

SERVED: January 21, 1993

NTSB Order No. EA-3763

UNITED STATES OF AMERICA  
NATIONAL TRANSPORTATION SAFETY BOARD  
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD  
at its office in Washington, D.C.  
on the 28th day of December, 1992

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HAROLD M. GAY, JR.,	)	
	)	
Applicant,	)	
	)	
v.	)	
	)	Docket 139-EAJA-SE-11830
THOMAS C. RICHARDS,	)	
Administrator,	)	
Federal Aviation Administration,	)	
	)	
Respondent.	)	
	)	

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**OPINION AND ORDER**

The Administrator has appealed the initial decision issued in this proceeding on May 18, 1992, by Administrative Law Judge William E. Fowler, Jr.<sup>1</sup> In that decision, the law judge granted in full applicant's request, filed under the Equal Access to Justice Act, 5 U.S.C. 504 et seq. (EAJA, originally Pub.L. No. 96-481), for attorney fees of \$21,750 and expenses of \$3,989 (a

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<sup>1</sup>A copy of that decision is attached.

total of \$25,739) in connection with his defense in SE-11830, Administrator v. Gay.<sup>2</sup>

We grant the appeal in part. We award \$6,725 in fees (87 hours x \$75/hour) and \$3,270 in expenses (the sought \$3,989 less applicant's \$719 travel expenses). Each of the Administrator's challenges to the law judge's decision is addressed below.<sup>3</sup>

1. Did the law judge have the authority to award attorney fees in excess of \$75 per hour? The Administrator's first challenge is to the law judge's use of a \$250 hourly attorney fee, a rate the law judge justified on the basis of "special circumstances."<sup>4</sup> Both the Administrator and applicant agree that

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<sup>2</sup>There, applicant was charged with violations of Federal Aviation Regulations (FAR), 14 C.F.R. 121.545 and 91.13, and the Administrator sought to revoke his airline transport pilot privileges. After hearing, the law judge dismissed the charges. Although the Administrator initially appealed that decision, he later withdrew his appeal. In the instant case, the Administrator does not argue that EAJA fees are inappropriate because, for example, his position was substantially justified. See 5 U.S.C. 504(a)(1). His various challenges go instead to the amount and type of fees and expenses that may be recovered by applicant.

<sup>3</sup>Applicant filed two replies to the appeal, one pro se, and one by counsel. Although the Administrator has filed no motion to strike, we will consider only the latter reply, filed by counsel. We admonish applicant's counsel that he should have withdrawn the earlier pleading.

In applicant's pro se reply, he seeks attorney fees in connection with the Administrator's appeal of the law judge's EAJA award. Counsel's reply does not contain such a request. Because we are not considering the first filing, and because, given counsel's silence on the matter, it is unclear whether or to what extent fees have been incurred or are sought, this issue is not properly or adequately before us, and it will not be considered here.

<sup>4</sup>As the Administrator notes, EAJA uses the phrase "special factor" in the provision "attorney or agent fees shall not be

our rules limit the fee rate for attorneys to \$75/hour, and that the only manner in which that rate may be increased is via a rulemaking. Applicant submitted a petition for rulemaking to the law judge. The parties disagree on whether the law judge had the authority to adopt a rule to increase the rate to \$250 and whether, as required by EAJA itself, special factors exist in this case that warrant the \$175/hour fee increase.

We are not convinced by applicant's claim that the requirements of the Administrative Procedure Act (APA) have been met and, therefore, that our law judges may exercise the necessary rulemaking power our current rules require be exercised to increase fees above \$75/hour. Whether the fee rate is increased is clearly a matter of policy generally understood to be committed to the discretion of the agency members themselves; the role of hearing officers would not appear to encompass such authority. See 5 U.S.C. 556 (duties and powers of hearing officers). Thus, the fact that our rules do not specifically address the body or employee to act on petitions for rulemaking is not compelling, nor is the law judge's alleged familiarity with the issues in the case.

Moreover, we do not agree with applicant's argument, in

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awarded in excess of \$75 per hour unless the agency determines by regulation that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys or agents for the proceedings involved, justifies a higher fee."

5 U.S.C. 504(b)(1)(A)(ii). The Administrator is also correct that our rule, 49 C.F.R. 826.7(a), while using the phrase "special circumstances," does not intend any departure from the statute. In this decision, we use the statute's terminology.

part, that because the Administrator and the applicant are the only parties-in-interest and both had notice, procedural matters under the APA were properly accounted for in the proceeding before the law judge. The Federal government's interest in fee levels under EAJA is not necessarily represented adequately by the Administrator alone. There would also be a broad public interest not represented by the applicant, given the U.S. Treasury source of the funds used to pay awards.

