

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD

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3 LANGHORNE M. BOND, Administrator,;
4 Federal Aviation Administration, ;

5 Complainant, ;

6 vs. ;

7 STEPHEN M. COHEN, ;

8 Respondent. ;

9 ; Docket No. SE-3709
10 ;
11 ;

12 Court of Claims, Room 8549
13 300 North Los Angeles Street
14 Los Angeles, California
15 Wednesday, April 5, 1978

16 ORDER

17 By Notice of Hearing issued February 23, 1978, this
18 matter was brought on for a hearing on April 5, 1978, in
19 Los Angeles, California.

20 The hearing in this matter has been held pursuant
21 to the provisions of the Federal Aviation Act of 1958, as
22 amended, and the Board's Rules of Practice in Air Safety
23 Proceedings. The matter arose originally on the appeal by
24 Stephen M. Cohen, herein the Respondent, from an Order of
25 Revocation issued June 20, 1977, which revokes Respondent's
Pilot Certificate.

The Administrator was represented by one of his



1 staff attorneys, Mr. Mark McDermott, Esq., of the Western
2 Regional Counsel's Office. The Respondent was present and
3 elected to represent himself pro se.

4 Although the proceeding today is somewhat unusual,
5 in the sense that it is a hearing on a motion rather than a
6 hearing on the Complaint itself, and a lengthy discussion is
7 not generally had, I think in this instance since this will
8 be a final order and because of the nature of the issues
9 raised, that some discussion should be made of the matters
10 brought by the parties in support of their respective
11 positions with respect to the motion.

12 Although the Board's initial jurisdiction arises
13 by virtue of Respondent's notice of appeal it is noted that
14 the hearing today is in the nature of a hearing on a
15 procedural matter, that is, the original motion to dismiss
16 filed by the Complainant against the notice of appeal, on the
17 grounds that the appeal was untimely filed. The original
18 motion to dismiss was not granted by the Board and subsequently
19 the Administrator filed a motion to reconsider the Board's
20 order with respect to the original motion to dismiss. The
21 Board had issued its initial order on the motion to dismiss
22 based upon representations made by the Respondent that he had
23 adequately advised the Federal Aviation Administration of an
24 effective change of address.

25 As indicated above, the Administrator filed an

1 order of revocation against the Respondent and addressed that
2 to the Respondent at what the Administrator contends was his
3 last known address of the Respondent, that is, 33185 Sea Bright,
4 Dana Point, California. Under the Board's Rules of Practice,
5 821.8(e), constructive service may be made by mailing
6 certified mail, return receipt requested, a document to the
7 individual's last known address. This is what the Administrator
8 contends was done in this case.

9 The Respondent contends that prior to June 1977 he,
10 by mailgram, advised the Federal Aviation Administration of a
11 change of address and that, therefore, constructive service
12 could not have been made under the Board's Rules since the
13 FAA did not serve the Respondent at the Respondent's last
14 known address.

15 The Administrator in his petition or request for
16 reconsideration of the Board's order with respect to the
17 motion, urges that the original order of the Board be set
18 aside on the grounds that the Respondent in his reply to the
19 Administrator's original motion used a fraudulent document to
20 support the allegation that an effective change of address
21 had been made with the Federal Aviation Administration; in
22 particular that the Respondent furnished to the Board in
23 support of his response a fraudulent mailgram, or document
24 which purported to be a mailgram, when in fact no such mailgram
25 was ever in fact sent to the Federal Aviation Administration.

1 The Administrator called Mr. Woodrow R. Sims, who
2 is an employee of Western Union and in particular is the
3 Mailgram Operations Manager and as such deals for Western
4 Union with all matters concerning mailgrams, as they arise, in
5 the United States, Alaska, Hawaii, and I believe he may have
6 said Puerto Rico. He also coordinates these mailgram matters
7 with the U. S. Postal Service.

8 Mr. Sims testified that the mailgrams are handled
9 through a central station which is in Middletown, Virginia,
10 where mailgrams which originate in one of three ways, that is,
11 either by voice, computer, or teletype, are forwarded
12 electronically, apparently to the clearing office in Virginia.
13 They are then sent electronically to the U. S. Postoffice
14 which is closest to the zipcode station that is shown on the
15 addressee of a particular mailgram. Thereafter, the Postoffice
16 places the mailgram in an envelope and delivers the mailgram
17 in the usual course of mail delivery.

18 As Mr. Sims testified, there are various computer
19 retrieval records available to Western Union in the mailgram
20 section, and he upon the request of the counsel for the
21 Administrator, attempted to obtain information with respect
22 to the alleged mailgram which the Respondent claims he sent
23 to the Federal Aviation Administration on May 15, 1977.

