

SERVED: September 29, 2009

NTSB Order No. EA-5482

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 25th day of September, 2009

APPLICATION OF)
)
JOHN JOSEPH GLENNON)
) Docket 338-EAJA-SE-17500RM
)
For an award of attorney)
fees and expenses under the)
Equal Access to Justice Act)
)
_____)

OPINION AND ORDER

Applicant has appealed from the April 24, 2009 Equal Access to Justice Act (EAJA)¹ written initial decision and order of Chief Administrative Law Judge William E. Fowler, Jr.² The law judge denied the EAJA application. Applicant argues that the

¹ See 5 U.S.C. § 504; see also 49 C.F.R. pt. 826. Applicant seeks fees in the amount of \$67,568.70. Appeal Br., Exh. B.

² A copy of the law judge's initial decision and order is attached.

Administrator's complaint was not substantially justified, and that awarding attorney's fees is, consequently, appropriate. We remand applicant's appeal.

The Administrator issued an order suspending applicant's airline transport pilot (ATP) certificate, based on alleged violation of 14 C.F.R. § 121.639³ when applicant operated a Boeing 737-300 on a flight from Ronald Reagan Washington National Airport (DCA) to LaGuardia Airport (LGA) on November 3, 2004. The Administrator alleged that the aircraft did not have sufficient fuel to complete the flight and, thereafter, to fly for 45 minutes at a normal cruising fuel consumption. The Administrator further alleged that applicant violated 14 C.F.R. § 121.627(a).⁴ The Administrator also ordered the suspension of the copilot's ATP certificate.⁵

³ Section 121.639, entitled, "Fuel supply: All domestic operations," states that no person may dispatch or take off a domestic air carrier airplane unless it has enough fuel to fly to the airport to which it is dispatched; thereafter, to fly to and land at the most distant alternate airport (where required) for the airport to which dispatched; and thereafter, to fly for 45 minutes at normal cruising fuel consumption.

⁴ Section 121.627(a) states that no pilot-in-command (PIC) may allow a flight to continue toward any airport to which it has been dispatched or released if, in the opinion of the PIC or dispatcher, the flight cannot be completed safely; unless, in the opinion of the PIC, no safer procedure exists.

⁵ The Board considered both pilots' appeals in a consolidated case. Only applicant Glennon submitted an application for attorney's fees under the EAJA.

Applicant appealed the order, and the law judge issued an oral initial decision, which applicant appealed to the Board. The Board remanded the case for clarification and analysis, and the law judge issued a decisional order on remand, in which he determined that applicant and his copilot violated § 121.639 and, consequently, 14 C.F.R. § 91.13(a).⁶ The law judge determined that the Administrator did not prove, however, that applicant violated § 121.627, and the Administrator did not appeal that finding. The law judge based his decision on applicant's acceptance, prior to taking off, of a new route that was 97 miles longer than the originally planned route, without having additional takeoff fuel. The law judge concluded that the new route would require an additional 850 to 900 pounds of fuel above the original calculation, and that applicant did not add this amount to the originally computed minimum fuel for takeoff under Delta Airlines' standards, nor did he coordinate the new fuel requirements with Delta Dispatch before taking off. The law judge concluded that, although the new route required approximately 11,020 pounds of fuel under these calculations,⁷

⁶ Section 91.13(a) prohibits careless or reckless operation so as to endanger the life or property of another.

⁷ The law judge cited Delta's dispatch release for the original flight route, in conjunction with testimony, as the source of his calculations. Under Delta policies, the dispatch release for the original route provided for 10,170 pounds minimum takeoff fuel, which consisted of trip burn fuel (minus taxi-out

applicant took off with 10,500 pounds. The law judge also reduced applicant's suspension to 60 days.

The consolidated appeal brief argued that the law judge used incorrect estimates and calculations in determining whether the pilots took off with insufficient fuel; that the law judge misinterpreted references to planned contingency fuel (PCF) in the Delta Flight Operations Manual; that he erred in finding that they violated § 91.13(a); that the law judge's order is subject to reversal in that he did not evaluate previous cases of violations of § 121.639; and that the copilot was not jointly responsible for the violations.

Delta Airlines filed an amicus curiae brief, arguing that the minimum fuel for takeoff⁸ was 10,170 pounds, and that the flight departed with 10,500 pounds of fuel. Delta asserted that the minimum fuel for purposes of § 121.639 did not change as a result of the new route, because PCF accommodates such changes, and that Delta uses this fuel category to accommodate any need

(..continued)

fuel), planned contingency fuel (PCF), and reserve fuel. With regard to the new route, the law judge found the amount of minimum takeoff fuel required by Delta rose to 11,020 pounds, based on testimony that the new route would require about 850 pounds of additional fuel. Decisional Order on Remand at 11.

⁸ Delta defines the fuel that §§ 121.639 and 121.647 require as "minimum fuel for takeoff." Delta's practice is to subdivide this into four categories: trip burn fuel (minus the taxi fuel that Delta places in this category), PCF, alternate airport fuel (where required), and reserve fuel. Br. of Amicus Curiae at 3.

for extra fuel pursuant to § 121.647.⁹ Delta thus contended that the law judge erred in concluding that the minimum fuel for takeoff increased because of the new route, and argued that the amount of PCF was available for route changes, even prior to takeoff. Furthermore, Delta argued that the Administrator failed to prove that respondents took off without PCF that would accommodate the route change. Delta asserted that the Board's affirmation of the law judge's decision would result in confusion in the industry, as operators would believe that § 121.639 does not allow use of PCF for route changes.

