

SERVED: March 4, 2010

NTSB Order No. EA-5510

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 2<sup>nd</sup> day of March, 2010

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APPLICATION OF	)	
	)	
AIR TREK, INC.	)	
	)	
	)	Docket 342-EAJA-SE-18284
For an award of attorney	)	
fees and expenses under the	)	
Equal Access to Justice Act	)	
	)	
	)	
_____	)	

**OPINION AND ORDER**

Applicant and the Administrator both appeal from the Equal Access to Justice Act (EAJA)<sup>1</sup> order of Administrative Law Judge William A. Pope, II, served on August 27, 2009.<sup>2</sup> The law judge granted, in part, the application for fees and expenses.

<sup>1</sup> Title 5 U.S.C. § 504; see also 49 C.F.R. part 826.

<sup>2</sup> A copy of the law judge's order is attached.

Applicant argues that the award was not enough, and presents additional expenses associated with the appeal of the law judge's order. The Administrator argues that the law judge erred in determining that applicant was entitled to attorney's fees and related costs as the prevailing party under the EAJA and that, even if applicant was the prevailing party, the Administrator was substantially justified in pursuing the allegations at each stage of the proceedings.<sup>3</sup> We partially grant applicant's appeal, to include an adjustment regarding the additional fees and expenses pertaining to the appeal of the law judge's order and responding to the Administrator's appeal of the law judge's order; we deny the Administrator's appeal.

On June 10, 2008, the Administrator issued an emergency order revoking applicant's air carrier certificate.<sup>4</sup> The Administrator's order<sup>5</sup> alleged that applicant violated 14 C.F.R.

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<sup>3</sup> The law judge ordered an award of fees and costs in the amount of \$120,169.35. Applicant now requests that we order an award of \$225,259.66, which, despite claiming the additional costs of appealing the law judge's order and responding to the Administrator's appeal, reflects a downward adjustment from a higher amount previously claimed, which was \$309,370.88.

<sup>4</sup> The pleadings and the law judge's orders reflect a more thorough recitation of the facts and procedural events in this case. For the purposes of this decision, we will refer only to pertinent facts and procedural history, and we refer the reader to our opinion and order in the underlying case (Administrator v. Air Trek, Inc., NTSB Order No. EA-5440 (2009)) for further clarification.

<sup>5</sup> At the beginning of the hearing, the order alleged violation of

§§ 91.13(a), 119.59(b)(2), 119.5(g),<sup>6</sup> 91.7(a), 119.69(a), and 135.25(a).<sup>7</sup> Hearing sessions were held from September 16 to September 18, 2008; from October 6 to October 8, 2008; and from October 15 to October 17, 2008. In our underlying opinion and order, served on April 22, 2009, we affirmed the law judge's decision, including his modification of sanction from a revocation to an indefinite suspension. Applicants filed a timely application for attorney's fees and expenses under the EAJA. The Administrator contested the application. The law judge issued his decision on August 27, 2009, granting a portion of the request for fees and expenses.

The EAJA permits an award of certain attorney's fees and other specified costs that a qualified<sup>8</sup> prevailing party incurs,

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(..continued)

14 provisions of the Federal Aviation Regulations (FARs). As we stated in our decision on the merits (see Air Trek, supra), the Administrator almost immediately encountered difficulties in presenting the case against applicant, and withdrew 8 of the 14 allegations, leaving 6 regulatory violations upon which the law judge rendered a decision.

<sup>6</sup> The law judge affirmed the Administrator's order regarding these first 3 alleged regulatory violations.

<sup>7</sup> The law judge did not affirm these last 3 remaining regulatory violations, and dismissed them.

<sup>8</sup> When a party seeking fees is a corporation, it has standing to pursue fees if its net worth did not exceed \$7,000,000, and it did not employ over 500 employees, at the time of the initiation of the adversary adjudication. 5 U.S.C. § 504(b)(1)(B). Applicant appears to meet these qualifications, and the Administrator does not contest that issue.

unless the government shows that it was substantially justified in pursuing its complaint.<sup>9</sup> The Supreme Court has defined the term "substantially justified" to mean that the government must show that its position is reasonable in fact and law.<sup>10</sup> Such a determination of reasonableness involves an initial assessment of whether sufficient, reliable evidence exists to pursue the matter.<sup>11</sup> The government must also show that the pursuit of the case at each step of the proceedings was reasonable.<sup>12</sup> The issue of whether a party is a "prevailing party" is a separate inquiry from whether the government was substantially justified in pursuing a case.<sup>13</sup>

Prior to reaching the issue of whether the government was substantially justified in pursuing a case, the analysis must look at whether the party seeking fees prevailed in the case below. The law judge found that, "the Applicant is the prevailing party ... as to the portions of the Complaint and

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<sup>9</sup> 5 U.S.C. § 504(a)(1); Application of Smith, NTSB Order No. EA-3648 at 2 (1992).

<sup>10</sup> Pierce v. Underwood, 487 U.S. 552, 565 (1988); see also Application of U.S. Jet, Inc., NTSB Order No. EA-3817 (1993).

<sup>11</sup> Administrator v. Catskill Airways, Inc., 4 NTSB 799, 800 (1983) (Congress intended EAJA awards to dissuade the government from pursuing "weak or tenuous" cases).

<sup>12</sup> See Administrator v. Phillips, 7 NTSB 167, 168 (1990).

<sup>13</sup> Application of Nicolai, NTSB Order No. EA-3951 (1993) (citing Fed. Election Comm'n v. Rose, 806 F.2d 1081 (D.C. Cir. 1986), and Application of Pando, NTSB Order No. EA-2868 (1989)).

alleged regulatory violations that were voluntarily withdrawn at the hearing by the Administrator, the affirmed findings that the Applicant had violated only three of the remaining six alleged regulatory violation, and the affirmed modification of the sanction from revocation to an indefinite suspension, all of which were highly favorable to the Applicant." Order Granting Fees at 8-9.

