



applicant's EAJA<sup>2</sup> application, based on a finding that the Administrator was substantially justified in pursuing charges that applicant had violated 14 C.F.R. §§ 121.639<sup>3</sup> and 91.13(a).<sup>4</sup> In his February 17, 2010 decision and order, the law judge granted applicant's EAJA application, based on a finding that the Administrator was not substantially justified in pursuing a charge that applicant violated 14 C.F.R. § 121.627(a).<sup>5</sup> Both parties have appealed: the Administrator with regard to the § 121.627(a) determination, and applicant with regard to the §§ 121.639 and 91.13(a) determinations. We deny both appeals.

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<sup>2</sup> 5 U.S.C. § 504; see also 49 C.F.R. part 826. Applicant now seeks fees in the amount of \$110,498.77. Attachment to Applicant's Reply Br. at 15.

<sup>3</sup> Section 121.639, entitled, "Fuel supply: All domestic operations," states that no person may dispatch or take off an airplane operating as a domestic air carrier unless it has enough fuel:

- (a) [t]o fly to the airport to which it is dispatched;
- (b) [t]hereafter, to fly to and land at the most distant alternate airport (where required) for the airport to which dispatched; and
- (c) [t]hereafter, to fly for 45 minutes at normal cruising fuel consumption.

<sup>4</sup> Section 91.13(a) prohibits careless or reckless operation so as to endanger the life or property of another.

<sup>5</sup> Section 121.627(a) states that no pilot-in-command (PIC) may allow a flight to continue toward any airport to which it has been dispatched or released if, in the opinion of the PIC or dispatcher, the flight cannot be completed safely; unless, in the opinion of the PIC, no safer procedure exists.

We have previously issued several opinions in this case,<sup>6</sup> and we therefore decline to recite the facts in this opinion, unless necessary in explaining our affirmation of the law judge's decisions concerning the EAJA application. The Administrator's complaint, which sought suspension of applicant's airline transport pilot (ATP) certificate for 120 days, alleged that applicant violated 14 C.F.R. § 121.639 when he operated, as PIC, a Boeing 737-300 on a flight from Ronald Reagan Washington National Airport to LaGuardia Airport (LGA) on November 3, 2004 (Delta 1966). The Administrator alleged that the aircraft did not have sufficient fuel to complete the flight and, thereafter, to fly for 45 minutes at a normal cruising fuel consumption. The Administrator further alleged that applicant violated 14 C.F.R. § 121.627(a) when he continued the flight. The Administrator also ordered the suspension of applicant's copilot's ATP certificate after the flight at issue.<sup>7</sup>

The law judge determined that the Administrator proved that applicant and his copilot had violated § 121.639 and,

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<sup>6</sup> NTSB Order Nos. EA-5302 (2007), EA-5411 (2008), EA-5425 (2009), and EA-5482 (2009).

<sup>7</sup> As noted in our previous opinion remanding the EAJA application case to the law judge, NTSB Order No. EA-5482, the Board considered both pilots' appeals in a consolidated case. Only applicant Glennon, however, submitted an application for fees under the EAJA.

consequently, § 91.13(a). The law judge concluded, however, that the Administrator did not prove that applicant violated § 121.627, and the Administrator did not appeal that finding. We reversed the law judge's decision, finding that the Administrator did not prove that applicant violated §§ 121.639 or 91.13(a).<sup>8</sup> Specifically, we found that § 121.639 did not require a component of the minimum fuel for takeoff, such as planned contingency fuel (PCF). We rejected the Administrator's argument that § 121.647<sup>9</sup> required the specific increase in minimum fuel for takeoff under § 121.639 for Delta 1966, based on the fact that applicant had accepted a route change prior to taking off that extended the flight by 97 nautical miles, or 24 minutes. Although the Delta Flight Control Operations Manual appeared to allow PCF to be reallocated as trip burn fuel only when the dispatcher concurred with the reallocation, we determined that applicant's noncompliance with the Manual did not suffice to prove that he violated § 121.639. We further found that the Administrator did not establish what amount of fuel, if any, in addition to the fuel that § 121.639 expressly

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<sup>8</sup> NTSB Order No. EA-5411 (2008).

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

requires, was necessary to accommodate the potential needs that § 121.647 contemplates, or how applicant should have computed this amount of fuel. As a result of the lack of a nexus between §§ 121.639 and 121.647, the Board determined that the Administrator failed to prove that applicant violated § 121.639 in this case. Given the Administrator's failure to prove the § 121.639 violation, the Board also held that the Administrator did not prove that applicant violated § 91.13(a).

Subsequently, applicant submitted an application for fees under the EAJA, which the law judge denied, based on his conclusion that, although the Administrator did not prevail on the §§ 121.639 and 91.13(a) charges, he nevertheless was substantially justified in pursuing the case. The law judge's decision did not mention the Administrator's original charge that applicant had also violated § 121.627(a), concerning continuation of the flight. We remanded the case to the law judge for a determination on whether the Administrator was substantially justified in pursuing the § 121.627(a) charge<sup>10</sup>; subsequently, the law judge issued a detailed opinion finding that the Administrator was not substantially justified concerning the § 121.627(a) allegation. Specifically, the law judge determined that § 121.627(a) only prohibits *continuation* of a flight already in progress, but does not prohibit

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<sup>10</sup> NTSB Order No. EA-5482 (2009).

*commencement* of a flight. In this case, the law judge stated, the dispatcher determined that the aircraft had sufficient fuel for the new route within 20 minutes after takeoff.<sup>11</sup> The law judge's decision on remand ordered the Administrator to pay \$11,056.75 in attorney's fees and expenses under the EAJA. The law judge stated that the litigation concerning the § 121.627(a) charge was short-lived, as the Administrator did not appeal the law judge's finding on that charge after the law judge's March 8, 2006 oral initial decision. The law judge also concluded that the § 121.627(a) charge comprised no more than 25 percent of the entire case, as the merits case was largely based on the § 121.639 charge.<sup>12</sup> The law judge apportioned the award of applicant's application for fees accordingly, but reduced the award based on a finding that applicant did not provide a sufficient description of the amount of time and the type of work performed, under 49 C.F.R. § 826.23.<sup>13</sup> Based on the foregoing, the law judge ordered an award of \$11,056.75.

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<sup>11</sup> We note that the dispatcher's change in opinion during the flight was the result of applicant's attainment of shortcuts from air traffic control (ATC), which the testimony at the hearing established were commonplace.

<sup>12</sup> The law judge stated that 25 percent is a liberal estimate, but noted that the Administrator had agreed to this estimate, so the law judge affirmed it, in the interest of providing applicant with the benefit of the doubt. Supp. Decision and Order at 9.