24 Mr. Sims indicated that on the basis of numerous discrepancies
25 within the purported mailgram it was his opinion that the

1 document which the Respondent attached to his response is not
2 an authentic mailgram. I would briefly indicate that the
3 Witness indicated that a search had been made on the date of
4 the mailgram, on one hour on either side of the time that
5 the mailgram was supposedly sent, and that in all of these
6 types of searches no record could be found within the Western
7 Union as to such mailgram ever having been transmitted over
8 their services. It is of particular interest to note that
9 the letters used within the Respondent's copy do not conform
10 to the typeset used on mailgrams, as illustrated by Exhibit
11 A-5, which was a "Good Morning" test-type mailgram which shows
12 the type of printing formats used. The letterhead on the
13 Respondent's alleged mailgram is improperly printed. Of
14 particular interest, the date on Respondent's mailgram is
15 inconsistent; that is, one of the numeral groups as they
16 appear on the Respondent's mailgram would indicate a
17 transmission date of 20 February 1977, whereas the date on the
18 mailgram is purportedly May 15, 1977. Of particular interest,
19 however, was the fact that one of the characters, 992, would
20 indicate that the Respondent's mailgram, which would have
21 been voice-originated, that is by telephone, as it clears
22 through the Reno collection bureau for mailgrams, that 992
23 separate messages were sent by the Respondent in the single
24 telephone call. That is, that the mailgram to the FAA would
25 have been one of 992 separate messages made in the course of

1 one telephone call. As Mr. Sims put it, this is highly
2 unlikely. I would certainly subscribe to that statement,
3 particularly in light of Mr. Sims' statement that the count
4 992 would indicate that there were either 992 separate
5 addressees or 992 separate messages. One would assume that
6 information as to change of address would probably not be
7 sent to 992 separate individuals, in the same telephone call
8 and in the same format, as the one to the FAA. Therefore,
9 we would assume that the one to the FAA was a single message
10 and that 991 separate, individual, different mailgrams were
11 also issued by the Respondent at the same time. I term that
12 so unlikely as to be unbelievable.

13 I think it suffices to state that Mr. Sims pointed
14 out at least a good half-dozen discrepancies within the
15 Respondent's alleged mailgram, also supporting that by pointing
16 out that at least three different types of searches failed
17 to substantiate any form of mailgram having been sent within
18 not only the exact time and date but within a bracketed time
19 and date, over the services of the Western Union.

20 Exhibit A-1 also indicates that upon diligent search
21 in the record center of the Federal Aviation Administration
22 that no information could be found which would indicate that
23 any message had ever been received from the Respondent
24 indicating a change of address should be had within the
25 record center of the Federal Aviation Administration. It is

1 also significant to note that within Administrator's A-2
2 there is indication that the Administrator did send the order
3 of revocation by regular mail, in August of 1977, and that
4 on the affidavit here in Exhibit 2 that the regular mailing
5 of the order of revocation was never returned to the Federal
6 Aviation Administration. I believe the inference can reason-
7 ably be drawn that lack of return would mean that receipt had
8 been made. I don't feel it is necessary to discuss the other
9 documents within A-2 which would indicate, however, that the
10 Respondent was in fact, during the period of time pertinent
11 here, receiving mail sent regular mail and also in at least
12 one instance certified mail sent to him at the Sea Bright,
13 Dana Point, California address.

14 Respondent testified on his own behalf. His state-
15 ment is that he did in fact send a mailgram to the Federal
16 Aviation Administration. He claims that the copy attached
17 to his response is a copy of a copy that he typed from the
18 original mailgram which, in some way, was placed in a washing
19 machine and rendered partially illegible. The Respondent, of
20 course, offered no explanation of why he did not attach
21 whatever he did have of the original mailgram, or did not
22 produce the mailgram at the hearing today when he did state
23 that he had it still in existence. He offered no explanation
24 of the discrepancies in the mailgram, either the telephone
25 numerical count, the date counts, or any of the other

1 discrepancies, other than just saying that he thought he had
2 copied the original mailgram accurately but apparently that he
3 had not. As to lack of receipt, the Respondent testified
4 that he moved from his Sea Bright address and that any mail
5 sent there was simply being received by his corporation and
6 then forwarded to him somewhere else. He, of course, offered
7 no viable explanation as to why mail sent to the Sea Bright
8 address and then supposedly picked up by the corporation and
9 forwarded, would not in any event be received by him.

10 Of further impact is the long history of convictions
11 which the Respondent admits to, convictions of the Respondent
12 for various offenses committed within the State of California.
13 I think it suffices to show here that the Respondent has been
14 convicted for numerous offenses wherein he has issued false
15 documentation or false checks, or committed forgery, or
16 altered official documents, such as a driver's license. These
17 offenses are of particular impact when we are addressing
18 ourselves to the issue of whether or not the mailgram, which
19 the Respondent attached to his response, was in fact a true
20 document.

21 Considering all of this foregoing evidence which I
22 have synopsized I would formally, for the record, conclude
23 that the credibility in this case, as an issue, must necessarily
24 be resolved in favor of the Administrator. I find the
25 Respondent's explanations inherently unreliable and in light

1 of his past history with respect to issuing false documents
2 or altering documents that his explanation, without any
3 supporting data as to the mailgram, renders his credibility
4 in this matter as to the sending of a mailgram to the FAA
5 one of lack of belief.