If the seeking party is determined to have prevailed, at least in some regard, in the case below, the focus then shifts to whether the government was substantially justified in pursuing the case. The law judge found that, "the Administrator was without substantial justification for prosecuting the portion of the Complaint which was withdrawn during the hearing," and that, "it is implicit that the Administrator was simply inadequately prepared to proceed on the allegations that were withdrawn, had not investigated them thoroughly, and lacked the evidence to sustain his burden of proof." Id. at 9. The law judge further found that it was "obvious that the Administrator should not have proceeded to a hearing on allegations of wrongdoing that he was not adequately prepared to prove," and that, "the Administrator did not have a reasonable basis for proceeding on the half of the complaint and alleged regulatory violations [] that he voluntarily dismissed during the first four days of the hearing." Id.

The law judge did find, however, "that the Administrator was substantially justified in prosecuting all six of the remaining regulatory violations ... even though only three were ultimately affirmed by the Board and the sanction was substantially modified...." Id.

The Administrator initially appeals the law judge's order on the basis that applicant is not eligible for expenses because applicant is not a prevailing party. The Administrator argues that the law judge's ruling is contrary to Supreme Court precedent, because Buckhannon Bd. and Care Home, Inc. v. West Virginia Dept. of Health, 532 U.S. 598 (2001), held that a prevailing party is one who received an enforceable judgment on the merits of a case, or who obtained a court-ordered consent decree that resulted in a change in the legal relationship between the parties. The Administrator argues that application of the analysis in Buckhannon indicates that applicant would not be a prevailing party for purposes of the EAJA because the legal relationship between the parties did not change.

Applicant argues that it did prevail below and that the Administrator was not substantially justified in pursuing the allegations that were ultimately withdrawn, and states that it filed several motions for summary judgment and sought negotiations with the Administrator regarding those violations because their prosecution was not substantially justified. In

the alternative, applicant also suggests that further proceedings in this case might be appropriate, pursuant to 49 C.F.R. § 826.36.<sup>14</sup>

We have recently acknowledged that our case law under the EAJA may have needed clarification. We have provided that clarification in Application of Turner and Coonan, NTSB Order No. EA-5467 (2009), and in Application of Rice, NTSB Order No. EA-5474 (2009). The instant case represents another fact scenario, one in which alleged regulatory violations were withdrawn, not in the absence of a hearing, not significantly prior to a hearing, and not in a hearing in which the applicant prevailed in a substantive and discreet portion of the proceedings. In the case before us, the Administrator withdrew, in effect, more than half of the complaint, both as regards the regulatory violations and the factual allegations. The Administrator withdrew the elements of the complaint, not in a manner so as to prevent the unnecessary expenditure of resources by applicant, and not in a manner that would appear to rest in good faith based on the prehearing pleadings and negotiation attempts put forward by applicant, but not until, as reflected by the record in this proceeding, it became painfully clear that the Administrator did not have sufficient evidence to establish

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<sup>14</sup> We conclude that further proceedings are not necessary, particularly in light of our disposition in applicant's favor.

its case as to most of the allegations.

The instant case is also distinguishable from Application of Shaffer, NTSB Order No. EA-5323 (2007), in that, although portions of the complaint were withdrawn during the hearing, the Administrator proceeded to prove that revocation was the appropriate sanction for the remaining charges. Although a reduction or waiver of sanction alone may not result in an award of fees, even though the applicants had received "a tangible benefit" from the outcome of the case (see Application of Swafford, NTSB Order No. EA-4426 at 5 (1996)), we will consider it in the context of the overall justification of the pursuit of the Administrator's chosen sanction. Moreover, in Application of Reinhold, NTSB Order No. EA-4354 at 6-7 (1995), we found that the applicant was not the prevailing party where he withdrew his appeal after the Administrator had issued a new certificate to him because he had obtained a new rating. We note also that the instant case is distinguishable from Application of Barth, NTSB Order No. EA-3833 at 2-3 (1993), where we stated that when the Administrator withdrew the charges after the parties were represented by counsel, had conducted discovery, and held a settlement conference, the parties had not participated in an "adversary adjudication" and the applicant was not entitled to fees as the prevailing party. Here, there was a hearing and there was a decision on the merits.

We find ourselves in basic agreement with the law judge's findings and reasoning in his disposition of the application for fees and expenses. We find that applicant is the prevailing party as to the portions of the complaint and alleged regulatory violations that were voluntarily withdrawn at the hearing by the Administrator, as to the alleged regulatory violations dismissed by the law judge, and as to modification of the sanction. If the seeking party is determined to have prevailed, at least in some regard, in the case below, the focus then shifts to whether the government was substantially justified in pursuing the case. The law judge found that, "the Administrator was without substantial justification for prosecuting the portion of the Complaint which was withdrawn during the hearing." Order Granting Fees at 9. We also find that the Administrator should not have proceeded to a hearing on allegations of wrongdoing that he was not prepared to prove, and that the Administrator did not have a reasonable basis for proceeding on the alleged regulatory violations that he voluntarily dismissed during the hearing.

We also find, however, that the Administrator was substantially justified in prosecuting the 6 regulatory violations that he did not withdraw and in pursuing the sanction of revocation.

Based on the above, we adopt the law judge's method of

calculating the fee award. The law judge disallowed applicant's claim of \$41,938.40 for chartered aircraft expenses in its entirety, finding that it was unsupported, and that it appeared to be "far in excess of what the fares charged for conveyance on commercial flights would have been." Id. The law judge also disallowed attorney's fees and expenses rendered before service of the Administrator's order on June 11, 2008, totaling \$27,184.89. The grand total of the claim disallowed by the law judge was \$69,123.29.<sup>15</sup> We concur with those determinations.