<sup>13</sup> Section 826.23, entitled, "Documentation of fees and

As stated above, both parties appealed the law judge's decision. We view each appeal in accordance with our standard of review for EAJA applications. Under the EAJA, we will not award certain attorney's fees and other specified costs if the government is shown to have been substantially justified in pursuing its complaint.<sup>14</sup> 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>15</sup> Such a

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(..continued)

expenses," requires that an EAJA application "be accompanied by full documentation of the fees and expenses." The section also sets forth several other requirements, indicating that the applicant has the burden of providing detailed documentation to support the expenses for which he or she seeks reimbursement:

A separate itemized statement shall be submitted for each professional firm or individual whose services are covered by the application, showing the hours [spent] in connection with the proceeding by each individual, a description of the specific services performed, the rate at which each fee has been computed, any expenses for which reimbursement is sought, the total amount claimed, and the total amount paid or payable by the applicant or by any other person or entity for the services provided. The administrative law judge may require the applicant to provide vouchers, receipts, or other substantiation for any expenses claimed.

This section of our Rules is a codification of the statutory requirement of 5 U.S.C. § 504(a)(2), which states that an EAJA application must include, "an itemized statement from an attorney ... stating the actual time expended and the rate at which fees and other expenses were computed."

<sup>14</sup> 5 U.S.C. § 504(a)(1); Application of Smith, NTSB Order No. EA-3648 at 2 (1992).

<sup>15</sup> Pierce v. Underwood, 487 U.S. 552, 565 (1988); see also Application of U.S. Jet, Inc., NTSB Order No. EA-3817 (1993).

determination of reasonableness involves an initial assessment of whether sufficient, reliable evidence exists to pursue the matter.<sup>16</sup>

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.<sup>17</sup> 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.

#### The Administrator's Appeal

The Administrator argues that he was substantially justified in pursuing the charge that applicant violated § 121.627(a). Consistent with the Administrator's argument during the merits phase of this case, the Administrator argues that the new route that applicant accepted increased the trip

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<sup>16</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).

<sup>17</sup> U.S. Jet, supra note 13, at 1 (citing Administrator v. Pando, NTSB Order No. EA-2868 (1989)).

burn fuel by at least 850 pounds, and that applicant had not allocated this amount of fuel for the flight. The Administrator lists several facts concerning the actions of the dispatcher, Mr. Stephen Caisse, which the Administrator argues indicate that Mr. Caisse did not feel that the flight could be completed safely after applicant accepted the new route. For example, the Administrator states that the flight planning computer indicated that the aircraft had insufficient fuel for the new route; that Mr. Caisse arranged for Delta to contact ATC to advise them that Delta 1966 did not have sufficient fuel for their route; that Mr. Caisse sent a message to applicant indicating that he was attempting to arrange for Delta 1966 to go back to its originally filed route; and that it wasn't until Mr. Caisse learned that applicant had obtained a specific shortcut from ATC that he advised applicant that Delta 1966 now had sufficient fuel for the trip. The Administrator contends that Mr. Caisse's testimony at the hearing, in which he indicated that he did not believe the flight was unsafe, was "inexplicable," and formed the basis for the Administrator's decision not to pursue an appeal of the law judge's conclusion that the Administrator had not met the burden of proof on the § 121.627(a) charge. We do not find the Administrator's arguments on this point to be persuasive. A charge of § 121.627(a) requires that the Administrator prove the state of mind of either the PIC or the

dispatcher. In this case, the Administrator has provided no evidence to indicate that Mr. Caisse or applicant held the opinion that the flight was unsafe.<sup>18</sup>

The Administrator also takes issue with the law judge's conclusion that the inclusion of the word "continue" in the language of § 121.627(a) indicates that the flight must have already taken off. The law judge explained that the regulation did not use the word "commence," but purposefully includes the word "continue," thereby indicating that the prohibition takes effect once the aircraft has taken off. The Administrator contends that this is an improper reading of § 121.627(a), which, according to the Administrator, prohibits *takeoff* when the dispatcher or PIC believe that the flight cannot be completed safely. We need not reach this argument because we find that the Administrator did not have sufficient evidence to support the allegation that Mr. Caisse or applicant believed that the flight could not be completed safely. As an ancillary matter, however, we note that §§ 121.639 and 121.647 set forth fuel calculation requirements that are effective prior to, and during, takeoff of an aircraft. Reading § 121.627(a) as though

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<sup>18</sup> We note that applicant's reply brief, filed in response to the Administrator's appeal brief, states that the Administrator deposed Mr. Caisse prior to the hearing, and that Mr. Caisse did not indicate that he believed the flight was unsafe. The Administrator's appeal brief does not mention this deposition, nor does it include a citation to any evidence showing Mr. Caisse's state of mind during the flight.

it refers to takeoff would therefore beg the inquiry of whether the prohibition in § 121.627(a) is superfluous. Overall, we agree with the law judge's finding that the Administrator was not substantially justified in pursuing the § 121.627(a) charge, and we concur with his conclusion that reimbursement of certain fees under the EAJA is appropriate.

#### Applicant's Appeal

On appeal, applicant argues that, because we disagreed—during the merits phase of this case—with the Administrator's interpretation of § 121.639, then the Administrator's pursuit of the case was not substantially justified. Applicant's appeal focuses on the contention that the Board is obligated to consider this entire case as a whole, pursuant to Alphin v. NTSB, 839 F.2d 817 (D.C. Cir. 1988). Applicant further states that his defense of the case is not capable of segregation by charges; essentially, he contends that all three charges (§§ 121.639, 91.13(a), and 121.627(a)) were interwoven, and that a partial award of fees under the EAJA is therefore inconsistent with Alphin. Finally, applicant contends that the law judge erred in finding that applicant's documentation of fees was incomplete under our Rules of Practice, at 49 C.F.R. § 826.23.

We disagree with applicant's assertions. We first note that we believe that the Administrator's pursuit of the §§ 121.639 and 91.13(a) charges were substantially justified.

The parties did not dispute that applicant accepted, prior to taking off, a new route that was 97 nautical miles longer than the originally planned route, when he did not obtain additional takeoff fuel. Applicant's defense to the charge was that Delta 1966 had sufficient fuel, because he reallocated PCF to make up the difference, in consideration of the new, longer route.

However, the Flight Planning and Releasing section of the Delta Flight Control Operations Manual provides that PCF is for "known airborne contingencies."<sup>19</sup> In the case at hand, applicant did not have Mr. Caisse's concurrence for the route change; in fact, Mr. Caisse sent a message to applicant urging him to refrain from taking off, as the aircraft did not have sufficient fuel.<sup>20</sup> Unbeknownst to Mr. Caisse, however, applicant had already taken off. Once en route, applicant requested several shortcuts from ATC, and eventually declared a fuel emergency at LGA. Based on

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<sup>19</sup> The Manual listed the following examples of such contingencies: "[w]eather deviations due to enroute thunderstorms," and "[a]nticipated ATC delays and reroute." The manual also stated, "[t]his fuel cannot be used prior to takeoff unless the captain has the concurrence of the dispatcher." Exh. A-15 at 2.

