SERVED: March 4, 2010

NTSB Order No. EA-5511

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 2nd day of March, 2010

APPLICATION OF THEROL WAYNE LAW For an award of attorney fees and expenses under the Equal Access to Justice Act	Docket 343-EAJA-SE-18489

OPINION AND ORDER

The Administrator has appealed from the Equal Access to Justice Act (EAJA) written initial decision and order of Administrative Law Judge William R. Mullins, served on September 3, 2009.[1] The law judge granted applicant's EAJA[2]

[1] A copy of the law judge's initial decision and order is attached.

[2] Equal Access to Justice Act, 5 U.S.C. § 504; see also 49 C.F.R. part 826.

application. The Administrator has appealed that decision, on the basis that applicant's EAJA application was procedurally defective, and that the complaint against applicant was substantially justified. As a result, the Administrator contends that awarding attorney's fees under the EAJA is inappropriate. We deny the Administrator's appeal.

On January 27, 2009, the Administrator issued an emergency order that consisted of two counts. Count I alleged that applicant falsified a maintenance record on May 18, 2006, when he indicated that he had the connecting rods for a Lycoming O-320B engine, which was installed in a Piper PA-12, overhauled by Aircraft Specialties Services. Count I stated that this representation was false, because applicant never installed connecting rods overhauled by Aircraft Specialties.[3] Count I asserted that, based on these allegations, applicant knowingly, and with the intent to defraud, used a materially false writing, entry, certification or document concerning an aircraft part. Count I then cited 18 U.S.C. § 38, and stated that § 38 "makes the activities described in the[se] paragraphs punishable by

[3] Count I also cited Administrator v. Law, NTSB Order No. EA-5221 (2006), and alleged that, by that order, the Board suspended applicant's mechanic certificate for using a non-airworthy crankshaft, connecting rods and piston during an engine overhaul of an O-360 engine. Count I further stated that, in 2005, applicant's mechanic's certificate was suspended for installing an improper crankshaft gear in a Lycoming "O-320 engine."

law."[4] Count I stated that the Administrator was revoking applicant's mechanic's certificate based on the Administrator's authority described at 49 U.S.C. § 44726.[5]

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[4] Section 38, entitled, "Fraud involving aircraft or space vehicle parts in interstate or foreign commerce," provides as follows:

> (a) Offenses.--Whoever, in or affecting interstate or foreign commerce, knowingly and with the intent to defraud--
> (1)(A) falsifies or conceals a material fact concerning any aircraft or space vehicle part;
> (B) makes any materially fraudulent representation concerning any aircraft or space vehicle part; or
> (C) makes or uses any materially false writing, entry, certification, document, record, data plate, label, or electronic communication concerning any aircraft or space vehicle part;
> (2) exports from or imports or introduces into the United States, sells, trades, installs on or in any aircraft or space vehicle any aircraft or space vehicle part using or by means of a fraudulent representation, document, record, certification, depiction, data plate, label, or electronic communication; or
> (3) attempts or conspires to commit an offense described in paragraph (1) or (2),
> shall be punished as provided in subsection (b).

[5] Section 44726, entitled, "Denial and revocation of certificate for counterfeit parts violations," provides, in subsection (b)(1)(B), as follows:

> (b) Revocation of certificate.--
>
> (1) In general.--Except as provided in subsections (f) and (g), the Administrator shall issue an order revoking a certificate issued under this chapter if the Administrator finds that the holder of the certificate or an individual who has a controlling or ownership interest in the holder--
> * * * * *
>
> (B) knowingly, and with the intent to defraud, carried out or facilitated an activity punishable under a law

Count II of the Administrator's order sought revocation of applicant's mechanic certificate with airframe and powerplant ratings, and inspection authorization (hereinafter "A&P certificate"), based on alleged violations of 14 C.F.R. §§ 43.2(a)(1), 43.9(a)(3), 43.9(d), 43.12(a)(1), and 43.13(a), all of which either prohibit falsification of records; require that mechanics use methods, techniques, and practices acceptable to the Administrator when performing certain maintenance; or require that a mechanic submit a form to the FAA describing any major alteration. Count II incorporated the allegations of Count I, and further alleged that applicant reassembled the Lycoming O-320B engine with the wrong size rod bearings required for the crankshaft. Count II alleged that the owner of the Piper PA-12 was forced to make an off-airport landing, which resulted in a propeller strike, due to applicant's faulty maintenance on the engine.