The Board found that Delta's brief was the only pleading that addressed the true issue, which was whether the Administrator could allege violation of § 121.639 with regard to specific categories of fuel. The Board considered whether § 121.647 would require the increase in minimum fuel for takeoff, because the Administrator apparently sought to require that in this case. The Board reviewed the Flight Planning and Releasing section of the Delta Flight Control Operations Manual, which provides that PCF is for "known airborne contingencies," and gives, as examples, weather deviations due to enroute

⁹ Section 121.647, entitled, "Factors for computing fuel required," states that a person computing fuel required for the purposes of this subpart shall consider the wind and other weather conditions forecast; anticipated traffic delays; one instrument approach and possible missed approach at destination; and any other conditions that may delay landing of the aircraft.

thunderstorms, and anticipated Air Traffic Control (ATC) delays and reroute. The manual also stated such fuel may not be used prior to takeoff unless the pilot has the concurrence of the dispatcher. The Board found that this provision, however, was relevant to internal Delta operating practices, not to whether pilots or dispatchers must reserve the PCF amount for minimum takeoff fuel computations.

The Board found that the Administrator did not establish what amount of fuel, if any, in addition to the fuel required by § 121.639, was necessary to accommodate the needs that § 121.647 contemplates, or how applicant should have computed this amount of fuel. As a result of the lack of an explicit nexus between §§ 121.639 and 121.647, the Board did not accept the Administrator's interpretation of § 121.639, as applied to the facts of the underlying case. The Administrator filed a petition for reconsideration, which the Board denied. Applicant then submitted an application for EAJA fees.

The law judge denied the application on the basis that the Administrator was substantially justified in pursuing the charges. The law judge stated that the Administrator relied on language in the FAA-approved manual, and that the aircraft needed 11,020 pounds of fuel for the new route. The law judge also stated that the dispatcher for the flight entered the requisite data into the flight planning computer, and advised

applicant not to take off, due to insufficient fuel. The law judge noted that the pilots communicated with ATC throughout the flight to request shortcuts to conserve fuel, and declared a fuel emergency at LGA at the conclusion of the flight. The law judge determined that the Administrator's analysis "appears to have been plausible." Initial Decision at 12.

The law judge also noted that this was a case of first impression, and cited Administrator v. Miller, NTSB Order No. EA-3581 (1992), for the proposition that the adjudicatory process may be used for interpreting and further defining regulations. The law judge concluded that the Administrator was substantially justified in pursuing the case, given the evidence, and that the Board had not previously considered whether § 121.639 requires an amount of fuel specifically to account for the factors in § 121.647.¹⁰

Applicant argues that the charges were not substantially justified, and that the law judge did not view the entire record, as required by Alphin v. NTSB, 839 F.2d 817 (D.C. Cir. 1988). In particular, applicant asserts that the Administrator failed to provide evidence to support the assertion that he took off without sufficient fuel, and that the flight had more fuel

¹⁰ The law judge included a footnote indicating that, even if applicant showed that pursuit of the case was not substantially justified, he did not present adequate information concerning the fees to allow for an award.

than required, both on takeoff and at landing. Applicant quoted the opinion and order, in which the Board stated that the evidence supported the Administrator's contentions "on the surface," and that the notion that the Administrator's interpretation of § 121.639 was arbitrary and capricious indicates that the case was not substantially justified. Applicant also submitted an amended fee statement. The Administrator contests these arguments, and urges us to uphold the law judge's decision.

We will not award attorney's fees and other 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 (1992). The Supreme Court defines "substantially justified" to mean that the government must show that its position is reasonable in 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).

Although the law judge carefully examined the charges under §§ 121.639 and 91.13(a), he did not examine, nor did the parties address, whether the Administrator was substantially justified concerning the original charge under § 121.627. We recognize both that the law judge initially found that the Administrator did not prove that applicant violated § 121.627, and that the Administrator did not appeal this finding. We are obligated to

consider the totality of the evidence to determine whether a partial award of fees may be appropriate. Alphin, supra, at 822. Therefore, we remand this case to the law judge to address whether the Administrator was substantially justified in bringing the § 121.627 charge.

Furthermore, we are mindful that, under our Rules of Practice, applicant must provide complete documentation of the services for which he seeks fees. 49 C.F.R. § 826.23. We further note that this is especially important if the law judge considers a partial award of fees; failure to provide such a record may result in dismissal of an application.

ACCORDINGLY, IT IS ORDERED THAT:

This case is remanded to the law judge for further proceedings consistent with this opinion and order.

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

Served: April 24, 2009

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

Application of

JOHN J. GLENNON

Docket 338-EAJA-SE-17500RM

for an award of attorney fees and
expenses under the Equal Access
to Justice Act (EAJA).

**WRITTEN INITIAL DECISION AND ORDER DENYING AWARD OF
FEES AND EXPENSES UNDER THE EQUAL ACCESS TO JUSTICE ACT**

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William E. Fowler, Jr., Chief Administrative Law Judge: On November 11, 2008, applicant, through counsel, filed with this office an application, under the Equal Access to Justice Act ("EAJA," codified at 5 U.S.C. § 504), for fees and expenses he incurred in connection with his appeal to the National Transportation Safety Board of an order, by which the Administrator of the Federal Aviation Administration ("FAA") suspended his air-line transport pilot ("ATP") pilot certificate for 120 days, stemming from a November 3, 2004 Delta Airlines flight, from Ronald Reagan National Airport ("DCA"), in Arlington, Virginia, to LaGuardia Airport ("LGA"), in Flushing, New York, on which he served as pilot-in-command.¹ Around the same time that application was submitted, the Administrator filed

¹ The Administrator originally issued an order of suspension to applicant on August 4, 2005, and later suspended the ATP certificate of Keith M. Shewbart, applicant's first officer on the subject flight, in an order issued on November 23, 2005. They both filed timely appeals of those orders with the Board, and the two matters were subsequently consolidated for hearing purposes. On

with the full five-member Board a request for reconsideration of a decision it had rendered in the underlying matter on October 15, 2008 (NTSB Order EA-5411),² and I therefore issued an order staying this EAJA proceeding pending the Board's final disposition of the air safety enforcement matter, pursuant to Rule 24(b) of the Board's Rules Implementing the EAJA (hereinafter "EAJA Rules," codified at 49 C.F.R. §826.24(b)), on December 5, 2008. Thereafter, on January 5, 2009, the Board denied the Administrator's reconsideration request in NTSB Order EA-5425. An amended application in this EAJA proceeding was then filed by applicant on January 7, 2009, after which the Administrator submitted an answer to the application, as amended, on March 5, 2009,³ and applicant filed a reply to that answer on March 16, 2009. This matter is, thus, now ripe for disposition.