<sup>20</sup> Mr. Caisse stated that the flight planning computer indicated that applicant did not have sufficient fuel for the new route. Tr. at 208-209. Mr. Caisse also acknowledged that Delta's policy is to plan to include only the minimum amount of fuel necessary for a flight, as a cost-saving measure. Tr. at 173, 196.

these events, we believe the Administrator's decision to pursue the case was substantially justified.

In our opinion on the merits phase of this case, NTSB Order No. EA-5411 (2008), we determined that the plain language of § 121.639 did not corroborate the Administrator's interpretation of the regulation, inasmuch as the Administrator believed the regulation prohibited applicant from reallocating the PCF to the trip burn fuel category. We stated that the Administrator did not prove that any specific amount of PCF was required, in addition to the amount of fuel required by § 121.639, notwithstanding the language of § 121.647, which requires that operators consider certain factors in calculating the appropriate amount of fuel for a flight. Although we determined that the Administrator did not articulate what nexus, if any, existed between §§ 121.639 and 121.647 for this flight, we nevertheless believe that the Administrator's interpretation was not so unreasonable that it necessitates a finding that the Administrator was unjustified in initiating a proceeding against applicant.<sup>21</sup> Applicant did not comply with Delta's policy concerning fuel planning, and we felt the need to consider this policy in light of the requirements of § 121.647 in the merits phase of this case. We finally determined that the

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<sup>21</sup> The circumstances of this case may have indicated that applicant did not consider all factors listed in § 121.647.

Administrator's evidence did not support a finding that applicant violated § 121.639, per se, as the Administrator did not show that § 121.639 specifically requires the inclusion of PCF; in particular, § 121.639 does not specifically reference § 121.647, and the Administrator did not charge applicant with a violation of § 121.647. Nevertheless, the Administrator obviously did not anticipate that our reading of § 121.639 would require the Administrator to prove that a specific amount of PCF was necessary, to assure compliance with both §§ 121.639 and 121.647. Our interpretation of § 121.639 differed from the Administrator's reading of § 121.639, and we stand by our holding that the Administrator, in this case, did not prove a violation of § 121.639.<sup>22</sup> However, we do not believe that the Administrator's interpretation, though novel, was unreasonable.

We agree with the Administrator that our decision in Application of Chandler, NTSB Order No. EA-4802 at 4 (1999), is worthy of consideration in resolving this issue. In Chandler, we stated that the Administrator's novel legal theory was reasonable, even though the Administrator did not "satisfy her burden of proof by laying an adequate evidentiary foundation." Id. (citing Hoang Ha v. Schweiker, 707 F.2d 1104, 1106 (9th Cir.

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<sup>22</sup> We recognized, in our previous opinion, that, in general, we are obligated to defer to the Administrator's interpretations of the Federal Aviation Regulations. NTSB Order No. EA-5411 at 19-20 (citing 49 U.S.C. § 44709(d)(3) and Garvey v. NTSB, 190 F.3d 571, 576-79 (D.C. Cir. 1999)).

1983), in which the Ninth Circuit stated that the government may sustain its burden by showing its position is "a novel but credible extension or interpretation of the law"). We extend this reasoning to the case at issue, and find that, although the Administrator did not fulfill his burden of proving that applicant violated § 121.639, he was nevertheless substantially justified in pursuing the § 121.639 charge against applicant, albeit based on a novel interpretation of § 121.639.

We also believe that our finding in this regard is consistent with the D.C. Circuit's holding in Alphin. In that case, the court admonished the Board for failing to view the "record as a whole" when the Board determined that the Administrator was substantially justified in pursuing a case against applicant Alphin. Alphin, 839 F.2d at 821. The court stated that, "even if the agency would have prevailed in an uncontested proceeding, fees should be awarded if, in light of *all* the evidence known to the agency, its case was not substantially justified." Id. at 822 (emphasis in original).<sup>23</sup>

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<sup>23</sup> The court provided the following example:

For example, if an agency were to bring an adversarial action against a private individual which was slightly stronger than frivolous, the agency would prevail if the respondent presented no defense. However, if the respondent successfully defended himself with overwhelming evidence, we would not deny his EAJA application solely because the agency would have prevailed had he not presented a defense.

In reaching our decision that the Administrator was substantially justified in pursuing the §§ 121.639 and 91.13(a) charges against applicant, we have carefully considered both the case-in-chief and applicant's rebuttal case. We note that, in considering the merits of each party's theory of this case, neither party explicitly identified and submitted arguments concerning the central issue in this case—whether § 121.639 requires a specific amount of PCF, by way of the requirements listed in § 121.647. Moreover, in our opinion, we specifically stated that we did not find applicant's arguments persuasive, but that the Administrator had not met his burden of proving that applicant did not comply with § 121.639, based on the plain language of § 121.639. We believe we made it clear that, during the merits phase of the case, applicant's rebuttal arguments were not on-point, and did not serve to exonerate him. Instead, it was our disagreement with the Administrator's interpretation of § 121.639 that led to the outcome of the case.

Finally, with regard to applicant's assertions that:

(1) the law judge erred in dividing the fee amount to provide for a partial award of fees based upon the finding that the Administrator was not substantially justified in pursuing the § 121.627(a) charge; and (2) the law judge erred in concluding

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(..continued)  
Id. at 821-22.

that applicant's EAJA application was deficient, based on its failure to include the amounts of time and a description of the work performed on the invoices that accompanied the application, we do not find either of these arguments persuasive. With regard to the first contention, we note that we have previously ordered partial awards of fees and expenses under the EAJA.<sup>24</sup> The circumstances of this case are not inconsistent with those involving such partial awards. Moreover, to the extent that applicant argues that we must view the entire case as a whole and refrain from subdividing it into the discrete charges that the Administrator alleged, we caution that, if anything, such a viewpoint would result in applicant receiving no fees at all. As explained above, we believe the Administrator was at least justified in pursuing the §§ 121.639 and 91.13(a) charges, despite our rejection of the Administrator's argument concerning these charges during the merits phase of this case. If applicant seeks to argue that the entire case must be viewed together, then we would find that the Administrator's pursuit of

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<sup>24</sup> The law judge's decision cites 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), and 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).

all charges was justified. We do not believe, however, that Alphin precludes us from issuing a partial award, which we have done in previous cases.<sup>25</sup> We find that the law judge correctly apportioned the award to provide for reimbursement of eligible fees and expenses related to applicant's defense of the § 121.627(a) charge.

