

SERVED: December 18, 2008

NTSB Order No. EA-5422

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 17<sup>th</sup> day of December, 2008

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APPLICATION OF	)	
	)	
JAMES W. BEAUCHAMP	)	
	)	Docket 330-EAJA-SE-18077
	)	
For an award of attorney	)	
fees and expenses under the	)	
Equal Access to Justice Act	)	
	)	
_____	)	

**OPINION AND ORDER**

The Administrator has appealed from the Equal Access to Justice Act (EAJA) written initial decision and order of Chief Administrative Law Judge William E. Fowler, Jr., served on August 14, 2008.<sup>1</sup> The law judge granted applicant's EAJA application. The Administrator has appealed that decision, and

<sup>1</sup> A copy of the law judge's initial decision and order is attached.

argues that the complaint against applicant was substantially justified, and that awarding attorney's fees under EAJA<sup>2</sup> is consequently inappropriate. We grant the Administrator's appeal.

On August 9, 2007, the Administrator issued an emergency order revoking applicant's airman pilot certificate, airman mechanic certificate, and inspection authorization, based on applicant's alleged falsification of a logbook entry. In the order, the Administrator alleged that, on February 3, 2006, applicant performed an overhaul of a Lycoming engine installed in a 1969 PA-28-180 Cherokee as part of applicant's sale of the aircraft. Compl. at ¶ 4. The Administrator's order also alleged that applicant conducted an annual inspection of the aircraft on February 3, 2006, and made a maintenance record entry returning the aircraft to service in the aircraft's logbooks. Compl. at ¶ 5. The order included lists of various entries found in both the aircraft and engine logbooks, which indicated that applicant had re-certified all engine parts and components to factory new limits, and installed a new camshaft and lifter bodies, a new fuel pump, and overhauled magnetos. Compl. at ¶¶ 6-7. The Administrator's order further stated that the engine logbook included a statement that applicant had

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<sup>2</sup> Equal Access to Justice Act, 5 U.S.C. § 504; see also 49 C.F.R. pt. 826.

cleaned and inspected the carburetor, and verified that the engine complied with all applicable overhaul service bulletins and airworthiness directives. Compl. at ¶ 7. The order also alleged that, on or about November 15, 2006, FAA Designated Mechanic Examiner Ron A. Davis inspected the aircraft after the aircraft's new owner experienced a 200 RPM magneto drop on the right magneto during pre-flight, that Mr. Davis discovered that a cylinder in the engine had "a severe exhaust leak," and that further inspection of the cylinders revealed "severe pitting on all lifters and scoring" to the camshaft lobes. Compl. at ¶¶ 8-9. The order further stated that, on January 27, 2007, FAA inspectors from the Oklahoma City Flight Standards District Office (FSDO) inspected several parts of the aircraft and discovered discrepancies indicating that the aircraft did not comply with Mandatory Overhaul Lycoming Service Bulletins, particularly with regard to the thermostatic bypass valve, fuel pump, carburetor, and both the left and right magnetos. Compl. at ¶¶ 10-11. Based on these allegations, the Administrator's order asserted that applicant had made a fraudulent or intentionally false entry in the maintenance records of the aircraft, because applicant had not overhauled the engine and did not ensure compliance with the service bulletins. Compl. at

¶ 12. As a result, the Administrator charged violations of 14 C.F.R. §§ 43.12(a)(1)<sup>3</sup> and 43.13(a).<sup>4</sup>

The case proceeded to hearing, at which the Administrator attempted to present a circumstantial and eyewitness case, beginning with the testimony of FAA aviation safety inspectors Patrick Stephens and Robert Giguere, who testified that they observed the disassembly of some of the parts, and opined that the parts were not in an overhauled condition. Tr. at 60-61, 67, 365. The Administrator also provided the testimony of the aircraft's new owner, Mr. Joel Clay, who stated that he purchased the aircraft from applicant because applicant offered to include an engine overhaul in the purchase price. Tr. at 148-49. Mr. Clay further testified that he asked Mr. Davis to evaluate the aircraft after he experienced the RPM drop, and that he relied on Mr. Davis's assessment. Tr. at 160-61; see also Tr. at 148. Mr. Clay stated that he had not flown the

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<sup>3</sup> Title 14 C.F.R. § 43.12(a)(1) provides that no person may make or cause to be made a fraudulent or intentionally false entry in any record or report that the Administrator requires to be made, kept, or used to show compliance.