The law judge found that, after deduction of the disallowed fees and expenses, applicant established a maximum potential award of \$240,338.69. Because applicant was not the prevailing party with respect to the entire case, and because the law judge found that the Administrator was substantially justified in pursuing approximately half of the underlying complaint, the law judge determined that reducing the maximum potential award by 50 percent was the most practicable manner of determining an appropriate award, and ordered the Administrator to pay \$120,169.35 to applicant. Adding the claim for replying to the Administrator's appeal of the law judge's order partially granting the application (\$1,821.99), the total amount awarded

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<sup>15</sup> The table in the law judge's order, at page 10, reflects an erroneous total of \$69,141.19. The correct number, and the number actually used to calculate the maximum potential award, is \$69,123.29.

is \$121,991.34.

**ACCORDINGLY, IT IS ORDERED THAT:**

1. The Administrator's appeal is denied;
2. The law judge's decision, granting applicant's EAJA application, in part, is affirmed;
3. Applicant's application for an award of attorney's fees and expenses is partially granted; and
4. The Administrator shall pay attorney's fees in the amount of \$121,991.34 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 27, 2009

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

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Application of

AIR TREK, INC.,

Docket No. 342-EAJA-SE-18284

for an award of fees and expenses  
under the Equal Access to Justice Act.

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**ORDER GRANTING, IN PART, APPLICATION FOR FEES AND  
EXPENSES UNDER THE EQUAL ACCESS TO JUSTICE ACT**

Served: *Brendan A. Kelly, Esq.*  
*Federal Aviation Administration*  
*Eastern Region*  
*1 Aviation Plaza, Room 561*  
*Jamaica, NY 11434*  
*(SERVED BY FAX)*

*Gregory S. Winton, Esq.*  
*Aviation Law Experts, LL.C.*  
*One Research Court, Suite 450*  
*Rockville, MD 20850*  
*(SERVED BY FAX)*

*Daryl H. M. Carr, Esq.*  
*Farr Law Firm*  
*99 Nesbit Street*  
*Punta Gorda, FL 33950*  
*(SERVED BY FAX)*

*Air Trek, Inc.*  
*28000 A5 Airport Road*  
*Punta Gorda, FL 33955*  
*(SERVED BY CERTIFIED AND REGULAR MAIL)*

**William A. Pope, II, Administrative Law Judge:** This is a proceeding brought under the Equal Access to Justice Act ("EAJA"); 5 U.S.C. § 504, and the Board's Rules Implementing the Equal Access to Justice Act ("EAJA Rules"), 49 C.F.R. Part 826. On May 18, 2009, Air Trek, Inc., the Applicant herein, filed an "Application for an Award of Attorney Fees and Other Expenses Pursuant to the Equal Access to Justice Act (EAJA)," seeking an award from the Administrator of the Federal Aviation Administration ("FAA") of \$302,501.03 for fees and expenses incurred<sup>1</sup> in connection with a certificate action in which the Administrator sought to revoke the Applicant's air carrier certificate for certain alleged violations of the Federal Aviation Regulations ("FAR," codified at 14 C.F.R.). Subsequently, in its Reply to the Administrator's Answer to the Application (see below), the Applicant claimed a supplemental amount of

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<sup>1</sup> That amount is broken down into \$213,669.15 for attorneys fees and expenses, and \$83,339.33 in additional litigation fees and expenses, including fees and expenses for expert consultant Richard Peck (\$2,454.89); airfare (\$3,620.48); lodging (\$13,239.62); catering/meals (\$1,429.03); fuel/mileage (\$955.69); rental car/charters (\$42,467.83); parking and tolls (\$161.42); copying (\$2,238.70); court reporting services (\$13,713.02); process servers (\$583.60); Federal Express delivery service (\$804.97); and supplies (\$1,669.99).

\$6,869.85 for the preparation of that document. Consequently, the total amount now sought by the Applicant in the instant EAJA claim is \$309,479.88.

The Administrator's "Answer to Application for Award of Fees and Expenses Under the Equal Access to Justice Act" was filed on June 18, 2009, and the "Applicant's Reply to the Administrator's Answer to Application for Attorney's Fees and Costs Pursuant to the Equal Access to Justice Act (EAJA) and Request for Further Proceedings Pursuant to 49 C.F.R. § 826.38" was filed on July 20, 2009.

The Administrator's Emergency Order of Revocation in the underlying certificate action was issued on June 10, 2008. The Administrator's Complaint in that proceeding (the certificate order reissued for pleading purposes) was filed on June 11, 2008. The Applicant waived a hearing under the Board's rules governing emergency proceedings on July 7, 2008. The hearing took place in Tampa, Florida, on September 16-18 and October 6-8, 2008, and in Miami, Florida, on October 15-17, 2008.

During the hearing, on September 16, 2008, the Administrator withdrew the factual allegations of Paragraphs 18 through 22, and 24(e)(1) through (3) and 26(b) of the Complaint, and his charges that the Applicant had violated FAR §§ 135.185(a) and 135.77. Subsequently during the hearing, on October 6, 2008, the Administrator withdrew the allegations of fact set forth in Counts IV through IX (Paragraphs 18 through 34) of the Complaint in their entirety; the words, "the operation of numerous flights with unqualified members," from Paragraph 36; the factual allegations of Paragraphs 37 and 38; and the charges that the Applicant had violated FAR §§ FAR §§ 135.185, 135.301(b), 135.63(a), 135.77, 39.3, 43.13(a), 135.263(a) and 91.417(a)(2)(v). Remaining in the Complaint after such withdrawals were allegations of violations of FAR §§ 119.69(a), 91.13(a), 91.7(a), 135.25(a), 119.59(b)(2) and 119.5(g).