We further reject applicant's contention that the law judge erred in finding that the EAJA application did not include the necessary information that 49 C.F.R. § 826.23 requires. We note that we have previously viewed the provisions of § 826.23 consistently to require copies of invoices and other specific documents to indicate the attorney's (or other professional's)

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<sup>25</sup> As explained above, Alphin stood for the notion that, during the EAJA phase of a case, we must consider both the Administrator's charges and the applicant's rebuttal arguments in order to determine whether the Administrator was substantially justified in pursuing the case. In addressing partial awards of fees, the Alphin court indicated that the EAJA contemplated such partial awards:

We believe the NTSB should have examined Alphin's application to determine if a partial award was appropriate, with respect to each allegation, and in light of the knowledge known by the FAA during the various stages of the proceedings. In Cinciarelli[,] this court stated that "[p]artial awards are contemplated within EAJA's statutory scheme; if some but not all of the government's defenses are substantially justified[,] the prevailing party should be compensated for combating those that are not."

839 F.2d at 822 (citing Cinciarelli v. Reagan, 729 F.2d 801, 804-805 (D.C. Cir. 1984), and Martin v. Lauer, 740 F.2d 36, 44 (D.C. Cir. 1984)).

rate, the hours spent, and a description of how the person spent the time billed in defense of the case.<sup>26</sup> Here, the law judge was correct in stating that applicant did not provide a description of the paralegal services performed on applicant's behalf.<sup>27</sup> We agree with the law judge's apportionment of the charges in light of the limited amount of time spent on the § 121.627(a) charge and the deficiencies in the documentation supporting the EAJA application, and we do not believe either party has proffered a reason for overturning the law judge's decisions concerning the EAJA application.

We note that applicant has submitted additional documentation with his request for a supplemental award of fees for the time spent in pursuing the EAJA appeal at issue here. The law judge in this matter granted fees in the amount of \$11,056.75. As explained above, we affirm the law judge's

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<sup>26</sup> See Carter at 7, supra note 24; see also, e.g., Application of Bosela, NTSB Order No. EA-5133 at 6-7 (2005); Application of Collings, NTSB Order No. EA-5007 at 2-3 (2002); Application of Thompson, NTSB Order No. EA-4353 at 3-4 (1995).

<sup>27</sup> For example, the billing statement attached to applicant's November 11, 2008 EAJA application included numerous entries merely for "[p]aralegal time." EAJA App. at Exh. B. Only one charge for "[p]aralegal time" contained the word "research"; the other charges did not indicate what services the paralegal(s) performed in defense of the case. Id. We believe this is an example of applicant's attorney's failure to include detailed entries in his invoices indicating the work performed on his behalf in defending his case.

decision. We believe reimbursement of an additional \$8,834.24, for a total of \$19,890.99, is recoverable.

Both parties appealed in the instant case, and applicant attached to his appeal a series of records establishing that he spent an additional \$18,454.47 in pursuing his appeal, and in responding to that of the Administrator. We first find that \$786.00 of these fees is not recoverable, as the records applicant provided list only "paralegal services" as the description of the work performed after the law judge's decision; this reduction is consistent with our agreement with the law judge's analysis of the deficiencies in the requisite documentation concerning paralegal services under § 826.23. We have not subtracted the fees for paralegal services where the spreadsheet includes a description of the work performed.

As for the remaining amount of \$17,668.47, we do not believe this amount is fully recoverable, because we have affirmed that the Administrator's pursuit of the § 121.639 charge was substantially justified and thus rule against applicant in his appeal. We believe, however, that the fees related to applicant's brief in response to the Administrator's appeal concerning the § 121.627(a) charge, which we find was not substantially justified, are recoverable.<sup>28</sup> We conclude that

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<sup>28</sup> See Cinciarelli v. Reagan, 729 F.2d 801, 809 (D.C. Cir. 1984) (holding that the petitioner "should receive a partial fee award

this defense constituted 50 percent of the total work applicant's attorney performed on the EAJA appeals.<sup>29</sup> Based on this determination, \$8,834.24 is the appropriate award of supplemental EAJA fees. We add this amount to the law judge's award of \$11,056.75, to reach a total of \$19,890.99.

**ACCORDINGLY, IT IS ORDERED THAT:**

1. Applicant's appeal is denied;
2. The Administrator's appeal is denied;
3. The law judge's decision granting fees, in part, is affirmed; and
4. The Administrator shall provide fees and expenses in the amount of \$19,890.99 to applicant.

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

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(..continued)

for expenses incurred in bringing [the] EAJA suit," and stating that the fee award should consist of "expenses incurred in this EAJA action that specifically relate to recovery of fees for combating the government's second defense," which the court found lacked substantial justification).

<sup>29</sup> We note that, aside from one entry of 2.4 hours, the invoice pages that applicant submitted with the reply brief do not specify how much time applicant's attorney spent on either the § 121.639 or the § 121.627(a) charges, during the EAJA phase of the case. Our estimate of 50 percent is based on the mentioning of § 121.627(a) in applicant's appeal and reply briefs, following the law judge's decision on remand.

Served: April 24, 2009

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

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Application of

JOHN J. GLENNON

Docket 338-EAJA-SE-17500RM

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

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

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

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

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

I.

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

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

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

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

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

<sup>4</sup> Those FARs provide:

"§ 91.13 Careless or reckless operation.

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

§ 121.627 Continuing flight in unsafe conditions.

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

§ 121.639 Fuel supply: All domestic operations.

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

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

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

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

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

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

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

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

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

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

<sup>6</sup> NTSB Order EA-5302 at 14.

<sup>7</sup> *Id.* at 4-5.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## II.

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

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

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

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<sup>12</sup> See n. 9 at p. 6, *supra*.