<sup>4</sup> The relevant portion of section 43.13(a) requires "[e]ach person performing maintenance, alteration, or preventive maintenance on an aircraft, engine, propeller, or appliance" to use "the methods, techniques, and practices prescribed in the current manufacturer's maintenance manual or Instructions for Continued Airworthiness prepared by its manufacturer, or other methods, techniques, and practices acceptable to the Administrator."

aircraft on a frequent basis before experiencing a problem with it (Tr. at 157), and that he felt that applicant had led him astray in representing that he had included an engine overhaul for the agreed upon price (Tr. at 148). In addition, the Administrator called Tony Taylor, the general manager of a repair station for Engine Components, Inc., to testify as an expert concerning the wear on certain engine components from the aircraft at issue. Mr. Taylor opined that the damage and wear that he observed on certain components was not consistent with the damage that one would normally observe on a "low time engine." Tr. at 242.

In addition, Mr. Davis testified that Mr. Clay contacted him and asked him to examine the aircraft, after experiencing a 200 RPM drop in the right magneto. Tr. at 277. Mr. Davis testified that he found a severe exhaust leak, and that the exhaust surface was "severely eroded," resulting in the need for the replacement of a cylinder. Tr. at 280. Mr. Davis also stated that the magneto did not appear to have been overhauled, that the cylinders were pitted, and that he could find no indication that new lifters had been installed. Tr. at 282, 286. Mr. Davis provided additional testimony concerning the wear that he observed on several parts. See, e.g., Tr. at 291-95, 298, 301-302. Mr. Davis stated that he photographed the

parts at issue after determining that the engine required disassembly. Tr. at 298.

In response to the Administrator's case, applicant provided the testimony of two character witnesses, one expert witness, and a witness who testified that he observed the condition of the aircraft and the aircraft's carburetor before applicant transported the aircraft to Oklahoma. Applicant also testified on his own behalf as both a fact witness and an expert in several specific types of aviation maintenance procedures. Applicant testified that he agreed to perform an engine overhaul on the aircraft before delivering it to Mr. Clay, but that he had originally recommended that Mr. Clay not overhaul the engine, because the manufacturer recommended overhauling the engine after every 2,000 hours of operation, and the aircraft at issue had less than 1,900 hours. Tr. at 558. Applicant testified that he agreed to "throw in" the labor to overhaul the engine in the purchase price, but that he told Mr. Clay that Mr. Clay would need to pay for all parts required in the overhaul "regardless of their cost," and that the parts may cost from \$3,000 to \$5,000. Tr. at 560. Applicant further testified that a typical overhaul of this type of engine, considering the parts that would need replacing, could total approximately \$18,000 to \$20,000. Tr. at 564. Applicant stated that he used parts that he purchased for the overhaul, and that he did not

install any rebuilt parts in the engine other than the parts that he had personally overhauled. Tr. at 577-78. Applicant then clarified that all the parts that were necessary to overhaul the engine were "brand new parts." Tr. at 578.