On October 17, 2008, I rendered an Oral Initial Decision ("OID"), which affirmed the Administrator's FAR §§ 91.13(a), 119.59(b)(2), and 119.5(g) charges, dismissed the charges of violations of §§ 119.69(a), 91.7(a), and 135.25(a), and reduced the certificate revocation imposed by the Administrator to an indefinite suspension. On April 22, 2009, the Board denied an appeal by the Administrator and fully affirmed the OID. *Administrator v. Air Trek, Inc.*, NTSB Order EA-5440. Thus, the Board's final action was affirmance of only the FAR §§ 91.13(a), 119.5(g) and 119.59(b)(2) charges, and modification of the certificate revocation ordered by the Administrator to an indefinite suspension of the Applicant's air carrier certificate.

#### I. The Parties' Positions in This EAJA Proceeding

In its Application, the Applicant contends that it is the prevailing party, and that the positions of the Administrator in the underlying certificate action on which it prevailed, including that it lacked the qualifications to be the holder of an air carrier certificate, were not substantially justified. The Applicant points out that, at the time this action was initiated, it was a Florida corporation engaged in the business of providing long distance air ambulance transportation of medical patients pursuant to 14 C.F.R. Part 135; that this matter was litigated during a nine-day hearing spread over a four-month period of time (July through October 2008); and that its counsel incurred additional expenses in connection with discovery and pre-hearing depositions. The Applicant further notes that it filed numerous motions for summary judgment, and that the Administrator ultimately withdrew the charges associated with those motions, but not until after the hearing had begun.

In his Answer, the Administrator argues that the Applicant is not a prevailing party because the Board's decision in the underlying matter "was not an enforceable judgment on the merits creating a material alteration of the legal relationship between the parties regarding the allegations in the complaint that were withdrawn by the FAA" (citing *Buchannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Services*, 532 U.S. 598, 604 (2001)). The Administrator contends that, in *Buchannon*, the Supreme Court ruled that "a prevailing party is one who received an enforceable judgment on the merits or obtained a court-ordered consent decree, resulting in a change of the legal relationship between the parties." The Administrator states that, while the Board has ruled that it is not necessary for an applicant to be successful on every issue in order to receive fees and expenses under the EAJA, "yet the applicant must show that he or she won a 'significant and discreet substantive portion of the proceeding,'" citing *Application of Swafford and Coleman*, NTSB Order EA-4426 at 6 (1996). With respect to the underlying proceeding here, the Administrator contends that the Board did not provide the Applicant with relief on the merits and it did not change the legal relationship of the parties. The Administrator contends that the issue litigated in this case was not that of sanction because the Applicant was seeking to have the Emergency Order of Revocation reversed *in its entirety*. In view of this, the Administrator argues that the Applicant was not the prevailing party in the underlying proceeding because it "did not win a 'significant and discreet substantive portion of th[at] proceeding.'"

The Administrator further avers in his Answer that he was substantially justified in pursuing a certificate action against the Applicant. He notes that, under the EAJA, attorney fees are not awarded if the agency's position was substantially justified, and argues that, while the Board did not agree that revocation was warranted, it did find the violations serious enough to warrant an indefinite suspension of the Applicant's air carrier certificate, and this, in effect, shows that the Administrator was substantially justified in pursuing a certificate revocation. In his Answer, the Administrator reviews in considerable depth the testimony of various witnesses during the hearing and concludes that the "determination of the appropriate sanction in the case against the Applicant rested much on the credibility determinations made by the ALJ [(Administrative Law Judge)] during the course of the hearing." The Administrator observes (citing NTSB Order EA-5440 at 19) that the Board stated in its decision that "it is clear that the Administrator had legitimate concerns regarding [Applicant]'s operation. However, as the law judge found, based on the documentary evidence and his credibility-based determinations, there is insufficient evidence to support many of the Administrator's allegations". The Administrator argues that, when key factual issues hinge on witness credibility to be assessed by the ALJ, he is substantially justified in pursuing the case, including the violations not found.

Finally the Administrator states in his Answer that, in the event the Application is granted, he "reserves the right" to address the applicability and appropriateness of the fees and expenses requested, which, he submits, are "grossly excessive" by at least 60%,<sup>2</sup> and that there should be no recovery for any fees and expenses incurred prior to issuance of the Emergency Order of Suspension on June 10, 2008.

In its Reply, the Applicant states that, since the Administrator did not place in issue whether it is financially qualified to receive an EAJA award or whether special circumstances

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<sup>2</sup> The Administrator had the opportunity to challenge specific fees and expenses claimed by the Applicant in its Application, and, for reasons best known the Administrator, did not do so in his Answer. The time for further submissions on the question of the appropriateness of specific claimed fees and expenses has passed, and I will accept no additional filings on this issue from the Administrator or the Applicant. I will decide the issue giving due consideration to the Administrator's general assertion that the fees and expenses claimed by the Applicant are excessive by at least 60%.

make an EAJA award unjust, and did not substantively argue that any of the specific fees and expenses claimed in the Application were unreasonable, those arguments have been waived by the Administrator. Therefore, the Applicant posits that the only issues in dispute are whether it was a prevailing party and whether the Administrator was substantially justified in prosecuting the underlying certificate action at each stage of the proceeding.

The Applicant asserts that, as a result of the Administrator's withdrawal at the hearing of most of the factual allegations and regulatory violations charged, it did not have an opportunity to present any evidence or testimony suggestive of an inadequate investigation and/or lack of substantial justification on the part of the Administrator concerning the withdrawn charges. In the Reply, the Applicant maintains that the withdrawn allegations and charges had no reasonable basis in fact, and that the Administrator did not have sufficiently reliable evidence to either initially to prosecute the matter, or to continue pursuit of the charges against it at any succeeding stage of the proceeding. The Applicant contends that the Administrator both failed to conduct a diligent investigation before prosecution and neglected to constantly question at every stage of the underlying action whether proceeding further was justified.