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

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

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

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

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

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

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

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

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

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

### III.

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

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

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

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

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

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

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

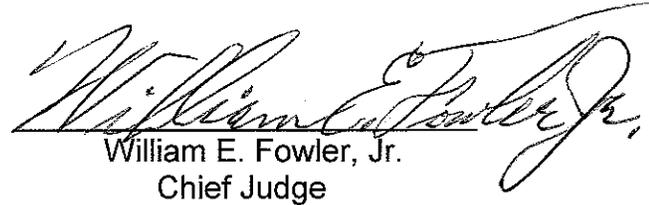
Because I thus find the Administrator's pursuit of an air safety enforcement action against applicant in the underlying proceeding to have been substantially justified in both fact and law, I will deny his EAJA claim here.<sup>15</sup>

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

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

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

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



William E. Fowler, Jr.  
Chief Judge

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

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

Served: February 17, 2010

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

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Application of

JOHN J. GLENNON

Docket 338RM-EAJA-SE-17500RM

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

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**SUPPLEMENTAL INITIAL DECISION AND ORDER  
GRANTING IN PART APPLICANT’S CLAIM FOR FEES AND  
EXPENSES UNDER THE EQUAL ACCESS TO JUSTICE ACT**

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***William E. Fowler, Jr., Chief Administrative Law Judge:*** In the above-captioned proceeding, applicant seeks reimbursement, under the Equal Access to Justice Act (“EAJA,” codified at 5 U.S.C. § 504), of fees and expenses he incurred in connection with his appeal to the National Transportation Safety Board of an order, by which the Administrator of the Federal Aviation Administration (“FAA”) suspended his airline transport pilot (“ATP”) pilot certificate for 120 days, stemming from a November 3, 2004 Delta Airlines flight (Flight 1966), from Ronald Reagan National Airport (“DCA”), in Arlington, Virginia, to LaGuardia Airport (“LGA”), in Flushing, New York, on which he served as pilot-in-command.<sup>1</sup>

<sup>1</sup> In that proceeding, the Administrator initially ordered the suspension of applicant’s ATP certificate on August 4, 2005, and later issued an order suspending, for 45 days, the ATP certificate of Keith M. Shewbart, who was applicant’s first officer on the subject flight, on November 23, 2005. After they both filed timely appeals of those orders with the Board and the two matters were consolidated for hearing purposes, the Administrator, on December 13, 2005, issued amended suspension orders to

## I.

In the underlying certificate action, applicant was charged with violations of §§ 91.13(a), 121.627(a) and 121.639 of the Federal Aviation Regulations (“FAR,” codified at 14 C.F.R.),<sup>2</sup> and, following an evidentiary hearing that took place on March 7 and 8, 2006, I issued an oral initial decision (“OID”), in which I found that he had violated FAR § 121.639 and, on a derivative or residual basis, § 91.13(a), but that the § 121.627(a) charge had not been established, and I reduced to 60 days the 120-day suspension that was imposed on him by the Administrator.<sup>3</sup> Thereafter, on cross-appeals from the parties, the full Board, in NTSB Order EA-5302 (served August 1, 2007), remanded the case to me for further proceedings consistent therewith. In compliance with that directive, I reviewed the OID and the evidentiary record of the case in its entirety, and, on November 20, 2007, I issued a written decisional order on remand (“DOR”), in which I clarified certain apparent inconsistencies in the OID, reaffirmed my prior determinations that applicant had violated FAR §§ 121.639 and 91.13(a), and that those violations warranted a 60-day suspension of his ATP certificate, and provided a more detailed explanation of the factual and legal bases underlying that decision than appeared in the OID. Since the Board noted in its remand order that the Administrator’s appeal of the OID did not contest my finding that no violation of FAR § 121.627(a) had occurred, I did not revisit that issue in my DOR, and the § 121.627(a) charge was not subsequently addressed by the parties or considered by the Board connection with the Board’s appellate review of the DOR.

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both applicant and First Officer Shewbart, which, pursuant to Rule 31(a) of the Board’s Rules of Practice in Air Safety Proceedings (codified at 49 C.F.R. § 821.31(a)), became the Administrator’s amended complaints in the underlying proceeding.

<sup>2</sup> Those FARs provide:

“§ 91.13 Careless or reckless operation.

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

§ 121.627 Continuing flight in unsafe conditions.

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

§ 121.639 Fuel supply: All domestic operations.

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

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

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

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

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

<sup>3</sup> I also found that First Officer Shewbart had violated FAR §§ 121.639 and 91.13(a), but reduced to 10 days the suspension the Administrator had ordered against his ATP certificate. He was not charged with a § 121.627(a) violation in the underlying proceeding, as that regulation applies only to pilots-in-command.

On such appellate review, the Board, in NTSB Order EA-5411 (served October 15, 2008), reversed my determinations that applicant had violated FAR §§ 121.639 and 91.13(a). The Administrator subsequently sought reconsideration of that decision, which the Board denied in NTSB Order EA-5425 (served January 5, 2009). In the interim, applicant had filed the instant EAJA claim, which was initially stayed pending the Board's disposition of the Administrator's reconsideration request in the underlying proceeding. After the Board issued its reconsideration denial and the parties completed their submissions referable to applicant's EAJA claim, I undertook consideration of the matter, and, on April 24, 2009, I issued a written initial decision ("EAJA WID"), in which I found that the Administrator was substantially justified in pursuing the §§ 121.639 and 91.13(a) charges against applicant, and, on that basis, denied his EAJA application. In connection with that decision, I did not consider the issue of whether the Administrator had substantial justification for prosecuting a § 121.627(a) charge against applicant in the underlying proceeding because the parties' EAJA filings contained absolutely no argument or discussion pertaining to that question.

Applicant subsequently appealed that EAJA WID to the Board, which, in NTSB Order EA-5482 (served September 29, 2009), stated (at 8-9):

Although the law judge [in the EAJA WID] carefully examined the charges under [FAR] §§ 121.639 and 91.13(a), he did not examine, nor did the parties address, whether the Administrator was substantially justified concerning the original charge under [FAR] § 121.627. We recognize both that the law judge initially found that the Administrator did not prove that applicant violated § 121.627, and that the Administrator did not appeal this finding. We are obligated to consider the totality of the evidence to determine whether a partial award of fees may be appropriate. *Alphin [v. National Transportation Safety Board]*, *supra*, [839 F.2d 817 (D.C. Cir. 1988)] at 822. Therefore, we remand this case to the law judge to address whether the Administrator was substantially justified in bringing the § 121.627 charge.

In view of that remand directive, I issued an Order on October 23, 2009, in which I afforded the parties the opportunity to make submissions pertaining to the propriety of an EAJA award as it relates to the Administrator's FAR § 121.627(a) charge, and advised them that, since my April 24, 2009 EAJA WID had fully reviewed and evaluated applicant's EAJA claim as it related to the FAR §§ 121.639 and 91.13(a) charges and the Board did not direct me to do anything further with respect thereto in its September 29, 2009 remand order, I would neither revisit those aspects of applicant's EAJA claim nor consider or review any submissions or portions thereof which related to any matters other than applicant's entitlement to reimbursement of fees and expenses incurred in connection with the Administrator's charge in the underlying proceeding that he violated FAR § 121.627(a).

The parties have since made their submissions in accordance with that Order, and I have thoroughly reviewed them and will now undertake consideration of applicant's entitlement to reimbursement of legal fees and expenses under the EAJA for his defense of the § 121.627(a) charge in the underlying certificate action.