I.

In the underlying air safety enforcement proceeding, the Administrator charged applicant with violations of §§ 91.13(a), 121.627(a) and 121.639 of the Federal Aviation Regulations ("FAR," codified at 14 C.F.R.).⁴

Following an evidentiary hearing held on March 7 and 8, 2006, I issued an oral initial decision ("OID"), in which I found that applicant had violated FAR § 121.639 and,

December 13, 2005, the Administrator issued amended suspension orders to both applicant and First Officer Shewbart, which, pursuant to Rule 31(a) of the Board's Rules of Practice in Air Safety Proceedings (codified at 49 C.F.R. § 821.31(a)), became the Administrator's amended complaints in the underlying air safety enforcement proceeding.

² The Administrator's reconsideration request in the underlying proceeding was filed on November 13, 2008, which was two days after applicant submitted his EAJA application herein.

³ On February 3, 2009, I issued an Order granting a request the Administrator had submitted by fax the previous day for an extension of time to file the answer, until March 9, 2009.

⁴ Those FARs provide:

"§ 91.13 Careless or reckless operation.

(a) *Aircraft operations for the purpose of air navigation.* No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

§ 121.627 Continuing flight in unsafe conditions.

(a) No pilot in command may allow a flight to continue toward any airport to which it has been dispatched or released if, in the opinion of the pilot in command or dispatcher (domestic and flag operations only), the flight cannot be completed safely; unless, in the opinion of the pilot in command, there is no safer procedure. In that event, continuation toward that airport is an emergency situation as set forth in § 121.557.

§ 121.639 Fuel supply: All domestic operations.

No person may dispatch or take off an airplane unless it has enough fuel—

(a) To fly to the airport to which it is dispatched;

(b) Thereafter, to fly to and land at the most distant alternate airport (where required) for the airport to which dispatched; and

(c) Thereafter, to fly for 45 minutes at normal cruising fuel consumption."

Subsection (b) of FAR § 121.639 was not applicable to the subject flight.

on a derivative or residual basis, § 91.13(a), but that the § 121.627(a) charge against him had not been established. With respect to sanction, I reduced to 60 days the 120-day certificate suspension that the Administrator had imposed on him.⁵ On appeals from that decision by applicant, his first officer and the Administrator, the full Board, in NTSB Order EA-5302 (served August 1, 2007), initially remanded the case to me for further proceedings consistent therewith.⁶

In its remand order, the Board observed that the Administrator's appeal maintained that I had erred in reducing the sanction imposed against applicant (as well as the first officer), and in my "apparent [factual] conclusion that [the crew] did not take off without the minimum fuel required,"⁷ although I found that they had violated FAR § 121.639. It also noted that the Administrator's appeal did not contest my finding that applicant had not been shown to have violated FAR § 121.627(a). The Board noted that applicant, in a joint appeal with his first officer, had posited that I erred: (1) in determining that they were required under FAR § 121.639 to obtain the concurrence of a dispatcher as to whether they had adequate fuel on board their aircraft before they proceeded to take off after receiving an amended clearance, with a longer route, from air traffic control ("ATC"); and (2) in failing to find that they had sufficient fuel on board to comply with FAR § 121.639. The Board further noted that they maintained in their appeal that the OID contained certain inconsistencies, and did not adequately explain the factual and legal bases underlying my ultimate findings. In remanding the case, the Board directed that I provide a more detailed and cogent factual and legal analysis to support the conclusions I reached in arriving at my initial decision, including those relating to sanction.

After conducting a thorough review of the March 8, 2006 OID and the evidentiary record in the case in its entirety, I issued a written decisional order on remand ("DOR") on November 20, 2007, in which I reaffirmed my findings that applicant violated FAR § 121.639, and § 91.13(a) on a residual basis, and that such violations warranted a 60-day suspension of his ATP certificate.⁸

As I observed in the DOR, certain basic facts in the case were not in dispute. The subject flight, Delta Flight 1966, was a shuttle flight scheduled to depart DCA for LGA at 7:30 p.m. The aircraft used on that flight was a Boeing 737-300. In addition to being pilot-in-command, applicant was the flying pilot. First Officer Shewbart handled flight communications. Approximately two hours before the flight's scheduled takeoff, Stephen Caisse, a Delta Airlines dispatcher, performed route and fuel planning for the

⁵ I also found that First Officer Shewbart had violated FAR §§ 91.13(a) and 121.639, but reduced the sanction imposed upon him for such violations from a 45-day suspension to one of 10 days.

⁶ NTSB Order EA-5302 at 14.

⁷ *Id.* at 4-5.

⁸ Since the Board noted in its remand order (EA-5302) that the Administrator did not contest my finding that applicant was not shown to have violated § 121.627(a), I did not revisit that issue in my DOR, and it was not raised by the parties or considered by the Board in its subsequent appellate review of the DOR.

flight with the aid of a flight planning computer ("FPC"). He then completed a dispatch release, which applicant subsequently agreed to before the aircraft left the gate at DCA.

For the planned route, the dispatch release designated 4,450 pounds of trip burn fuel (fuel expected to be used between the time of taxi out at DCA and landing at LGA), including 480 pounds of taxi fuel; 2,200 pounds of planned contingency fuel (fuel designated by the dispatcher to accommodate anticipated delays, such as for air traffic and weather); 350 pounds of unplanned contingency fuel (fuel the dispatcher designates for unforeseen circumstances); and 4,000 pounds of reserve fuel (fuel calculated to meet the FAR § 121.639(c) requirement that the aircraft carry sufficient fuel to fly for 45 minutes at normal cruising fuel consumption in addition to that needed to reach the destination airport). The dispatch release aircraft block fuel (which is the total of trip burn fuel, plus planned and unplanned contingency fuel, plus reserve fuel) was 11,000 pounds. Also calculated in the dispatch release was minimum takeoff fuel (which is block fuel, minus taxi fuel, minus unplanned contingency fuel; or, viewed another way, is trip burn fuel, plus planned contingency fuel, plus reserve fuel) of 10,170 pounds. The target gate arrival fuel was 6,400 pounds.