The Applicant describes the results of the underlying matter as follows (edited slightly):

1. Violation of FAR § 119.69(a)	Dismissed by ALJ
2. Violation of FAR § 135.185	Voluntarily Withdrawn
3. Violation of FAR § 135.301(b)	Voluntarily Withdrawn
4. Violation of FAR § 135.63	Voluntarily Withdrawn
5. Violation of FAR § 135.77	Voluntarily Withdrawn
6. Violation of FAR § 39.3	Voluntarily Withdrawn
7. Violation of FAR § 43.13(a)	Voluntarily Withdrawn
8. Violation of FAR § 135.263	Voluntarily Withdrawn
9. Violation of FAR § 91.13(a)	Affirmed — Winchester Operations
10. Violation of FAR § 91.417(a)(2)(v)	Voluntarily Withdrawn
11. Violation of FAR § 91.7(a)	Dismissed by ALJ
12. Violation of FAR § 135.25(a)	Dismissed by ALJ
13. Violation of FAR § 119.59(b)(2)	Affirmed — De Minimis
14. Violation of FAR § 119.5(g)	Affirmed — Winchester Operations

The Applicant contends that, since it was the prevailing party in the action by virtue of the Administrator's withdrawal of most of the charges and a substantially favorable modification by the Board of sanction, it is entitled to an award under the EAJA. In this regard, the Applicant maintains that there was no substantial justification for the Administrator's initiation of the withdrawn charges or his pursuit of a certificate revocation, and that it can recover fees for charges voluntarily withdrawn by the Administrator (citing *Application of Gull*, NTSB Order EA-3521 (1992); *Application of Washington*, NTSB Order EA-5063 (2003); and *Application of Gilfoil*, NTSB Order No. EA-3982 (1993)). The Applicant also argues that the Administrator should have withdrawn his appeal of the OID and, in this vein, includes a quote from the Board's decision stating that the Administrator did not acknowledge in his brief that more than half of the original complaint was dismissed within the first days of the hearing or that the ALJ affirmed only half of the remaining allegations, and for those reasons, the Administrator had not sufficiently demonstrated lack of qualifications and his choice of sanction was not entitled to deference.

In its Reply, the Applicant further maintains that it was prejudiced by the Administrator's failure to substantively challenge the amount of attorney fees it had claimed in the Application, and notes that the Board has previously held that it will not second-guess the strategy that an applicant's counsel employs in the development of the applicant's defense(s) in the underlying

proceeding when evaluating an EAJA claim (citing *Application of Thompson*, NTSB Order EA-4353 (1995)).

I note that the application and supporting documents filed by the Applicant establish that it meets the eligibility requirements set out in the EAJA and the Board's EAJA Rules, and that the application is both timely filed and procedurally correct. The Administrator did not challenge the Application in any of these respects in his Answer.

## II. Legal Standards Governing EAJA Claims

The EAJA, 5 U.S.C. § 504, *et seq.*, requires the Government to pay to the prevailing party in an administrative action certain fees and expenses, unless the Government establishes that its position in that action was substantially justified, or that special circumstances exist that would make an award of fees unjust. 5 U.S.C. § 504(a)(1).

### A. Prevailing Party

The United States Court of Appeals for the District of Columbia Circuit set forth the standard, in *National Coalition Against the Use of Pesticides v. Thomas*, 828 F.2d 42 (1987), that, in order to be considered a prevailing party under the EAJA, the claimant “must show that the ‘final result represent[ed] in a real sense a disposition that furthers [his] interest.’”<sup>3</sup> Subsequently, the Board addressed the issue of what is necessary to make an EAJA applicant a prevailing party in the context of air safety enforcement litigation before it in *Application of Gilfoil, supra*, and *Application of Grzybowski*, NTSB Order EA-4413 (1996). In *Grzybowski*, the Board plainly stated that “a reduction in sanction standing alone will not ordinarily support an EAJA award.”<sup>4</sup> The earlier *Gilfoil* case stemmed from a certificate action in which the Administrator revoked the applicant's airline transport pilot certificate on an emergency basis for alleged violations of FARs governing cockpit check procedures and the avoidance of careless flight activities. On appeal, the revocation was reduced to a 90-day suspension. In considering the applicant's EAJA claim, the Board noted that “he had at all times [in the underlying proceeding] (including prior to [the evidentiary hearing] and again prior to appeal to the full Board), indicated to the Administrator that he did not contest the facts underlying the certificate action — but that some reasonable suspension rather than revocation was the proper penalty. The Administrator at each step chose to continue to seek revocation. . . . [Thus, t]his is not a case of simple sanction reduction, but a proceeding in which the argument was between revocation and suspension and the [Administrator] was aware of the fact that the lesser of the penalties (at least in principle) would not have been contested by [the] applicant. Consequently, the litigation is fairly understood as litigation over sanction, and in this contest [the] applicant clearly prevailed.”<sup>5</sup>

In another case, *Application of Shaffer*, NTSB Order EA-5323 at 3-4 (2007), the Board opined that that the applicant had not established that the Administrator's voluntary withdrawal of portions of the complaint conferred prevailing party status on him where the ALJ's ruling

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<sup>3</sup> 828 F.2d at 44, quoting *Grano v. Barry*, 783 F.2d 1104, 1108 (D.C. Cir. 1986).

<sup>4</sup> NTSB Order EA-4413 at 3 n.3, citing *Gilfoil*.

<sup>5</sup> NTSB Order EA-3982 at 4.

affirmed revocation, albeit on fewer factual and regulatory charges, and the ruling, therefore, accomplished the full purpose of the Administrator's litigated order.<sup>6</sup>

See also *Application of Turner and Coonan*, NTSB Order EA-5467 (2009), where the applicants did not prevail *at hearing* on any portion of the merits of the case because the Administrator withdrew the charges before a hearing was held.<sup>7</sup>

## B. Substantial Justification

Whether the Administrator was substantially justified in pursuing a case against a party applying for fees and expenses under the EAJA is separate question from the issue of whether that applicant was a prevailing party. Whether the government wins on, loses on, or withdraws all (or, as in this case, major portions) of the complaint at the hearing, is not determinative of whether the Administrator was substantially justified in pursuing the matter; thus a different analysis must be undertaken. *Application of Turner and Coonan, supra*, at 4-5.

