

UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

In the Matter of:

TCI CORPORATION,
Applicant.

FAA Order No. 94-17

Served: June 22, 1994

Docket No. CP93NE007

ORDER OF DISMISSAL

The FAA has appealed from the law judge's decision¹ regarding TCI Corporation's application for attorney's fees and expenses under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504. Because this case is moot, the appeal is dismissed.

The FAA prevailed in a civil penalty action it brought against TCI for violations of the Hazardous Materials Transportation Act² and implementing regulations.³ The law judge found, after a hearing, that TCI violated all of the hazardous materials regulations alleged in the complaint, but reduced the \$35,000 civil penalty sought by the FAA to \$5,000. The FAA appealed to the Administrator, arguing that a civil penalty of \$5,000 was too low. Although the Administrator did not believe that the goals of the Hazardous Materials Transportation Act required a civil penalty as high as \$35,000, the amount sought by the FAA, he found that the \$5,000 penalty imposed by the law judge was "far too low relative to the seriousness

¹ A copy of the law judge's written initial decision is attached.

² 49 U.S.C. App. § 1809.

³ The Department of Transportation Hazardous Materials Regulations are found in Subchapter C of Title 49 of the Code of Federal Regulations, 49 C.F.R. Parts 171-177.

of Respondent's numerous violations." In the Matter of TCI Corporation, FAA Order No. 92-77 at 11-12 (December 22, 1992). The Administrator increased the civil penalty to \$15,000.

At the conclusion of the civil penalty proceedings, TCI filed an application under the EAJA, 5 U.S.C. § 504, for more than \$16,000 in attorney's fees and other expenses that it incurred in defending against the FAA's action. The EAJA provides that prevailing parties in certain adversarial proceedings may recover attorney's fees from the Government.

The FAA moved to dismiss TCI's application on the ground that litigation involving the Hazardous Materials Transportation Act is not covered by the EAJA, but the law judge denied the FAA's motion. The FAA then requested permission to file an interlocutory appeal with the Administrator, but the law judge denied this request also. Ultimately, however, the law judge held that TCI was *not* entitled to an award of attorney's fees and other expenses because the FAA's civil penalty case against TCI was substantially justified.

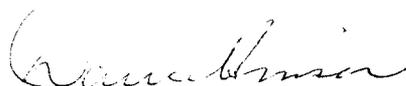
Although the FAA prevailed before the law judge, it has filed this appeal. The FAA's contention on appeal is that the law judge should not have reached the merits of the attorney's fees case. According to the FAA, the law judge should have dismissed TCI's application for attorney's fees on the ground that the EAJA does not apply to litigation arising under the Hazardous Materials Transportation Act.

This issue will not be considered because it is moot. The law judge found that the FAA's case against TCI was substantially justified. As a result, no matter how the FAA's appeal is decided, TCI will not obtain an award of attorney's fees. Prudent decisionmakers avoid rendering a decision when it will not have any practical effect on the existing controversy--*i.e.*, when the case is "moot." Powell v. McCormack, 395 U.S. 486 (1969). There are a number of reasons for exercising this type of judicial restraint. Not only is it better to conserve judicial resources for

problems that are both real and present,⁴ but there is a risk involved in deciding issues where there is no longer any true contest between the parties. The adversary system of adjudication relies on a contest between two opposing parties to obtain truth and justice. As the Supreme Court has observed, "concrete adverseness sharpens the presentation of issues upon which [courts and other decisionmakers] so largely depend for illumination of difficult ... questions." Flast v. Cohen, 392 U.S. 83, 99 (1967). In this regard, it should be noted that TCI did not file a reply brief.

Under the Administrative Procedure Act--specifically, 5 U.S.C. § 554--administrative agencies may, in their sound discretion, issue declaratory orders "to terminate a controversy or remove uncertainty." Central Freight Lines v. Interstate Commerce Commission, 899 F.2d 413, 417 (5th Cir. 1990), citing State of Texas v. United States, 866 F.2d 1546, 1551 (5th Cir. 1989). However, agencies have the broad power to refuse to grant declaratory relief. Intercity Transportation Company v. United States, 737 F.2d 103, 107-08 (D.C. Cir. 1984). Agencies are not required to render advisory opinions on request. Chelsea Community Hospital v. Michigan Blue Cross Association, 436 F. Supp. 1050, 1064 (D.C. Mich. 1977).

Based on the foregoing, the FAA's appeal is dismissed.



DAVID R. HINSON, ADMINISTRATOR
Federal Aviation Administration

Issued this 21st day of June, 1994.

⁴ 4 Kenneth Culp Davis, Administrative Law Treatise § 25:6, at 369 (2d ed. 1983).