



In its appeal brief, Complainant argues that Section 13.205(a) of the Rules of Practice,<sup>2/</sup> 14 C.F.R. § 13.205(a), which lists the specific powers of law judges in these proceedings, does not include the authority to award costs to any party. In addition, Complainant points out, the law judge's award of \$937.50 to Respondent is contrary to Section 13.205(b), 14 C.F.R. § 13.205(b), which specifically provides that a law judge shall not award costs to any party or impose any sanction not specified in this Subpart G of Part 13. Finally, Complainant argues that the law judge's imposition of a sanction is inappropriate because the law judge never ruled on Respondent's motion to compel, and, therefore, Complainant had not abused the discovery process.

Respondent argues that a law judge's authority to adjudicate includes the power to protect the proceedings from disruption. Citing In the Matter of American Airlines, FAA Order No. 89-6 (December 21, 1989), Respondent argues that the law judge has the discretion to decide on a case-by-case basis what sanction should be imposed for failure of a party to file timely discovery responses, and that the Administrator in this instance should defer to the law judge's decision to order Complainant to pay costs because the law judge exercised his

---

<sup>2/</sup> The Rules of Practice in Civil Penalty Actions were published in the Federal Register on July 3, 1990 and will be codified at 14 C.F.R. Part 13. See 55 Fed. Reg. 27548 (July 3, 1990).

discretion "appropriately, fairly and judiciously." (Reply Brief at 5). Respondent argues further that to force a Respondent to file a motion to compel is a costly abuse of discovery. In addition, Respondent argues that the United States waived its immunity from suit for sanctions when it passed the Equal Access to Justice Act. Respondent also argues that because Complainant referenced Rule 37(a) of the Federal Rules of Civil Procedure in its Request for Discovery and Production of Documents, the Federal Rules of Civil Procedure are dispositive in this matter. Finally, Respondent argues that Complainant did not file a timely objection to Respondent's Motion for Sanctions.

I agree with Respondent that the discovery process must not be abused, and I consider Complainant's failure to respond to Respondent's discovery requests, including Respondent's Request for Admissions, to be both imprudent and an abuse of the discovery process. Nonetheless, while I do not condone Complainant's action -- or inaction -- in this matter, I must grant Complainant's appeal because the law judge lacked the authority to grant the motion for sanctions.

Section 13.205(b) of the Rules of Practice in Civil Penalty Actions prohibits a law judge from awarding costs to any party.<sup>3/</sup> Although a law judge may not award costs, he may in

---

<sup>3/</sup> Section 13.205(b) provides in pertinent part "[t]he administrative law judge shall not . . . award costs to any party . . . ."

accordance with Section 13.220(n) use any of the following sanctions, as appropriate, when a party fails to comply with a discovery order or an order to compel production: (1) strike that portion of a party's pleadings; (2) preclude prehearing or discovery motions by that party; (3) preclude admission of that portion of a party's evidence at the hearing; or (4) preclude that portion of the testimony of that party's witnesses at the hearing.<sup>4/</sup> 14 C.F.R. § 13.220(n). In this case, it was improper for the law judge to award costs to Respondent in light of the specific prohibition against such an award by Section 13.205(b). Moreover, the use of the sanctions provided in Section 13.220(n) would have been inappropriate because Complainant withdrew the complaint, and because the law judge had not issued an order to compel or other discovery order.<sup>5/</sup>

A party may only recover its attorney fees and other expenses incurred in connection with a civil penalty proceeding

---

<sup>4/</sup> In addition, a law judge may use the same sanctions when a party fails to comply with an order establishing a joint discovery or procedural schedule. 14 C.F.R. § 13.217(f).

<sup>5/</sup> Although as Respondent points out, it may be costly for a party to prepare and defend a motion to compel responses to discovery requests, Section 13.220(n) of the Rules of Practice only permits the law judge to impose sanctions for failure of that party to comply with an order compelling discovery or other discovery order.

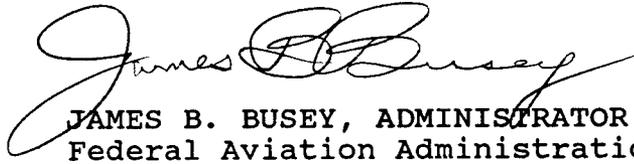
through an application under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504, and the FAA's Rules Implementing the EAJA, 14 C.F.R. Part 14. The EAJA provides for the award of attorney fees and other expenses when the applicant prevails over Complainant, unless Complainant's position was substantially justified or special circumstances make an award unjust. 14 C.F.R. §§ 14.01, 14.04. Indeed, Respondent did file a separate application for an award of additional fees and expenses under the EAJA.<sup>6/</sup>

Respondent's remaining arguments may be easily dismissed. The Administrator need not defer to an ultra vires act of any law judge, such as the law judge's decision in this matter to award costs without applying the standards of the EAJA and without following Part 14's procedural requirements. The fact that Complainant referenced one of the Federal Rules of Civil Procedure in its Request for Discovery and Production of Documents does not change the fact that those rules applicable to litigation in Federal district courts are not binding on administrative proceedings conducted under the Rules of Practice in Civil Penalty Actions, 14 C.F.R. Part 13. Although the Federal Rules of Civil Procedure may be looked to for guidance, they do not supercede Part 13's provisions.

---

<sup>6/</sup> By order dated May 14, 1991, the law judge denied Respondent's request for additional fees and expenses. This denial is a separate matter, and it may, at another time, come before me on appeal.

THEREFORE, in light of the foregoing, the Order of Dismissal and Order Awarding Sanctions is hereby reversed to the extent that it awarded costs to Respondent.<sup>1/</sup>

  
JAMES B. BUSEY, ADMINISTRATOR  
Federal Aviation Administration

Issued this 29<sup>th</sup> day of May, 1991.

---

<sup>1/</sup> Respondent may file a petition for reconsideration within 30 days of the date of this order, or file a petition for judicial review within 60 days of the date of this order in accordance with Sections 13.234 and 13.235 of the Rules of Practice, 14 C.F.R. §§ 13.234 & 13.235.