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601 THIRTEENTH STREET, N.W.
SUITE 600 SOUTH
WASHINGTON, D.C. 20005-3807
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FACSIMILE: (1-202) 639-9355

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August 13, 2002

BY HAND

Donald S. Clark
Secretary
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Re: *Schering-Plough Corp., Upsher-Smith Laboratories, Inc., American Home Products Corporation, Docket No. 9297*

Dear Mr. Clark:

We enclose for filing on behalf of Respondents Schering-Plough and Upsher-Smith in the above-captioned proceeding the original and twelve paper copies of Respondents' Motion To Dismiss The Appeal. We are also providing an electronic copy on the enclosed disk.

If you have any questions, please do not hesitate to contact me.

Sincerely,

Christopher M. Curran

Enclosures

cc: Joseph J. Simons, Esq.
Karen G. Bokat, Esq.

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

In the Matter of	)	
	)	
Schering-Plough Corporation,	)	
a corporation,	)	
	)	**Docket No. 9297**
Upsher-Smith Laboratories, Inc.,	)	
a corporation,	)	
	)	
and	)	
	)	
American Home Products Corporation,	)	
a corporation.	)	
	)	

RESPONDENTS' MOTION TO DISMISS THE APPEAL

As explained below, Complaint Counsel failed to file a timely appeal brief and Judge Chappell's Initial Decision has become the decision of the Commission by operation of law. Consequently, this appeal must be dismissed for lack of jurisdiction.

1. The Administrative Procedure Act ("APA") — which sets forth the "minimum essential rights and procedures" for agency adjudication, *Chrysler Corp. v. Brown*, 441 U.S. 281, 313 (1979) — states: "When the presiding employee [i.e., administrative law judge] makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within time provided by rule." 5 U.S.C. § 557(b).

2. In accordance with this requirement of the APA, Commission Rule 3.51(a) provides: "Once issued, the initial decision shall become the decision of the Commission thirty (30) days after service thereof upon the parties or thirty (30) days after the filing of a

timely notice of appeal, whichever shall be later, unless a party filing such a notice shall have perfected an appeal by the timely filing of an appeal brief or the Commission shall have issued an order placing the case on its own docket for review or staying the effective date of the decision."

3. Under the APA and Commission Rule 3.51(a), Judge Chappell's Initial Decision has become the decision of the Commission because (i) Complaint Counsel did not perfect their appeal by the "timely filing of an appeal brief" and (ii) the Commission did not "plac[e] the case on its own docket" or "stay[] the effective date of the decision" within thirty days after Complaint Counsel's notice of appeal.

4. Complaint Counsel's appeal brief was untimely under Commission Rule 3.52(b), which states: "The appeal shall be in the form of a brief, filed within thirty (30) days after service of the initial decision . . . ." All of the parties, including Complaint Counsel, were served with the Initial Decision no later than Friday, June 28, 2002, when the Commission Secretary delivered a copy to all counsel by hand in the Secretary's office. This delivery constituted service in conformity with Commission Rule 4.4(a)(1)(ii), which states that service of initial decisions by the Commission may be effected by "delivery to an individual" (i.e., "the person to be served") and that service is "complete upon delivery." *See, e.g., In the Matter of Supreme Freezer Meats, Inc.*, 73 F.T.C. 990, 998 (1968) (holding that personal service of initial decision was official service for appeal purposes). Accordingly, Complaint Counsel's appeal brief was due by July 30, 2002 (i.e., thirty days from service beginning with Monday, July 1, 2002, which was the first business day after Friday, June 28, 2002, *see* Rule 4.3(a)). Despite this deadline, Complaint Counsel did not file their brief until one week later, August 6, 2002.

5. Complaint Counsel apparently dispute that the Secretary's hand delivery of the Initial Decision in the Secretary's Office on June 28, 2002 constituted service. Complaint Counsel appear to take the position that the Secretary's June 28, 2002 delivery of the Initial Decision was some sort of unofficial "courtesy copy" of the Initial Decision. But Rule 4.4(a)(1)(ii) unmistakably provides that such delivery constitutes service. The Commission's Rules do not contemplate the delivery of any unofficial "courtesy copy" that does not trigger the thirty-day appeal period.