Applicant appealed the Administrator's order, and the law judge ordered a hearing to determine whether the Administrator could prove the allegations described above. At the commencement of the hearing, respondent's counsel indicated that respondent did not contest any of the allegations of Count II. Tr. at 8. Based on this stipulation, the law judge ordered that

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(..continued)
described in paragraph (1)(A).

the evidence at the hearing should only address Count I of the order. The law judge also articulated, and the parties did not dispute, that if the Administrator proved the allegations of Count I, then the "lifetime revocation" of applicant's A&P certificate would result. See Tr. at 131; Initial Decision at 207, 216.

At the hearing, the Administrator provided numerous exhibits, including copies of logbook entries, photographs of the crankshaft and connecting rods in the engine, and invoices for the work that applicant performed. The Administrator also called Wendy Lessig, the owner of the Piper PA-12 at issue, to testify. Ms. Lessig described the propeller strike accident that she had in the aircraft in December 2007. Ms. Lessig also described how she researched the problems with the engine, which included calls to Lycoming concerning the connecting rods, and discovered that the connecting rods were 0.006" undersized.

The Administrator also called Robert Despain, the general manager and chief inspector and mechanic at Precision Air Power in Woods Cross, Utah, to testify. Mr. Despain stated that he tore down the engine at issue after Ms. Lessig asked him to do so, and found that the engine had "new-style connecting rod bolts" in it, but that, "identification on the side of the rod indicated the old part number rod that wasn't compatible with the new part number rod bolt." Tr. at 78. Mr. Despain further

testified that, "physical examination of the rod showed that the rod had not been modified [in accordance with Lycoming] service instruction 1183." Id. As a result of the installation of the new bolt on the non-modified connecting rod, Mr. Despain testified that damage to metal, and the formation of a crack in the bolt, would occur, and that the likelihood of the bolt failing was "pretty good." Tr. at 80—81. On cross-examination, Mr. Despain stated that he did not consider a service instruction, such as instruction 1183, to be mandatory, whereas a service bulletin from a manufacturer would be mandatory. Tr. at 91.

The Administrator concluded the case-in-chief by calling Wesley Dollahite, an aviation safety inspector at the FAA who holds an A&P certificate, to testify. Inspector Dollahite stated that he investigated the allegations that instigated the Administrator's order, and determined the crankshaft in the engine at issue was "ground down" to be undersized by 0.006" on August 25, 2005 (Tr. at 102), and that Precision Air Power consequently modified the connecting rods to accept the new bolts (Tr. at 110), even though applicant had overhauled the engine in May 2006 and March 2007 (Tr. at 115). Inspector Dollahite testified that the yellow tag on the crankshaft erroneously indicated that the crankshaft was "standard," despite the fact that it was 0.006" undersized.

In response to the Administrator's case, Byron Matthews and applicant both testified. Mr. Matthews stated that, although he does not hold an A&P certificate, he has worked under the supervision of applicant for 15 years, as they co-own KW Aviation. Mr. Matthews testified that he did nothing to alter the crankshaft in the engine at issue, and that an employee of the company to which he sent the crankshaft for overhaul, Engine Components, Inc. (ECI), had worked on the crankshaft and connecting rods. Mr. Matthews asserted that he relied on the yellow tag attached to the crankshaft that ECI completed, which indicated that the crankshaft was "standard," when he determined that the crankshaft was not undersized. Tr. at 152. Mr. Matthews stated that he learned that the crankshaft was not a standard size after Precision Air Power worked on it.

After Mr. Matthews's testimony, applicant testified on his own behalf, and admitted that he "hate[s] [the] paperwork" involved in performing maintenance work on aircraft (Tr. at 162), and is not organized with regard to recordkeeping. Applicant stated that, when he wrote "connecting rods overhauled by Aircraft Specialities" in Ms. Lessig's engine logbook, he did not believe that statement was false, because he was relying on the notes that Mr. Matthews took concerning the overhaul. See Exh. R-1 (handwritten notes from Mr. Matthews). Applicant further testified that the entry he wrote concerning the

overhaul of the connecting rods was not even required to be in the engine logbook, and that he is not required to retain the yellow tags concerning the crankshaft, but that his practice is to keep the yellow tags for his own records. Applicant also admitted that his certificate had been the subject of previous enforcement actions.

