

U.S. DEPARTMENT OF TRANSPORTATION  
FEDERAL AVIATION ADMINISTRATION

OFFICE OF CHIEF COUNSEL  
HEARING DOCKET

2000 SEP 20 A 9:30

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In the Matter of:

Canuck Industries, Inc.

CP00500021

FAA Case No. 98SO7300293

Chief Administrative Law Judge Yoder

FAA - 2000-776-1

**OPPOSITION TO MOTION TO DISMISS  
AND ADDITIONAL MEMORANDUM REGARDING  
REQUEST FOR HEARING FILED BY RESPONDENT**

The Federal Aviation Administration ("Complainant") by counsel files this opposition to Respondent's Motion to Dismiss and Additional Memorandum Regarding Its Request for Hearing and hereby moves the administrative law judge (ALJ) to (1) strike Respondent's Motion to Dismiss as premature and outside the jurisdiction of this administrative forum and (2) strike Respondent's response to Complainant's Motion to Dismiss the Request for hearing as untimely. Complainant states the following in support thereof:

1. On August 7, 2000, Complainant filed a motion to dismiss the request for hearing in this matter pursuant to 14 C.F.R. § 13.218(f)(2)(i).<sup>1</sup> A copy of this motion was served on counsel for respondent by mail. Answer to the motion to dismiss was due by August 22, 2000. See 14 C.F.R. §§ 13.218(d) &

<sup>1</sup> Respondent's request for hearing was filed with the Hearing Docket on or about March 7, 2000 but was not received by counsel for Complainant until July 21, 2000. See Complainant's Motion to Dismiss dated August 7, 2000 for complete chronology of events in this matter.

13.211(e).<sup>2</sup> Respondent did not file a timely response to Complainant's motion to dismiss.

2. On September 7, 2000, Respondent filed a motion to dismiss and a memorandum in support of its request for a hearing.
3. The Rules of Practice in FAA Civil Penalty Actions ("Rules of Practice") only apply to actions in which a complaint has been issued. 14 C.F.R. § 13.201(a). A complaint has not been filed in this matter. The Administrator has held that the Rules of Practice are intended to apply to a motion to dismiss a request for hearing under section 13.218(f)(2)(i) where it is filed instead of a complaint. *See In the Matter of Michael R. Larsen*, FAA Order No. 94-27 (September 30, 1994). However, this precedent has not been extended to other types of motions. Here, there is no matter before the ALJ to which Respondent's motion to dismiss may be appropriately directed. Respondent's arguments concerning the jurisdiction of the Federal Aviation Administration under the Department of Transportation Hazardous Materials Regulations are premature and should not be considered prior to resolution of the motion to dismiss the request for hearing and, if denied, the filing of a complaint in this matter.
4. Respondent uses its motion to dismiss as a vehicle to argue in support of its request for a hearing. This argument properly should have been made in a timely response to Complainant's motion to dismiss. Respondent does not assert any good cause for the lateness of its response.

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<sup>2</sup> Section 13.218(d) provides, in part, that: "Answers to motions. Any party may file an answer, with affidavits or other evidence in support of the answer, not later than 10 days after service of written motion on that party." Section 13.211(e) provides for an additional 5 days to be added to a prescribed time period after service by mail.

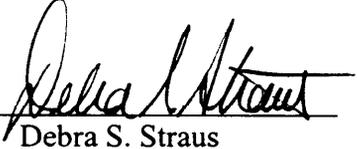
5. Respondent raises a new issue regarding the late-filed request for hearing in its memorandum. Respondent now argues that the Final Notice of Proposed Civil Penalty was not effective because it was not signed by the official delegated with this authority by the Administrator. This argument is without merit. The Administrator of the FAA clearly delegates the authority to initiate and assess civil penalties to the Assistant Chief Counsel for Enforcement. See 14 C.F.R. § 13.16(c). The Final Notice of Proposed Civil Penalty in this matter was issued by “Peter J. Lynch” the Assistant Chief Counsel for Enforcement. The Final Notice was signed by the undersigned attorney to whom the Assistant Chief has delegated the authority to sign on his behalf. See Attached Delegation dated July 28, 1998. This argument is untimely and without merit.
6. Lastly, Respondent argues that Complainant asserts that it is not required to comply with its own regulations. This is not an accurate characterization of Complainant’s argument or consistent position in this matter. Complainant informed counsel for Respondent in early telephone conversations that it believed that counsel’s letter to Complainant indicating his representation of Respondent as legal counsel was sufficient to satisfy the requirement of a written designation under section 13.16(e). Complainant now similarly argues that the written notice of legal representation was sufficient to satisfy the requirements of section 13.16.
7. Complainant also argues that Respondent should have requested a hearing in a timely manner after the telephone conversation in which this position was