For the Administrator's position to be substantially justified, it must be reasonable in both fact and in law — *i.e.*, the facts alleged must have a reasonable basis in truth, the legal theory propounded must be reasonable, and the facts alleged must reasonably support the Administrator's legal theory. *Application of U.S. Jet, Inc.*, NTSB Order EA-3817 at 2 (1993); *Pierce v. Underwood*, 487 U.S. 552, 565 (1988); *United States v. 2, 116 Boxes of Boned Beef*, 726 F.2d 1481, 1487 (10th Cir. 1984). The EAJA permits an award of attorney fees and other specific fees and expenses that a prevailing party incurs, unless it is shown that the Government was substantially justified in pursuing the complaint.

Reasonableness in fact and law should be judged as a whole, including whether “there was sufficient reliable evidence initially to prosecute the matter,” and at each succeeding step of the proceeding. *Application of U.S. Jet, Inc., supra*, at 2; *Application of Philips*, 7 NTSB 167, 168 (1990); *Administrator v. Turner and Coonan, supra*, at 4. But the Board has also made it clear that the substantial justification test is less demanding than the Administrator's burden of proof in the underlying proceeding, and it is not whether the Administrator won or lost that determines whether his position therein was substantially justified. *Application of U.S. Jet, Inc., supra*, at 3. See also *Federal Election Commission v. Rose*, 806 F.2d 1081, 1087 (D.C. Cir. 1986), and *Application of Caruso*, NTSB Order EA-4165 (1994), in which the Board observed (at 7, n.8) that “[t]he standard of review at the EAJA stage does not require the certainty of a favorable outcome, *only a reasonable basis for proceeding*” (emphasis added).

In *Application of Gull, supra*, (at 4) the Board stated that the relevant inquiry is whether the government's case is “justified in substance or in the main — that is, justified to a degree that would satisfy a reasonable person.” The Board continued (at 4-5) that, what is required to show substantial justification is a reasonable basis both in fact and in law, which includes whether there was sufficient reliable evidence initially to prosecute the matter, as that the

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<sup>6</sup> The Board's *Shaffer* decision significantly referenced (at 4, n.5) the Supreme Court's decision in *Buckhannon, supra*, for the proposition that “[a] prevailing party is one who achieves a ‘judicially sanctioned change in the legal relationship of the parties,’” and quoted *Crabill v. Trans Union*, 359 F.3d 662, 666 (7th Cir. 2001), for the proposition that “[t]he significance of the [Supreme Court's] *Buckhannon* decision ... [i]s its insistence that a plaintiff must obtain formal judicial relief, and not merely ‘success,’ in order to be deemed a prevailing . . . party.”

<sup>7</sup> The instant case differs from *Turner and Coonan* in that, here, the Administrator withdrew more than half of the charges *during* the hearing, and the ALJ rendered a decision on the remaining charges, dismissing some, affirming some, and modifying the sanction from revocation to suspension.

purpose of the EAJA is to dissuade the government from pursuing weak or tenuous cases and to caution agencies to evaluate their cases carefully, but not to prevent them from bringing cases that have some risk. In *Gull*, the Board noted that the Administrator offered no discussion of the reasons for withdrawing the charges, and it is the Administrator who has the burden of proof in the underlying proceeding.

In *Application of Petersen*, NTSB Order EA-4490 (1996), the Board held that “when key factual issues hinge on witness credibility, the Administrator is substantially justified — absent some additional dispositive evidence — in proceeding to hearing where credibility judgments can be made on those issues,” and that the Administrator is substantially justified in pursuing a case so that appropriate credibility judgments could be made. NTSB Order EA-4490 at 6-7, citing *Application of Caruso, supra*; *Application of Conahan*, NTSB Order EA-4276 (1994); and *Application of Martin*, NTSB Order EA-4280 (1994), in which the Board said (at 7) that the Administrator’s position cannot be found lacking simply because the ALJ discredited the testimony of a particular witness. But, in *Application of Scott*, NTSB Order EA-4274 at 5 (1994), the Board said that “[u]nder EAJA, the Administrator has a duty to discontinue his investigation or prosecution at any time he knows *or should know* that his case is not reasonable in fact or law, or be liable for EAJA fees for any further expenses applicant incurs. The Administrator was required to analyze, as more information became available to him, whether continued investigation and prosecution was reasonable” (emphasis original).

### C. Factors Governing EAJA Award Amounts

In *Application of Carter*, NTSB Order EA-3959 (1993), the Board held that partial awards are contemplated under EAJA, and granted the applicant an award, but reduced its amount by one-third, where two of the Administrator’s three charges against the applicant had been dismissed, the certificate revocation sought by the Administrator was reduced to a 180-day suspension, and the Board determined that the dismissed charges were not substantially justified while the charge it had sustained was. In *Carter* (at 6), the Board noted that this type of adjustment is far from exact, and that, while a breakdown of fees and expenses referable to each of the particular charges would have been preferable, such a breakdown is not always possible.

In *Application of Gull, supra* (at 6-8), the Board said that the Administrator’s appellate objections both to the level of documentation of the claim and to the judge’s 75 percent award were relevant, but “as far as documentation is concerned, we would not expect that attorneys would (or would necessarily be able to) to report by each claimed illegality,” and that some approximation was, thus, necessary and allowable. In its decision (at 7, n.8) the Board cited *Application of Rooney*, 5 NTSB 776 (1986) (“fee reduced by one-third after Administrator’s appeal on one (of three) issues granted”), and *Wilkett v. Interstate Commerce Commission*, 844 F.2d 867 (D.C. Cir. 1988) (“upon finding claim excessive, court reduced it’ [*sic*] by half”).

