

In its petition for reconsideration Respondent asserts that, as a general matter, the application of procedural rules which were subsequently held to be invalid is "presumptively prejudicial," and that the burden should be on the FAA to show there was no prejudice or harm. Respondent asserts that the Administrator "cannot unilaterally and peremptorily shift" the burden to Respondent to show that there was harm. However, as Complainant correctly points out in its opposition to Respondent's petition, it is the court's own language in Air Transport Association v. Department of Transportation, 900 F.2d 369 (D.C. Cir. 1990), which places the burden on Respondent to "raise the defense that the FAA could not have successfully prosecuted him but for the agency's reliance on some aspect of the . . . Rules abandoned in the new scheme." Id. at 381. Indeed, the approach suggested by Respondent's argument -- that the agency should be required to show, with regard to each and every case which was initiated under the former rules, that the respondent was not adversely affected by any of the changes made in the rules during the pendency of the case -- would

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Department of Transportation, 900 F.2d 369 (D.C. Cir. 1990). In Air Transport, the court barred the FAA from initiating new cases, or prosecuting pending cases, until the procedural rules were re-promulgated with notice and comment. Id. at 380. The court also stated that the FAA was free to hold pending actions in abeyance while it engaged in further rulemaking. Id. However, the court noted that a respondent in such a case would "be free to raise the defense that the FAA could not have successfully prosecuted him but for the agency's reliance on some aspect of the . . . Rules abandoned in the new scheme." Id. at 380-81.

impose an excessive and undue burden on the agency and would be patently unworkable.

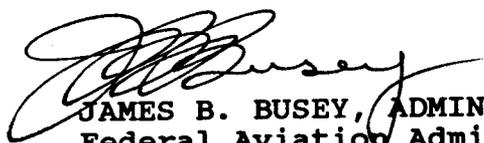
Respondent further argues that it was prejudiced in this case by two specific changes in the rules. First, it asserts that it was denied an opportunity to discuss settlement of this case without a finding of violation because the original rules did not permit such a compromise. Respondent cites the new rule which states that agency attorneys may now compromise a civil penalty action without a finding of violation (see, 55 Fed. Reg. 27545 (July 3, 1990) (to be codified at 14 C.F.R. §13.16(1))). In reply, Complainant asserts that the opportunity to discuss settlement under the new rule is still available to Respondent, and notes that the agency has agreed, in appropriate instances, to compromise a case even when the Administrator has already issued a decision and order on appeal. Whether or not this is so, it is the case that the current provision, which allows the prosecutor to compromise a case without a finding of violation, is wholly discretionary with the prosecutor. For Respondent now to assert that it was prejudiced by the absence of this opportunity assumes that the prosecutor would have agreed to such a compromise. Unless Respondent can show that, in fact, this case would likely have been compromised but for the prosecutor's inability to agree to do so without a finding of violation, Respondent's claim of prejudice is totally speculative. I cannot accept the mere possibility of such an agreement as an adequate showing of prejudice.

Respondent also cites the expansion of the agency's separation of functions to remove the Chief Counsel from participating in a case before it is initiated (see, 55 Fed. Reg. 27576 (July 3, 1990) (to be codified at 14 C.F.R. §13.203)), and alleges that the language of the former section 13.203 "specifically permitted" a breach of the separation of functions as now required by the revised rule. However, as the agency explained in response to comments on the original rules, section 13.203 as originally promulgated fully satisfied the requirements of the Administrative Procedure Act with regard to separation of functions. See, 54 Fed. Reg. 11914, 11915-16 (March 22, 1989); 54 Fed. Reg. 46196, 46196-98 (November 1, 1989); 55 Fed. Reg. 15112, 15114-15 (April 20, 1990). Furthermore, although the original rule did not explicitly forbid the Chief Counsel from being involved with a case before issuance of a notice of proposed civil penalty, there is nothing in the record (or outside of the record) that suggests that the Chief Counsel actually participated in the case before it was initiated, and I find that there was no such involvement. Thus, Respondent was not prejudiced by this change in the rules.

Finally, Respondent asserts that it was prejudiced in this case because the agency attorney "deliberately withheld . . . information concerning the identity of the decision-makers involved in the prosecution process" -- information which allegedly would have disclosed a violation of the required separation of functions. However, this argument is not based

on any changes in the rules and, in any event, was already rejected as baseless in Order No. 90-18, at 6-7.

THEREFORE, for the reasons discussed above, Respondent's petition for reconsideration is denied.


JAMES B. BUSEY, ADMINISTRATOR
Federal Aviation Administration

Issued this 7th day of November, 1990.