

SERVED: February 5, 1993

NTSB Order No. EA-3778

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 25th day of January, 1993

THOMAS C. RICHARDS,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-10537
v.)	
)	
ROBERT L. WASHBURN,)	
)	
Respondent.)	
)	

OPINION AND ORDER

Respondent has appealed from the oral initial decision of Chief Administrative Law Judge William E. Fowler, Jr., issued on October 17, 1990, following an evidentiary hearing.¹ By that decision, the law judge affirmed an order of the Administrator suspending respondent's commercial pilot certificate and flight instructor certificate on an allegation of a violation of section

¹The initial decision, an excerpt from the hearing transcript, is attached.

91.9 of the Federal Aviation Regulations (FAR), 14 CFR Part 91,² as a result of an incident involving a gear-up landing. The law judge affirmed the allegation, but modified the sanction from a 30-day suspension to a 15-day suspension. The Administrator filed a notice of appeal of that modification, but subsequently withdrew his appeal.

Respondent contends on appeal that the law judge erroneously denied his motion to dismiss the complaint as stale under Rule 33 of the Board's Rules of Practice.³ The Administrator has not filed

²FAR §91.9 provided at the time of the incident as follows:

"§91.9 Careless or reckless operation.

No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another."

³Rule 33 of the Board's Rules of Practice, 49 CFR 821.33, provides in pertinent part as follows:

"§821.33 Motion to dismiss stale complaint.

Where the complaint states allegations of offenses which occurred more than 6 months prior to the Administrator's advising respondent as to reasons for proposed action under section 609 of the Act, respondent may move to dismiss such allegations pursuant to the following provisions:

(a) In those cases where a complaint does not allege lack of qualification of the certificate holder:

(1) The Administrator shall be required to show by answer filed within 15 days of service of the motion that good cause existed for the delay, or that the imposition of a sanction is warranted in the public interest, notwithstanding the delay or the reasons therefor.

(2) If the Administrator does not establish good cause for the delay or for imposition of a sanction notwithstanding the delay, the law judge shall dismiss the stale allegations and proceed to adjudicate only the remaining portion, if any, of the complaint...."

a reply brief. For the reasons that follow, we grant respondent's appeal, reverse the initial decision, and dismiss the complaint.

The incident which gave rise to the complaint occurred on December 8, 1988. On August 25, 1989, the Administrator issued an Order of Suspension to respondent. On December 11, 1989, respondent filed his motion to dismiss stale complaint, asserting that the first notification he had received concerning the allegation was the Order of Suspension, and that he received the Order almost ten months after the incident. On April 17, 1990, the Administrator filed a response opposing the motion, in which he claimed that he had mailed a Notice of Proposed Certificate Action to respondent by overnight mail on June 1, 1989, and that the mail had not been returned to the Administrator. On April 18, 1990, the law judge denied the motion to dismiss, stating only that the motion was denied after "due consideration." Respondent renewed his motion at the hearing, but the law judge ruled that the issue was "moot."

In respondent's motion, he noted that the order of suspension which he received on August 26, 1989 was addressed to him at "112 North Street," when his address was in fact at that time, "112 North Olsen Street." Rather than dealing with this issue, the Administrator replied only that the Notice of Proposed Certificate Action had been sent in a timely fashion, and that "Respondent has provided no evidence that the Notice of Proposed Certificate Action was not received by him."

In our view, the Administrator's evidence that he mailed the

Notice of Proposed Certificate Action within the 6 month time period was not sufficient to defeat the stale complaint motion. The burden was on the Administrator to prove respondent's actual or constructive receipt of the Notice of Proposed Certificate Action within the six month period. He did not meet that burden by showing that an incorrectly addressed copy of the Notice of Proposed Certificate Action had not been returned to him.⁴

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is granted;
2. The initial decision is reversed; and
3. The Administrator's complaint is dismissed.

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

⁴Since the notice was sent by overnight mail, the Administrator should have been able, for example, to obtain evidence from the overnight mail service to establish whether delivery to respondent had been made.