Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-544

In re Applications of

HUGHES-MOORE ASSOCIATES, INC.	File No. BPH-870612MC
HERBERT REGENSTREIF	File No. BPH-870615MI
MIDWAY COMMUNICATIONS, LTD.	File No. BPH-870615MT
BELHOUSE & ASSOCIATES, INC.	File No. BPH-870615MV

For Construction Permit for New
FM Station, Midway, Kentucky

MEMORANDUM OPINION AND ORDER

Adopted: February 10, 1992; Released: February 19, 1992

By the Commission:

1. Before the Commission are an Application for Review filed May 9, 1991, by Herbert Regenstreif (Regenstreif), a Request for Official Notice filed June 13, 1991, by Belhouse & Associates, Inc. (Belhouse), and an Opposition to Application for Review filed June 17, 1991, by Midway Communications, Ltd. (Midway). These pleadings relate to a Review Board decision, *Hughes-Moore Associates, Inc.*, 6 FCC Rcd 889 (Rev. Bd. 1991), *recon. denied*, 6 FCC Rcd 1984 (1991), denying Regenstreif's appeal of the Administrative Law Judge's order (FCC 90M-2868, released September 12, 1990), allowing Midway to participate in the applicants' universal settlement agreement terminating this proceeding. We will grant Regenstreif's application for review, vacate the Board's decision reinstating Midway's application, the ALJ's order allowing Midway to participate in the agreement, and the Board's decisions here appealed, and reinstate the ALJ's order dismissing Midway's application.

BACKGROUND

2. By *Memorandum Opinion and Order*, FCC 90M-103, released January 18, 1990, the Administrative Law Judge (ALJ) dismissed Midway's application for its failure to file a notice of appearance as required by 47 C.F.R. § 1.221 and denied it the right to payment under a settlement agreement entered into by the applicants; approved the remainder of applicants' agreement; granted the construction permit here requested to Regenstreif and Belhouse, who had merged their interests pursuant to that agreement; and terminated this proceeding.[1]

3. The Review Board thereafter reinstated Midway's application relying on *St. Croix Wireless Co.*, 3 FCC Rcd 4073 (1988), noting that the Commission held there that an applicant could file a late notice of appearance and participate in an earlier filed settlement agreement, if the agreement involved all of the applicants, would terminate the proceeding, and would not prejudice the other parties or the public. (Midway had filed a late notice of appearance.) Since the applicants' settlement agreement was not before it, the Board remanded the matter to the ALJ for action consistent with *St. Croix*. *See Hughes-Moore Associates, Inc.*, 5 FCC Rcd 3694 (1990) (hereafter remand order).

4. The ALJ on remand applied *St. Croix* and allowed Midway to join in the agreement. *Order*, FCC 90M-2869, released September 12, 1990. Regenstreif appealed that order, as well as the Board's remand order upon which it was predicated. He contended that Midway had not in fact filed with the Commission a timely appeal of the ALJ's earlier order dismissing its application, since no record of such a filing could be found in the Commission's files, nor had any of the parties ever received a copy of that purported appeal.[2] Midway's failure to file an appeal, Regenstreif argued, resulted in the ALJ's dismissal order becoming final as a matter of law under 47 C.F.R. § 1.302, and, thus, actions thereafter by the Board (its remand Order) and the ALJ (allowing Midway to participate in the settlement) were void *ab initio*.

5. Recognizing that a significant question had been raised as to whether Midway had filed with the Commission its questioned appeal, the Board, by letter dated November 14, 1990, directed Midway to file a statement for the record explaining the circumstances surrounding the filing of that appeal. The Board emphasized that it was interested in obtaining information as to how the appeal was filed (*i.e.*, by mail, courier, or by the applicant or counsel), and how Midway came to retain possession of a pleading that had been originally stamped by the Commission.

6. Midway responded to that directive with a verified statement from its counsel. Statement For The Record, filed November 29, 1990. Therein, counsel stated that Midway's appeal was filed with the Commission by overnight courier; that he did not know which courier was utilized but was attempting to obtain invoices and bills of lading to establish the identity of the courier; and that neither he nor Midway had the appeal stamped original by the FCC. Counsel also submitted another copy of Midway's appeal, pointing out that the FCC Mail Section stamp affixed thereon indicated that it was filed on February 1, 1990, rather than on February 19, 1990, as the Board had previously found in its remand order.[3] Exhibit 13 to Midway's Statement For The Record.