According to witness testimony, Flight 1966 pushed back from the gate at DCA with between 11,000 and 11,100 pounds of fuel onboard. Delta's Fuel Service Record, which I determined was the most reliable evidence of pushback fuel amount, indicated 11,080 pounds of fuel were onboard when the aircraft left the gate.

Pushback occurred at 7:30. However, takeoff was delayed due to a ground stop at LGA and/or air traffic saturation that resulted in the selected release of aircraft from DCA, Dulles International Airport and Baltimore-Washington Airport, and applicant taxied the aircraft to a block holding area and shut down its engines. The crew had several communications with Dispatcher Caisse about the delay over the Aircraft Communications Address and Reporting Service ("ACARS") between 7:37 and 8:30, and was then advised by ATC that Flight 1966 could have an amended clearance to fly a "back door" route to LGA, which would first take the flight north over Central Pennsylvania, then east toward LGA. This alternate route was 97 nautical miles ("NM") longer than the original route provided by Dispatcher Caisse. The crew was at liberty to accept or reject this amended clearance. The ground controller who handled Flight 1966 at DCA noted in his testimony that one reason to reject an alternate route would be to avoid having to go back to the gate for additional fuel. At that time, 10,500 pounds of fuel were on board the aircraft. Applicant entered the new route into the aircraft's Flight Management System ("FMS") computer, and determined, on the basis of the FMS information he received, that there was sufficient fuel for the new route. First Officer Shewbart checked and confirmed this on FMS. At 8:36, the crew sent an ACARS message to Delta Dispatch, which informed it of the new route, and indicated that the aircraft had 10,500 pounds of fuel on board. Flight 1966 then took off at 8:37. However, after he received the crew's 8:36 ACARS message, Dispatcher Caisse entered the new route and fuel information into the FPC, which responded that there was insufficient fuel for the new route. At 8:38, Dispatcher Caisse, not knowing that the flight had already taken off, sent the message "INSUFFICIENT FUEL FOR THAT ROUTE - NEC TO REFUSE" to Flight 1966 via ACARS. At 8:39, he sent another ACARS message to Flight 1966, relating that the FPC's response to the new route and fuel information was

"BLOCK FUEL TOO LIGHT." Subsequently, at 8:43, he sent an ACARS message to the crew that he was attempting to get the flight turned back on its original route. While these messages were being sent, the aircraft was climbing, and, according to applicant, the crew was focused on flying the aircraft. Applicant testified that, at some point in time after climb, he asked First Officer Shewbart to recheck the FMS data, and no error was found.

Thereafter, at 8:44, the crew contacted ATC, stating that "we're gonna be real tight on fuel with this long . . . westward routing that we're getting," and requested a shortcut. Ultimately, Flight 1966 was given two shortcuts, which shortened the route by approximately 40 NM, as well as clearance to climb from 21,000 feet to 27,000 feet, which was also designed to conserve fuel. The crew later sent an ACARS message to Delta Dispatch at 8:53, relaying the shortcuts and altitude increase, and indicating that there were 8,200 pounds of fuel onboard the aircraft and that the flight was expected to land with 6,400 pounds of fuel. Based on that information, Dispatcher Caisse informed the crew by ACARS at 8:57 that, "WITH THOSE NUMBERS WE LOOK FINE," and provided a recalculation of the flight's fuel numbers from that point. This became the flight's redispach. Nothing remarkable occurred thereafter until the flight was on approach to LGA.

On approach, Flight 1966 was given a series of altitude, speed and heading changes, and was directed to turn left to a heading of 270 at 9:25:16. At 9:25:19, the crew transmitted to the approach controller, "two seven zero . . . are we going to dials [(Digital Integrated Automatic Landing System)] here shortly." The controller later communicated at 9:25:24, "you're going to be re-sequenced turn left heading two seven zero," to which the crew responded, "we don't have the fuel to do that" at 9:25:30, and the controller subsequently communicated at 9:26:07, "turn left two two zero," which was a turn further away from LGA. The crew then made a transmission at 9:26:12 that was blocked, after which the controller repeated the 220 heading instruction at 9:26:13, and, at 9:26:15, the crew radioed "delta nineteen sixty six declaring an emergency for fuel we're going direct to dials." That fuel emergency declaration gave the flight immediate priority in the approach and landing sequence at LGA. The aircraft subsequently landed with between 5,300 and 5,400 pounds of fuel onboard.

At the hearing, applicant testified that he had calculated that the new, 97 NM-longer route he accepted would require about 1,000 pounds more fuel than the original route,⁹ but that this did not affect or change the flight's minimum fuel for takeoff because he used planned contingency fuel to make up the difference. The propriety of this action was contested by the Administrator, who offered into evidence Delta's Flight Control Operations Manual (Ex. A-15), which, in its fuel planning section, defines planned contingency fuel as the fuel computed by the dispatcher "to allow for known *airborne* contingencies. The fuel burn is calculated at 15,000 feet *and is included in minimum fuel for takeoff. . . . This fuel cannot be used prior to takeoff unless the captain has the concurrence of the dispatcher.* During situations when takeoff delays are excessive or unanticipated, a

⁹ First Officer Shewbart calculated that between 850 and 900 pounds of additional fuel would be required. Other evidence was offered that the additional amount of fuel necessitated by the longer route was as high as 1,600 pounds.