Upon reviewing the evidence, the law judge dismissed the Administrator's complaint, concluding that applicant, who testified that all the parts he installed in the engine were new, had an exemplary record and was credible. Initial Decision at 842. The law judge determined that the evidence applicant proffered, including evidence showing applicant's abilities and skills over his 30-year career and unblemished record, convinced the law judge that the Administrator had not fulfilled his burden of proof. Id. at 843. Based on this conclusion, the law judge subsequently granted applicant's application for attorney's fees under EAJA, finding that the Administrator was not substantially justified in pursuing the charges. In the law judge's order granting the application for attorney fees and expenses, the law judge stated that FAA inspectors, in their pursuit of this case, had ignored several "large proof problems," such as the fact that no one saw anyone take the engine apart, which occurred 2 months prior to FAA inspectors' inspection of the engine; that the engine oil and oil filter had been discarded; that the camshaft had been buffed and cleaned; and that chain of custody of the engine parts was an issue,

because the parts had been left unsecured in a bulk hangar for more than 2 months. Order Granting Application at 5. The law judge therefore concluded that the Administrator was not substantially justified in his pursuit of this case.

The Administrator has appealed the law judge's EAJA decision, and argues that the law judge based his decision upon a credibility determination. The Administrator asserts that the evidence established that several discrepancies in the aircraft's engine existed, as indicated by the corroborating testimony of multiple witnesses, and that this evidence contradicts applicant's testimony that the new aircraft owner's improper operation of the aircraft was the cause of these discrepancies. The Administrator also contends that the attorney fees and costs that the law judge awarded to applicant, in the amount of \$61,449.00, were excessive. Applicant disputes each of the Administrator's arguments, and urges us to affirm the law judge's decision.<sup>5</sup>

Under EAJA, we will not award certain attorney's fees and other specified costs if the government is shown to have been substantially justified in pursuing its complaint. 5 U.S.C. § 504(a)(1); Application of Smith, NTSB Order No. EA-3648 at 2

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<sup>5</sup> In his reply to the Administrator's appeal, applicant also seeks an additional award of supplemental fees in the amount of \$3,216.90, which applicant contends is the supplemental cost of the work required in responding to the Administrator's appeal of the law judge's order granting his application for fees.

(1992). The Supreme Court has defined the term "substantially justified" to mean that the government must show that its position is reasonable in both fact and law. Pierce v. Underwood, 487 U.S. 552, 565 (1988); see also Application of U.S. Jet, Inc., NTSB Order No. EA-3817 (1993). Such a determination of reasonableness involves an initial assessment of whether sufficient, reliable evidence exists to pursue the matter. Catskill Airways, Inc., 4 NTSB 799, 800 (1983) (stating that Congress intended EAJA awards to dissuade the government from pursuing "weak or tenuous" cases).

We have previously recognized that EAJA's substantial justification test is less rigorous than the Administrator's burden of proof when arguing the merits of the underlying complaint. U.S. Jet, supra, at 1 (citing Administrator v. Pando, NTSB Order No. EA-2868 (1989)). In Federal Election Commission v. Rose, 806 F.2d 1081 (D.C. Cir. 1986), the D.C. Circuit stated that the merits phase of a case is separate and distinct from the EAJA phase. As such, we are compelled to engage in an independent evaluation of the circumstances that led to the Administrator's original complaint, and determine whether the Administrator was substantially justified in pursuing the case based on those circumstances. Id. at 1087.

We have carefully evaluated the evidence in this record, and determined that the only manner in which the law judge could

have resolved the apparent contradictions in the evidence was to engage in an assessment of Mr. Davis's credibility and applicant's credibility. Mr. Davis asserted that the parts that he removed from the aircraft and photographed were the same parts at issue here, and that he kept the parts in the hangar until Inspectors Stephens and Giguere requested that he send them some of the parts. Tr. at 284. Mr. Davis also stated that he had not opened the left magneto nor examined the carburetor until Inspectors Stephens and Giguere arrived to inspect the parts. Tr. at 287. In addition, Inspector Giguere testified the thermostatic bypass valve and fuel pump were still in their accessory casing when the inspectors arrived. Tr. at 381-82. Overall, Mr. Davis's testimony, as corroborated in significant respects by the testimony of Inspectors Stephens and Giguere, indicated that he observed the parts in a condition that was not consistent with them having been overhauled.

