



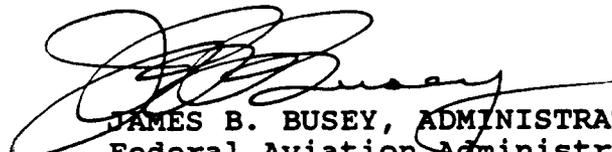
On January 11, 1990, Respondent's attorney filed his application for attorney fees and expenses under the EAJA. The application, which cited the EAJA Rules applicable to proceedings before the National Transportation Safety Board (NTSB), was directed to, and was apparently filed with, the NTSB. That agency, which adjudicates FAA certificate actions (see, 49 U.S.C. App. §1429(a)), has no jurisdiction over FAA civil penalty actions. A copy of the improperly directed application was served upon the FAA agency attorney in this case, who transmitted it to the FAA hearing docket, noting the NTSB's lack of jurisdiction. In addition, the agency attorney argued that no fees could be awarded because FAA rules implementing the EAJA provide that fees may be awarded only for work performed after the issuance of an Order of Civil Penalty (which serves as the complaint to start the proceeding), and no such order was ever issued in this case.

Respondent's application and the agency's response were forwarded to the Department of Transportation (DOT) Office of Administrative Law Judges. The Chief Administrative Law Judge returned the file, stating that an Order of Civil Penalty was never issued, and, therefore, the matter was inappropriate for consideration by that office.

Under the FAA's rules implementing the EAJA (14 C.F.R. Part 14), fees may be awarded for work performed only after the issuance of an Order of Civil Penalty. 14 C.F.R. §14.05(e). This limitation is consistent with the clear language of the statute itself, which provides for the award of fees and

expenses incurred by a party in connection with only an "adversary adjudication," i.e., an adjudication under section 5 U.S.C §554. 5 U.S.C. §504(a)(1) and (b)(1)(C). As explained in the preamble to the interim final rule promulgating the FAA's EAJA rules, "the opportunity for a hearing [under section 554] arises only when the FAA issues an Order of Civil Penalty, which serves as the complaint and which begins the adversary adjudication. Consequently, legal expenses that are incurred before that time are not incurred in connection with an adversary adjudication and thus [are] not covered by the EAJA and this regulation." 54 Fed. Reg. 46196, 46198 (November 1, 1989).<sup>1/</sup>

THEREFORE, Respondent's application for attorney fees and expenses under the EAJA is denied.<sup>2/</sup>

  
JAMES B. BUSEY, ADMINISTRATOR  
Federal Aviation Administration

Issued this 6<sup>th</sup> day of April, 1990.

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<sup>1/</sup> In light of my conclusion that neither the EAJA nor the agency's implementing regulations authorize an award of fees and expenses in this case, it is not necessary to decide whether Respondent's improper filing of the application with the NTSB precludes an award.

<sup>2/</sup> Respondent may appeal this Decision and Order by petition for review in an appropriate United States Court of Appeals pursuant to section 1006 of the Federal Aviation Act of 1958, as amended (49 U.S.C. App. §1486), and section 13.235 of the Rules of Practice (14 C.F.R. §13.235) not later than 60 days after service of this Decision and Order.