portion of this fuel may be allocated to *taxi fuel* to eliminate a gate return for additional fuel” (emphasis added). That manual section also states that planned contingencies may include, but are not limited to, anticipated ATC delays and reroute, and weather deviations due to enroute thunderstorms.¹⁰ FAA Aviation Safety Inspector (“ASI”) Jack D. Corbitt, who was qualified at the hearing as an expert in air carrier operations, opined in his testimony that the concurrence of Delta Dispatch was needed to convert planned contingency fuel into trip burn fuel, and Dispatcher Caisse, in response to being asked, “[W]hen the aircraft takes off is it required to have planned contingency fuel on board,” replied, “The requirement is at the commencement of the takeoff event, which means the application of the throttles for purposes of taking off. Once it’s in the air, that fuel is there to take — to handle anything that the ATC system —” (Tr. 364-65).¹¹

In analyzing the applicability of FAR § 121.639, I found in my DOR (at 11-12) that (emphasis original):

The evidence is clear that, at the time Flight 1966 took off on the amended clearance, at 8:37 p.m. on November 3, 2004, it had 10,500 pounds of fuel on board. Dispatcher Caisse’s dispatch release for the original route of flight, which [applicant] approved, designated trip burn fuel of 4,450, of which 480 pounds was taxi fuel. He also designated 2,200 pounds of planned contingency fuel, 350 pounds of unplanned contingency fuel and 4,000 pounds of reserve fuel. Minimum takeoff fuel was 10,170 pounds.

The amended clearance was for a route that was 97 NM longer than the original route for which Dispatcher Caisse made those fuel designations. Calculations of the additional amount of fuel

¹⁰ At the head of that section of the manual, it is noted that, under FAR § 121.647, winds and other forecast weather conditions, anticipated traffic delays, one instrument approach and possible missed approach at the destination airport, and “[a]ny other conditions that may delay landing of the aircraft,” are factors to be considered in computing a flight’s fuel requirements.

¹¹ Evidence was also presented regarding the question of whether Flight 1966 should have taken off without first obtaining the concurrence of Delta Dispatch, without regard to the crew’s determination that the aircraft had adequate fuel onboard for the new route. With respect to that matter, the flight dispatch release section of Delta’s Flight Operations Manual (Ex. A-13) provides that the captain is responsible for “coordinating with the Dispatcher of any significant route changes,” including, as is relevant here, lateral changes from the planned route of flight by more than 100 NM, any condition that will affect estimated time of arrival by more than 15 minutes, and *fuel consumption greater than planned*. ASI Corbitt testified that he believed that dispatcher concurrence was needed because the new route represented a significant change from the original route, and would result in significantly greater total fuel consumption than was originally planned. However, applicant and Dispatcher Caisse, in their testimony, and Delta’s Chief Pilot, Gary Beck, in a September 13, 2005 letter to the Administrator (Ex. R-1), expressed the view that the crew was not required under the Flight Operations Manual to obtain Dispatch’s concurrence before accepting and taking off on the amended clearance. Nevertheless, applicant also testified that he would not have taken off without trying to resolve the discrepancy between the crew’s calculations and those of Delta Dispatch as to the adequacy of fuel on board Flight 1966 had the crew received Dispatcher Caisse’s “insufficient fuel” and “block fuel too light” ACARS messages before takeoff.

consumption that could be expected in flying the new route ranged from 850 to 1,600 pounds. Viewed in the light most favorable to [applicant and First Officer Shewbart], this would appear to increase the minimum amount of fuel required for takeoff from 10,170 pounds to 11,020 pounds, *which is 520 pounds more than the amount of fuel on board the aircraft on takeoff.*

[Applicant] related in his testimony that he reallocated planned contingency fuel to make up the difference. Although both he and First Officer Shewbart believed this to be permissible, Delta's Flight Control Operations Manual unambiguously states that the purpose of planned contingency fuel is to allow for known *airborne* contingencies, and that planned contingency fuel *cannot be used prior to takeoff* without the concurrence of the dispatcher. Further, Dispatcher Caisse indicated in his testimony that planned contingency fuel cannot be tapped into freely before "the commencement of the takeoff event, which means the application of the throttles before taking off." Here, the possible events for which Flight 1966's planned contingency fuel was originally calculated (such as in-air ATC delays and weather-related rerouting) remained unchanged; what changed was that the amount of fuel that could be expected to be consumed in flying the new, longer, route, *without any contingencies*, increased by at least 850 pounds.

While there was some suggestion from Dispatcher Caisse and the crewmembers at the hearing that the reason the onboard FMS calculated that the flight had adequate fuel for takeoff, while Delta Dispatch's FPC determined that onboard fuel was insufficient for the new route, was that FMS is more accurate and less conservative than the FPC, I believe that this disparity more likely stemmed from the fact that [applicant] and First Officer Shewbart reallocated planned contingency fuel in making their FMS calculations, while Dispatch's FPC did not.

Consequently, I conclude that Flight 1966 did not have sufficient fuel on board for takeoff on the new route to comply with FAR § 121.639. While ATC was able to provide the crew with two short-cuts and a fuel-saving altitude increase while in flight, there was no guarantee, at the time of takeoff, that they would be obtained.

I therefore find, as a matter of fact, that, on November 3, 2004, Delta Flight 1966 did not take off with enough fuel to fly to the airport to which it was dispatched, which was LGA, and to thereafter fly for 45 minutes at normal cruising fuel consumption. As pilot-in-command, [applicant] was clearly responsible for this. . . . In view of that determination, I further find that [applicant] violated FAR § 121.639.

As to the applicability of FAR § 91.13(a), I noted that the Board has long held that a finding of a violation of an operational FAR provision (such as § 121.639) is sufficient, without more, to support a derivative or residual finding of carelessness under § 91.13(a)

(and former § 91.9, which was the forerunner of § 91.13(a) prior to a recodification of the FARs in 1990), and reiterated my finding that applicant must, thus, also be found to have violated § 91.13(a).

II.