## II.

The EAJA WID I issued in this matter on April 24, 2009 set forth (at 11-12) the legal standards applicable to an EAJA claim, and they need not be reiterated here. It is clear that applicant prevailed in the underlying proceeding on the issue of whether he violated FAR § 121.627(a), and the question I must now decide is whether the Administrator was substantially justified in prosecuting that charge.

The principal allegation against applicant in the underlying certificate action was that he took off on the subject flight with insufficient fuel after accepting an amended clearance to fly a “back door” route to LGA that was 97 nautical miles (“NM”) longer than the original route coordinated with Delta Dispatch.<sup>4</sup> There was some conflict between the aircraft’s Flight Management System (“FMS”) computer used by the flight crew and the Flight Planning Computer (“FPC”) used by the dispatcher as to the sufficiency of the fuel on board for the flight’s amended route,<sup>5</sup> and, at 8:43 p.m., eight minutes after take-off, the dispatcher sent an ACARS message to the crew that he was attempting to get the flight turned back onto its original route. At some point in time after climb, applicant asked First Officer Shewbart to recheck the FMS data, and no error was disclosed on FMS.

At 8:44, the crew contacted the ATC Washington Center to request a shortcut, and was advised to contact the New York Center with that request. One minute later, the crew radioed the New York Center with such a request. Flight 1966 was ultimately given two

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<sup>4</sup> Flight 1966 was scheduled to depart DCA at 7:30 p.m., but, due to a ground stop at LGA and/or air traffic saturation that resulted in the selected release of aircraft from DCA, Dulles Airport and Baltimore-Washington Airport, the flight was delayed and the aircraft taxied to a block holding area, where it waited with its engines shut down. Approximately an hour after scheduled takeoff, applicant was offered the amended clearance by air traffic control (“ATC”), and took off from DCA at 8:37.

<sup>5</sup> At the time of takeoff, 10,500 pounds of fuel were on board the aircraft. Prior to takeoff, applicant entered the new route into the FMS computer and determined, on the basis of the information he received, that there was sufficient fuel for the new route, and First Officer Shewbart checked and confirmed this on FMS. At 8:36, the crew sent an Aircraft Communications Address and Reporting Service (“ACARS”) message to Delta Dispatch, which informed it of the new route. After receiving the crew’s 8:36 ACARS message, the dispatcher entered the route and fuel information that the crew provided into the FPC, which responded that there was insufficient fuel for the new route. At 8:38, not knowing the flight had already taken off, the dispatcher transmitted the message, “INSUFFICIENT FUEL FOR THAT ROUTE – NEC TO REFUSE,” to Flight 1966 via ACARS. He then sent another ACARS message to Flight 1966 at 8:39, relating that the FPC’s response to the new route and fuel information was “BLOCK FUEL TOO LIGHT.” In my DOR (at 11), I determined that the likely reason for the disparity between the FMS and FPC analyses of the flight’s fuel situation was that the crew converted planned contingency fuel to trip burn fuel, while the dispatcher did not make such a fuel reallocation. (At the hearing, evidence was adduced that Delta’s Flight Control Operations Manual forbade the conversion of planned contingency fuel into trip fuel prior to takeoff without the concurrence of Dispatch.)

shortcuts by ATC — first, direct to the Milton intersection, then to MARCC, which shortened the route by approximately 40 NM — and clearance to climb from 21,000 feet to 27,000 feet, which was also designed to conserve fuel. At 8:53, the crew sent an ACARS message to Delta Dispatch, relaying the shortcuts and altitude increase, and indicating that there were 8,200 pounds of fuel on board the aircraft and that the flight was expected to land with 6,400 pounds of fuel. Based on that information, the dispatcher informed the crew by ACARS at 8:57 that, “WITH THOSE NUMBERS WE LOOK FINE,” and provided a recalculation of the flight’s fuel numbers from that point. This became the flight’s re-dispatch. Nothing remarkable occurred thereafter until the flight was on approach to LGA, when ATC resequenced the flight and directed it to turn away from LGA.<sup>6</sup> Applicant then declared a fuel emergency and landed at LGA.

In the portion of the OID relating to the § 121.627(a) charge, I stated (Tr. 573-74):

[I]t is my determination that there’s a non-violation of Section 121.627(a), which I incorporate by reference here, which states that no pilot in command may allow a flight to continue toward any airport to which it has been dispatched or released which in the opinion of the pilot in command or dispatcher, the flight cannot be completed safely. Well, once airborne and beyond the junction of Milton, the flight, as I determined, the flight was safe and the captain was well based in subsequently declaring an emergency. So as I said, it is my determination that there is no violation of Section 127.627(a) [sic] and there’s no violation of that section by Captain Glennon where this proceeding is concerned.

The Administrator asserts that there was substantial justification for the FAR § 121.627(a) charge in the underlying proceeding because the dispatcher did not believe that the flight could be completed safely after determining that there was inadequate fuel on board the aircraft following his receipt of crew’s 8:36 ACARS message informing him of the new route and his calculation of fuel sufficiency using the FPC. That assessment was made at takeoff. Once the crew and the dispatcher communicated following takeoff and determined that a shortened route was advisable, they worked at both ends (beginning at six-to-seven minutes after takeoff) to obtain one, and, when ATC gave the flight two shortcuts and clearance to fly at a higher altitude, which reduced its projected fuel usage, the dispatcher determined that there was adequate fuel on board and re-dispatched the flight based on that revised route. When, on cross-examination, the dispatcher was asked by applicant’s counsel whether he believed that there was any issue at any time in the flight regarding safety, the dispatcher responded, “Not in my judgment” (Tr. 346). The Administrator believes that such testimony contradicts the dispatcher’s 8:38 and 8:39 ACARS messages to the flight crew, and — in light of those contemporaneous responses to Flight 1966’s amended clearance — does not provide a

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<sup>6</sup> The resequencing initially had New York Approach Control redirect Flight 1966 to turn left, to a heading of 270 degrees. Although the crew responded that “we don’t have the fuel to do that,” Approach Control directed the flight to turn further away from LGA, to a heading of 220 degrees, approximately one minute later.

basis for a finding that the § 121.627(a) charge was without substantial justification. At the same time, the Administrator acknowledges that said response by the dispatcher on cross-examination was a significant factor in the decision not to appeal the OID's finding that applicant did not violate § 121.627(a).

I do not concur with applicant's suggestion that the Administrator's failure to appeal my determination that he did not violate § 121.627(a) is, in-and-of itself, indicative of a lack of substantial justification for the § 121.627(a) charge. Nor do I believe that the above-referenced response to applicant's counsel's question at the hearing — which the Administrator did not at the time appear to have reason to expect — establishes that substantial justification did not exist for the prosecution of that charge. Rather, I find a lack of substantial justification in the Administrator's application of § 121.627(a) in light of the facts of the case.