In response to this evidence, applicant did not attempt to dispute the photographs of the parts that Mr. Davis testified that he made as he was first inspecting and removing the parts. Applicant instead testified that all of the parts that he used in overhauling the engine at issue were either brand new or were freshly overhauled. Tr. at 577-78. This testimony directly contradicts that of Mr. Davis and Inspector Giguere. In essence, applicant did not provide an explanation for how parts

that appeared to have experienced a significant amount of wear existed in the aircraft, despite his claim that he had overhauled the engine; instead, applicant attempted to assert that Mr. Clay's use of the aircraft explained the appearance of the parts, and implied that Mr. Davis may have exchanged the newer parts in the aircraft for used parts during his inspection. Given that applicant did not provide any extrinsic evidence to support these assertions, but instead relied on his own testimony, we find that the law judge was required to resolve this case predominantly on the basis of credibility.

We have long held that an award of fees under EAJA is inappropriate when credibility is a primary component of a law judge's decision based on the factual record. Specifically, we have stated, "when key factual issues hinge on witness credibility, the Administrator is substantially justified – absent some additional dispositive evidence – in proceeding to hearing where credibility judgments can be made." Application of Petersen, NTSB Order No. EA-4490 at 6 (1996); see also Application of Conahan, NTSB Order No. EA-4276 at 7 (1994) (falsification case in which we stated, "the Administrator was not obligated to accept applicant's denial of knowledge of the false entries" in pursuing the case). The reasoning for this long-held rule remains suitable for this case. When a dispositive factual issue rests upon credibility, the

Administrator is substantially justified in pursuing the case, as the Administrator cannot predict whether the law judge will discredit any particular witness's testimony, or the testimony of multiple witnesses for the Administrator. See, e.g., Application of Martin, NTSB Order No. EA-4280 at 7-8 (1994).

In order to determine whether the Administrator was substantially justified in pursuing this case, we have carefully reviewed the evidence that the Administrator introduced into this record. Resolution of the key factual issue of whether applicant installed parts in the aircraft in compliance with the requisite service bulletins and airworthiness directives was dependent upon the law judge's assessment of whether applicant's testimony or the Administrator's witnesses' testimony was more credible. In bringing this case, the Administrator collected evidence from several witnesses demonstrating that the aircraft included parts that were not overhauled or new. For example, Inspector Stephens testified that he saw pitting on the faces of the lifter bodies when he arrived to inspect them. Tr. at 56. In addition, Inspector Giguere stated that he observed the magnetos from the aircraft's engine upon inspection, and that one magneto was "definitely not in an overhauled condition," and did not appear to have only 29 hours of operation since the overhaul. Tr. at 365. Inspector Giguere also stated that he observed masking tape over the data plate on one of the

magnetos, and that this indicates that someone had painted it to make it appear overhauled or repaired. Tr. at 367. Inspector Giguere determined that neither the magnetos, fuel pump, lifter bodies, nor bypass valve were in new or overhauled condition. Tr. at 389. Inspector Giguere also stated that the carburetor did not have a required marking indicating that it contained a metal float (Tr. at 389), and that, instead, the carburetor had composite floats (Tr. at 376).

The Administrator also provided the testimony of Mr. Taylor, who has extensive experience with lifter bodies (also known as "tappets"). Tr. at 214-19. Mr. Taylor reviewed the photographs of the engine parts that applicant allegedly replaced or overhauled and opined that the tappets appeared to have a significant number of hours on them, according to the wear pattern on the tappets. Tr. at 231-32; Exh. A-18. The Administrator also provided a photograph of a new tappet, for comparison, and Mr. Taylor confirmed that this tappet appears less worn than the tappets in the other photographs, which had a wavy pattern and other signs of use. Tr. at 236, 243.