6. Complaint Counsel apparently take the position that a subsequent mailing of an expurgated public version of the Initial Decision, received by the parties on July 5, 2002, constituted the official service of the Initial Decision. But the Commission Rules expressly provide that service of the complete *in camera* version of a document — not the expurgated public version — is operative. *See* Rule 3.45(e) ("Any time period within which these rules allow a party to respond to a document shall run from the date the party is served with the complete version of the document."); Rule 3.45(f) (directing an administrative law judge to file and serve a "complete version" containing *in camera* information and then, within five days, a "pubic record" version). The June 28, 2002 hand delivery by the Commission Secretary was the only delivery of the complete *in camera* version of the Initial Decision, and therefore was the only delivery that could have constituted service.

7. Complaint Counsel's failure to file its appeal brief within the allotted period is inexplicable, because Upsher-Smith forewarned Complaint Counsel that the Secretary's June 28, 2002 delivery constituted service and triggered the thirty-day appeal period. In responding to Complaint Counsel's motion to expand the word-count limitation, Upsher-Smith observed that Complaint Counsel had been served by hand by the Secretary on June 28, 2002 (Upsher-Smith

Opp'n at 9 (citing Rule 4.4(a)(1)(ii)), and Upsher-Smith even invited Complaint Counsel to seek an extension, which could have been granted while the Commission still had jurisdiction. Nonetheless, Complaint Counsel let the July 30, 2002 deadline pass and filed their brief a full week later.

8. Because Complaint Counsel did not file their appeal brief on time, and because the Commission did not self-initiate an appeal or issue a stay within thirty days after Complaint Counsel's notice of appeal, Judge Chappell's Initial Decision has become the decision of the Commission under the APA and Rule 3.51(a). Given these circumstances, the Commission no longer has jurisdiction to hear this appeal, and it must be dismissed. *See, e.g., Da Cruz v. INS*, 4 F.3d 721, 722 (9th Cir. 1993) (holding that Board of Immigration Appeals lacked jurisdiction to hear appeal of initial decision where Immigration and Naturalization Service filed appeal one day late) (attached hereto as Exhibit A); *In the Matter of Hollywood Carpets, Inc.*, 86 F.T.C. 424 (1975) (denying respondents' request to file an untimely appeal brief in opposition to Complaint Counsel's appeal brief); *Talmantes v. INS*, 51 F.3d 133, 134-35 (8th Cir. 1995) (affirming Board of Immigration Appeals's dismissal of notice of appeal that was one day late); *Brown v. NTSB*, 795 F.2d 576, 577 (6th Cir. 1986) (dismissing appeal where party filed timely notice of appeal but did not perfect appeal with timely appeal brief).

CONCLUSION

Because Complaint Counsel failed to file their appeal brief within the time provided by Commission Rules, both the Administrative Procedure Act and Commission Rule 3.51(a) require that this appeal be dismissed.

August 13, 2002

Respectfully submitted,

HOWREY SIMON ARNOLD & WHITE, LLP

By: Laura S. Shores/cmc

John W. Nields, Jr.
Laura S. Shores
1299 Pennsylvania Ave., N.W.
Washington, DC 20004
Telephone: (202) 783-0800
Facsimile: (202) 383-6610

Attorneys for Schering-Plough Corp.

WHITE & CASE LLP

By:

Robert D. Paul
J. Mark Gidley
Christopher M. Curran
601 Thirteenth Street, N.W.
Washington, D.C. 20005-3807
Telephone: (202) 626-3600
Facsimile: (202) 639-9355

Attorneys for Upsher-Smith Laboratories, Inc.

EXHIBIT A

The County does not challenge the merits of the preliminary injunction, only the district court's power to issue it. We conclude that when all of the requirements for equitable relief under section 1983 have been met, Norris–LaGuardia does not preclude the district court from issuing an injunction in a section 1983 action, even though the action involves a labor dispute between an employee and a municipality.

AFFIRMED.

Joaquim Paulo DA CRUZ, Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE, Respondent.

No. 91–70752.

United States Court of Appeals, Ninth Circuit.

Submitted * Aug. 6, 1993.

Decided Aug. 31, 1993.

Lawful permanent resident of the United States and a native of Portugal appealed Board of Immigration Appeals' (BIA) decision reversing original order of immigration judge and ordering lawful permanent resident deported. The Court of Appeals, Beezer, Circuit Judge, held that BIA lacked jurisdiction over Immigration and Naturalization Services' (INS) appeal of immigration judge's decision and, thus, Court of Appeals had no jurisdiction to review immigration judge's decision.

Petition for review granted and decisions and orders vacated.

1. **Administrative Law and Procedure** ⇐744.1

   Aliens ⇐54.3(2.1)

   Court of Appeals reviews de novo whether Board of Immigration Appeals (BIA) had jurisdiction to consider untimely appeal.