Pilots-in-command are proscribed by FAR § 121.627(a) from allowing a flight to *continue* toward any airport to which the flight has been dispatched or released if, in the opinion of the pilot in command or the dispatcher, the flight cannot be completed safely, with the exception that, if the pilot-in-command believes that there is no safer procedure, continuation of the flight to the destination airport under emergency procedures (as set forth in FAR § 121.557) is permitted. I believe that § 121.627(a) contemplates circumstances where an *in-flight situation* arises which makes the flight, as planned, unsafe.

In the underlying proceeding, the Administrator's assessment that the dispatcher considered the subject flight unsafe relied on the dispatcher's evaluation of the aircraft's fuel load at the time of *takeoff* on the amended clearance's longer route. The Administrator's submission in response to my October 23, 2009 Order avers (at 8 n.4) that the position that a violation of § 121.627(a) can only take place after an aircraft has taken off "would lead . . . to the untenable conclusion that whereas it would be a violation if a PIC, already in flight, proceeds with a flight notwithstanding his — or his dispatcher's opinion — that the flight could not be completed safely, it would be perfectly fine for a pilot to takeoff on a flight that has not yet commenced even if he or the dispatcher is of the opinion that the flight could not be safely completed." However, the regulation as written references only the continuation — and not the commencement — of a flight,<sup>7</sup> and the facts of this case reveal that any belief the dispatcher may have had that the flight could not be completed safely due to an insufficient fuel supply at takeoff was alleviated within 20 minutes of takeoff, when the dispatcher determined that the aircraft had adequate fuel on board to fly the revised route to LGA with the two shortcuts and altitude increase that the crew had obtained from ATC. There thus appears to have been no rational basis for the legal applicability of § 121.627(a) in light of the case's attendant facts. As a result, I conclude that the Administrator was without substantial justification in prosecuting an FAR § 121.627(a) charge against applicant in the underlying proceeding.

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<sup>7</sup> Clearly, violations of other FARs may be charged for a pilot's commencement of a flight under unsafe conditions. At the very least, an independent (as opposed to residual) violation of FAR § 91.13(a) could be pursued under such circumstances, thus avoiding the potentially "untenable" result decried in the Administrator's submission.

## III.

Thus, applicant is entitled to a partial EAJA award for the legal fees and expenses he incurred in connection with his defense of the Administrator's FAR § 121.627(a) charge, and it is incumbent upon me to determine what the amount of that award should be.

As I noted earlier in the April 29, 2009 EAJA WID, the Board has previously held that any fees and expenses that are incurred prior to the filing of the complaint by the Administrator in the underlying certificate action may not be reimbursed under the EAJA because "the adversary adjudication does not begin until the filing of the complaint."<sup>8</sup> Here, the Administrator's original complaint in the underlying certificate action against applicant was issued on August 19, 2005. Thus, while applicant contends, in his filings in response to the October 23, 2009 Order, that he is entitled to the inclusion, in any EAJA award he may receive, of legal fees and expenses incurred as early as February 1, 2005 (when he apparently first consulted with his counsel after receiving a letter of investigation pertaining to the subject flight from the FAA), I cannot incorporate into his award any fees or expenses that were incurred prior to August 19, 2005. I will also not include in applicant's award any fees and expenses he incurred in connection with his defense of the underlying certificate action following the conclusion of the evidentiary hearing and issuance of my OID, as the Administrator did not appeal the OID's finding that he had not violated FAR § 121.627(a), and that issue, therefore, ceased to be contested by the parties at that time.<sup>9</sup>

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<sup>8</sup> EAJA WID at 13-14 n.15, quoting *Application of Granda*, NTSB Order EA-4675 at 2 (1998). See also *Application of Petersen*, NTSB Order EA-4490 at 8-9 (1996).

<sup>9</sup> In his submissions in response to the October 23, 2009 Order, applicant — in an attempt to have fees and expenses incurred following the hearing and issuance of the OID included in an EAJA award made in connection with his defense of the § 121.627(a) charge — points to references to factual allegations pertaining to that charge and a citation of that FAR as a regulatory provision he allegedly violated in both the original appeal brief the Administrator filed with the Board following the issuance of the OID and the supplemental brief the Administrator submitted after the DOR was issued. It is somewhat disingenuous for applicant to allude to such references here, as they are found in the section of those briefs in which the Administrator merely quotes the amended complaint in setting forth the history of the certificate action. As the Board itself noted as far back as the time it issued its original remand order in the underlying proceeding (NTSB Order EA-5302), the Administrator's appeal of the OID did not in any way seek review of my determination that applicant had not violated § 121.627(a).

I also find untenable applicant's assertion that I should, in connection with the instant inquiry, consider awarding reimbursement for legal fees he may have incurred as a result of references made by the Administrator to FAR §§ 121.557 and 121.647, and "hybrid charges" stemming from his purported failure to comply with provisions of Delta's Flight Control Operations Manual and instructions from Delta Dispatch and air traffic controllers in connection with the flight's approach to LGA. As has been noted above (at p.2 n.2), FAR § 121.627(a) makes reference to § 121.557 in providing that, if a pilot-in-command believes there is no safer procedure than continuing to the airport to which the flight was dispatched, continuation to that airport becomes "an emergency situation as set forth in § 121.557." This did not have the effect of adding a charge applicant was

It must, however, be observed that, while the OID in the underlying proceeding was issued on March 8, 2006, the billing statements applicant has provided in connection with the submissions he made in response to the October 23, 2009 Order contain a series of entries dated March 14, 2006 which include "Subpoenas" and "FAA 2 Day Hearing in DC." Also billed on March 14, 2006 were travel and lodging expenses associated with the attendance of applicant's counsel at the hearing. In view of this, I believe that amounts billed between August 19, 2005 and March 14, 2006 are, to the extent allowable, recoverable in connection with applicant's defense of the § 121.627(a) charge in the underlying proceeding.

Applicant represents that he is not able to allocate the legal work and expenses for which he seeks reimbursement in this EAJA action between the § 121.627(a) charge and the Administrator's other charges, for which I previously considered and denied an EAJA award. A review of the billing statements he has provided shows that a total of 48.7 hours of attorney work was billed to him between August 19 to December 31, 2005, and 44.1 hours of attorney work was billed between January 1 and March 14, 2006. Among the items billed, all but 1.1 hours clearly appear to relate to the adjudication of the underlying proceeding between the time the original complaint and the OID were issued. The items open to question are "Review of Client E-Mails" (0.4 hours) and "Call with [First Officer] Keith Shewbart" (0.7 hours) on August 19, 2005, both of which precede entries made on August 25, 2005 for "Review Complaint" and "Answer to Complaint." This may indicate that they represent attorney work performed before the original complaint was issued; however, given the *de minimus* portion of applicant's claim such work items represent, and resolving reasonable doubt in his favor, I will incorporate reimbursement for such services into his award.