This analysis should not, however, be interpreted as Board rejection in principle of an increase in the hourly fee rate. The \$75 amount has been in effect for a decade and, although it was never intended fully to compensate respondents for litigation costs,<sup>5</sup> we believe it would be valuable to examine the question further.<sup>6</sup> Towards this end, we have recently issued a notice of proposed rulemaking, Equal Access to Justice Act Fees, 57 FR 60785, December 22, 1992, incorporating this and other petitions that are pending before us, and will request comments on the issue. Should we determine that an increase, either in specific types of cases or across-the-board, is in order and would apply to applicant, he may qualify for an additional payment, and our order here invites applicant to submit further evidence and argument on the issue of a cost of living adjustment (COLA) to

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<sup>5</sup>See Application of Mark J. Cross, NTSB Order EA-3601 (1992), slip opinion at 11.

<sup>6</sup>To our knowledge, no agency has granted a petition to increase the hourly payment, and none has proposed a rulemaking to consider the matter as a general proposition.

the 87 hours of attorney time we approve here (see infra), computed as we have suggested in our proposed amendment to 49 C.F.R. 826.6(b).<sup>7</sup> Any such filing will be addressed following completion of the rulemaking proceeding.

2. Did the law judge err in finding that special factors warranted the \$250/hour rate? We also agree with the Administrator that the special factors cited by applicant and found by the law judge -- necessary knowledge of the history of the case requiring use of the same attorney and that attorney's alleged expertise in aviation law -- do not warrant an increase in attorney fee rates in this case. As both parties note, useful language is found in Pierce v. Underwood, 487 U.S. 552, 571-572 (1988):

[T]he "special factor" formulation suggests Congress thought that \$75 an hour was generally quite enough public reimbursement for lawyers' fees, whatever the local or national market might be. If that is to be so, the exception for "limited availability of qualified attorneys for the proceedings involved" must refer to attorneys "qualified for the proceedings" in some specialized sense, rather than just in their general legal competence. We think it refers to attorneys having some distinctive knowledge or specialized skill needful for the litigation in question - as opposed to an extraordinary level of the general lawyerly knowledge and ability useful in all litigation. Examples of the former would be an identifiable practice specialty such as patent law, or knowledge of foreign law or language. Where such qualifications are necessary and can be obtained only at rates in excess of the \$75 cap, reimbursement above that limit is allowed.

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<sup>7</sup>Applicant is free to reference prior submissions, but is reminded that the question before us, should we ultimately adopt a cost of living fee inflator, will be the propriety in this case of a COLA as discussed in the rulemaking, not the validity of the rates applicant has been charged.

Despite its potential superficial appeal and judicial support,<sup>8</sup> applicant's first argument -- that counsel was needed because of his familiarity with the case -- appears little more than bootstrapping, and we view it as contrary to public policy.

All a respondent in complex or multi-forum litigation need do under this theory would be to use the same attorney or firm throughout. That attorney or firm would then automatically develop "unique" knowledge that would justify a higher fee. Applicant ignores the fact that attorney continuity would be to his benefit generally, in any event, and is typically a factor in the choice of the attorney or firm in the first place.<sup>9</sup> We also must note our disagreement with the law judge's conclusion that the FAA should reasonably have expected to pay attorney fees here. Whatever the FAA's expectation, this is not a factor in EAJA analysis.

We further find that the aviation law expertise of applicant's attorney, however extensive it may be, does not qualify for an increased fee. The issues in this case have not been shown to be so complex as to rise to the level required by Pierce. Applicant does not dispute the Administrator's characterization that the action did not raise technical issues

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<sup>8</sup>Applicant cites David v. Sullivan, 777 F. Supp. 212 (E.D.N.Y. 1991).

<sup>9</sup>There is one aspect of using the same attorney that, in theory, can produce a public benefit. That is the likelihood that fewer hours would be needed for the attorney to prepare for subsequent proceedings. Nevertheless, there is no basis in this record to find that such a benefit attached here equivalent to allowing applicant to recover \$250/hour for 87 hours.

requiring particular expertise; instead, it was primarily factual. We would also note that expertise with the FARs and Board procedures generally would not, in our view, qualify as a special factor under Pierce. Consequently, applicant has not shown that special factors existed requiring more than simple experience and competence in administrative hearings. Applicant may have felt more comfortable with the selection of an expensive litigator, but the public cannot be required to pay such fees absent a showing that adequate representation could not be obtained at a lower rate. That showing has not been made here.

3. Did the law judge err in authorizing an award for 87 hours of attorney time? The Administrator next argues that 87 hours is too much: the work should and could have been done in less time. The Administrator would reduce the number of compensated hours from 87 to 60.<sup>10</sup> We note, initially, that the Administrator failed to raise this argument before the law judge,<sup>11</sup> and it is considerably fact bound. It is, therefore, not possible for us thoroughly to address it on appeal. We are not unwilling to reduce compensated hours if warranted,<sup>12</sup> but, to the extent we are able to consider this challenge on the merits, we

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<sup>10</sup>We cannot discern where the Administrator obtains this figure. Adding the hours he believes are appropriate produces a total of 51.

