

As printed in

The National Transportation Safety Board Bar Association

Fall 2008 Newsletter

Recent Developments in FAA Enforcement... by John S. Yodice

This column is intended as an aid to practitioners, including panel attorneys of the AOPA Legal Services Plan, to keep abreast of recent developments in the law and procedures governing FAA enforcement actions. Your comments and suggestions are welcome.

A NEW FAA COMPLIANCE AND ENFORCEMENT HANDBOOK.

Experienced practitioners are aware that the FAA provides to its attorneys and inspectors a detailed handbook specifying the procedures and policies, including a sanction guidance table, they are to observe in investigating and prosecuting enforcement cases. While it has been difficult to hold the FAA prosecutors and investigators to the handbook (the NTSB calls it “prosecutorial discretion”), nevertheless, the handbook has been an important resource to practitioners in understanding and anticipating FAA policy and process. The former version was contained in FAA Order 2150.3A. A new version, FAA Order 2150.3B, has been issued effective October 1, 2007, and is available to the public on the FAA website, <https://rgl.faa.gov>. Among what is new in the handbook is the articulation of the

FAA position on the deference the FAA is owed in appeals of enforcement actions to the National Transportation Safety Board. According to the handbook, the NTSB is bound by FAA’s interpretations of the laws and regulations that the FAA carries out, and the NTSB is bound by the FAA policy guidelines related to the sanctions to be imposed. The handbook concedes that the NTSB is not bound if an interpretation is “arbitrary, capricious, or otherwise not according to law.” In practice and for some time before the issuance of the new handbook, the NTSB has been consistently deferring to the FAA on legal interpretations and on the sanction guidance table. To our knowledge, the NTSB has never found an FAA interpretation or sanction to be “arbitrary, capricious, or otherwise not according to law.” And with the present composition of the Board and its general counsel’s office, and their demonstrated bias in favor of the FAA, such a finding is unlikely.

LATE FILING OF DOCUMENTS WITH NTSB. The Board’s Strict Application Of Time Limits Does Not Apply To Responsive Pleadings.

In the last Newsletter, we reported a case in which a respondent was one-day late in filing with the NTSB an appeal of an FAA order. As a result, the respondent’s appeal was dismissed. The NTSB quoted and reaffirmed its strict policy: “The Board consistently follows the good cause policy established on remand from *Hooper v. NTSB and FAA*, 841 F.2d 1150 (D.C. Cir. 1988). That is, [the Board] intends to adhere uniformly to a policy requiring the dismissal, absent a showing of good cause, of all appeals in which timely notices of appeal, timely appeal briefs or timely extension requests to submit those documents have not been filed.’ *Administrator v. Hooper*, 6 NTSB 559, 560 (1988).” In a more recent case, we are now reminded that this strict policy that has been applied to respondents does not apply to responsive pleadings by the FAA unless prejudice is shown. In this case, the FAA was two-days late in filing a reply to respondent’s petition for reconsideration of an NTSB order. The FAA filed a motion to have the Board accept FAA’s late response. The Board granted FAA’s motion. “We note that while we will reject an untimely notice of appeal, an appeal brief, and a petition for reconsideration

for lack of timeliness unless the party filing the pleading establishes good cause for untimely filing, this standard does not apply to responsive pleadings. In accordance with our precedent, we will reject responsive pleadings only if the opposing party can demonstrate that prejudice would result from our acceptance of the late-filed reply.” Administrator v. Martz, NTSB Order No. EA-5387 (2008) (footnote 1). The Board failed to indicate how a respondent could practically demonstrate prejudice to a two-day-late FAA reply, or any late FAA responsive pleading. Is it too cynical to observe that this inexplicable difference in policy almost always favors the FAA and disfavors respondents?

LATE FILING OF PETITION FOR JUDICIAL REVIEW OF NTSB ORDER LEADS TO DISMISSAL. Filing Period Begins When Order Issued And Not When Received.

An airman sought judicial review of an NTSB order affirming a forty-day suspension of his pilot certificate. In an unpublished opinion, the federal court of appeals dismissed the petition as untimely. Such a petition is due “not later than 60 days after the order is issued“ (emphasis supplied) unless there was a reasonable ground for the late filing. The pilot, believing that the filing period began when he actually received the order, put his petition in the mail within 60 days of his receipt of the order, but only one day before the due date (based on the issuance date). The appellate rule allows filing by

mail, “but filing is not timely unless the clerk receives the papers within the time fixed for filing. Under this rule, the petition was received three days late. The court held that the pilot’s (or his counsel’s) belief was not a reasonable ground for the late filing. *Nadal v. FAA*, The United States Court of Appeals for the Tenth Circuit, April 30, 2008. One cannot help but contrast this decision to the Martz decision reported above. Would the FAA have been able to show prejudice if the respondent’s petition was allowed to proceed?