At the conclusion of the hearing, the law judge issued an oral decision, in which he determined that the Administrator had not met his burden of proving that applicant violated 49 U.S.C. § 44726(b)(1)(B). The law judge provided a detailed description of the evidence, and stated that applicant's recordkeeping at his repair shop was sloppy, which was why applicant did not dispute the allegations contained in Count II. With regard to Count I, the law judge determined that § 44726 specifically deals with counterfeit parts, and that the Administrator had not provided any evidence to show that the connecting rods were counterfeit, or even life-limited or unapproved. Initial Decision at 218. Instead, the law judge stated that the Administrator's counsel had attempted to fulfill the elements of § 44726(b)(1)(B) by showing that the part did not comply with a Lycoming service instruction, but that, even absent such compliance, these actions still did not rise to the level of a violation of § 44726(b)(1)(B). The law judge further found that, given that applicant relied upon Mr. Matthews's records

concerning the overhaul, in conjunction with the yellow tag indicating that the crankshaft was "standard," applicant had not intentionally deceived Ms. Lessig concerning his work on the engine. As a result, the law judge dismissed Count I, on the basis that the Administrator could not prove the elements of § 44726.

On June 3, 2009, applicant submitted an application for attorney's fees and costs under the EAJA, concerning Count I of the Administrator's order. Applicant's application stated that he was the prevailing party under the EAJA, and that the Administrator's pursuit of the allegations of Count I was not substantially justified. The application also indicated that applicant's net worth did not exceed $2 million, and that applicant's business, KW Aviation, Inc., does not have a net worth in excess of $7 million and does not have more than 500 employees. Applicant also attached an affidavit to the application, in which he swore that his net worth, and his company's net worth, did not exceed the amounts stated above. In addition, applicant's attorney attached an affidavit describing his billing rate, as well as a bill listing services provided from January 30, 2009, to June 3, 2009, and listing a total amount of $18,538.60 for fees and expenses. The Administrator opposed applicant's application, and urged the law judge to deny applicant's application for an award of fees.

On September 3, 2009, the law judge issued a written initial decision and order awarding $14,333.00 in fees and expenses to applicant.[6] The law judge determined that applicant had complied with the procedural requirements of 5 U.S.C. § 504 and 49 C.F.R. part 826, and that the Administrator was not substantially justified in pursuing a case against applicant for a violation of 49 U.S.C. § 44726. In particular, the law judge stated that § 44726 refers to the installation of a "fraudulently represented aviation part," but that, "a fraudulently represented aviation part, by its very definition, cannot be a part originally taken off of an airplane and re-installed on the same airplane." Written Decision at 5. The law judge further stated that, "there was no question" that the connecting rods at issue were not counterfeit or fraudulently represented, nor were the rods unapproved, because they "came off of the engine originally." Id. The law judge concluded that, even though applicant should have known that new connecting rods were needed because the crankshaft was shaved

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[6] The law judge computed the amount of the award as follows:

> The current statutory calculation of the hourly fee for services under an EAJA claim is $178 per hour. The Applicant worked a total of 76.8 hours on this matter[,] which entitles Applicant to an amount of $13,670 for hourly services rendered, plus an additional $663 in costs, which the Administrator does not object to. Therefore, Applicant is entitled to a total of $14,333 under the EAJA.

Written Decision at 7.

down, applicant's action did not constitute a violation of § 44726.

The Administrator appeals the law judge's decision, and urges us to find that applicant is not eligible for or entitled to fees under the EAJA. The Administrator argues that applicant's EAJA application is procedurally defective, because applicant provided no evidence that his net worth did not exceed $2 million, that the net worth of his business did not exceed $7 million, and that he did not employ more than 500 people in his business. The Administrator contends that the Board's Rules of Practice require more than a statement in the EAJA application that the applicant satisfies the requirements of 49 C.F.R. § 826.22(a).[7] The Administrator also argues that applicant failed to establish that his attorney's fees were at a rate "customarily charged." The Administrator alleges that applicant's attorney charged $250 per hour, and that applicant did not prove that this rate complies with 49 C.F.R. § 826.6.

