

SERVED: January 27, 2010

NTSB Order No. EA-5504

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 26th day of January, 2010

_____)	
APPLICATION OF)	
)	
CHRISTOPHER W. KLABER)	
)	Docket 341-EAJA-SE-18351
)	
For an award of attorney)	
fees and expenses under the)	
Equal Access to Justice Act)	
)	
_____)	

OPINION AND ORDER

Applicant has appealed from the August 3, 2009 Equal Access to Justice Act (EAJA)¹ written initial decision and order of Administrative Law Judge William R. Mullins.² The law judge

¹ See 5 U.S.C. § 504; see also 49 C.F.R. pt. 826. Applicant seeks fees in the amount of \$9,619.20, and expenses in the amount of \$1,185.53. EAJA Application at 4 and at Exh. B.

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

denied the EAJA application. Applicant argues that the Administrator's complaint was not substantially justified, and that awarding attorney's fees and associated expenses is, consequently, appropriate. We grant applicant's appeal.

The Administrator issued an order suspending applicant's commercial pilot and certified flight instructor (CFI) certificates for a period of 120 days, based on two alleged violations of 14 C.F.R. § 91.13(a).³ The order alleged that applicant acted carelessly on two occasions on February 17, 2008,⁴ when he provided flight instruction to a student pilot at night in a Piper Seminole model PA-44, a twin-engine aircraft, and the operation terminated in an accident at the St. Louis Downtown Airport in Cahokia, Illinois. Specifically, the order stated that applicant directed the student to initiate a final practice single engine instrument approach at the airport, and, after transitioning to a visual approach, that the student pilot lined the aircraft up with the left edge of the runway, then made a banking turn approximately 20 to 30 feet above the ground, which caused applicant to take control of the aircraft. The order alleged that applicant attempted to execute a go-

³ Section 91.13(a) prohibits operation of an aircraft in a careless or reckless manner, so as to endanger another.

⁴ At the hearing, the Administrator's counsel amended the order to state that the conduct at issue occurred on February 7, 2008, rather than February 17.

around, but applied full power to only one of the aircraft's engines, which caused applicant to lose control of the aircraft and impact the ground, resulting in substantial damage to the aircraft. The order concluded that applicant erred by not taking control of the aircraft earlier in the landing process, and by failing to apply full power to both of the aircraft's powerplants. The order also alleged that the fact that applicant, as a CFI, holds a commercial pilot certificate aggravated the circumstances surrounding his alleged careless operation of the aircraft, because such certificate holders are held to a high standard of safety.

Applicant appealed the order, and the law judge issued an oral initial decision, in which he determined that the Administrator did not prove that applicant had acted carelessly or recklessly. In particular, the law judge stated that the evidence showed that the left engine was not producing power, and that this lack of power created an emergency, thereby absolving applicant of responsibility for the accident. With regard to the allegation that applicant should have taken the controls from the student pilot⁵ earlier in the flight, the law judge concluded that the Administrator did not show that

⁵ Testimony at the hearing established that the student pilot had a private pilot's certificate with a multiengine rating, and was engaged in the flight at issue as part of a Commercial Multiengine Initial Rating course at St. Louis University. Tr. at 86-88.

applicant had erred. The law judge cited Administrator v. Strobel, NTSB Order No. EA-4384 (1995), for the viewpoint that the Board is generally reluctant to second-guess flight instructors unless "something very unusual" occurs. Initial Decision at 225.⁶ The Administrator did not appeal the law judge's decision.

Applicant subsequently filed an application for fees and expenses under the EAJA, in which he asserted that the Administrator was not substantially justified in pursuing the case against applicant after the February 7, 2008 accident. The law judge denied the application, on the basis that our holding in Strobel "does not rule out any responsibility on the part of the flight instructor," and that, in some cases, the Administrator must pursue a case against a respondent. Initial Decision and Order at 6. The law judge implied that actions or the inaction of applicant had initially created the emergency situation, and that, therefore, the Administrator was substantially justified in taking action against applicant's certificate.

Applicant now appeals the law judge's denial of his application. Applicant argues that the law judge erred because

⁶ In Strobel, we stated, "[a]lthough flight instructors are expected to 'do all things possible for the safety of the flight,' they are not held strictly liable for its safe outcome." Id. at 7 (quoting Administrator v. Hamre, 3 NTSB 28, 31 (1977)).

the Administrator's case against applicant was neither reasonable in fact nor reasonable in law, and that the case was weak and tenuous from the outset. Applicant urges us to grant his application for fees and expenses under the EAJA. The Administrator contests applicant's arguments, and urges us to affirm the law judge's initial decision and order.⁷

We note that we will not award attorney's fees and other costs if the government is shown to have been substantially justified in pursuing its complaint.⁸ The Supreme Court defines "substantially justified" as meaning that the government must show that its position is reasonable in fact and law.⁹ Such a determination of reasonableness involves an initial assessment of whether sufficient, reliable evidence exists to pursue the matter.¹⁰

⁷ We note that the Administrator does not challenge applicant's calculation of fees and expenses, nor does he dispute that applicant meets the general eligibility requirements of 49 C.F.R. part 826. The Administrator's reply brief only asserts that the Administrator was substantially justified in pursuing the case against applicant, thereby precluding an award.

