

UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

In the Matter of:

SONICO, INC.

FAA Order No.2000-24

Served: December 21, 2000

Docket No. CP98NM0018

**ORDER DISMISSING CROSS-APPEALS AND
DENYING MOTION
TO VACATE INITIAL DECISION¹**

Complainant and Respondent Sonico filed cross-appeals from the written initial decision dated October 26, 1999, issued by Administrative Law Judge Burton S. Kolko. Both parties subsequently perfected their appeals by filing appeal briefs. On September 26, 2000, prior to the due date for the parties' reply briefs, Complainant and Sonico filed a joint motion to vacate the initial decision.

In the joint motion to vacate, the parties represented as follows:

1. The parties have agreed to settle the ... case whereby:
 - (A) Respondent withdraws its request for a hearing;
 - (B) Respondent withdraws its appeal to the FAA Decisionmaker of the Initial Decision of Administrative Law Judge Burton S. Kolko, served October 26, 1999.
 - (C) Complainant withdraws its Complaint that was filed with the hearing docket on July 1, 1998.

¹ The Administrator's civil penalty decisions are available on LEXIS, Westlaw, and other computer databases. They also can be found in Hawkins's Civil Penalty Cases Digest Service and Clark Boardman Callaghan's Federal Aviation Decisions. For additional information, see 65 Fed. Reg. 67,445, 67,462 (November 9, 2000).

- (D) Complainant withdraws its appeal to the FAA Decisionmaker of the Initial Decision of Administrative Law Judge Burton S. Kolko, served October 26, 1999.
- (E) The FAA withdraws its Amended Final Notice of Proposed Civil Penalty, issued on June 30, 1998.

Joint Motion to Vacate, at 1-2. The parties represented further that “[i]t is the desire of the parties to this civil penalty action that there be no findings of record of any violations of any Federal Aviation Regulation(s) and that there will be no civil penalty imposed in the above-captioned matter.” Joint Motion at 2. The parties also filed their respective documents withdrawing their individual appeals of the initial decision, the request for hearing and the complaint on September 26, 2000.²

The law judges acquire jurisdiction over a civil penalty action when a complaint is filed. *See* 14 C.F.R. §§ 13.16(g), 13.201(a), and 13.215. Hence, once a complaint is withdrawn, the jurisdictional basis for an initial decision is removed. Under such circumstances, an initial decision has no legal force or significance, and the FAA has no authority to collect a civil penalty from the respondent. The Administrator has held that if a Complainant withdraws a final notice of proposed civil penalty and complaint pursuant to a settlement reached after the issuance of an initial decision, an appeal from the initial decision becomes moot. In the Matter of Griffin, FAA Order No. 92-9 (February 6, 1992). Thus, in this case, with the withdrawal of the Complaint by

² Complainant did not file a document with the Hearing Docket withdrawing the Amended Final Notice of Proposed Civil Penalty. The Administrator assumes that Complainant has not filed such a document with the Hearing Docket because while Complainant sent the Amended Final Notice of Proposed Civil Penalty to Sonico, the first document that Complainant filed with the Hearing Docket was the Complaint. For purposes of this order, however, it is assumed that Complainant has, in accordance with the settlement agreement, withdrawn the Amended Final Notice of Proposed Civil Penalty.

Complainant, the initial decision has no legal foundation and as a result, no force and effect in law.³

As to the parties request that Administrator vacate the law judge's initial decision, the request is denied because it is unclear whether the Administrator has the authority to vacate an initial decision, and because to do so would be inconsistent with Federal precedent.⁴

The Administrator has the authority to affirm, modify or reverse the initial decision, make any necessary findings or remand the case to the law judge for further proceedings. 14 C.F.R. § 13.233(f). The Rules of Practice in Civil Penalty Proceedings do not specifically provide the Administrator with the authority to vacate an initial decision.⁵

³ While the Administrator is not bound by the case law issued by the National Transportation Safety Board, the Administrator may look to NTSB decisions for guidance. The NTSB has held that when the FAA withdraws a complaint filed with the Board, the foundation for an initial decision issued previously is removed and that any appeal from that initial decision becomes moot. Administrator v. Nicolai, 7 NTSB 822 (1991).

⁴ The NTSB has vacated the law judges' initial decisions in a few cases when a settlement has been reached. However, in these cases the NTSB did not address the question of whether it had the authority to vacate an initial decision under its Rules of Practice. The NTSB also discouraged the FAA from requesting that the NTSB vacate initial decisions when settlements are reached after law judge has issued the initial decision. *E.g.*, Administrator v. Nicolai, 7 NTSB at 822 n2; Administrator v. Westcor Aviation, 7 NTSB 308 (1990).