On appeal from my DOR by applicant, First Officer Shewbart and the Administrator (as to sanction), the full Board, in NTSB Order EA-5411, reversed my findings that applicant had violated FAR §§ 121.639 and 91.13(a). The Board, in that decision, related that, upon conducting a *de novo* review of the record, it determined that the Administrator did not meet the burden of proof necessary to establish such violations. In so doing, the Board's analysis centered on "whether [the amount of] fuel on board the aircraft at takeoff met the requirements of the Federal Aviation Regulations." NTSB Order EA-5411 at 15. The Board, in finding that Flight 1966 did not fail to meet those requirements, reasoned (*id.* at 15-22 (emphasis original, footnotes omitted)):

The Administrator has essentially presented and argued his case alleging that [FAR] § 121.639, in addition to its plain language, requires some additional component in the minimum fuel for takeoff. In this instance, that component is that part of Delta's fuel flight planning allocation called planned contingency fuel. The Administrator argues that this additional component is mandated by § 121.647,^[12] which states that certain factors shall be "considered" in the fuel planning under the governing regulations. Not well explained in the initial allegation or in the briefs accompanying this case is how [FAR] § 121.639, even when modified by § 121.647, requires a particular amount of contingency fuel that is in addition or additive to the fuel required under the express language of § 121.639. The plain language of § 121.639 requires airmen to ensure that their aircraft has sufficient fuel to fly to the airport to which it is dispatched, to fly to an alternative airport (if one is required), and to fly for 45 minutes at normal cruising fuel consumption. Under § 121.647, operators in computing their fuel requirements are also directed to "consider" factors such as anticipated traffic delays.

Although not clearly articulated by the Administrator, we have examined the regulatory basis for the apparent assertion that PCF [(planned contingency fuel)] forms a component of the minimum fuel for takeoff defined under § 121.639 that is not subject to adjustment by pilots. In this regard, although the Administrator did not expressly charge a violation of 14 C.F.R. § 121.647, we have considered whether § 121.647 would require the specific increase in minimum fuel for takeoff under § 121.639 as the Administrator has apparently sought to require here.

¹² See n. 9 at p. 6, *supra*.

In this case, we note the definition of planned contingency fuel provided in the Flight Planning and Releasing section of the Delta Flight Control Operations Manual. Exh. A-15 at 2. That definition provides that PCF is for "known airborne contingencies" and gives the following examples: "[w]eather deviations due to enroute thunderstorms," and "[a]nticipated ATC delays and reroute." *Id.* The definition also instructs, "[d]uring situations when takeoff delays are excessive or unanticipated, a portion of this fuel may be allocated for taxi fuel to eliminate a gate return for additional fuel," implying that at least someone has the authority to allocate PCF to taxi fuel and to reduce the minimum amount required for takeoff. *Id.* During the hearing and in their briefs, the parties debated the meaning of the following sentence in the definition: "This fuel cannot be used prior to takeoff unless the captain has the concurrence of the dispatcher." *Id.* This provision, however, appears to go to internal Delta operating practices, not whether pilots or dispatchers must reserve the entire PCF amount for minimum takeoff fuel computations.

We thus find it noteworthy that the Delta Flight Operations Manual that the Administrator quoted and ostensibly approved would have allowed Delta Dispatch to adjust the PCF prior to the aircraft taking off, or that the pilots could have adjusted the PCF with "the concurrence" of Dispatch, or that the pilots could have accepted an ATC reroute immediately after taking off that left less fuel for traffic delays at the destination. Regardless, in litigating the case, there was insufficient effort given to identifying what specific portion of Delta's PCF was devoted to addressing the requirements of § 121.647, and whether such a specific required amount remained on the aircraft at the time respondents [(as applicant and First Officer Shewbart were referred to in the underlying air safety enforcement proceeding)] elected to take off on the flight at issue. Without such proof, we are unable to conclude that the entire PCF as originally computed must have been available to respondents at takeoff.

Assuming, *arguendo*, that § 121.647 modifies the language of § 121.639, and that the Administrator fairly placed respondents on notice of this theory in the manner in which he alleged the subject violations, the Administrator still has not established what amount of fuel, if any, in addition to the fuel that § 121.639 expressly requires, is necessary to accommodate the potential needs that § 121.647 contemplates, or how respondents should have computed this amount of fuel.

Moreover, were we to accept without proof or argument that § 121.647 required some additional specific amount be added to minimum fuel required for takeoff, there is no evidence that this specific amount of fuel was not indeed available here. Under the revised computations for the rerouted flight, substantially less PCF existed than was allocated for the original route. On the other hand, the Administrator provided no evidence or argument indicating that all of the initially computed PCF was no longer available

for the accepted route of flight at takeoff. Stated obversely, there appears to have been some quantity of fuel on the aircraft at take-off in excess of the quantity that § 121.639 expressly requires, and the Administrator has presented no evidence that this quantity was insufficient to satisfy any amount that § 121.647 might require. The Administrator thus cannot enforce an interpretation of § 121.639, in conjunction with § 121.647, that would require an amorphous and arbitrary amount above that existing within Delta's PCF remaining at the time of the instant takeoff.

We are mindful of the fact that Congress has directed the Board to defer to the Administrator's interpretation of FAA regulations. 49 U.S.C. § 44709(d)(3) This direction, however, is not without limitation: section 44709(d)(3) provides that the Board "is bound by all validly adopted interpretations of laws and regulations the Administrator carries out . . . unless the Board finds an interpretation is arbitrary, capricious, or otherwise not according to law." Here, the Administrator asks the Board to defer to his interpretation of 14 C.F.R. § 121.639, in which the Administrator asserts that § 121.639 requires airmen to include a certain amount of fuel, in this instance the entire amount of Delta's original PCF computation, in the minimum fuel for take-off category. Such an interpretation appears to be, at best, inconsistent with the plain language of the regulation and thus not according to law, and, at worst, to be arbitrary and capricious.