Moreover, the Administrator provided the testimony of Mr. Davis, who stated that one magneto did not appear to have been overhauled, and that the cylinders in the engine were pitted. Tr. at 282. Mr. Davis further testified that the pitting he observed would not occur in an engine with only 29

hours of operation after its last overhaul, as the logbook indicated. Tr. at 285. Mr. Davis also stated that he found no indication that new lifters (or "tappets") had been installed (Tr. at 286), and that the thermostatic bypass valve appeared to have a previously damaged safety wire and opening (Tr. at 291). With regard to the carburetor, Mr. Davis testified that it had composite floats (Tr. at 294-95), and that the fuel pump appeared to be aged (Tr. at 301). Mr. Davis stated that he did not believe that the fact that the aircraft sat mostly unused for approximately 5 months caused the corrosion that he observed on the cylinder or the other contradictions between what he found in the aircraft and what applicant recorded in the logbook with regard to certain parts. Tr. at 334.

In addition to the testimony of the witnesses described above, the Administrator also presented several exhibits, including statements from Inspectors Stephens and Giguere, and photographs of the lifter bodies, thermostatic bypass valve, magnetos, carburetor, and fuel pump from the engine at issue. Exhs. A-2-A-8, A-20. Of substantial weight was the testimony of Inspectors Stephens and Giguere, Mr. Davis, and Mr. Taylor, who all indicated that the lifter bodies and camshaft in evidence, although apparently paired during previous operation of the aircraft, did not match. While the camshaft could be traced to applicant, who purchased it new, the lifter bodies were clearly

not the ones sold new with the camshaft lifter kit applicant stated he had purchased for the overhaul. Tr. at 101-102, 231, 242-44, 248, 286, 377-79; see also Exh. A-15 (invoice from A.E.R.O. dated January 24, 2006, showing that Beauchamp Aviation received one "cam-lifter kit"). The Administrator also provided the overhaul manual for the aircraft at issue, service bulletins with which the Administrator alleged applicant did not comply, and a letter of complaint from the aircraft's new owner that described the problems and included an inspection report from Mr. Davis that detailed the anomalies that Mr. Davis observed. Exhs. A-9-A-12.

In response to the Administrator's case-in-chief, applicant's character witnesses affirmed the quality of applicant's work in aviation maintenance, and applicant's commendable reputation in the community. Applicant's expert witness, Mr. Jerron Smith, testified that a number of different issues could have caused the exhaust port to leak (Tr. at 468-69), and that Lycoming service requirements did not require replacement of the thermostatic bypass valve that was in the aircraft in question (Tr. at 475). Mr. Smith also stated that physically observing the magneto that appeared dirty and used would not indicate whether it was recently overhauled (Tr. at 476-77), and that the fuel pump sitting in the bulk hangar could have caused it to appear corroded on the fuel pump (Tr. at 479),

although the fuel pump appeared used, rather than new (Tr. at 480-81). With regard to the camshaft kit, Mr. Smith implied that the damage on the cam lobes and apparent corrosion on the faces of the lifter bodies could have resulted from inactivity of the aircraft. Tr. at 493.

In light of the aforementioned evidence, we have determined that the Administrator had a substantial factual basis on which to charge violations of 14 C.F.R. §§ 43.12(a)(1) and 43.13(a). The Administrator relied upon photographs of the parts and statements from Mr. Davis and Inspectors Stephens and Giguere, which indicated that the logbook entries that applicant included were inaccurate. Applicant's testimony, however, diametrically opposed the evidence upon which the Administrator relied, and established doubt in the mind of the law judge that applicant had included inaccurate logbook entries. The fact that FAA inspectors were not present when Mr. Davis initially disassembled significant portions of the engine, and that the aircraft's new owner left the parts in an unsecured location, also influenced the law judge's decision.<sup>6</sup> In evaluating these

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<sup>6</sup> In this regard, we note that while Mr. Davis did not disassemble the engine in the presence of FAA inspectors, Mr. Davis was present at the hearing and described his disassembly. Tr. at 277-84. In addition, Mr. Davis established a record of the parts by photographing them, and testified concerning these photographs. Tr. at 298; see also Tr. at 291-95, 301. Inspectors Stephens and Giguere also testified that some of the parts in question had not been disassembled before

facts, the law judge listed several reasons why he believed applicant to be a credible witness, and stated that the case "[came down to] who you are going to believe." Initial Decision at 841. The law judge also stated that he was "giving [applicant] the benefit of the doubt and [would issue his] rulings and determinations accordingly." Id. at 844.

