

SERVED: July 22, 2010

NTSB Order No. EA-5534

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 21<sup>st</sup> day of July, 2010

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

**ORDER DENYING RECONSIDERATION**

The Administrator seeks reconsideration of our opinion and order in this case, NTSB Order No. EA-5511, served March 4, 2010. In that decision, we affirmed the law judge's order, in which he granted respondent's application for fees under the EAJA.<sup>1</sup> The law judge determined that the Administrator was not substantially justified in pursuing a case based on 49 U.S.C. § 44726(b)(1)(B).<sup>2</sup> The law judge determined that § 44726

<sup>1</sup> Equal Access to Justice Act, 5 U.S.C. § 504; see also 49 C.F.R. part 826.

<sup>2</sup> Section 44726, entitled, "Denial and revocation of certificate for counterfeit parts violations," provides, in subsection (b)(1)(B), as follows:

specifically deals with counterfeit parts, and that the Administrator had not provided any evidence to show that the connecting rods were counterfeit, or even life-limited or unapproved. Instead, the law judge stated that the Administrator's counsel had attempted to fulfill the elements of § 44726(b)(1)(B) by showing that the part did not comply with a Lycoming service instruction, but that, even absent such compliance, these actions still did not rise to the level of a violation of § 44726(b)(1)(B). The law judge further found that the evidence did not establish that applicant had intentionally deceived the owner of the Piper PA-12 on which he completed the work in question, concerning his work on the aircraft's engine. As a result, the law judge dismissed the count concerning the § 44726(b)(1)(B) charge. Consequently, the law judge granted applicant's application for fees.

We affirmed the law judge's decision with regard to the § 44726(b)(1)(B) charge. First, we determined that § 44726 appears to address counterfeit parts, and both parties agreed that the connecting rods and crankshaft at issue in this case were not counterfeit. We recognized that the law judge held that the Administrator did not prove that applicant violated 18 U.S.C. § 38, which is a criminal statute involving fraud.<sup>3</sup> We

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(..continued)

(b) Revocation of certificate.—

(1) In general.—Except as provided in subsections (f) and (g), the Administrator shall issue an order revoking a certificate issued under this chapter if the Administrator finds that the holder of the certificate or an individual who has a controlling or ownership interest in the holder—

(A) was convicted in a court of law of a violation of a law of the United States relating to the installation, production, repair, or sale of a counterfeit or fraudulently-represented aviation part or material; or

(B) knowingly, and with the intent to defraud, carried out or facilitated an activity punishable under a law described in paragraph (1)(A).

<sup>3</sup> Section 38, which the Administrator referenced in the complaint against applicant concerning the § 44726 charge, is entitled, "Fraud involving aircraft or space vehicle parts in interstate or foreign commerce," and provides as follows:

stated that the Administrator, on appeal, attempted to establish that he was substantially justified in charging applicant with violations of 18 U.S.C. § 38 and 14 U.S.C. § 44726(b)(1)(B) on the basis that he could show that applicant committed fraud according to the standard set forth in Hart v. McLucas, 535 F.2d 516 (9<sup>th</sup> Cir. 1976).<sup>4</sup> However, we noted that the Administrator's counsel also did not dispute that the FAA did not seek criminal prosecution under 18 U.S.C. § 38 against either applicant or his colleague, Mr. Matthews, who the Administrator also argued committed fraud. We further stated as follows:

The Administrator supplies no authority for the proposition that we should independently find that a certificate holder has violated a criminal statute, and does not explain how our jurisdiction might extend to such matters. Without adequate proof and a legal

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(..continued)

(a) Offenses.—Whoever, in or affecting interstate or foreign commerce, knowingly and with the intent to defraud—

- (1)(A) falsifies or conceals a material fact concerning any aircraft or space vehicle part;
- (B) makes any materially fraudulent representation concerning any aircraft or space vehicle part; or
- (C) makes or uses any materially false writing, entry, certification, document, record, data plate, label, or electronic communication concerning any aircraft or space vehicle part;
- (2) exports from or imports or introduces into the United States, sells, trades, installs on or in any aircraft or space vehicle any aircraft or space vehicle part using or by means of a fraudulent representation, document, record, certification, depiction, data plate, label, or electronic communication; or
- (3) attempts or conspires to commit an offense described in paragraph (1) or (2),

shall be punished as provided in subsection (b).

<sup>4</sup> We have long recognized that Hart requires that the Administrator establish the following five elements to prove that a respondent fraudulently falsified a record: (1) a false representation (2) in reference to a material fact (3) made with knowledge of its falsity (4) and with the intent to deceive (5) with action taken in reliance upon the representation.

basis on which to find that applicant violated 18 U.S.C. § 38, we do not believe it was reasonable for the Administrator to pursue a case against applicant on the basis of 49 U.S.C. § 44726.

NTSB Order No. EA-5511 at 19 (footnotes omitted).

