

SERVED: December 7, 2000

NTSB Order No. EA-4868

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 5th day of December, 2000

BONNIE LEE MENDENHALL,)
)
)
 Applicant,)
) Docket 150RM-EAJA-SE-12564
 v.)
)
 JANE F. GARVEY,)
 Administrator,)
 Federal Aviation Administration,)
)
 Respondent.)
)
)
_____)

OPINION AND ORDER

On remand from the United States Court of Appeals for the Ninth Circuit, affirming in part and denying in part applicant's petition for review of our award of attorney's fees and expenses ("EAJA II"),¹ we are directed to make "an award of attorneys' fees at between \$250 and \$315 per hour for the 141 hours [applicant's] attorney spent in, and in preparation for, the petition for review" of our original Opinion and Order denying

¹ Mendenhall v. Administrator, NTSB Order No. EA-4612 (1998).

applicant's application for an award of attorney's fees and expenses ("EAJA I").² Mendenhall v. National Transp. Safety Bd., 213 F.3d 464 (9th Cir. 2000).³

In our EAJA II Opinion and Order, we discussed the "jurisdictional difficulty" we perceived in the Court's direction to award fees at a "reasonable market rate" because no such provision is contained in section 504, but, with this caveat, we endeavored to follow the Court's instructions and ultimately determined the reasonable market rate for the services provided by applicant's attorney was \$150 per hour. The Court, in its Opinion and Order remanding the instant case, concludes that its instruction to calculate applicant's attorney's fees using the reasonable market rate, in so far as that instruction applied to the 89 hours and 40 minutes applicant's attorney billed in connection with the administrative proceedings prior to (and on remand after) petitioning the Ninth Circuit for review of our EAJA I Opinion and Order, "contravened plain statutory text and Supreme Court case law" and "Mendenhall's recovery should have

² Mendenhall v. Administrator, NTSB Order No. EA-4121 (1994).

³ The Court frames the issue presented by the appeal of our EAJA II Opinion and Order as "whether a federal agency properly determined an award of attorneys' fees to a petitioner wrongly charged with violating that agency's regulations." Mendenhall, 213 F.3d 464, 465 (9th Cir. 2000) (emphasis added). The NTSB, which is independent of the Department of Transportation and the Federal Aviation Administration ("FAA"), serves as an impartial adjudicator of administrative enforcement cases brought by the FAA for alleged violations of its regulations. See 49 U.S.C. §§ 1111(a); 1133(1).

been limited by the statutory cap[.]"⁴ Mendenhall, 213 F.3d 464, 469 (9th Cir. 2000). The Court further states, nevertheless, that it "lack[s] jurisdiction to reverse and to remand the NTSB's award for recalculation using the correct rate." Id. at 470.⁵

Turning to the Court's present instructions, the affidavits submitted by other attorneys specializing in "aviation matters" claim a market rate for their services of between \$250 and \$315 per hour, applicant's attorney's affidavit states that the market rate for his services is \$300 per hour, and the Administrator has not submitted evidence of a different market rate.⁶ In accordance with the Court's Opinion, the record thus supports applicant's claim that the reasonable market rate for her attorney's services is \$300 per hour. We therefore recalculate in accordance with the Court's instructions a new total award of \$57,864.04.⁷

⁴ The maximum hourly fee awardable under 5 U.S.C. § 504, as increased by the CPI-based formula in our EAJA regulations, is, for the relevant time period, \$116 for work performed in 1992, \$119 for work performed in 1993, \$122 for work performed in 1994, \$126 for work performed in 1995, and \$130 for work performed in 1996.

⁵ We construe the Court's instructions to empower and require us to award, in this case, an amount greater than the statutory cap.

⁶ The Administrator had argued in her appeal brief filed in connection with our EAJA II Opinion and Order that the affidavits were, because applicant's legal fees were incurred over several years, deficient because they did not specify the time period during which the affiants' fee rate was as claimed.

⁷ In our EAJA II Opinion and Order, we awarded a total of \$36,714.04, but that amount was tallied using a rate of \$150 per hour for the 141 hours expended for the petition for review by the Ninth Circuit. Applying the new rate of \$300 per hour to

ACCORDINGLY, IT IS ORDERED THAT:

Our Opinion and Order awarding applicant \$36,714.04 in attorney's fees and expenses is modified, and the Administrator shall pay applicant a total of \$57,864.04.

HALL, Acting Chairman, HAMMERSCHMIDT, GOGLIA, BLACK, and CARMODY, Members of the Board, concurred in the above opinion and order.

those same 141 hours, we recalculate applicant's entire EAJA award as \$57,864.04.