Given the evidence described above, we cannot find that the facts of this case were so clear that the Administrator had no substantial justification for pursuing the case. The evidence on this record required the law judge to resolve the case based upon whether the law judge deemed applicant's testimony that he had overhauled the engine as required and did not include inaccurate information in the logbooks as more credible than the Administrator's witnesses' factual testimony and expert opinions that applicant had not properly overhauled the engine they personally observed. Because resolution of this case rested squarely on the law judge's determination of witness credibility, we do not find convincing applicant's argument that the Administrator pursued this case with no substantial justification. Therefore, we will not award attorney's fees under EAJA.

**ACCORDINGLY, IT IS ORDERED THAT:**

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(..continued)  
they observed them. Tr. at 60, 67, 381-82.

1. The Administrator's appeal is granted; and
2. The law judge's initial decision granting the application for attorney's fees and expenses is reversed.

ROSENKER, Acting Chairman, and HERSMAN, HIGGINS, SUMWALT, and CHEALANDER, Members of the Board, concurred in the above opinion and order.

SERVED: August 14, 2008

UNITED STATES OF AMERICA  
NATIONAL TRANSPORTATION SAFETY BOARD  
OFFICE OF ADMINISTRATIVE LAW JUDGES

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APPLICATION OF

JAMES W. BEAUCHAMP

For an award of attorneys fees  
and related expenses under the  
Equal Access to Justice Act

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Docket No.: 330-EAJA-SE-18077

INITIAL DECISION AND ORDER  
GRANTING APPLICATION FOR ATTORNEY FEES AND EXPENSES

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(Priority Mail)

CHIEF JUDGE WILLIAM E. FOWLER, JR.

Pursuant to the Equal Access to Justice Act (EAJA), 5 U.S.C. Section 504 et seq. and the National Transportation Safety Board's (NTSB) Rules Implementing the EAJA, 49 C.F.R. 826.1 et seq., (herein after referred to as the Board's EAJA Rules) the applicant comes before the Board for an award of attorney fees and other expenses in the aggregate amount of \$64,979.12 (sixty four thousand nine hundred seventy nine dollars and twelve cents) against the Federal Aviation Administration (FAA), an agency of the United

States. The applicant through counsel filed the application. The application and supporting documents filed by the applicant establish that he meets the eligibility requirements set out in the EAJA and Section 826.4 of the Board's Rules and it has been determined by the undersigned that the application is both timely filed and procedurally correct.

Following a three day evidentiary hearing in Washington, DC on December 11-12, 2007 and January 22, 2008, this judge reversed and dismissed the Administrator's Emergency Order of Revocation in a proceeding concerning the revocation of the applicant's airframe and powerplant certification, his inspector's authorization and his private pilot's license for alleged violations of 43.12(a)(1) and 43.13(a) of the Federal Aviation Regulations.

The FAA appealed the undersigned's decision but subsequently withdrew that appeal on March 25, 2008, and conceded applicant was the prevailing party in this case.

The EAJA provides that an agency that conducts an adversarial adjudication shall award to the prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the administrative officer of the agency finds the position of the agency was substantially justified or that circumstances make an award unjust, 5 U.S.C. Section 504 (a). The applicant's eligibility for an EAJA award and his status here as a prevailing party in the underlying proceeding is undisputed. Accordingly, the issue to be resolved here is whether the

Administrator's position was "substantially justified" within the meaning of 5 U.S.C. Section 504 (a) (1). It is clear from the legislative history of the EAJA and case precedent that where the Government agency can show that its action giving rise to the underlying litigation had a reasonable basis both in law and fact, no award shall be made. Where the record, on the other hand, discloses that the agency proceeded on a weak or tenuous basis, an award is appropriate. This determination encompasses a review of the agency's position in both its pre-litigation and trial posture, 1985 Amendments to the EAJA, Section 504 (b).