[7] Section 826.6 provides which fees and expenses, and in what amounts, are appropriate under the EAJA. Specifically, § 826.6(b)(1) provides that, "[n]o award for the fee of an attorney or agent under these rules may exceed $75 indexed" according to a formula that utilizes the Consumer Price Index (CPI), to account for inflation. The Department of Labor recently released the CPI applicable to 2009 services; according to this formula, the maximum hourly rate for allowable EAJA fees is $177 per hour, as the CPI for 2009 is 214.537. However, the law judge correctly applied the CPI for 2008, as he evaluated the rate in 2009. Therefore, we affirm his application of the CPI of 215.303 and find that the correct rate was $178 per hour. See http://www.ntsb.gov/alj/fees.htm.

The Administrator also contends that the law judge erred in allowing applicant to submit an amended application, which contained information concerning applicant's net worth.

With regard to the substance of the application, the Administrator asserts that the law judge erred in determining that the Administrator was not substantially justified in pursuing the charge based on 49 U.S.C. § 44726. The Administrator argues that the Board must defer to the Administrator's interpretation of the Federal Aviation Regulations (FAR), and that such deference is a key component of a case when the case is one of first impression, such as the case at issue here. Although the Administrator's appeal brief acknowledges that no case law exists concerning the application of § 44726 in the absence of a criminal prosecution, the Administrator argues that the law judge's interpretation of § 44726 "was strained and without legal support." Appeal Br. at 19. The Administrator contends that the law judge's conclusion that § 44726 does not apply to parts that are reinstalled on an aircraft is contrary to the plain language of the statute. The Administrator also argues that the law judge's decision was based on a finding that applicant's testimony, as well as Mr. Matthews's testimony, concerning the connecting rods was credible, and that, when the law judge's conclusion on the merits of a case hinges on witness credibility, EAJA fees are

inappropriate. The Administrator asserts that the law judge erred in excluding certain evidence at the hearing, which would have shown that applicant misrepresented his work on the parts at issue. Finally, the Administrator also contends that special circumstances make an award of fees under the EAJA unjust; in this regard, the Administrator alleges that applicant's history of "admitted numerous and egregious violations" of the FAR counsels against any award of fees and expenses under the EAJA. Applicant contests each of the Administrator's arguments, and urges us to affirm the law judge's decision.

Under the 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.[8] 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.[9] Such a determination of reasonableness involves an initial assessment of whether sufficient, reliable evidence exists to pursue the matter.[10]

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[8] 5 U.S.C. § 504(a)(1); Application of Smith, NTSB Order No. EA-3648 at 2 (1992).

[9] Pierce v. Underwood, 487 U.S. 552, 565 (1988); see also Application of U.S. Jet, Inc., NTSB Order No. EA-3817 (1993).

[10] 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 the EAJA's substantial justification test is less rigorous than the Administrator's burden of proof when arguing the merits of the underlying complaint.[11] 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.[12]

Our Rules of Practice implementing the EAJA include specific requirements pertaining to the EAJA application that an applicant must file. See 49 C.F.R. § 826.21. Section 826.22(a) of the Rules requires that an applicant submit "a detailed exhibit showing the net worth of the applicant and any affiliates." Furthermore, § 826.22(a) provides that, "[t]he exhibit may be in any form convenient to the applicant that provides full disclosure of the applicant's and its affiliates' assets and liabilities and is sufficient to determine whether the applicant qualifies under the standards in this part."

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[11] U.S. Jet, supra note 9, at 1 (citing Administrator v. Pando, NTSB Order No. EA-2868 (1989)).

[12] Id. at 1087.

Attached to applicant's June 3, 2009 application for fees, applicant included an affidavit, also dated June 3, 2009, in which he stated as follows:

> At the time that the adversary adjudication was initiated, on January 27, 2009, my net worth did not exceed [$2 million] … I am partial owner of KW Aviation Inc., a business [that] has a net worth of not more than [$7 million,] including both personal and business interests and not more than 500 employees at the time the adversary adjudication was initiated.

On July 6, 2009, the Administrator's attorney submitted an answer to applicant's application, in which he alleged, among other arguments, that applicant's application was defective because it "[failed] to address whether [applicant's] personal net worth exceeds two million dollars because the [a]pplication failed to [include] the net worth exhibit required by 49 C.F.R. § 826.22(a)." Answer at 11. On July 20, 2009, applicant submitted a reply to the Administrator's answer, with which he included another affidavit listing the balances in his and his wife's bank accounts, his mortgage loan balance, and all the personal property he has that is worth $500 or more. The affidavit also included a listing of the value of the office and shop equipment of KW Aviation, as well as the balance in the corporation's bank account.