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. Id. at 1087.

We also acknowledge that we have long held that an award of fees under the EAJA is inappropriate when credibility is a primary component of a law judge's decision based on the factual record. Specifically, we have stated, "[w]hen key factual issues hinge on witness credibility, the Administrator is substantially justified – absent some additional dispositive evidence – in proceeding to hearing where credibility judgments can be made."¹² In general, when a dispositive factual issue

¹¹ U.S. Jet, supra note 7, at 1 (citing Administrator v. Pando, NTSB Order No. EA-2868 (1989)).

¹² Application of Petersen, NTSB Order No. EA-4490 at 6 (1996); see also Application of Conahan, NTSB Order No. EA-4276 at 7 (1994) (falsification case in which we stated, "[t]he Administrator was not obligated to accept applicant's denial of knowledge of the false entries" in pursuing the case).

rests upon credibility, the Administrator is substantially justified in pursuing the case, as the Administrator cannot predict whether the law judge will discredit any particular witness's testimony, or the testimony of multiple witnesses for the Administrator.¹³

In the case at hand, we recognize that the law judge's decision in the merits phase of this case included a finding that applicant's testimony at the hearing was credible. The law judge also found that additional evidence supported applicant's recollection of his actions that preceded the accident. Initial Decision at 222. In particular, photographs of the aircraft that came into evidence during the merits phase of the case showed the throttle and propeller controls in the forward position, which tends to indicate applicant made an attempt to utilize both engines for the failed go-around. Id. at 224. The law judge correspondingly found that applicant's testimony that he tried in vain to use both powerplants as he executed the go-around was credible.¹⁴ The law judge noted that the student pilot did not appear at the hearing to testify, in spite of the

¹³ See, e.g., Application of Martin, NTSB Order No. EA-4280 at 7-8 (1994).

¹⁴ We note that the Administrator did not provide evidence to show that applicant did anything to cause the left engine's stalling, but only argued that applicant's hand may have slipped on the controls.

fact that both parties had issued subpoenas to compel his appearance. The lack of evidence refuting applicant's version of events, combined with the law judge's assessment that applicant's testimony was credible, influenced the law judge's finding that applicant did not act in a careless or reckless manner.

Despite the law judge's credibility determination in which he found applicant's testimony credible, we nevertheless find that the Administrator was not substantially justified in pursuing this case. Specifically, we conclude that the law judge's credibility determination was not necessary to resolve the case below, because the Administrator produced no evidence that directly established that applicant should have taken control of the aircraft earlier, nor did the Administrator provide clear evidence to show that applicant failed to apply power to both engines when he initiated the go-around. In short, the law judge's decision did not hinge on this credibility determination.

First, the Administrator provided no direct evidence to show that applicant erred by failing to assume control of the aircraft earlier, whether or not the student pilot abruptly banked the aircraft as applicant testified. The Administrator therefore provided no evidence to indicate that applicant placed the aircraft in a situation in which a mishap was inevitable, or

where the flight was subject to obvious danger. Instead, the Administrator appears to argue that the accident speaks for itself, and expressly in the complaint, that applicant should have anticipated Mr. Johnson's abrupt maneuver, because Mr. Johnson had not properly positioned the aircraft over the runway in preparation for landing. We have carefully reviewed the record for this case, however, and have not found any evidence to indicate that applicant should have expected the student pilot in the aircraft with him to maneuver the aircraft in an abrupt manner.¹⁵ The record indicates that Mr. Johnson was not a beginning pilot undergoing training, but a licensed, multiengine pilot seeking to upgrade his qualifications and skills. The Administrator's contention that applicant should have taken control of the aircraft before the aircraft was in jeopardy, or before any abrupt maneuver, thus appears to have been based solely on the conjecture and second-guessing of non-percipient witnesses.