The NTSB has always held the Administrator to high standards of responsibility including undertaking a diligent investigation before prosecution, fully evaluating potential and asserted defenses, exculpatory materials, and constantly asking at every stage whether proceeding further is justified. The EAJA "puts teeth" into these standards. The Administrator's investigation must be objective and complete. Administrator v. Waingrow, 5 NTSB 372 (1985); Application of Gordon, NTSB Order No. EA-4446 (1996) (finding a "flawed investigation" to be insufficient analysis by the Administrator to constitute substantial justification).

The evidence indicates applicant has held a valid mechanic's certificate for airframe and powerplant since 1982, an inspection authorization since 1985 as well as a private pilot certificate. Prior to this matter applicant had never had a complaint filed against him related to any of his certifications.

The Administrator's complaint alleged that applicant made an intentionally false logbook entry when he stated he had overhauled a Lycoming engine with new parts in civil aircraft N2320R. In January and February 2006, the Administrator investigated the matter and found numerous parts that did not appear to be new or reconditioned. The applicant testified under oath that every part he installed in that engine was new. He introduced evidence to show he ordered new parts that were utilized and put in this aircraft N2320R. The applicant's testimony concerning the parts in the aircraft he installed, the camshaft and lifter bodies, the carburetor, the fuel pump, and the magnetos, was quite persuasive and compelling.

After the engine overhaul and while the aircraft was still in the applicant's possession, he flew it from Virginia to Shawnee, Oklahoma. There were no problems. Before that, he had run enumerable tests to certify his having done a valid overhaul on this engine. The same type overhaul he had done during his career on 300 or 400 Lycoming engines previously (over a period of almost 30 years) going by the operations manual and the Federal Aviation Regulations.

Nothing occurred with the aforesaid aircraft from February 2006 until November 2006. During that time the aircraft was not in the possession of applicant but in the possession of the new owner Joel Clay. The great majority of that time the aircraft was sitting in a hangar, flown a very few hours.

From its inception the investigation in this matter was an exercise gone awry. The FAA inspectors were faced with a lack of sufficient reliable evidence from the beginning of their involvement in this matter. The inspectors ignored the following several large proof problems: (1) no one saw the engine taken apart, which was two months before the inspectors saw the engine; (2) the engine oil and oil filter had been discarded; (3) the cam shaft had been buffed and cleaned; (4) the engine parts had been left unsecured in a bulk hangar for more than two months and chain of custody was an issue. None of these obvious problems adequately was taken into account, nor was independently verifiable rebuttal evidence provided by the applicant which would have led a reasonable person to decide not to pursue the complaint.

Taking the administrative record as a whole this is exactly the type of weak and tenuous case Congress intended for EAJA to dissuade agencies from pursuing. See Application of Catskill Airways Inc., NTSB Order No. EA-1887 (1983).

It is the undersigned's opinion that the independent record sufficiently demonstrates that this case, an Emergency Order of Revocation, should not have proceeded beyond the investigatory stage and was not substantially justified. The applicant therefore should be awarded his attorney fees and expenses in having to defend himself.

Where the issue of fees, expenses and litigation costs are concerned, Rule 6(a) of the Board's Rules 49 C.F.R. Part 826 Subpart A sets the guidelines for determining

reasonable fees and expenses. In making this determination, I have considered the extent and complexity of the factual and legal issues presented. I have also considered the depth of legal research as reflected by the pleadings and other documents filed in this case. Finally, I have considered the reasonable cost of any service to the extent that the charges for such services were necessary for preparation of the applicant's case.

