We will deny the Administrator's motion. Our decision dismissing the appeal due to respondent's failure to file a

(continued...)

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's "objection" is denied as moot;
2. The Administrator's motion to strike is denied;
3. Respondent's appeal is denied; and
4. The initial decision is affirmed.

HALL, Chairman, FRANCIS, Vice Chairman, HAMMERSCHMIDT, GOGLIA, and BLACK, Members of the Board, concurred in the above opinion and order.

(continued...)

timely answer to the complaint is completely separate from and independent of any other judicial or administrative action related to the cited incidents. That a jury in California acquitted respondent is no basis to ignore Board rules and precedent. Respondent may apply to the Administrator for reissuance of his pilot certificate.