The Administrator cites Application of Swafford and Coleman, NTSB Order No. EA-4426 (1996), and Application of Bosela, NTSB Order No. EA-5133 (2005), in an attempt to show

that the law judge should not have accepted applicant's July 20, 2009 affidavit. Neither of these cases, however, indicate that we should consider applicant's first affidavit, which accompanied his application, to be inadequate. Instead, these cases stand for the notion that applicants should include all the necessary information in their applications when they first submit the application. The Administrator cites no authority, and we are unaware of any, to indicate that a sworn statement, such as an affidavit, is an inadequate showing of a person's net worth under § 826.22. The Administrator provides no evidence to impeach the statements provided in applicant's affidavit, and does not suggest what other types of documents are required under our Rules of Practice. Overall, the Administrator's argument on this point is vague and unavailing.

Likewise, the Administrator does not explain how the law judge erred in computing the amount of fees at issue. The law judge applied the rate of $178 per hour, which was the permissible rate under 49 C.F.R. § 826.6(b)(1) at the time the law judge issued the decision. The Administrator contends that applicant's attorney charged $250 per hour, but does not dispute that the law judge applied the rate of $178 per hour in his written decision. The Administrator's failure to articulate how the law judge erred in this regard leads to our rejection of this argument.

Concerning the substance of the Administrator's allegations in the emergency order, we agree with the law judge that the Administrator was not substantially justified in pursuing the allegation that applicant violated 49 U.S.C. § 44726. First, § 44726 appears to address counterfeit parts, and both parties agree that the connecting rods and crankshaft at issue here were not counterfeit. To the extent that the Administrator attempts to establish that the parts were unapproved, and therefore result in a violation of § 44726, the Administrator's argument appears loosely based on mere conjecture. Section 44726 specifically requires violation of a criminal statute. The law judge held that the Administrator did not prove that applicant violated 18 U.S.C. § 38, which is a criminal statute involving fraud.[13] The Administrator now attempts to establish that he was substantially justified in charging applicant with violations of 18 U.S.C. § 38 and 14 U.S.C. § 44726(b)(1)(B) because the Administrator could show that applicant committed fraud according to the standard set forth in Hart v. McLucas, 535 F.2d 516 (9th Cir. 1976). In this regard, we have long recognized that Hart requires that the Administrator establish the following five elements to prove that a respondent fraudulently falsified a record: (1) a false representation (2) in reference

[13] The Administrator did not appeal the law judge's decision on the merits in this case.

to a material fact (3) made with knowledge of its falsity (4) and with the intent to deceive (5) with action taken in reliance upon the representation.[14]

The Administrator argues that applicant's assertion in the engine logbook that he had overhauled the connecting rods amounted to fraud. This allegation, however, does not appear to be reasonable, as Mr. Matthews and applicant testified that they relied upon the yellow tag, which indicated that the crankshaft was "standard." Mr. Matthews further testified that the difference between modified and regular connecting rods was not readily apparent. Finally, both Mr. Matthews and applicant testified that they did not believe the statement in the logbook indicating that the connecting rods had been overhauled was false, and the Administrator did not provide any evidence in an attempt to impeach their testimony.

The Administrator's counsel also did not dispute that the FAA did not seek criminal prosecution under 18 U.S.C. § 38 against either applicant or Mr. Matthews. The Administrator,

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[14] Id. at 519 (citing Pence v. United States, 316 U.S. 332, 338 (1942), and United States v. Kiefer, 228 F.2d 448 (D.C. Cir. 1955), cert. denied, 350 U.S. 933 (1956)); see also Twomey v. NTSB, 821 F.2d 63, 66 (1st Cir. 1987). We note that the last two elements of this five-prong test are unique to the allegation that a certificate holder committed fraud; with intentional falsification cases in which the Administrator does not allege fraud, we have held that the Administrator need only establish the first three elements of the test.

therefore, asks us to infer that applicant violated 49 U.S.C. § 44726(b)(1)(B), even though the Administrator had apparently not charged applicant with a violation of 18 U.S.C. § 38. The Administrator supplies no authority for the proposition that we should independently find that a certificate holder has violated a criminal statute, and does not explain how our jurisdiction might extend to such matters.[15] Without adequate proof and a legal basis on which to find that applicant violated 18 U.S.C. § 38, we do not believe it was reasonable for the Administrator to pursue a case against applicant on the basis of 49 U.S.C. § 44726.[16]