2. **Administrative Law and Procedure** ⇐722.1

   Aliens ⇐54(5)

   Time limit for filing appeal to Board of Immigration Appeals (BIA) is mandatory and jurisdictional.

3. **Administrative Law and Procedure** ⇐481

   Aliens ⇐54(5)

   Case may not be reopened solely to allow late appeal to Board of Immigration Appeals (BIA).

4. **Administrative Law and Procedure** ⇐513

   Aliens ⇐54(5)

   Board of Immigration Appeals (BIA) did not have jurisdiction over Immigration and Naturalization Service's (INS) appeal of administrative decision where appeal was untimely.

5. **Aliens** ⇐54(5)

   Board of Immigration Appeals (BIA) acts arbitrarily when it disregards its own precedents and policies without reasonable explanation.

6. **Administrative Law and Procedure** ⇐723

   Aliens ⇐54.3(1)

   Court of Appeals lacked jurisdiction to review immigration judge's decision where Immigration and Naturalization Service (INS) did not timely appeal immigration judge's decision to Board of Immigration Appeals (BIA).

Daniel H. Smith, MacDonald, Hoague & Bayless, Seattle, WA, for petitioner.

* The panel unanimously finds this case suitable for decision without oral argument. Fed.R.App.P. 34(a); Ninth Circuit Rule 34–4.

Carl H. McIntyre, Office of Immigration Litigation, U.S. Dept. of Justice, Washington, DC, for respondent.

Petition to Review a Decision of the Board of Immigration Appeals.

Before BEEZER, HALL, Circuit Judges, and CONTI, District Judge.**

BEEZER, Circuit Judge:

[1] Joaquim Paulo Da Cruz, a lawful permanent resident of the United States and a native of Portugal, appeals the Board of Immigration Appeals' ("BIA") decision reversing the original order of the Immigration Judge and ordering Da Cruz deported. On appeal, Da Cruz claims that the BIA did not have jurisdiction in this case because the Immigration and Naturalization Service ("INS") filed an untimely appeal. We review *de novo* whether the BIA had jurisdiction to consider an untimely appeal. *Montes v. Thornburgh*, 919 F.2d 531, 534 (9th Cir.1990). We grant the petition for review and vacate the decision of the BIA for lack of jurisdiction.

I

The original decision of the Immigration Judge, dated July 27, 1990, was mailed to the parties on July 31, 1990. A notice that any appeal must be *filed on or before* Monday, August 13, 1990 accompanied the decision which terminated the deportation proceedings against Da Cruz. The notice correctly stated the time limit for such appeals—thirteen days from mailing. *See* 8 C.F.R. §§ 3.38(b) and 242.21(a) (1993). 8 C.F.R. §§ 3.39 and 242.20 (1993) provide that the decision of the Immigration Judge becomes final in the absence of a timely appeal. The INS filed a Notice of Appeal on August 14, 1990. The Notice of Appeal was one day late.

[2, 3] The time limit for filing an appeal is mandatory and jurisdictional. *See Hernandez-Rivera v. INS*, 630 F.2d 1352, 1354 (9th Cir.1980); *Matter of Escabar*, 18 I & N Dec. 412 (BIA 1983). A case may not be reopened solely to allow a late appeal. *Matter of D.*, 5 I & N Dec. 520 (BIA 1953).

[4] The INS has two responses to the charge of untimely appeal. Notably, the INS does not dispute the late filing of the appeal to the BIA. First, the INS claims we have no jurisdiction over the claim because it was not raised before the BIA. The time limit is mandatory and jurisdictional, *Hernandez-Rivera*, 630 F.2d at 1354; we raise it *sua sponte*.

Second, the INS claims that pursuant to 8 C.F.R. § 3.1(c) the BIA may consider cases under its certification authority, regardless of the filing of a notice of appeal. When an appeal is not taken within the allotted time, the right to appeal is lost. *Id.;* Gordon & Mailman, Immigration Law and Procedure § 3.05[4][a] (1993). *See also* Davis, Administrative Law Treatise § 14:19 (1980) ("[u]nder § 557 of the APA, an initial decision by a presiding employee (now usually an administrative law judge) becomes final in absence of appeal to or review of the initial decision . . ."). The only exception to this rule is when the decision of the Immigration Judge is certified to the BIA. When certification occurs, all parties are served with notice of the certification and given an opportunity to respond. 8 C.F.R. §§ 3.1(c), 3.7 (1993). That was not done in this case; the speculation that the BIA might have certified this appeal is belied by the record.