discussed and, at the very least, after the Order Assessing Civil Penalty was issued. In this respect, the case of the *Federal Aviation Administration v. Robert Wiedle*, 2000 FAA LEXIS 78 (January 6, 2000), provides valuable guidance. Unlike the *Wiedle* case, where Respondent's attorney asserted that he did not receive a copy of the Final Notice, counsel in this matter clearly received the Final Notice of Proposed Civil Penalty. *Id.* The significance of the *Wiedle* case, however, lies in the fact that the ALJ considered the Order Assessing Civil Penalty as a document to which Respondent or his attorney also should have responded in a timely matter. *Id.* In this matter, Respondent's counsel filed a Request for Hearing 75 days after receipt of the Final Notice, 57 days after counsel informed him that it believed he was a proper representative to receive the Final Notice for respondent, and 33 days after issuance of the Order Assessing Civil Penalty to both Respondent and his counsel.

Wherefore, Complainant requests that Respondent's Motion to Dismiss be stricken as premature and outside the jurisdiction of this forum to consider at this time and as an untimely response to the Complainant's Motion to Dismiss the Respondent's request for hearing.

Respectfully submitted this 20<sup>th</sup> day of September, 2000.

PETER J. LYNCH  
Assistant Chief Counsel

By: 

Debra S. Straus  
Enforcement Division, AGC-300  
Office of the Chief Counsel

CERTIFICATE OF SERVICE

I hereby certify that on this date I have sent by U.S. mail, postage prepaid, certified return receipt requested, one copy of Complainant's Opposition to Respondent's Motion to Dismiss in the Matter of Canuck Industries, FAA Case No. 98SO730293 addressed to:

Francis J. Mulcahy, Esq.  
Tinsley Bacon Tinsley, LLC  
100 North Point Center East, Suite 440  
Alpharetta, Georgia 30022  
(Counsel for Respondent Canuck Industries)

The Honorable Ronnie A. Yoder  
Chief Administrative Law Judge  
Office of Hearings, M-20, Room 5411  
U.S. Department of Transportation  
400 Seventh Street, S.W.  
Washington, D.C. 20590

In addition, I hereby certify that on this date I hand-delivered the original and one copy of the above-described document in the Matter of Canuck Industries, FAA Case No.

98SO730293 to:

Hearing Docket  
Federal Aviation Administration  
800 Independence Avenue, S.W.  
Room 924A  
Washington, D.C. 20591

Donna M. Davis  
Donna M. Davis

Dated: September 20, 2000



U.S. Department  
of Transportation  
**Federal Aviation  
Administration**

# Memorandum

Subject: Delegation of Authority

Date: **JUL 28 1998**

From: Assistant Chief Counsel for Enforcement

Reply to  
Attn. of:

To: Delegation of Authority File

1. In accordance with paragraphs 1202(a) and (f) of Order 2150.3A, Compliance and Enforcement Program, I delegate to the following persons my authority under 14 C.F.R. §13.19 to issue notices of proposed certificate action, orders of suspension, and orders of revocation under 49 U.S.C. 44709 and 44710. This delegation includes authority to issue emergency orders under 49 U.S.C. 44709 or immediately effective orders under 49 U.S.C. 44710.

Allan H. Horowitz  
Cynthia A. Dominik  
Susan S. Caron  
James A. Barry  
James W. Tegtmeier  
Robert P. Vente

Edmund A. Averman, III  
Cathy E. Scherr  
Debra S. Straus  
David M. Hernandez  
Alison B. Vawter

2. I also delegate to the aforementioned persons my authority under 14 C.F.R. §13.16 to initiate and assess civil penalties under 49 U.S.C. 46301, 46302, and 46303 through the issuance of appropriate documents, and to refer cases to the Attorney General of the United States or the delegate of the Attorney General for the collection of civil penalties.

3. In accordance with paragraph 1204 of Order 2150.3A, I delegate to the aforementioned persons my authority under 14 C.F.R. §13.15 to propose civil penalties through the issuance of civil penalty letters.

Any documents authorized by this delegation to be issued are to be signed with a by-line under my name.

  
Peter J. Lynch