We also stated that the evidence that the Administrator provided did not fulfill the elements of § 44726(b)(1)(B). With regard to the Administrator's factual argument concerning § 44726(b)(1)(B), we stated:

To the extent that the Administrator sought to show that the connecting rods at issue were unapproved parts, we note that the Administrator's evidence at the hearing only established that a service instruction from Lycoming indicated that the connecting rods should have been modified. The Administrator did not provide evidence to show, nor did the Administrator's counsel argue, that a service bulletin or other such binding authority addressed the connecting rods under these circumstances.

Id. at 19-20 (footnote omitted). As this quotation shows, we assumed, arguendo, that § 44726(b)(1)(B) was not limited to counterfeit parts, but also could include unapproved parts. Even based on that presumption, we still determined that the Administrator did not provide sufficient evidence to show that the connecting rods applicant installed were "unapproved."<sup>5</sup>

The Administrator now petitions us to reconsider our original decision, principally on the contention that we erred when we determined that the Administrator's position with regard to the § 44726(b)(1)(B) charge was not reasonable in law. As we stated in our original opinion, the Supreme Court has defined the term "substantially justified" to mean that the government must show that its position is reasonable in both fact and law.<sup>6</sup> Such a determination of reasonableness involves an initial

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<sup>5</sup> We also note that this was a liberal reading of the statutory requirement, as the actual language of § 44726(b)(1) refers to "counterfeit or fraudulently-represented" aviation parts or materials.

<sup>6</sup> Pierce v. Underwood, 487 U.S. 552, 565 (1988); see also Application of U.S. Jet, Inc., NTSB Order No. EA-3817 (1993).

assessment of whether sufficient, reliable evidence exists to pursue the matter.<sup>7</sup>

Section 821.50(c) of our Rules of Practice requires that petitions for reconsideration "state briefly and specifically the matters of record alleged to have been erroneously decided, and the ground or grounds relied upon." Furthermore, § 821.50(d) provides that the Board will not consider, and will summarily dismiss, repetitious petitions for reconsideration. The arguments that the Administrator raises in the petition at issue here are not based on new matter, but consist of assertions that our original decision contained incorrect factual and legal conclusions. Although the petition appears somewhat repetitious of the arguments the Administrator made on appeal, we will address the assertions, in the interest of ensuring that our decision is clear.

The Administrator's petition states that we did not determine whether the Administrator's position on appeal was reasonable in fact, that we incorrectly found that the part at issue did not fall within the purview of § 44726, and that we erred in assessing the Administrator's "burden of proof and the procedural requirements for proving a violation of ... § 44726(b)(1)(B)." Pet. for Recon. at 3. Applicant contests the Administrator's petition, and requests that we award additional fees under the EAJA for his response to the petition.

With regard to the Administrator's argument that § 44726 applies to applicant's installation of the connecting rods, we note that we addressed this argument in our original opinion. As described above, we provided an analysis concerning the connecting rods as "unapproved" parts, a less rigorous burden for the Administrator, rather than counterfeit parts, under § 44726. In the Administrator's petition, he argues that applicant's statement in the logbook that the parts were "overhauled" amounts to fraud under 18 U.S.C. § 38. However, the Administrator does not provide any authority for this assertion, and the law judge found this argument unpersuasive. The Administrator did not provide proof of a conviction or evidence that otherwise shows that the Administrator could prove that petitioner violated 18 U.S.C. § 38. In the petition for reconsideration, the Administrator argued that he is not

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<sup>7</sup> Catskill Airways, Inc., 4 NTSB 799, 800 (1983) (stating that Congress intended EAJA awards to dissuade the government from pursuing "weak or tenuous" cases).

required to prove a violation of 18 U.S.C. § 38 beyond a reasonable doubt in order to prove that petitioner violated 49 U.S.C. § 44726. We note that both parties acknowledged that the Board has no recognized precedent addressing this narrow issue. Regardless of whether the appropriate standard is beyond a reasonable doubt or by a preponderance of the evidence, we need not decide the appropriate burden of proof here, because the Administrator did not meet either burden. We discussed the Administrator's evidence on this point previously, and determined that the Administrator did not provide sufficient evidence to show that applicant had committed fraud. See NTSB Order No. EA-5511 at 5-6 (discussion of Robert Despain's testimony concerning applicant's mistakes in installing the connecting rod bolts, and regarding applicant's failure to adhere to the service instruction).

The Administrator also contends that § 44726(b)(1)(B) does not require criminal prosecution, but "only requires proof by a preponderance of the evidence that [applicant] knowingly, and with the intent to defraud, carried out or facilitated an activity punishable under a law relating to the installation, production, repair, or sale of a counterfeit or fraudulently-represented aviation part or material." Pet. for Recon. at 5. The Administrator asserts, therefore, that we have the authority to affirm revocation of applicant's certificate, despite our reluctance in the original opinion to find a criminal violation independently, under a less than clear factual scenario. See NTSB Order No. EA-5511 at 19 (stating that, "[t]he Administrator supplies no authority for the proposition that we should independently find that a certificate holder has violated a criminal statute, and does not explain how our jurisdiction might extend to such matters").

