

SERVED: September 29, 1994

NTSB Order No. EA-4253

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 15th day of September, 1994

DAVID R. HINSON,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-13087
v.)	
)	
WIL BLAIR,)	
)	
Respondent.)	
)	

OPINION AND ORDER

In this case, the Administrator issued an order against respondent alleging that he violated 14 C.F.R. 61.195(d)(2) when he endorsed a student pilot's logbook for a cross-country flight without supervising the student's review of weather information regarding the flight.¹ Respondent appealed the order to the

¹§ 61.195(d)(2) reads:

The holder of a flight instructor certificate is subject to the following limitations:

Board. After a hearing, the law judge found that the Administrator had not met his burden of proof and dismissed the complaint. The Administrator appealed that conclusion, and respondent replied in defense of the initial decision.

Shortly thereafter, respondent's counsel, on behalf of respondent's estate, moved to dismiss the Administrator's appeal, on the grounds that the respondent was deceased and the matter was moot.² Concurrently, respondent also filed an Equal Access to Justice Act³ application for fees and expenses. The Administrator replied, questioning how the Board would determine whether respondent qualified for EAJA fees, if it did not hear the appeal on the merits. (As the Administrator noted, before an EAJA award may be issued, respondent must show that he was a "prevailing party" in the underlying proceeding.) The Administrator argued, alternatively, that the case was not moot but that, if the Board dismissed it as such, the law judge's decision should be vacated.⁴

(..continued)

(d) logbook endorsement. He may not endorse a student pilot's logbook -

(2) For a cross-country flight, unless he has reviewed the student's flight preparation, planning, equipment, and proposed procedures and found them to be adequate for the flight proposed under existing circumstances[.]

²Respondent had died in an aircraft accident.

³EAJA, 5 U.S.C. 504.

⁴Respondent has filed a reply to the Administrator's reply, and the Administrator has moved that this filing be rejected. We agree. Respondent had the opportunity to submit supporting argument with his motion to dismiss, and he failed to do so. He

We will deny respondent's motion to dismiss for mootness, not because we have changed our long-standing belief that the interest in a certificate is personal and does not survive the holder's death, but because of the EAJA implications of a finding of mootness at this stage of this proceeding.⁵

EAJA grants respondents a right to seek recovery of certain expenses when specified criteria are met. The intent of EAJA is to compensate individuals when they are prosecuted by their government and the government's case is not reasonably founded. We have found no statutory or case law indication (the parties did not brief the question) that respondent's death mooted any right he might have had to EAJA fees, or that his estate would not have the right, through EAJA, to seek recompense, had he met the criteria. We think the preservation of EAJA "rights" is consistent with the purpose of EAJA to act as a watchdog of sorts over government action. Because in the circumstances of this case finding the proceeding moot would, in our view, preclude a finding that respondent met the EAJA criteria, we will not grant respondent's motion.⁶

(..continued)

should not now be permitted to supplement his analysis as an impermissible reply to a reply. Moreover, the questions before the Board are clear without further pleading.

⁵We intimate no view on the proper result when the death occurs at a different time in the proceedings. We leave those questions for the appropriate case.

⁶In this case, even were we to grant respondent's motion, it would not have the effect respondent appears to have anticipated. Under the circumstances presented here, dismissal of the Administrator's appeal would not leave respondent's estate with use of the law judge's decision to establish, for EAJA purposes,

Turning to the merits of the Administrator's appeal, we agree it must be granted and the law judge's decision reversed. The issue is not, as respondent frames it, whether in preparing a student pilot for a cross-country flight, the flight instructor must be personally present at the departure airport to discuss weather issues. We do not see the question as narrowly, nor does the Administrator embrace that argument (see Appeal at footnote 5). The cited regulation prohibits logbook endorsement unless the flight instructor "has reviewed" the student's preparation "under existing circumstances." We disagree with the law judge's conclusion that respondent exercised reasonable judgment in allowing his student independently to review the weather on the date in question and decide whether to fly, and we disagree with any suggestion that the regulation is ambiguous regarding the need for flight instructors to review weather conditions as part of their review of a student's flight planning.

(..continued)

that respondent was a prevailing party. Granting the motion would deny the Administrator the review of that decision he timely sought. It would be highly inequitable, we think, to deny the Administrator Board review of the law judge's decision but then use that decision to establish respondent's prevailing party status. Having no other basis to find respondent or his estate to have been a prevailing party, the EAJA application also would have to be dismissed. It might also be argued that, with the underlying action dismissed as moot prior to action on the Administrator's appeal on the merits, respondent's right to file an EAJA application never ripened. Our EAJA rule governing the filing of such applications, 49 C.F.R. 826.24, did not contemplate treating an initial decision as a final disposition for EAJA purposes, where a pending appeal was dismissed due to the death of a respondent. In this case, it is simply coincidental that the same result obtains (i.e., criteria for EAJA award have not been met) whether the underlying proceeding is dismissed as moot or not.

Respondent endorsed Katherine Campbell's logbook to allow her to make a lengthy solo cross-country flight.⁷ The endorsement authorized that the flight take place on "any dates from 11/13/91 -- 12/18/91." (An earlier endorsement had allowed the flight until November 30, 1991.) Ms. Campbell testified that, for close to a month, she and respondent had checked the weather every day, but it was always foggy somewhere along her proposed 3-leg route. Tr. at 18. Respondent discussed weather forecasts with Ms. Campbell on November 27, 1991, and then left town for the Thanksgiving weekend. Ms. Campbell was hoping to make the flight that weekend, and on November 30 determined that the weather, which she considered to be "continued clear" (Tr. at 21), permitted her to do so. She did not consult with respondent, and she did not know how to reach him. Thus, although the two had discussed other aspects of the flight (and the complaint does not allege that any part of that briefing was inadequate), they did not discuss the weather conditions for her flight, as known to her that day based, in part, on a weather briefing she obtained that morning.