6 In summary, therefore, I would find that the
7 totality of the evidence presented during the course of this
8 proceeding demonstrates that the Administrator did, in
9 June 1977, effect constructive service on the Respondent by
10 mailing to the Respondent the order of revocation, at the
11 Respondent's last known address as contained in the official
12 records of the Federal Aviation Administration. Further, that
13 the evidence supports the finding which I make, that the
14 Respondent did, in an effort to explain his late filing, file
15 with the Board a false and fraudulent document, to wit, the
16 mailgram which purported to establish that the Respondent had
17 attempted to notify the FAA of a change of address. So that
18 it is clear, I am deciding that the preponderance of the
19 reliable evidence does show constructive service and use by
20 the Respondent of a false or fraudulent document in his
21 pleading filed with the Board.

22 The Board has in the past, for example in the case
23 of Administrator vs. Pischke and Bures (ph), taken the position
24 as it has repeatedly in other cases, that it prefers to dispose
25 of matters before the Board on a consideration of the factual

1 matters, rather than upon a procedural basis. However, I
2 believe the facts in this case distinguish this matter from
3 the usual type of case which arises wherein the Board does
4 not grant a motion to dismiss because of a technical or
5 procedural deficiency. Generally there, the issue is one of
6 a late filing, as it is here. However, the filings are
7 usually a matter of only a few days or a few weeks and a
8 finding is made that no substantial prejudice has occurred
9 to either party. It is of concern, of course, the longer the
10 period of time between the expiration date for the timely
11 making of appeal and the date that the appeal is actually
12 received. Herein there is a substantial period of time
13 between the two. That in itself would give hesitation to
14 continuing this matter and voiding the effect of the timely
15 filing of an appeal. However, of greater import is the fact
16 that in his response to the Board, Respondent caused to be
17 filed with the Board in support of his response a false and
18 fraudulent document; that is, the mailgram. I believe that
19 changes the situation in this case sufficiently to preclude
20 any further consideration of waiving the effectiveness of the
21 rule in favor of the Respondent. I feel, therefore, that
22 the period of time which the Respondent let expire from the
23 time he obtained constructive service of the order of
24 revocation upon him and his subsequent use of a false and
25 fraudulent document to mislead the Board as to why he failed

1 to timely effectuate an appeal, precludes any favorable
2 consideration of his request that his appeal to the Board be
3 docketed and receive favorable consideration, even though it
4 is untimely. That being the case, I feel that evidence here
5 requires that the Board's original order, with respect to
6 the motion to dismiss, should be vacated, and that the
7 Administrator's motion to dismiss should in fact be granted.

8 ORDER

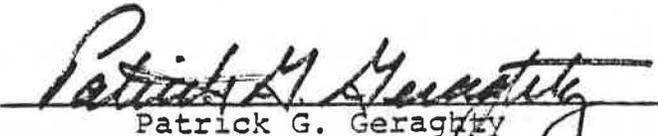
9 It is therefore adjudged and ordered:

10 (1) That the original Board order denying the
11 Administrator's motion to dismiss be, and the same hereby is
12 vacated.

13 (2) That the Administrator's request for
14 reconsideration of his motion to dismiss be, and the same
15 hereby is granted; and further, that upon such reconsideration
16 that the Administrator's motion to dismiss be, and the same
17 hereby is granted.

18 (3) That the Respondent's notice of appeal be,
19 and the same hereby is dismissed and set aside.

20 Entered this Fifth Day of April, 1978, in
21 Los Angeles, California.

22
23 
24 Patrick G. Geraghty
25 Administrative Law Judge

APPEAL

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2 As this is a final order in this case, dismissing
3 the appeal, I would note that either party to this decision
4 may appeal from this decision and order entered herein by
5 filing with the Board within ten days a notice of appeal,
6 and within the time limits provided within the Board's Rules
7 thereafter filing a brief, in order to perfect that appeal.
8 Parties' attention is directed to the Board's Rules of
9 Practice, to those sections pertaining to appeals, for further
10 information concerning the form and content of an appeal brief.
11 Parties are cautioned, however, that the Board may on its own
12 motion, or the motion of a party, dismiss an appeal where the
13 appeal is not perfected by the timely filing of an appeal
14 brief.

15 The documents should be filed with the Office of
16 Administrative Law Judges, Docket Section, 800 Independence
17 Avenue, S.W., Washington, D.C. 20594, with copies of all
18 documents served upon the other party.

19 The Board, on its own motion, does not review this
20 decision, and in the absence of a notice of appeal, timely
21 filed, the order contained herein shall become final.
22 Timely filing of a notice of appeal shall, however, stay the
23 order contained in this decision.
24
25

ENTERED: April 5, 1978

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