We understand that our jurisdiction indisputably extends to our review of appeals involving "the denial, amendment, modification, suspension, or revocation of a certificate issued by the Secretary of Transportation under [49 U.S.C. §§ 44703, 44709, or 44710]." 49 U.S.C. § 1133(a). We believed that, on appeal, the Administrator requests that we find that applicant violated 18 U.S.C. § 38; we again decline to make such a finding.

Concerning the Administrator's allegation that applicant violated § 44726, we note that we have previously held that, in general, we will review such cases to determine whether the Administrator has fulfilled the burden of proving all elements

of an alleged violation by a preponderance of the evidence.<sup>8</sup> With regard to this burden, the Administrator asserts that we misunderstood the requirements of § 44726. In particular, the Administrator argues:

The FAA did not have to prove to the Board that [applicant] was actually convicted or could have been convicted under the criminal standard in 18 U.S.C. § 38; instead, the FAA had to prove by a preponderance of the evidence that [applicant's] conduct as alleged in the [c]omplaint was subject to punishment under that law.

Pet. for Recon. at 5–6. In support of this interpretation of § 44726, the Administrator compares § 44726 to 49 U.S.C. § 44710.<sup>9</sup> We understand this analogy, but note that Congress used the phrase “could have been convicted” in discussing § 44726 upon enactment.<sup>10</sup> At the very least, in order to have been reasonable in fact and in law in his pursuit of this case, the Administrator would have been wise to review the evidence and fashion an argument that the part at issue was fraudulent under the elements of the offense at issue. The only evidence the Administrator used in attempting to prove this point was the Lycoming service bulletin, and we declined to find that failure to follow the service bulletin amounted to installing a fraudulently-represented part, or that documenting such

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<sup>8</sup> See, e.g., Administrator v. Schwandt, NTSB Order No. EA-5226 at 2 (2006); Administrator v. Van Der Horst, NTSB Order No. EA-5179 at 3 (2005).

<sup>9</sup> Section 44710 provides that the Administrator may revoke a certificate if he finds that the certificate-holder used an aircraft to “knowingly [carry] out an activity punishable, under a law of the United States or a State related to a controlled substance (except a law related to simple possession of a controlled substance), by death or imprisonment for more than one year,” and served as an airman or was on the aircraft to assist in carrying out the prohibited activity. 49 U.S.C. § 44710(b)(2).

<sup>10</sup> H.R. Conf. Rep. 108-334, 2004 U.S.C.C.A.N. 2212, 2253–54 (stating that the Senate bill inserted provision that, “would ... deny a certificate to a person who carried out an activity related to counterfeit or fraudulent aviation parts for which he could have been convicted”).

installation was a commission of fraud. NTSB Order No. EA-5511 at 19-20.

As an ancillary matter, we note that the Administrator's allegations that applicant violated other regulations in the complaint, to which applicant admitted, included recordkeeping violations under 14 C.F.R. part 43.<sup>11</sup> It appeared from the evidence that the Administrator had a firm basis to pursue those charges, and applicant did not contest them. As we stated in our original opinion, we found applicant's conduct troubling, and our opinion did not function to condone his inadequate recordkeeping. However, we determined in the original opinion that the Administrator was not substantially justified in pursuing the § 44726 charge against applicant, and we reaffirm our opinion on this issue.

Applicant has also submitted a supplemental request for fees and expenses incurred in this EAJA action.<sup>12</sup> In light of our denial of the Administrator's petition for reconsideration, we will grant applicant's supplemental request.

**ACCORDINGLY, IT IS ORDERED THAT:**

1. The Administrator's petition for reconsideration is denied; and
2. The Administrator is ordered to pay applicant an additional \$4,832.10 in fees.

HERSMAN, Chairman, HART, Vice Chairman, and SUMWALT, ROSEKIND, and WEENER, Members of the Board, concurred in the above order.

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<sup>11</sup> See NTSB Order No. EA-5511 at 4 (describing Count II of Administrator's complaint against applicant, which alleged violations of 14 C.F.R. §§ 43.2(a)(1), 43.9(a)(3), 43.9(d), 43.12(a)(1), and 43.13(a)).

<sup>12</sup> Applicant's attorney attached an affidavit to the response to the Administrator's petition for reconsideration, which indicated that applicant's attorney spent 27.3 hours to prepare a response to the petition. As we explained in our original opinion, the maximum allowable rate under 49 C.F.R. § 826.6 for services performed in 2009, which is currently applicable to 2010, is \$177.00. Therefore, applicant's attorney may receive \$4,832.10 in fees.