Even assuming that the Administrator could have shown that applicant committed fraud in completing the logbook entry at issue, the Administrator's argument that the facts of this case fulfill the elements of § 44726(b)(1)(B) is tenuous. We agree with the law judge that § 44726 addresses counterfeit parts, as the title of the section establishes. To the extent that the Administrator sought to show that the connecting rods at issue were unapproved parts, we note that the Administrator's evidence at the hearing only established that a service instruction from

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[15] See generally 49 U.S.C. § 1133.

[16] We further note that the FAR contains specific sections addressing falsification of records; cases involving alleged falsification need not be addressed only in criminal actions under Title 18 of the United States Code.

Lycoming indicated that the connecting rods should have been modified. The Administrator did not provide evidence to show, nor did the Administrator's counsel argue, that a service bulletin or other such binding authority addressed the connecting rods under these circumstances.[17]

We note that we are mindful of our precedent concerning credibility findings and cases under the EAJA. We have carefully reviewed the evidence in the case at issue, and are aware that the law judge ostensibly determined that Mr. Matthews and applicant provided credible testimony. However, we do not believe this consideration precludes an award of fees under the EAJA, because, as the law judge and this opinion conclude, the Administrator's case was not reasonable in law. As explained above, the Administrator's attempt to show that applicant violated 49 U.S.C. § 44726, even though the FAA did not instigate a criminal prosecution against applicant for a violation of 18 U.S.C. § 38, lacked a sound legal basis. As

[17] In our opinion addressing applicant's 2006 certificate suspension, we stated, in dicta, that service instructions may not be mandatory in the absence of an Airworthiness Directive. Administrator v. Law, NTSB Order No. EA-5221 at 6—7 (2006). In that opinion, we found that the Lycoming overhaul manual specifically incorporated service instructions by reference; therefore, we found that applicant should have complied with a certain service instruction from Lycoming. Here, however, the Administrator did not establish that compliance with such service instructions was mandatory because Lycoming incorporated such instructions by reference. The Administrator also did not dispute or clarify Mr. Despain's testimony concerning service instructions.

such, the law judge's apparent credibility findings in favor of applicant and Mr. Matthews were not central to the resolution of this case.

Finally, we also do not find the Administrator's argument that special circumstances make an award unjust to be convincing. We acknowledge that applicant has been subject to other recent certificate actions, and we admonish him that certificate holders such as himself are subject to high standards, and that the FAR requires scrupulous recordkeeping. Applicant's acknowledgement at the hearing that his recordkeeping was substandard is troubling, given that keeping organized records is critical in ensuring the safety of aircraft. However, on the narrow issue of whether applicant violated 49 U.S.C. § 44726(b)(1)(B) by way of 18 U.S.C. § 38, we do not find that special circumstances make an award of fees concerning this allegation unjust.

Based on our conclusion that the Administrator was not substantially justified in pursuing this case because the Administrator's charges against applicant were not reasonable in law, we find that applicant is entitled to an award of $13,670.40 in attorney's fees and $663.00 in expenses, which totals $14,333.40.[18]

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[18] To the extent that applicant seeks additional fees for services performed during his preparation of the appeal

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's appeal is denied;

2. The law judge's initial decision granting the application for attorney's fees and expenses is affirmed; and

3. The Administrator shall pay attorney's fees in the amount of $14,333.40 to applicant in accordance with 49 C.F.R. § 826.40.

HERSMAN, Chairman, HART, Vice Chairman, and SUMWALT, Member of the Board, concurred in the above opinion and order.

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concerning this award of fees, we note that applicant did not submit any copies of invoices or documents showing the expenses incurred. Therefore, this opinion addresses only the amount of the award supported by the record before us.