[5] Where an alien has been merely one day late in filing an appeal, the BIA has held that it had no jurisdiction to extend the time for filing a late appeal. *Matter of G.Z.*, 5 I & N Dec. 295 (BIA 1953). The BIA acts arbitrarily when it disregards its own precedents and policies without reasonable explanation. *Israel v. INS*, 785 F.2d 738, 740 (9th Cir. 1986).

[6] The BIA was without jurisdiction to reverse the final decision of the Immigration Judge. We have no jurisdiction to review the Immigration Judge's decision because

** Honorable Samuel Conti, Senior District Judge for the Northern District of California, sitting by designation.

the INS did not timely appeal to the BIA. *See Xiao v. Barr*, 979 F.2d 151, 153 (9th Cir.1992).

We **GRANT** Da Cruz's petition for review and **VACATE** all decisions and orders subsequent to the July 27, 1990 decision and order of the Immigration Judge. Each side shall bear its own costs of petition for review.

UNITED STATES of America, Plaintiff–Appellee,

v.

Richard HEUER, Defendant–Appellant.

UNITED STATES of America, Plaintiff–Appellee,

v.

Eugene HOLDERNESS, Defendant–Appellant.

Nos. 92–10545, 92–10546.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted May 11, 1993.

Decided Aug. 31, 1993.

Defendant management employees of propellant manufacturer were convicted in the United States District Court for the District of Nevada, Howard D. McKibben, J., of knowing storage of hazardous waste without permit in violation of Resource Conservation and Recovery Act (RCRA), disposing of hazardous waste in knowing violation of material condition or requirement of permit, and knowingly making false statement within jurisdiction of federal agency. Defendants appealed. The Court of Appeals, Rymer, Circuit Judge, held that: (1) manufacturer's new hazardous waste generating facility was not qualified for interim status authorization for hazardous waste storage; (2) defendant could not be convicted of disposing of hazardous waste in knowing violation of material condition or requirement of permit based upon disposal of waste propellant generated off-site; and (3) evidence supported finding that defendant knew that materials were hazardous waste.

Affirmed in part and reversed and remanded in part.

Reinhardt, Circuit Judge, concurred and filed opinion.

1. Health and Environment ⇐25.5(5.5)

Resource Conservation and Recovery Act (RCRA) was enacted to address problem of disposing of solid waste that is hazardous to public health and environment. Solid Waste Disposal Act, § 1003, as amended, 42 U.S.C.A. § 6902.

2. Health and Environment ⇐25.5(5.5)

Entity which generates hazardous waste at more than one site must have permit for temporary accumulation at one site of waste that is produced at another site. Solid Waste Disposal Act, § 3005(a), as amended, 42 U.S.C.A. § 6925(a).

3. Health and Environment ⇐25.5(5.5)

Propellant manufacturer's new hazardous waste generating facility, construction of which began in 1987, was not legally qualified for interim status authorization for hazardous waste storage so as to render manufacturer's management employee not guilty of knowing storage of hazardous waste without permit in violation of Resource Conservation and Recovery Act (RCRA). Solid Waste Disposal Act, § 3008(d)(2)(A), as amended, 42 U.S.C.A. § 6928(d)(2)(A).

4. Health and Environment ⇐25.5(5.5)

Interim status authorization for hazardous waste storage could not be implied from Nevada Department of Environmental Protection letter so as to render propellant manufacturer's management employee not guilty of knowing storage of hazardous waste without permit in violation of Resource Conservation and Recovery Act (RCRA); letter indicated that Department would review manufacturer's revised waste permit application in

CERTIFICATE OF SERVICE

I hereby certify that on August 13, 2002 I caused a paper original and twelve copies as well as an electronic version of the foregoing Respondents' Motion To Dismiss The Appeal to be filed with the Secretary of the Commission:

Office of the Secretary
Federal Trade Commission, Room 104
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

and one copy to be served by hand delivery upon:

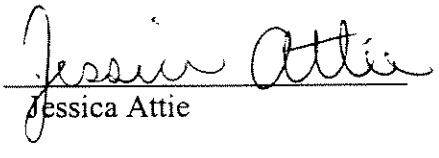
Hon. D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Ave, N.W.
Washington, D.C. 20580

and one paper copy to be hand-delivered and an electronic version to be served upon the following counsel:

Joseph J. Simons
Director
Bureau of Competition
Federal Trade Commission, H-374
601 Pennsylvania Avenue, N.W.
Washington, DC 20580

Karen G. Bokat
Bureau of Competition
Federal Trade Commission, S-3115
601 Pennsylvania Avenue, N.W.
Washington, DC 20580

Counsel Supporting the Complaint



Jessica Attie