7. Based on the foregoing, the Board concluded that Midway had shown that it had timely appealed the ALJ's dismissal order, and, thus, it rejected Regenstreif's contention that the Board had improperly exercised its authority under Section 1.302 when it ruled on that appeal and entered its remand order. Accordingly, the Board denied Regenstreif's appeal of the ALJ's ruling allowing Midway to join in the applicants' settlement agreement, after concluding that the ALJ had correctly applied *St. Croix*, *supra*. *Hughes-Moore Associates, Inc.*, 6 FCC Rcd 889 (1991), *recon. denied*, 6 FCC Rcd 1984 (1991).

DISCUSSION

8. Regenstreif argues that Midway's statement for the record was inadequate to show that it had timely appealed the ALJ's order dismissing its application, and that the Board erred in holding otherwise. We agree. Throughout this proceeding Midway has relied on copies of its appeal with an FCC Mail Section stamp to show that it filed a timely appeal of the ALJ's dismissal order.[4] The Board twice accepted those copies as meeting Midway's burden of proof of showing actual receipt by the Commission of the purported appeal: first, when it reinstated Midway's application and entered its remand order (n.2, *supra)*; and, again, when it rendered its decision here appealed. We believe the Board erred when it found that copies of that pleading were sufficient to show that the claimed appeal was actually received by the Commission. It is well settled under established rules of evidence that a copy of a document will not suffice when the original contains certain features that are disputed and subject to disavowment. *See Wigmore, Evidence*, § 1179, page 417, explaining the reasons for the best evidence rule: "As between a supposed literal copy and the original, the copy is always liable to errors by the copyist, whether by willfulness or by inadvertance * * * [and] the original may contain, and the copy will lack, such features of handwriting, paper and the like * * *." *See also United States v. Alexander*, 326 F.2d 736 (4th Cir. 1964) (citing the above with approval); and *United States v. Vandersee*, 279 F.2d 176, 180-181 ¶ 9 (2nd Cir. 1960) (although a copy of a typed original may be acceptable, it will not suffice if it is challenged.)

9. Here, Regenstreif challenged the authenticity of the copy of Midway's appeal submitted by counsel as an exhibit to his verified statement. (Reply to Midway's Statement for the Record filed December 10, 1990). He contended that the FCC stamp appearing thereon could be unauthentic for various reasons, and that counsel should submit the copy of Midway's appeal with the original FCC ink stamp purportedly returned to him by the Commission when he filed that appeal. The Board refused to require counsel to submit the pleading, finding that the copy with the FCC stamp appearing thereon that had been submitted by counsel was sufficient to show that Midway's claimed appeal was timely received by the Commission (6 FCC Rcd at 889-890 ¶¶ 7 and 8). As the authenticity of a specific feature of the submitted copy, the FCC stamp thereon, had been challenged, we believe the Board erred in failing to require counsel to submit the requested pleading.[5] In the absence of a document with an actual FCC date stamp, and where neither the Commission nor the parties have a record of initially receiving the pleading in question, see paras. 10-11, *infra*, the submitted copy of Midway's appeal was not entitled to be accepted at face value, and the Board erred in holding otherwise.

10. Moreover, an applicant such as Midway, whose claim to have filed a document with the Commission is disputed, has the initial burden to show that the document was properly delivered to the Commission when there is no record of such a filing in the Commission's files. If regular mail service is used, the applicant must submit proof that the mailed document was properly addressed to the Commission, had sufficient postage, and was deposited in the mail. *See In re Yoder Co.*, 758 F.2d 1114, 1118 ¶ 4 (6th Cir. 1985); and *Simpson v. Jefferson Standard Life Insurance Company*, 465 F.2d 1320 (6th Cir. 1972). That a delivery service other than regular mail service is used does not materially affect the type of proof that must be submitted. *See Yoder, supra* at 1120, 1121 ¶¶ 10 and 11.

11. Here, Midway relied on a verified statement of its counsel to meet its burden of proof of proper delivery. Therein, counsel stated that he used an overnight courier to deliver Midway's claimed appeal to the Commission, that he did not know which courier was used, but that he was attempting to obtain invoices and/or bills of lading to establish its identity. Midway has never provided these documents to the Commission, even though it was specifically invited to do so.[6] Under the circumstances of this case, we believe that something more was required of Midway: namely, the pertinent invoice and/or bill of lading from the courier that counsel indicated he was attempting to obtain, which would have certainly shown the identity of the courier and when its services were retained. In the absence of such corroborating evidence, we cannot agree with the Board that Midway met its burden of showing proper delivery to the Commission of its appeal.