SERVED SEPT. 3, 2009

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

APPLICATION OF	*	
	*	
THEROL W. LAW	*	
	*	**Docket No.**
	*	**343-EAJA-SE-18489**
For an award of attorney and	*	**JUDGE MULLINS**
Related expenses under the	*	
Equal Access to Justice Act (EAJA)	*	

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WRITTEN INITIAL DECISION AND ORDER

This matter is before the National Transportation Safety Board ("the Board") pursuant to the provisions of the Equal Access to Justice Act ("EAJA"), 5 U.S.C. § 504, and the Board's Rules implementing that Act (49 C.F.R. Part 826). By his Application filed with the Office of Judges, NTSB, on June 3, 2009, the Applicant (Respondent) seeks an award of attorney fees and expenses against the Federal Aviation Administration ("FAA").

The Application and supporting documents filed by Applicant establish that he meets the eligibility requirements set out in the EAJA and the Board's Rules, and that the Application is both timely filed and procedurally correct.

STATEMENT OF CASE

On January 27, 2009, the Administrator filed an Emergency Order of Revocation as a Complaint in this matter setting forth two counts. Count One was an Order of Revocation that carried a lifetime revocation and Count Two was an Order of Revocation which carried a one year revocation. Before opening statements, Applicant stated that he was not contesting Count Two. The undersigned accepted that Applicant would not be contesting Count Two, and affirmed Count Two issuing the appropriate sanction as to the revocation of Applicant's A&P License. Thereafter, Count One, the Order of Revocation carrying a lifetime revocation, was presented to the undersigned based on the following allegation:

1. You are now, and at all times mentioned herein were, the holder of Mechanic Certificate No. 518508559 with Airframe and Powerplant ratings and Inspection Authorization.
2. You are now, and at all times mentioned here were, the holder of Commercial Pilot Certificate No. 2143778 with Instrument Privileges and Certified Flight Instructor Certificate No. 2143778CFI and Ground Instructor Certificate.
3. On or about May 18, 2006, you performed maintenance on and approved for return to service a Lycoming O-320B engine, serial number (s/n) 1883-27 that was installed on a Piper PA-12 civil aircraft, N3222M.
4. You indicated that as part of the maintenance to this engine that you used connection rods overhauled by Aircraft Specialties Services.

5. These representations were intentionally false or fraudulent, in that you never installed connection rods overhauled by Aircraft Specialties.
6. In 2006, per NTSB Order EA-5221, you had your Mechanic Certificate suspended for using non-airworthy crankshaft, connecting rods, and piston during an engine overhaul of an O-360 engine.
7. In 2005, you had your Mechanic Certificate suspended for installing an improper crankshaft gear in an O-320 engine.
8. By your conduct as described above, in paragraphs 3 though 5, you knowingly and with the intent to defraud, falsified, or concealed a material fact concerning aircraft parts.
9. By your conduct as described above, in paragraphs 3 though 5, you knowingly and with the intent to defraud made or used a materially false writing, entry, certification, or document concerning an aircraft part.
10. Section 38 of Title 18 of the United States Code (U.S.C.) makes the activities described in the paragraphs punishable by law [18 U.S.C. §38].

On March 24, 2009, this matter was heard before the undersigned and a ruling was made in favor of the Applicant on Count One of the alleged violations of 18 U.S.C. §38 above. On March 30, 2009, the Administrator filed his Intent to Appeal the Decision of the undersigned, and on May 15, 2009, the Administrator withdrew the Appeal of that Decision. On June 3, 2009, Applicant filed his Application for attorney's fees and expenses under the EAJA.

THE PREVAILING PARTY REQUIREMENT

Section 826.1 of this Board's Rules provides that an eligible party may receive an award when it prevails over the Federal Aviation Administration (FAA), unless the Government's position in the proceeding was substantially justified or special circumstances make an "award unjust." The Oral Initial Decision and Order entered in this case on March 24, 2009 ruled for the Applicant and dismissed the FAA's Order of Suspension. Although that Order was appealed, the Appeal was subsequently withdrawn, thereby making Applicant the prevailing party.

There were no special circumstances that would make an award of attorney fees unjust. Therefore, the remaining issue is whether or not the FAA's position was substantially justified.

SUBSTANTIAL JUSTIFICATION

An Agency is not required to pay attorney fees or expenses where its position was substantially justified or where special circumstances make an award unjust {5 U.S.C. § 504(a)(1)}, To establish "substantial justification," the Government must "…show (1) that there is a reasonable basis in truth for the facts alleged in the pleadings; (2) that there exists a reasonable basis in law for the theory it (the Government) propounds; and (3) that the facts alleged will reasonably support the legal theory advanced." McCrary v. Administrator, 5 NTSB 1235, 1238 (1986), citing United States v. 2,116 Boxes of Boned Beef, 726 F. 2d 1481 (10th Cir. 1985).