With regard to the yawing of the aircraft and the consequent accident, the Administrator also offered no evidence, other than opinion testimony from witnesses, in an attempt to

¹⁵ We have previously stated that, "[a] flight instructor's function is to teach. If he permits a flight to be placed in a situation where a mishap is inevitable, or even where the flight is subjected to potential danger, he has, in our opinion, exhibited carelessness." Administrator v. Hamre, 3 NTSB 28, 31 (1977).

show that applicant did not apply full power to both engines when attempting the go-around. As the law judge stated, photographs of the aircraft shortly after the accident showed both throttles in the full power position and both propeller controls in the full forward position, appearing to corroborate applicant's testimony that he attempted to apply full power to both engines.¹⁶ Exhs. R-1(C), R-1(D), and R-1(E). The Administrator ostensibly concluded that applicant acted carelessly or recklessly because applicant speculated shortly after the accident that his hand may have slipped when he was trying to apply power to the left engine. However, at the hearing, applicant testified, consistent with his earlier correspondence with the Administrator, that this statement he made following the accident about his hand slipping was the result of his brainstorming regarding what may have happened,

¹⁶ We also note that Lawrence Wiggins, a pilot who holds a multiengine instructor's certificate, testified at the hearing that he had operated the aircraft earlier the day of the accident, and noticed that the left engine noticeably lagged behind the right engine in terms of power. Tr. at 158-60. Mr. Wiggins, however, did not inform applicant of the issue. In addition, Eric Heightman, the maintenance manager of the Flight Department at St. Louis University, Parks College, stated that he observed the aircraft after the accident, and that the right engine propeller looked as though it impacted the ground at a high RPM (revolutions per minute), while the left engine propeller "looked like it was running at idle." Tr. at 197. Mr. Heightman opined, however, that no engine failure occurred in this case, because he verified that "both mag needles produced a spark," and he checked the spark plugs and verified that the engine had been properly functioning, although he did not tear it down. Tr. at 195-97.

not an admission. The law judge found this explanation credible, but even had he not, and instead concluded that applicant's hand possibly did slip, we do not believe this would have risen to the level of careless flight under the circumstances.

We recognize that counsel for the Administrator may have anticipated adducing substantial relevant evidence in support of the complaint via the direct testimony of the student pilot who failed to appear at the hearing on the merits. However, the record contains no indication that the student pilot had ever indicated his intent to appear, or counsel's attempt to ensure the availability of this essential evidence via signed sworn statements or deposition, or even that the student would have testified that applicant failed to advance the left engine throttle. In short, without assurance key evidence was available that would tend to show undue delay by applicant to intervene or mismanagement of the throttles during the attempted go-around, the Administrator was left with a case built on the speculation of non-percipient witnesses. To proceed with such a lack of evidence appears to the Board to indicate a lack of substantial justification.

In summary, although the law judge made a credibility finding in favor of applicant, we note that we do not consider this finding to be dispositive of the issue of whether the

Administrator was substantially justified in pursuing this matter. Even if the law judge had not completely credited applicant's recollection of the events of the accident flight, the Administrator failed to produce evidence to show that applicant acted in a careless or reckless manner in not assuming control of the aircraft earlier in the flight, nor did the Administrator offer any direct evidence to prove that applicant failed to advance the left engine throttle in a timely manner. The Administrator's evidence for this case consisted of witness speculation that applicant should have taken control of the aircraft sooner, and that the engine showed no signs of a malfunction. Such a lack of direct evidence to show that applicant either caused the emergency or took clearly inappropriate action in responding to it leads us to conclude that the Administrator's case was not reasonable in fact.

ACCORDINGLY, IT IS ORDERED THAT:

1. Applicant's appeal is granted;
2. The law judge's decision denying fees is reversed; and
3. The Administrator shall provide fees in the amount of \$9,619.20 and expenses in the amount of \$1,185.53 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.

SERVED AUGUST 3, 2009

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

APPLICATION OF

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CHRISTOPHER W. KLABER

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**Docket No. 341-EAJA-SE-18351
JUDGE MULLINS**

For an award of attorney and
Expert consultant fees and
Related expenses under the
Equal Access to Justice Act (EAJA)

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INITIAL DECISION AND ORDER

SERVICE: BY FAX & REGULAR MAIL

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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 April 27, 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 August 19, 2008, the Administrator filed an Order of Suspension as a Complaint in this matter setting forth the following allegation:

1. At all times mentioned herein you were the holder of Airman Certificate No. 3175388 with commercial pilot privileges. You were also the holder of a flight instructor (CFI) with the same number.
2. On or about February 17, 2008, you acted as pilot-in-command of Civil Aircraft N554CP, a double engine Piper Seminole Model PA-44, the property of another, on a flight that terminated in an accident at the St. Louis Downtown Airport (KCPS) in Cahokia, IL.
3. Incident to the above operation:
 - a. You were giving flight instruction to a student pilot in N554PC at night.
 - b. During the flight instruction you had your student initiate a final practice single engine ILS instrument approach to Runway 30L.
 - c. When your student arrived at the minimum descent altitude (MDA) for runway 30L, ATC instructed your student to circle south of runway 30L and cleared him for a full stop landing on Runway 12R.
 - d. While N554PC was reaching the threshold of Runway 12R with one engine simulated inoperative, the landing gear fully extended, and full flaps extended, it was lined up with the left edge of the runway.
 - e. After your student made a slight right banking turn you took the flight controls from your student at approximately 20 to 30 feet above ground level.
 - f. When you took the control from your student you ceased giving instruction to your student and your student ceased exercising control of N554PC.
 - g. After taking over control of N554PC you attempted to execute a go-around.
 - h. In the process of attempting to execute a go-around you applied full power to only one of N554PC's two engines.
 - i. When you applied full power to only one of the two powerplants, you lost control of N554pc's two engines.

