

SERVED: September 20, 2010

NTSB Order No. EA-5551

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 17<sup>th</sup> day of September, 2010

_____	)	
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	)	
	)	
_____	)	

**ORDER DENYING RECONSIDERATION**

The Administrator seeks reconsideration of our opinion and order in this case, NTSB Order No. EA-5510, served March 4, 2010. In that decision, we affirmed the law judge's order in part, in which he partially granted respondent's application for fees under the EAJA.<sup>1</sup> The law judge determined that applicant was the prevailing party with regard to eight of the 14 charges that the Administrator withdrew during the hearing, and with regard to three of the remaining six charges. The law judge also held that the Administrator was substantially justified in

<sup>1</sup> Equal Access to Justice Act, 5 U.S.C. § 504; see also 49 C.F.R. part 826. We ordered reimbursement of fees and expenses in the amount of \$121,991.34.

pursuing the remaining six charges and in seeking revocation of applicant's certificate. The three remaining charges that the law judge eventually affirmed involved applicant's failure to allow the FAA to inspect applicant's facility, applicant's careless or reckless operation, and applicant's operating as a direct air carrier or commercial operator without appropriate operations specifications.<sup>2</sup> Although the Administrator did not prevail on the other three charges during the merits phase of this case, we nevertheless affirmed the law judge's finding that the Administrator was substantially justified in pursuing them.<sup>3</sup>

In our opinion below awarding reimbursement of certain fees and expenses under the EAJA, we determined that applicant was the "prevailing party" on the eight charges that the Administrator withdrew at the commencement of the hearing. We analyzed the facts of this case with our previous cases concerning the definition of "prevailing party." NTSB Order No. EA-5510 at 7-9. We cited various cases in which we had analyzed the issue of when a party has prevailed,<sup>4</sup> and determined that, because a hearing had commenced in this case, and applicant had prepared to defend against all allegations in the complaint, an adversarial adjudication had transpired. Given the occurrence of an adversarial adjudication, applicant prevailed under the EAJA with regard to the charges that the Administrator abruptly withdrew during the hearing.

As summarized above, although we determined that the Administrator was substantially justified in pursuing revocation of applicant's air carrier certificate on the remaining charges, we ultimately affirmed the law judge's holding that applicant's

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<sup>2</sup> The remaining six counts charged violations of 14 C.F.R. §§ 91.7(a), 91.13(a), 119.5(g), 119.59(b)(2), 119.69(a), and 135.25(a).

<sup>3</sup> As we noted in our opinion ordering partial reimbursement of fees, our consideration of whether the Administrator was substantially justified in pursuing a case is distinct from our consideration of whether a party is a "prevailing party." NTSB Order No. EA-5510 at 4.

<sup>4</sup> Id. at 7-8 (citing Application of Turner & Coonan, NTSB Order No. EA-5467 (2009); Application of Rice, NTSB Order No. EA-5474 (2009); Application of Swafford, NTSB Order No. EA-4426 at 5 (1996); Application of Reinhold, NTSB Order No. EA-4354 at 6-7 (1995); and Application of Barth, NTSB Order No. EA-3833 at 2-3 (1993)).

certificate should be indefinitely suspended, rather than revoked. We evaluated each alleged violation, and subsequently reviewed the Administrator's choice of sanction, to determine whether the Administrator was substantially justified in pursuing each charge at each stage of the case. After this analysis, we determined that a partial award of fees and expenses was appropriate.

In his petition for reconsideration, the Administrator contends that we erred in finding that applicant was the prevailing party under the EAJA concerning the eight charges that the Administrator withdrew, and that we erred in not viewing the case as a whole, given our finding that the Administrator was substantially justified in pursuing some of the charges and in choosing the sanction. Applicant contests the Administrator's petition, and requests that we award additional fees under the EAJA for his response to the petition. We find that neither of the Administrator's arguments warrant reconsideration of our opinion and order.

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 are largely repetitious of those he asserted in his appeal brief, and mostly consist of assertions that our original decision contained incorrect legal conclusions. To the extent, however, that the Administrator believes our opinion was inconsistent with the D.C. Circuit's recent holding in Turner and Coonan v. NTSB, No. 09-1225, 2010 WL 2352184 (D.C. Cir. June 8, 2010), we provide a brief clarification below.