<sup>11</sup>He stated, inconsistently, that if applicant's attorney spent 87 hours on this case, any fees must be limited to 87 hours. Administrator's Response to Applicant's Reply to Administrator's Answer to Application for Award of Attorney Fees and Expenses, at unnumbered 2.

<sup>12</sup>See Application of George Sandy, NTSB Order EA-3543 (1992)

would deny it here for failure of supporting evidence.

The Administrator challenges the number of hours alleged to have been spent preparing for the two hearings (the first in New York and the second in Washington), and travel time. As to the latter, there were two listings of hours: one for October 22 and 23, 1991 (which also included interviewing witnesses), totalling 10 hours; and one for November 25, 1991 (including "preparation"), totalling 10 hours. The Administrator suggests that travel time for the first trip should not be more than 4 hours and for the second should not be more than 3 hours. It is possible, however, in view of the fact that return travel is not separately listed, that it is included in these numbers. Even if it were not, we are not convinced, and the Administrator has not shown us, that these hours are excessive. Simply because he had worked on a related case does not mean that the attorney does not need to refresh his recollection. Moreover, the FAA does not argue that this enforcement proceeding did not raise new issues of law related to the FAR charges -- issues that required new or additional analysis. For the same reasons, we reject the Administrator's suggestion that, because applicant's counsel worked on this matter before, 40 other hours billed for preparation<sup>13</sup> is an excessive amount.

(..continued)  
at footnote 7.

<sup>13</sup>26 hours on October 15-18, 1991; 10 hours on October 24, 1991 (the remaining 12 of which were for the hearing itself); and 4 hours on November 26, 1991 (the remaining 7 for the hearing).

4. Did the law judge err in authorizing recovery of applicant's travel expenses to attend the two Board hearings?

The law judge authorized a \$719 payment to reimburse applicant for his hotel, driving, parking, and food expenses during the 3 days of hearings. Citing Application of Rooney, 5 NTSB 776, 777 (1985), the Administrator correctly argues that our precedent does not permit this compensation.<sup>14</sup>

Applicant argues that we should reconsider our case law. He does not, however, present any precedent specifically supporting compensation for an applicant's personal expenses, and we continue to believe that EAJA does not contemplate such awards. 5 U.S.C. 504(a)(2) (applicant to submit itemized statement from "attorney, agent, or expert witness representing or appearing" on his behalf).<sup>15</sup>

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<sup>14</sup>Once again, the Administrator raises this issue for the first time here. We are able to address it, however, because it raises no issues of fact. We, nevertheless, caution the Administrator against raising arguments for the first time on appeal. We need not consider them, for obvious due process reasons. In the case of EAJA applications, however, we feel a heightened duty to safeguard the integrity of the process. See, e.g., Gull v. Administrator, NTSB Order EA-3521 (1992), slip opinion at footnote 2 (arithmetical calculations corrected on our own motion).

<sup>15</sup>We also disagree with City of Brunswick, GA v. United States, 661 F.Supp. 1431 (5.D.Ga. 1987), to the extent applicant cites it for the proposition that prevailing parties are to be fully compensated. Reply brief at 18. As we have earlier noted, we believe the correct position to be that EAJA awards are intended to contribute to the costs. If full compensation had been intended, there would have been no \$75 cap on attorney fees. See also 5 U.S.C. 504(a)(3), and (b)(1)(A)(i), as well as Pub.L. No. 96-481, Section 202(b) (the purpose of EAJA is to diminish the deterrent effect of seeking review of, or defending against governmental action).

5. Conclusion. For the reasons discussed above, we are awarding attorney fees for 87 hours at the rate of \$75 per hour.

The Administrator has not justified a reduction in the number of hours sought. Although we do not here authorize an increase in the hourly rate due to special factors present in this case alone, we have instituted a rulemaking broadly to consider the question. We are also awarding expenses in the amount of \$3,270.<sup>16</sup>

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<sup>16</sup>Counsel's expenses included \$1,070 for travel between West Palm Beach and New York, \$984 for travel between West Palm Beach and Washington, and \$1216 for the few days' hotel charges. The Administrator did not explore the issue and we have inadequate information to modify the amounts on our own motion. We are sufficiently troubled with their magnitude to urge that, in future cases, these types of expenses be closely scrutinized by the Administrator.

**ACCORDINGLY, IT IS ORDERED THAT:**

1. The Administrator's appeal is granted to the extent set forth in this opinion;
2. The initial decision is modified to reduce the award to \$9995.00;
3. Applicant may, within 30 days, submit further evidence and argument regarding the propriety of applying a cost of living increase, as discussed in this opinion and in Equal Access to Justice Act Fees;
4. The Administrator may reply to any such pleading within 30 days of its filing; and
5. This proceeding is held open pending receipt and consideration of the above pleadings.

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.