The Board has expended considerable energy in deliberating this case, and recognizes that some evidence appears, on the surface, to support the Administrator's position. For example, we recognize that some circumstantial evidence in the record before us indicates that respondents took off without sufficient fuel to conduct the flight in a manner consistent with the operating certificate that the FAA granted Delta Airlines, and apparently not consistent with respondents' own training and self-defined personal margin for safety. Such evidence in the record before us includes facts highlighting the following circumstances: 7 minutes after taking off, respondents began requesting shortcuts from ATC after admitting they were "light" on fuel; the dispatcher's fuel calculations indicated that respondents did not have enough fuel to be consistent with Delta's standard practices and PCF requirements; the dispatcher therefore immediately sent messages to respondents and began coordinating with ATC to attempt to re-direct respondents to a shorter route; and respondents ultimately declared a fuel emergency after ATC attempted to re-sequence them at their destination airport on their first attempted approach. However, we are confined in our analysis to whether the Administrator has met his burden on the allegations that he presented to us.

In summary, the Board concludes that the Administrator has not met his burden of proof in pursuing a violation of § 121.639,

as he specifically alleged in the initial complaint. The Administrator did not provide sufficient evidence indicating that at takeoff respondents' aircraft did not contain sufficient fuel to fly to the airport to which it was dispatched, to fly to an alternative airport (in this instance not required by the conditions), *and* to fly for 45 minutes at normal cruising fuel consumption, as § 121.639 requires, even incorporating factors from § 121.647 such as anticipated delays that "shall be considered" in computing minimum fuel for takeoff. The Administrator failed to prove that the entire original PCF at issue in this case as defined by Delta was a required component of the minimum fuel for takeoff governing the flight at issue. In brief, the Administrator failed to prove the elements of the charge under a reasonable interpretation of §§ 121.639 and 121.647. Through proper rulemaking, he may one day amend this regulatory provision to require a greater margin of safety and more specificity in fuel reserves, but until then, he is bound by the language of the rule he promulgated and the rule now before us.

Subsequently, in denying the Administrator's request for reconsideration of that decision, the Board noted that it had determined in NTSB Order EA-5411 "that the Administrator impermissibly attempted to read additional requirements into § 121.639 when he in essence alleged that the regulations did not permit respondents' utilization of any of the planned contingency fuel . . . categorization of fuel in the original fuel computations for the extended route," and "could not read into § 121.639 a requirement that pilots have at takeoff the full amount of planned contingency fuel computed under Delta policies." NTSB Order EA-5425 at 2. The Board related that "the Administrator has neither shown that Delta's entire PCF amount is required by any particular regulation, nor charged or proved that Delta's operating certificate somehow requires the amounts that Delta's flight planning computer calculates. In essence, the Administrator does not ask us to consider any new matter, but instead attempts to reargue the case-in-chief. Such arguments are generally not cognizable in the context of a petition for reconsideration. See 49 C.F.R. § 821.50(d) [(Rule 50(d) of the Board's Rules of Practice in Air Safety Proceedings)]. Overall, nothing in the Administrator's petition leads us to reverse our decision below." NTSB Order EA-5425 at 4.

III.

Under the EAJA, "[a]n agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award [of such fees and expenses] unjust." 5 U.S.C. § 504(a)(1).

Here, it is unquestioned that applicant was a prevailing party in the underlying proceeding. Thus, the central question with which I am presented in evaluating his EAJA

application is whether the Administrator was substantially justified in pursuing a certificate action against him in the underlying air safety enforcement proceeding. On this issue, the Board has opined that the question of whether the Administrator had substantial justification for prosecuting a certificate action against an airman "is a considerably different question from [that of] whether he met his burden of proof" in the underlying proceeding sufficiently to warrant affirmation of the certificate action. *Application of Grant*, NTSB Order EA-3919 at 4 (1993).

The issue with which this judge and the full Board were presented in the underlying proceeding was whether the crew of Flight 1966 failed to comply with the fuel supply requirements of FAR § 121.639 when it accepted and took off from DCA for LGA on the new, longer route it accepted from ATC just prior to takeoff. The Administrator posited that the flight was impermissibly light on fuel at takeoff because, after the crew and Delta Dispatch arrived at the minimum takeoff fuel amount for the flight based on the original route assigned by ATC, applicant impermissibly took fuel from PCF to make up for the 850-to-1,600 pounds of extra takeoff fuel needed to fly that longer route. In support of that position, the Administrator relied on language found in the fuel planning section of Delta's FAA-approved Flight Control Operations Manual relating to PCF, which specifically stated that PCF is computed by Dispatch to allow for known airborne contingencies, is included in minimum fuel for takeoff and cannot be used prior to takeoff unless the captain has the concurrence of the dispatcher to do so. Given that the original dispatch release set the flight's minimum fuel for takeoff at 10,170 pounds; that the new, longer route required at least 850 additional pounds of fuel, thus increasing minimum takeoff fuel for that route to at least 11,020 pounds; and that the aircraft had 10,500 pounds of fuel on board at the time of takeoff, that analysis certainly appears to have been plausible.

At the time the underlying air safety enforcement action was initiated, and throughout the entire time it was adjudicated, there were no prior cases in which the Board considered the issue of whether the provisions of a carrier's operations manual, or other similar FAA-approved company document, relating to fuel requirements and the use of various categories of fuel could fairly be read into an evaluation of a flight's compliance with FAR § 121.639, in conjunction with the provisions of FAR § 121.647 or otherwise. In *Administrator v. Miller*, NTSB Order EA-3581 (1992), which was also a case of first impression, the Board noted that "the Administrator was, in effect, offering an interpretation of [FAR] sections that encompassed [the] respondent's behavior. While the evolutionary interpretation of rules is thought to be better accomplished through the rulemaking process itself, there is little question that the adjudicatory process may also be used to develop and define the meaning of existing regulations. . . . The question which the Board must answer is whether the interpretation now sought by the Administrator is sensible and in conformance with the purpose and wording of the regulation." NTSB Order EA-3581 at 4-5, citing *Martin v. Occupational Safety and Health Review Commission*, 499 U.S. 144, 111 S.Ct. 1171 (1991).¹³ See also *Administrator v. Gould*, NTSB Order EA-5085 at 5 (2004).