The D.C. Circuit affirmed our conclusion in Application of Turner and Coonan, NTSB Order No. EA-5467 (2009), on the basis that the relationship between the Administrator and the applicants had not changed, because the law judge affirmed—without prejudice—the Administrator's withdrawal of the complaint prior to hearing. The Administrator's petition for reconsideration contends that, in our opinion in the case at hand, we "erroneously carved out an exception to the 'prevailing party' standard where the Administrator's voluntary withdrawal of charges in a complaint occurs after the hearing on the merits has begun." Pet. at 7–8. We disagree with this assessment, and note that we explained, in the context of Buckhannon Board &

Home Care, Inc. v. West Virginia Department of Health and Human Services, 532 U.S. 598 (2001), our reasoning in determining that applicant was the prevailing party on the eight charges the Administrator withdrew at the hearing. The D.C. Circuit's holding in Turner and Coonan does not alter our reasoning. We remind the Administrator that our opinion provided as follows:

[The instant case is] 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 ... 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 its case as to most of the allegations.

NTSB Order No. EA-5510 at 7-8. We further stated that a hearing and a decision on the merits had occurred. Id. at 8. At the very least, this case is easily distinguishable from Turner and Coonan based on the facts.<sup>5</sup> With regard to the applicability of Buckhannon, we note that the D.C. Circuit stated, in Turner and Coonan, that it applies a three-part test to determine whether a party has "prevailed" under Buckhannon:

(1) there must be a "court-ordered change in the legal relationship" of the parties; (2) the judgment must be in favor of the party seeking the fees; and (3) the judicial pronouncement must be accompanied by judicial relief.

Turner and Coonan at \*2 (quoting District of Columbia v. Straus, 590 F.3d 898, 901 (D.C. Cir. 2010)). In the petition for reconsideration, the Administrator does not explain, within the context of this three-prong standard, how we erred in finding

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<sup>5</sup> We note that in Turner and Coonan, the Administrator withdrew the *entire* complaint well before the hearing was scheduled to occur. Here, the Administrator withdrew, *during the hearing*, only *portions* of the complaint that the Administrator's attorney realized he could not prove.

that applicant prevailed on the charges that the Administrator withdrew at the hearing. The Administrator does not dispute that a hearing occurred and that the law judge provided judicial relief in favor of applicant by accepting the Administrator's withdrawal of eight charges and finding three additional charges were unsupported by the evidence.

We also find that the Administrator's argument that we erred in not viewing this case as a whole, when we determined that the Administrator was substantially justified in pursuing some of the charges and in pursuing revocation of applicant's certificate, is meritless. We recognize that we must judge reasonableness in fact and law as a whole, including whether "there was sufficient reliable evidence initially to prosecute the matter," and at each succeeding step of the proceeding.<sup>6</sup> We have long awarded partial reimbursement of fees and expenses under the EAJA when we have determined that the Administrator was not substantially justified in pursuing *certain charges* alleged in the complaint.<sup>7</sup> The Administrator's reliance on Commissioner v. Jean, 496 U.S. 154 (1990), in this regard is misleading. The Court's statement in Jean that the question of whether an agency was substantially justified in pursuing a case is a "one-time threshold for fee *eligibility*" focused on whether the prevailing party was eligible for any fees at all. Id. at 160 (emphasis added). The Court went on to say that the lower courts had the duty of determining what *amount* of fees was appropriate.<sup>8</sup> In fact, the D.C. Circuit has specifically stated that the Board should examine EAJA applications to determine

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<sup>6</sup> Application of U.S. Jet, Inc., NTSB Order No. EA-3817 at 2 (1993).

<sup>7</sup> Application of Carter, NTSB Order No. EA-3959 (1993) (allowing reimbursement of two-thirds of the fees and expenses that the applicant accumulated in his defense of the case, based on the fact that the Board dismissed two of the three charges pursuant to the stale complaint rule); Gull v. Administrator, NTSB Order No. EA-3521 (1992) (allowing reimbursement of 75 percent of fees and expenses concerning the portion of complaint on which the applicant prevailed).

<sup>8</sup> We further note that Jean principally stands for the notion that a second "substantial justification" finding need not occur before a court awards EAJA fees for the fee litigation itself. This is obviously not the issue that the Administrator argues here.

whether a *partial* award of fees would be appropriate.<sup>9</sup> In light of these considerations, we reject the Administrator's argument that we erred in issuing a partial award of fees and expenses in this case.

Applicant has also submitted a supplemental request for fees and expenses incurred in this EAJA action. 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 \$2,535.97 in fees.<sup>10</sup>

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

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<sup>9</sup> Alphin v. NTSB, 839 F.2d 817, 822 (D.C. Cir. 1988).

<sup>10</sup> Applicant's attorney may receive additional reimbursement in the amount of \$2,535.97, as he attached copies of invoices to the response to the Administrator's petition for reconsideration indicating that he spent 14 hours to prepare a response to the petition, and incurred expenses in the amount of \$43.97.