The first leg of her flight was approximately 100 nautical miles and took her over mountains.⁸ Halfway to her destination (she was traveling in excess of 100 knots, i.e., approximately

⁷See § 61.109 (an applicant for a private pilot certificate must have performed a solo flight of at least 300 nautical miles (nm) with landings at at least three points, one of which is at least 100 nm from the departure point).

⁸Ms. Campbell testified that, at lower than 6,000 feet, she would be "squeaking" through the pass. Tr. at 22.

1/2 hour into the trip), she encountered clouds and determined to head back. The weather had changed dramatically and it was cloudy all the way back. Tr. at 26-27. Aviation Safety Inspector Steven Albert testified on behalf of the Administrator that mountain flying is hazardous, especially in the fall when weather patterns are hard to predict, and air masses are unstable and moving rapidly. Tr. at 55-56.

Although respondent argues to the contrary, the law judge found (Tr. at 193), and we agree, that a student's flight preparation necessarily includes weather checks. The law judge also concluded, however, that when read in conjunction with other rules, respondent's behavior was reasonable and should not be sanctioned. We find no basis for this conclusion.

Section 61.93(d)(1), cited by the law judge, speaks to endorsement of student certificates, not logbooks. The certificate endorsement requirement is in addition to the logbook endorsement and does not modify it. Section § 61.93(d)(2) speaks to the logbook endorsement, and makes it a violation for the student pilot to fly a solo cross country flight if the instructor has not endorsed the logbook "attesting that the student is prepared to make the flight safely under the known circumstances." This language, just as the section under which respondent is charged, means that the instructor must participate actively in the weather briefing at the time of the flight, not 3 days earlier, as he may not endorse the log until he can attest to the safety of the actual circumstances of the flight.

Section 61.193(b)(3), also cited by the law judge, refers back to § 61.93(d), and contains nothing inconsistent with § 61.93(d) and § 61.193(d)(2) that the endorsement not be made until after the instructor has reviewed the planning and found it adequate "for the flight proposed under existing circumstances."⁹

Inspector Albert aptly commented that § 61.93 relates to general preparatory training, and § 61.193 relates to application of training and knowledge. Tr. at 75-76.¹⁰

Respondent abdicated the important role the rules assign to him to supervise and assist Ms. Campbell in her analysis of the current and expected weather and her decision whether to fly her 3-leg, solo cross-country flight that day. As pertinent to this case, § 61.195(d)(2) is designed to ensure that the student has the benefit of the flight instructor's analysis and interpretation of the weather data available. As Mr. Albert

⁹The transcript also contains a discussion of § 61.93(d)(2)(ii), which does not require a review of flight planning, but that rule relates to local flights (within 50 nautical miles) with other conditions precedent that ensure a student's familiarity with the area and airports, and for that reason does not require the same degree of supervision at the time of the flight itself. See also Tr. at 77.

¹⁰The law judge rejected the Administrator's offer of Exhibit C-2, the explanatory text for a 1967 revision to rule 180 of Part 61. Although it is not clear from the record whether the rule at 180 is the precursor of 61.195 or 61.95, the text supports the Administrator's interpretation of his rule by stating, in part, that "This [rule change] will ensure that a considered determination has been made by the flight instructor before the student pilot logbook is endorsed." The law judge rejected this material on the grounds offered by respondent that he may not look beyond the regulation itself to interpret it or to judge whether it is ambiguous. That is not the law. See Administrator v. Miller, NTSB Order EA-3581 (1992). In light of our decision, this evidentiary exclusion was harmless error.

testified, student pilots must have preflight planning and preparation reviewed by the instructor prior to the latter's endorsement of the logbook. The purpose of the flight instructor's endorsement is to ensure that he has taken responsibility for the flight's proper planning. Respondent's blanket endorsement, regarding weather at least, improperly transferred that responsibility entirely to the student, compromising aviation safety.

The reasonableness of a rule requiring that the student pilot must have preflight planning and preparation reviewed by the instructor prior to the latter's endorsement of the logbook is demonstrated here. Ms. Campbell, regardless of respondent's confidence in her abilities, was still a student pilot, and her flying experience was limited. Mr. Albert testified that he would not expect that Ms. Campbell would have been able to understand the import of the full weather briefing available but he would have expected a flight instructor to understand that the weather was changing and unstable. Tr. at 71, 80.¹¹ In any case, it is immaterial both that respondent testified that he would have allowed her to fly had he been there and that she returned without incident. Respondent violated the regulation

¹¹Respondent countered that the complete weather information introduced at the hearing (see Exhibit R-1) would not have been provided to Ms. Campbell when she called flight service for a weather briefing. This misses the point. The flight instructor is more experienced, both in his knowledge of the weather patterns in the area, and his understanding and use of weather reports. It is likely he would learn more from a weather briefing than a student pilot.

when he pre-endorsed her flight log. Whether Ms. Campbell was as good as interpreting weather as she was going to get prior to obtaining her private pilot certificate, as argued by respondent, is also not the issue. The Administrator has established that the solo cross-country flight is a required part of the private pilot instruction program, that the instructor is to assist and supervise in all aspects of its planning, and that the instructor may not endorse the logbook before he has done so.

In view of our conclusion reversing the law judge's finding, no EAJA application is authorized and it is, therefore, dismissed.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's motion to dismiss is denied;
2. Respondent's motion for leave to file a reply is denied and the reply is rejected; and
3. Respondent's EAJA application is dismissed.

HALL, Acting Chairman, LAUBER, HAMMERSCHMIDT and VOGT, Members of the Board, concurred in the above opinion and order.