The billing statements also include several charges for "Paralegal Time," totaling 33.5 hours, between August 19, 2005 and March 14, 2006, none of which indicate the precise tasks attributable to such charges. Rule 23 of the Board's Rules Implementing the EAJA (hereinafter "EAJA Rules," codified at 49 C.F.R. §826.23) requires "[a] separate itemized statement . . . for each professional firm or individual whose services are covered by the application showing the hours spent in connection with the proceeding by each individual, *a description of the specific services performed*, [and] the rate at which each fee has been computed" (emphasis added). Since applicant has provided no description of the paralegal services performed in connection with his defense of the FAR § 121.627(a) charge, reimbursement will not be allowed for any of those 33.5 hours of claimed services.

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obligated to defend against. References to § 121.647 also did not augment the charges against applicant, as that FAR provision sets forth factors to be considered in computing fuel required for flights conducted under Part 121, and must, therefore, be taken into account in connection with an examination of whether a flight complies with or contravenes the provisions of FAR § 121.639. Similarly, the introduction of provisions of Delta's Flight Control Operations Manual (which also references FAR § 121.647) and evidence relating to applicant's compliance with instructions from Delta Dispatch and ATC in connection with the flight's approach to LGA related to the question of whether the flight at issue ran afoul of § 121.639, and did not burden applicant with allegations of other violations. Applicant's contentions in this vein are, thus, grossly misleading.

EAJA Rule 6(b)(1) (codified at 49 C.F.R. § 826.6(b)(1)) provides a formula which limits the hourly rate of legal fees that may be ordered reimbursed by the Board as part of an EAJA award. Under that formula, the maximum rate awardable for services rendered in 2005 is \$161.00 per hour, and for services rendered in 2006 is \$167.00 per hour. Since applicant's counsel has charged \$250.00 per hour for the legal services he performed on applicant's behalf, those limits apply here. Accordingly, applicant cannot be reimbursed for any more than \$7,840.70 (\$161.00 multiplied by 48.7 hours) for attorney services rendered in 2005 and \$7,364.70 (\$167.00 multiplied by 44.1 hours) for such services rendered in 2006. Applicant's billing statements also disclose that he incurred associated expenses of \$46.00 in overnight delivery service charges, and \$2,200 in travel and lodging related to his counsel's attendance at the hearing, as well as a \$50.00 "Filing Fee" charged on March 14, 2006. While the first two of these items are clearly allowable, there is no indication of what the filing fee was for. The Board does not charge any fees for the filing of documents in connection with its conduct of aviation safety enforcement proceedings, and reimbursement will, therefore, not be allowed for that item.

Because applicant is unable to allocate the legal work and expenses for which reimbursement is sought between the § 121.627(a) charge and the other charges he was required to defend in the underlying certificate action, I must apportion the unallocated fees and expenses between the § 121.627(a) charge for which I have found reimbursement is warranted under the EAJA and the §§ 121.639 and 91.13(a) charges for which I have previously determined applicant should not be reimbursed.<sup>10</sup>

Having presided over the underlying proceeding throughout the entire prehearing process and the hearing, I have observed that the vast preponderance of the parties' proof and argument from the inception of that proceeding up to the hearing's conclusion related to the sufficiency of fuel issue that was the subject of the § 121.639 charge. I further note that, in the submission the Administrator has made in response to my October 23, 2009 Order, it was posited that, if I were to find that applicant is entitled to an EAJA award in connection with his defense of the § 121.627(a) charge, the award should not exceed 25 percent of the allowable legal fees and expenses incurred during the relevant period. That 25 percent figure derived by the Administrator is greater than the proportion of time I believe the parties devoted to litigating the § 121.627(a) charge through the hearing,<sup>11</sup> and I will, therefore, apply it in determining the amounts applicant is entitled to recover herein. As a consequence, I find that applicant is entitled under the EAJA to reimbursement of \$3,801.35 (25 percent of \$15,205.40) in legal fees and \$561.50 (25 percent of \$2,246.00) in expenses — or a total of \$4,362.85 — for his defense of the § 121.627(a) charge in the underlying proceeding.

Applicant is also entitled to recover legal fees and expenses associated with his prosecution of this EAJA action as it relates to the § 121.627(a) charge. Because his original EAJA claim completely ignored that charge, no such fees or expenses incurred prior to the issuance of the Board's September 29, 2009 remand (NTSB Order EA-5482)

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<sup>10</sup> In this regard, see, e.g., *Application of Gull*, NTSB Order EA-3521 at 6-8 (1992); *Application of Carter*, NTSB Order EA-3959 at 6-7 (1993).

<sup>11</sup> In my opinion, the § 121.627(a) issue encompassed no more than one-sixth of the litigation referable to the underlying certificate action between August 19, 2005 and March 8, 2006.

are recoverable. Subsequent to that time, applicant has, according to the billing statements he has furnished, been charged for 33.7 hours of attorney time and 21.7 hours of paralegal time (all for services rendered in 2009), and expenses of \$15.00 (for over-night delivery service), all of which relate to the § 121.627(a) aspect of the EAJA action. With respect to the paralegal time, no description of services rendered is given for 9.8 of the hours shown, and reimbursement for such work will not be allowed. The remaining 11.9 hours of paralegal work include 3.9 hours for "Research" and "Research and Proof," and 8.0 hours ascribed to "Research Billing issues @ NTSB & USCt of App" and "Billing." Those descriptions are sufficient to permit reimbursement.

The maximum hourly rate of attorney fees that are awardable under EAJA Rule 6(b)(1) for services rendered in 2009 is \$177.00, and paralegal services were billed to applicant at the rate of \$60.00 per hour. Since the fees and expenses referenced above were all incurred solely in connection with the § 121.627(a) facet of applicant's EAJA claim, they are reimbursable in full. Thus, applicant is entitled to recover attorney fees of \$5,964.90 (\$177.00 multiplied by 33.7 hours), paralegal fees of \$714.00 (\$60.00 multiplied by 11.9 hours) and expenses of \$15.00 — or a total of \$6,693.90 — for the prosecution of his EAJA claim.

As a result, applicant is entitled to an aggregate EAJA award of \$11,056.75 (\$4,362.85 plus \$6,693.90).

THEREFORE, IT IS ORDERED that the application in this proceeding for fees and expenses under the Equal Access to Justice Act is GRANTED IN PART, and that the Administrator shall pay to applicant \$11,056.75 within 30 days of the date of service of this Order.

Entered this 17th day of February, 2010, at Washington, D.C.

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William E. Fowler, Jr.  
Chief Judge