12. In view of the foregoing, we find that no timely appeal of the ALJ's order dismissing Midway's application was pending before the Commission; that no good cause for the late-filing of such an appeal is apparent based on the circumstances before us; that, consequently, the ALJ's dismissal order became final as a matter of law under Section 1.302;[7] and that actions thereafter by the Board and the ALJ were therefore void *ab initio*.

13. ACCORDINGLY, IT IS ORDERED, That the Board's decision, 5 FCC Rcd 3694 (1990), reinstating Midway's application, the ALJ's order, FCC 90M-2868, released September 12, 1990, allowing Midway to participate in the applicants' settlement agreement, and the Board's decisions, 6 FCC Rcd 889 (1991), *recon. denied*, 6 FCC Rcd 1984 (1991), ARE VACATED.

14. IT IS FURTHER ORDERED, That the ALJ's order, FCC 90M-103, released January 18, 1990, dismissing Midway's application IS REINSTATED.

15. IT IS FURTHER ORDERED, That the Application for Review filed May 9, 1991, by Herbert Regenstreif IS GRANTED to the extent indicated herein and IS DENIED in all other respects.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Under the applicants' settlement agreement Midway was to receive $30,000 from Regenstreif and Belhouse for the dismissal of its application. As the agreement was filed prior to August 1, 1991, it is not subject to the current requirements of 47 C.F.R. § 73.3525 which limit settlement payments to legitimate and prudent out-of-pocket expenses. *See Amendment of Section 73.3525 of the Commission's Rules Regarding Settlement Agreements Among Applicants for Construction Permits*, 6 FCC Rcd 85 (1990), *clarified and modified on reconsideratioin*, 6 FCC Rcd 2901 (1991).

[2] The Board's remand order was issued in response to an appeal (titled Exceptions), which was submitted to the Board by Midway's counsel on April 2, 1990, 41 days after the February 20 due date and after he had been informed during an earlier status check that no such pleading was then pending before the Board. *See,* 5 FCC Rcd 3694 at n.1 and 6 FCC Rcd at 890 ¶ 9. As the submitted copy bore an FCC Mail Section stamp indicating that it was timely filed with the Commission, the Board concluded that it had authority under 47 C.F.R. § 1.302 to rule on that appeal.

[3] The Board subsequently acknowledged that fact, but found that it was harmless error since Midway's appeal was filed more timely than the Board had thought when it entered its remand order. *See* 6 FCC Rcd 890 at n.2 (1991).

[4] As previously mentioned, none of the parties to this proceeding ever received a copy of that appeal, even though the certificate of service attached thereto indicated that copies were mailed to them. Non-receipt of copies by them warrants an inference that the claimed appeal was in fact not received by the Commission. *See Baldwin v. Fidelity Phenix Fire Insurance Co. of N.Y.,* 260 F.2d 951 (6th Cir. 1958) (evidence that one addressee did not receive a notice supports the inference that another addressee did not receive the notice). Moreover, where, as here, two independent delivery services were allegedly used (an overnight courier to deliver the document to the Commission and regular mail service to deliver copies to the parties) we believe that such an inference is even stronger since the likelihood that both delivery services would fail to deliver the pleadings is extremely remote.

[5] While this matter was pending before us, counsel was accorded the opportunity to submit the actual stamped-in copy of Midway's appeal that bears the original ink stamp of the FCC Mail Section, as well as the documentation from the courier that he previously indicated he was attempting to obtain. FCC 91I-062, released September 11, 1991. Counsel for Midway submitted neither. Instead, on September 18, 1991, he merely again submitted a copy of Midway's Exceptions. Counsel further stated that "the documents regarding the courier are not in my control, but I have requested them from my former firm." Thus, Midway has provided no documents showing receipt of its pleading by the FCC and it has given no credible explanation why they are unavailable.

[6] *See* n.5.

[7] Section 1.302 provides that a presiding officer's final ruling, such as a dismissal of an application, shall be final 50 days after the day of its release, if an appeal is not filed following the filing of a notice of appeal.