- j. After you lost control of N554PC, the aircraft banked to the left and impacted the ground resulting in substantial damage to the aircraft's nose, left and right wing, underside of fuselage and empennage, landing gear and propeller.
4. Your operation of N554PC, as noted above, constituted a series of careless acts on your part:
 - a. You endangered the life of your student and others on the ground, as well as the property of another, by failing to take over control of N554PC earlier in the landing process when the aircraft was aligned with the left edge of the runway at night flying with only one engine and configured as noted above.
 - b. You endangered the life of your student and others on the ground, and caused actual damage to the property of another by failing to apply full power to both powerplants after taking control of the aircraft, thereby resulting in your loss of control of the aircraft.
5. The noted careless operation is aggravated by the fact that you are the holder of a commercial pilot certificate and are held to a high standard in the aviation industry—you have the training, knowledge, and experience to ensure that such a careless operation does not occur.
6. The above careless operation is also aggravated by the fact that as the holder of a commercial pilot certificate, you are capable of understanding and appreciating the detrimental impact to safety in air commerce caused by a pilot who fails to maintain control of an aircraft while there is a student on board.
7. By reason of the foregoing facts and circumstances, on two (2) separate occasions you violated § 91.13(a) of the Federal Aviation Regulations (FARs), which states in relevant part that no person may operate an aircraft in a careless manner so as to endanger the life or property of another.

On February 25, 2009, this matter was heard before the undersigned and a ruling was made in favor of the Applicant on both counts of the alleged violations of FAR 91.13(a) (Paragraphs 4 a. and b.) above. On February 27, 2009, the Administrator filed his Appeal of the Decision of the undersigned, and on April 1, 2009, the Administrator withdrew the Appeal of that Decision.

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 February 25, 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 denied.

A determination of an Award of Attorney Fees under the EAJA requires the Judge to review the evidence presented at trial to determine the issue of substantial justification. Here, the Administrator's Counsel, seeks to add to or enlarge the evidence with his personal affidavit submitted with Administrator's response to the Application. That submission is inappropriate and has not been considered in this Opinion.

In this matter there were two allegations of regulatory violation of FAR 91.13(a). The first related to the Applicant's conduct in allowing his student pilot to continue an approach when that student pilot was not properly aligned with the runway. The second was when Applicant took control of the aircraft and was unable to successfully initiate a "go around" which resulted in the crash of the aircraft.

Applicant, in his closing argument, correctly argued the Board's decision in Strobel (Hinson v. Strobel, EA-4384, August 1, 1995).

That case was similar to the instant case and involved a situation where the student pilot, while executing a "touch and go" maneuver, attempted to stop the aircraft when there was not sufficient runway remaining, resulting in the aircraft traveling beyond the end of the runway, through a fence, and into a cornfield. In the instant case, the student pilot was making a single engine approach in a twin engine aircraft and not aligned with the center line of the runway, and at a point when the aircraft was over the approach end of the airport, the student pilot banked the aircraft 10 to 15 degrees, apparently to correct the misalignment, creating an emergency situation, and Applicant took control of

the Aircraft and when he applied power to both engines, one engine did not respond, resulting in the accident.

In Strobel, the Board found for Respondent (Instructor Pilot), stating that “Despite Respondent’s status as flight instructor and pilot-in-command, we will not impose strict liability on him for all his student’s mistakes.” (Id. at page 7) By that ruling, the Board does not rule out any responsibility on the part of the flight instructor and given the facts of both those cases, it appears that the Administrator must review, and in some cases, like here, would be substantially justified in bringing the action against the Pilot.

It would follow then that if the Administrator would be substantially justified in the first allegation of a violation of FAR 91.13(a), then the subsequent allegation would be the accident itself, which the undersigned found was the result of an emergency, and on that allegation, the Administrator would also be substantially justified in bringing it because a pilot cannot create his own emergency and expect to not be held accountable.

ORDER

It is therefore Ordered that the reliable and probative evidence establishes that the Administrator was substantially justified in bringing these regulatory violations against the Applicant and, therefore, Applicant’s request for attorney fees and expenses under the EAJA is DENIED.

And it is SO ORDERED.

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

WILLIAM R MULLINS
ADMINISTRATIVE LAW JUDGE