The expenses incurred by the applicant which are set forth in the EAJA application in minute detail, all of which were contested by the Administrator with a panoply of reasons. It should be noted that the Board has held that secretarial time, postage charges and long distance telephone charges are recoverable under the EAJA if these charges are normally charged separately to the client.

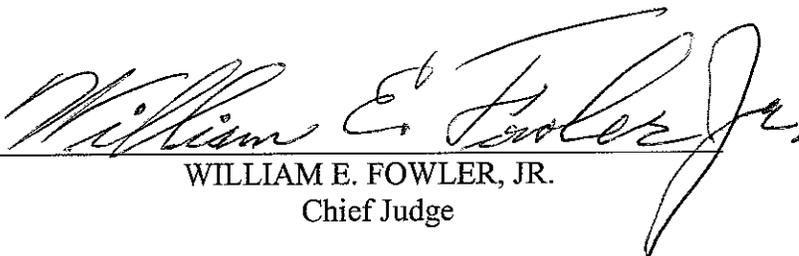
Having carefully reviewed the documentation filed by the applicant, it is concluded the legal fees requested are neither vague nor excessive but are limited to the maximum of \$171.00 per hour for 196.10 total hours thus an award of \$32,934.00 was reasonable and necessary for the proper defense of the applicant. Thus a total award in this case of \$61,449.00 (sixty one thousand four hundred forty nine dollars).

IT IS THEREFORE ORDERED THAT:

- (1) The application for an award of attorney fees and expenses, except as modified herein, is GRANTED.

- 2) The Administrator shall in accordance with this Order pay the applicant the total sum of \$61,449.00 (sixty one thousand four hundred forty nine dollars) within thirty (30) days of the date of the entry of this Order.

Entered and served this 14<sup>th</sup> day of August 2008, at Washington, DC.

  
WILLIAM E. FOWLER, JR.  
Chief Judge

**APPEAL (EAJA INITIAL DECISION)**

Any party to this proceeding may appeal this written initial decision by filing a written notice of appeal within 10 days after the date on which it has been served (the service date appears on the first page of this decision). An original and 3 copies of the notice of appeal must be filed with the:

National Transportation Safety Board  
Office of Administrative Law Judges  
Room 4704  
490 L'Enfant Plaza East, S.W.  
Washington D.C. 20594  
Telephone: (202) 314-6150 or (800) 854-8758

That party must also perfect the appeal by filing a brief in support of the appeal within 30 days after the date of service of this initial decision. An original and one copy of the brief must be filed directly with the:

National Transportation Safety Board  
Office of General Counsel  
Room 6401  
490 L'Enfant Plaza East, S.W.  
Washington, D.C. 20594  
Telephone: (202) 314-6080

The Board may dismiss appeals on its own motion, or the motion of another party, when a party who has filed a notice of appeal fails to perfect the appeal by filing a timely appeal brief.

A brief in reply to the appeal brief may be filed by any other party within 30 days after that party was served with the appeal brief. An original and one copy of the reply brief must be filed directly with the Office of General Counsel in Room 6401.

**NOTE: Copies of the notice of appeal and briefs must also be served on all other parties to this proceeding.**

An original and one copy of all papers, including motions and replies, submitted thereafter should be filed directly with the Office of General Counsel in Room 6401. Copies of such documents must also be served on the other parties.

The Board directs your attention to Rule 38 of its Rules Implementing the Equal Access to Justice Act (codified at 49 C.F.R. § 826.38) and Rules 7, 43, 47, 48 and 49 of its Rules of Practice in Air Safety Proceedings (codified at 49 C.F.R. §§ 821.7, 821.43, 821.47, 821.48 and 821.49) for further information regarding appeals.

**ABSENT A SHOWING OF GOOD CAUSE, THE BOARD WILL NOT ACCEPT LATE APPEALS OR APPEAL BRIEFS.**