Finally, it is well-established that fees and expenses recoverable under the EAJA are limited to those incurred in an “adversary adjudication,” which, the Board has held, does not begin until the Administrator’s filing of the complaint in the underlying proceeding. *Application of Granda*, NTSB Order EA-4675 at 2 (1998), citing *Application of Barth*, NTSB Order EA-3833 (1993), and *Application of Peterson, supra*. Thus, there can be no recovery of fees for services rendered or expenses incurred prior to the date of the filing of the Administrator’s complaint. *Granda* at 2.

### III. Analysis and Conclusions

As is noted above, the Administrator's Emergency Order of Revocation in the underlying certificate action was issued on June 10, 2008, and, after the Applicant submitted its appeal from that order, the Administrator reissued the revocation order as the Complaint on June 11, 2008. In terms of sanction, the Board's ultimate disposition in this matter was the affirmation of an indefinite suspension of the Applicant's air carrier certificate, which was the result initially sought by the Administrator in an Emergency Order of Suspension that was issued shortly before the issuance of the superseding Emergency Order of Revocation herein.<sup>8</sup>

To recap, the Administrator had, by the fourth day of a nine-day hearing on the Emergency Order of Revocation, withdrawn the factual allegations of Counts IV through IX (Paragraphs 18 through 34) of the Complaint in their entirety; the words, "the operation of numerous flights with unqualified members," from Paragraph 36; the factual allegations of Paragraphs 37 and 38; and the charges that the Applicant had violated FAR §§ 135.185, 135.301(b), 135.63(a), 135.77, 39.3, 43.13(a), 135.263(a) and 91.417(a)(2)(v). As a result, approximately half of the factual allegations of the Complaint and eight out of 14 of the charged regulatory violations were withdrawn by the Administrator during the hearing.

Subsequently, in my OID, I affirmed the Complaint as to violations of FAR §§ 91.13(a), 119.59(b)(2), and 119.5(g),<sup>9</sup> dismissed the remaining regulatory violations (FAR §§ 91.7(a), 119.69(a), and 135.25(a)) alleged therein, and reduced the sanction imposed on the Applicant from a revocation of its air carrier certificate to an indefinite suspension of that certificate. The OID was subsequently affirmed *in toto* by the Board in NTSB Order EA-5440.

As the Board noted in its Opinion and Order (at 2-3):

The complaint initially contained allegations of violations of 14 regulatory provisions, and 38 factual allegation paragraphs within 10 counts. Counsel for the Administrator almost immediately began experiencing difficulties in presenting his case. At the outset of the 9-day hearing, on September 16, 2008, the Administrator withdrew seven paragraphs in three counts, and two regulatory violations. By the fourth day of the proceedings, the Administrator had withdrawn half of the factual allegations, 6 counts and 8 FAR violations.

Applying the case law cited above, I find that the Applicant is the prevailing party for purposes of the EAJA as to the portions of the Complaint and alleged regulatory violations that were voluntarily withdrawn at the hearing by the Administrator, the affirmed findings that the Applicant had violated only three of the remaining six alleged regulatory violations, and the

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<sup>8</sup> Prior to the issuance of the June 10, 2008 Emergency Order of Revocation, the Administrator had, on May 23, 2008, issued an Emergency Order of Suspension to the Applicant. That suspension order contained nine counts (set forth in 31 paragraphs) of factual allegations, and charged the Applicant with violations of FAR §§ 119.69(a), 135.185(a), 135.301(b), 135.63(a), 135.77, 39.3, 43.13(a), 135.263(a), 61.55(a)(3), 91.13(a), 91.417(a)(2)(v) and 91.7(a). The Applicant's appeal from that order was docketed as SE-18273, and the Administrator reissued the suspension order as the Complaint in that proceeding on May 28, 2008. The Administrator subsequently withdrew the Emergency Order of Suspension and issued an Emergency Order of Revocation, which, as noted above, contained additional allegations of fact and FAR violation charges, on June 10, 2008. An Order Terminating Proceeding in Dkt. SE-18273 was then issued, and the Applicant's appeal of the Emergency Order of Revocation was docketed as SE-18284.

<sup>9</sup> FAR § 91.13(a) prohibits operation of an aircraft in a careless or reckless manner to as to endanger the life or property of another; § 119.59(b)(2) provides that a certificate holder must allow the Administrator to make any test or inspection to determine compliance; and § 119.5(g) declares that no person may operate as a direct air carrier or as a commercial operator without, or in violation of, an appropriate certificate and appropriate operations specifications.

affirmed modification of the sanction from revocation to an indefinite suspension, all of which were highly favorable to the Applicant.

Here, the Applicant achieved a “substantially favorable outcome” and a “judicially sanctioned change in the legal relationship of the parties” in the underlying proceeding. The final result represents, in a real sense, a disposition that furthers the Applicant’s interests. The Applicant clearly enjoyed a substantially favorable outcome as a result of both in the in-hearing withdrawals of allegations and charges by the Administrator and the ultimate decision of the ALJ (and its affirmation by the Board) following a nine-day hearing, on the merits of the charges that remained. Clearly, the Administrator failed to achieve his ultimate goal in the prosecution of the underlying certificate action, which was the revocation of the Applicant’s air carrier certificate.

With respect to the withdrawn allegations and charges, I find it significant, as the Board also apparently did, that the Administrator almost immediately began experiencing difficulties with his case, and, by the fourth day of the hearing, had withdrawn half of the factual allegations and eight of the 14 FAR violations charged. The Administrator has offered no real explanation for the withdrawals, but, from the record before me, I find that it is implicit that the Administrator was simply inadequately prepared to proceed on the allegations that were withdrawn, had not investigated them thoroughly, and lacked the evidence to sustain his burden of proof. It is obvious that the Administrator should not have proceeded to a hearing on allegations of wrongdoing that he was not adequately prepared to prove. It is evident, and I so find, that the Administrator did not have a reasonable basis for proceeding on the half of the complaint and alleged regulatory violations and that he voluntarily dismissed during the first four days of the hearing. Thus, I find that the Administrator was without substantial justification for prosecuting the portion of the Complaint which was withdrawn during the hearing.