¹³ In the *Martin* case, the Supreme Court recognized that, within agencies like the FAA, which both promulgate and enforce regulations, use of the adjudication process is an appropriate form of rulemaking. See 111 S.Ct. 1176-78.

Here, in addition to the manual provisions themselves and Dispatcher Caisse's testimony that Delta's manual requirement to have full PCF on board applies "at the commencement of the takeoff event, which means the application of the throttles for purposes of taking off," and that, only "[o]nce [the flight i]s in the air [is] that fuel . . . there to take," there was further evidence that could reasonably support the position that applicant took off on the new, longer route with insufficient fuel to comply with the requirements of § 121.639, including both that, after Dispatcher Caisse entered the new route information into Delta's FPC, it responded that the flight had insufficient fuel, and that applicant indicated that he would not have taken off without first attempting to resolve the discrepancy between such FPC analysis and his own onboard FMS calculations had he received Dispatcher Caisse's ACARS messages prior to takeoff. In addition, the Board itself recognized that both the FPC calculations and applicant's request for a shortcut just seven minutes after takeoff, on the basis that the flight was going to be "real tight on fuel," constituted circumstantial evidence that the flight did not have sufficient fuel to comply with § 121.639 at takeoff. In view of such factors, as well as the flight's apparent inability, after being allotted two shortcuts and a fuel-saving altitude increase, to accept a heading change away from LGA on its *initial* approach to that airport for fuel-related reasons and applicant's consequent declaration of a fuel emergency,¹⁴ I believe that there were ample facts to justify the Administrator's pursuit of a certificate action in the underlying proceeding. I am also of the opinion that the Administrator's interpretation of FAR § 121.639 was sufficiently plausible to provide a legal basis for that action in light of those facts, and that the Administrator was, thus, substantially justified in pursuing that action, especially given the complete lack of prior guidance by the Board as to the correctness of such a regulatory interpretation. I do not believe that the Administrator could reasonably foresee the Board's view of § 121.639 as the only viable interpretation of that regulation under the attendant facts, and my own determination in the DOR affirming the Administrator's certificate action is testament to this.

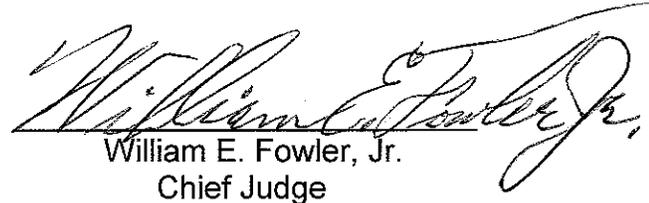
Because I thus find the Administrator's pursuit of an air safety enforcement action against applicant in the underlying proceeding to have been substantially justified in both fact and law, I will deny his EAJA claim here.¹⁵

¹⁴ In this judge's mind, such action would seem to have raised a reasonable question as to whether Flight 1966 had on board at the time of its takeoff on the new route sufficient fuel to fly from DCA to LGA on that route *and thereafter to fly for 45 minutes at normal cruising fuel consumption.*

¹⁵ Applicant should know that, had I found a lack of substantial justification on the part of the Administrator in pursuing a certificate action against him in the underlying matter, information contained in his application as amended, as to fees and expenses, provided an insufficient basis upon which to formulate an award. Counsel for applicant, in the reply to the Administrator's answer to the application, responded to an objection lodged by the Administrator as to the adequacy of that information by stating (at 3-4) that the application "contained in Exhibit 'B' a breakdown showing both the 'Normal' and 'EAJA' [maximum] hourly rates," and that "the monetary amounts listed on the detailed Customer Activity, divided by the 'Normal' hourly rate will produce the amount of hours, or fractions of an hour, spent on each task. Further, 49 CFR § 826.23 [(EAJA Rule 23)] provides that 'the administrative law judge may require the applicant to provide vouchers, receipts or other substantiation for any expenses claimed.'"

THEREFORE, IT IS ORDERED that the application in this proceeding for attorney fees and expenses under the EAJA is hereby DENIED.

Entered this 24th day of April, 2009, at Washington, D.C.



William E. Fowler, Jr.
Chief Judge

I have observed that there are over 300 items listed in the billing statement designated by applicant's counsel as Ex. B to the application, the vast majority of which represent services provided by him and his paralegal, and I consider it presumptuous for him to think that either this judge or the Board should have to take it upon ourselves to painstakingly locate each separate work item on the statement and divide the charge for each by his or his paralegal's normal hourly rate (as applicable) in order to decipher the number of hours spent on each separate item in arriving at a determination of what fees and expenses applicant would be entitled to, were his claim found to be meritorious. Moreover, EAJA Rule 23 specifically requires "[a] separate itemized statement . . . for each professional firm or individual whose services are covered by the application *showing the hours spent in connection with the proceeding* by each individual, a description of the specific services performed, [and] the rate at which each fee has been computed" (emphasis added). While the portion of EAJA Rule 23 quoted by applicant's counsel permits the judge to request vouchers, receipts, etc., this is for the purpose of *substantiation of expenses* claimed by an applicant. There is nothing in that rule which abrogates an applicant's responsibility to specifically enumerate the hours devoted to *services* for which fees are claimed, or which, in the event the application contains insufficient information pertaining thereto, shifts to the judge the responsibility for garnering such information.

In addition, the billing statement includes charges for services rendered and expenses sustained between February 1, 2005 and August 12, 2005, although the original complaint in the underlying air safety enforcement proceeding was not filed until August 19, 2005. However, none of those fees and expenses would have been recoverable here, as the Board has previously held that any fees and expenses that are incurred prior to the filing of the complaint by the Administrator in the underlying matter may not be awarded under the EAJA because "the adversary adjudication does not begin until the filing of the complaint." *Application of Granda*, NTSB Order EA-4675 at 2 (1998). See also *Application of Petersen*, NTSB Order EA-4490 (1996).