DISCUSSION

For the reasons stated below, this Application will be granted.

The Administrator alleged that the Applicant violated 49 U.S.C. 44726 and 18 U.S.C. 38 for using counterfeit parts, which if established would result in a lifetime revocation of Applicant's Mechanic Certificate and Pilot Certificates. Specifically, the Administrator alleges that Applicant intended to defraud the aircraft owner by claiming that he had installed overhauled connecting rods when in fact the connecting rods had not been overhauled. Furthermore, that when the parts at issue were installed on the aircraft, Applicant was fully aware they had not been properly serviced. The Administrator argued that these actions described above constituted activity under 49 U.S.C. 44726(b)(1)(B) that is described in 44726(a)(1)(A), namely, installing a "fraudulently represented aviation part." However, a fraudulently represented aviation part, by its very definition, cannot be a part originally taken off of an airplane and re-installed on the same airplane.

The undersigned, rejected the Administrator's characterization at the hearing held on March 24, 2009, because there was no question that the parts used in this case, the connecting rods, were not counterfeit or fraudulently represented parts. Specifically, the part was not an unapproved part because the part came off of the engine originally. The yellow tag, which accompanied the crankshaft, did not indicate that the crankshaft had been "ground down", thus requiring a different set of connecting rods. Even though Applicant should have known that a different set of connecting rods were required as a result of the

shaved crankshaft, Applicant's action does not constitute installing a fraudulently represented aviation part as defined in 49 U.S.C. 44726(a)(1)(A).

Furthermore, the connecting rods that came off the engine were subject to a service instruction only and not a service bulletin. The Administrator essentially argued that failure to comply with the service instruction rendered the connecting rods as counterfeit parts, even though the same connecting rods that were removed from the engine were reinstalled on the engine. The Administrator's own expert witness stated that a service bulletin would have made the connecting rod bolt issue mandatory, but a service instruction does not make it mandatory. (TR-91, 219). Therefore, the failure to comply with the service instruction does not taint the re-installed connecting rods as counterfeit parts.

The Administrator's claim that the connecting rods were counterfeit because the rods were removed and reinstalled on the same engine without putting the new bolts on, as suggested by the service instruction, is not substantially justified in law or fact. As a result, the facts alleged do not reasonably support the legal theory advanced by the Administrator. Therefore, the Administrator has failed to meet the "substantial justification" test as set forth in McCrary. Accordingly, the Administrator was not substantially justified in pursuing a lifetime revocation of Applicant's Certificates simply because the Applicant put the original parts back on the engine that was overhauled.

The Administrator's principal objection to the Applicant's Application for Attorney Fees and Costs under the Equal Access to Justice Act is that the

Applicant failed to comply with the procedural requirements as set forth in 5 U.S.C. 504 and 49 CFR Part 826. The Administrator's objection is misplaced. In the Applicant's Application for Attorney Fees and Costs under the EAJA, Applicant specifically states that Applicant's net worth did not exceed $2,000,000 and as an owner of a business, the business had a net worth of not more than $7,000,000. Applicant then submitted an Affidavit in support of the Applicant's net worth. The undersigned finds that the Affidavit of Net Worth as amended is sufficient to satisfy Part 826.22(a).

The Applicant in its Respondent's Reply Re: Respondent's EAJA Application, dated July 20, 2009, correctly sets forth the amount the Applicant is entitled to under the EAJA. The current statutory calculation of the hourly fee for services under an EAJA claim is $178 per hour. The Applicant worked a total of 76.8 hours on this matter which entitles Applicant to an amount of $13,670 for hourly services rendered, plus an additional $663 in costs, which the Administrator does not object to. Therefore, Applicant is entitled to a total of $14,333 under the EAJA.

ORDER

It is therefore ordered that the reliable and probative evidence establishes that the Administrator was not substantially justified in bringing this violation against the Applicant and that Applicant complied with all procedural requirements of the EAJA under Part 826, therefore, Applicant's request for $14,333 in attorney fees and expenses under the EAJA is GRANTED.

And it is SO ORDERED.

ENTERED this 3d day of September 2009 at Arlington, Texas.

WILLIAM R MULLINS
ADMINISTRATIVE LAW JUDGE