However, I also find that the Administrator was substantially justified in prosecuting all six of the remaining regulatory violations alleged in the Complaint, even though only three were ultimately affirmed by the Board and the sanction was substantially modified from a revocation to an indefinite suspension of the Applicant’s air carrier certificate. It is, at least, arguable that revocation may have been the appropriate sanction had all of those six purported regulatory violations been proven. As stated by the Board in *Application of Caruso, supra*, the standard of review at the EAJA stage does not require the certainty of a favorable outcome, but only a *reasonable basis for proceeding*. I find that the Administrator had a reasonable basis for proceeding on the Complaint, as modified by the withdrawals of factual allegations and regulatory violations that he made during the hearing, and that substantial justification thus existed for the prosecution of that portion of the Complaint.

I have reviewed the Applicant’s EAJA claim and supporting documents, and, in the absence of any definitive claim by the Administrator that specific attorney fees and expenses are inappropriate, I decline to attempt second-guess the Applicant’s counsel as to what actions were necessary in preparing its defenses.

However, I find the amount of \$41,938.40 claimed for chartered aircraft expenses between June 19 and July 8, 2008 to be unsupported, as to either the necessity of use such an expensive mode of transportation or the purpose of the seven roundtrip flights. The amount claimed for these flights appears on its face to be far in excess of what the fares charged for conveyance on commercial flights would have been, but, without more information from the Applicant, it is impossible to compare those costs. In light of the information before me, I will disallow the unsupported claim for \$41,938.40 for chartered aircraft expenses in its entirety.

The Applicant has claimed fees for legal services of Attorneys Gregory S. Winton and Daryl H. M. Carr, for research by associates of Mr. Winton and for expenses, which predate the issuance of the Complaint in the underlying matter on June 11, 2008. As is noted above, the Board has held that such legal fees and expenses are not reimbursable as part of an EAJA award relating to an air safety enforcement action. The following is a breakdown of such disallowed legal fees and expenses. (Disallowed legal fees for services rendered by Messrs. Winton and Carr have been computed at the rate of \$178.00 per hour.<sup>10</sup> Disallowed legal fees for services rendered by associates of Mr. Winton have been computed at the rate of \$125.00 per hour.<sup>11</sup> Disallowed expenses are shown at the actual claimed cost.)

Legal fees for services prior to June 11, 2008 claimed by Attorney Carr	\$15,672.90
Legal fees for services prior to June 11, 2009 claimed by Attorney Winton	\$ 4,823.80
Legal fees for associates prior to June 11, 2008 claimed by Attorney Winton	\$ 3,412.50
Expenses prior to June 11, 2008 claimed by Attorney Winton	\$ 432.71
Expenses prior to June 11, 2008 claimed by Applicant	\$ 2,824.18
Expenses prior to June 11, 20089 claimed by Attorney Carr	\$ 18.80
Disallowed aircraft charter expenses (see above)	<u>\$41,938.40</u>
 Total Disallowed Attorney Fees and Expenses	 \$69,141.19

After deduction of the disallowed legal fees and expenses described above, I find that the Applicant has established a maximum potential award of \$240,338.69 in fees and expenses for purposes of the EAJA with respect to the entire case. However, for the reasons set forth above, the Applicant is not entitled to that amount in its entirety because it was the not the prevailing party on, and/or the Administrator was substantially justified in proceeding with the charges with respect to, approximately half of the allegations/violations in the underlying proceeding.

A review of the Application and supporting documents in this complex case shows that it would be highly impractical, if not virtually impossible, to sort out which of the claimed fees and expenses apply to the withdrawn portions of the Complaint (for which no substantial justification has been found) and which apply to the remaining portions of the Complaint (on which the Applicant did not prevail and/or substantial justification was found). The charges overlap and are intertwined, making it virtually impossible to make such a determination. It would be highly impracticable, and would certainly result in both unnecessary delay, and the incurrence of yet additional attorney fees and expenses by the Applicant, were I to ask the Applicant to attempt to sort this out, and I therefore decline to do so. Instead, I find that the only feasible way to determine how much to award the Applicant is to reduce the \$240,338.69 maximum potential award by 50 percent, which approximates the proportion of the allegations and charges set forth in the Complaint that both the Applicant prevailed on and the Administrator was not substantially justified in prosecuting.

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<sup>10</sup> That figure is derived from a formula set forth in EAJA Rule 6(b)(1) (codified at 49 C.F.R. § 826.6(b)(1)), which limits the hourly rate of attorney fees that may be ordered reimbursed by the Board as part of an EAJA award.

<sup>11</sup> That figure represents the actual hourly charge that the Applicant was billed for associate services (which is less than the maximum hourly rate awardable for attorney services under EAJA Rule 6(b)(1)).

WHEREFORE, IT IS ORDERED THAT the Applicant's "Application for an Award of Attorney Fees and Other Expenses Pursuant to the Equal Access to Justice Act" is GRANTED to the extent that the award of such fees and expenses shall be limited to the amount of \$120,169.35<sup>12</sup>, and

It is further ORDERED that the Administrator shall pay the aforesaid amount to the Applicant within 30 days of the date of this Order.

ORDERED this 27th day of August, 2009 at Washington, D.C.

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WILLIAM A. POPE, II  
Administrative Law Judge

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<sup>12</sup> \$309,479.88, less \$69,141.19 in disallowed attorney fees and expenses, equals \$240,338.69, which, divided by two and rounded up, equals \$120,169.35.