⁵ Contrast with 28 U.S.C. § 2106 which provides:

The Supreme Court or any other appellate jurisdiction may affirm, modify, *vacate*, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

(Emphasis added.)

However, assuming *arguendo* that the Administrator has the authority to vacate the initial decision issued by a law judge, the Administrator would only do so, in accordance with Federal court precedent, under extraordinary circumstances. The leading case on this issue is U.S. Bancorp. Mortgage Co. v. Bonner Mall Partnership, 513 U.S. 18 (1994). In that case, the Supreme Court held that appellate courts should not vacate civil judgments of subordinate courts in cases that are settled while an appeal is pending unless doing so is in the public interest.⁶ The Court held:

Where mootness results from settlement, ... the losing party has voluntarily forfeited his legal remedy by the ordinary processes of appeal or certiorari, thereby surrendering his claim to the equitable remedy of vacatur. The judgment is not unreviewable, but simply unreviewed by his choice.

Id., at 25. The Court noted that the judicial precedents issued by the lower courts do not belong to the parties, are presumptively correct, and as such have value to society. *Id.*, at 26-27. The Court was not persuaded by the argument that vacatur was appropriate because both parties had agreed to settle and thus were equally responsible for the mootness of the appeal. The Court stated it was necessary for the petitioner to demonstrate "equitable entitlement to the extraordinary remedy of vacatur." *Id.*, at 26.

The petitioner in U.S. Bancorp argued that it was likely that the lower court judgment would have been reversed had the parties not settled the case. The Court wrote that it would be inappropriate for a court that lacked jurisdiction due to mootness to review a decision to vacate that decision because of any assumptions about the merits – or lack thereof -- of that lower court decision. *Id.*, at 27; *see also id.*, at 28 regarding an appellate court review of a district court decision.

⁶ Justice Scalia, writing for the unanimous Court, distinguished a voluntary settlement from a situation in which an appellant "is frustrated by the vagaries of circumstance" that make a conflict moot and hence cannot obtain review of the merits of a lower court decision. *Id.*, at 25.

The Court explained that it was unable to evaluate whether vacatur would facilitate timely settlements:

[W]hile the availability of vacatur may facilitate settlement after the judgment under review has been rendered and certiorari granted (or appeal filed), it may deter settlement at an earlier stage. Some litigants, at least, may think it worthwhile to roll the dice rather than settle in the district, or in the court of appeals, if, but only if, an unfavorable outcome can be washed away by a settlement-related vacatur. And the judicial economies achieved by settlement at the district-court level are ordinarily much more extensive than those achieved by settlement on appeal. We find it quite impossible to assess the effect of our holding, either way, upon the frequency or systemic value of settlement.

Id., at 27-28.

Since the U.S. Bancorp. decision, when a settlement made a judgment moot, the Federal appellate courts have vacated lower court decisions only under exceptional circumstances.⁷

In FAA civil penalty cases, the law judges' initial decisions do not have precedential value unless they are affirmed on appeal by the Administrator. 14 C.F.R. § 13.233(j)(3).⁸ Nonetheless, a well-reasoned initial decision may provide useful guidance to the parties, other law judges and to the Administrator in subsequent cases with similar facts or issues. Hence, the public interest is served by not vacating initial

⁷ See e.g., Major League Baseball Properties, Inc. v. Pacific Trading Cards, Inc., 150 F.3d 149 (2d Cir. 1998); Motta v. District Director of Immigration and Naturalization Services, 61 F.3d 117 (1st Cir. 1995). The changing of a party's litigation position does not constitute such extraordinary circumstances justifying the equitable relief of vacatur. Dilley v. Gunn, 64 F.3d 1365, 1372 (9th Cir. 1995)(dictum).

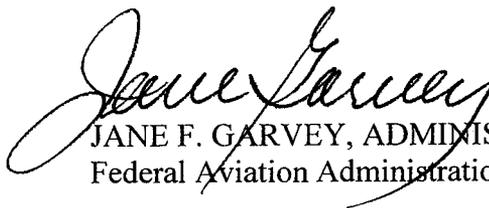
⁸ Section 13.233(j)(3) provides in part:

Any issue, finding or conclusion, order, ruling or initial decision of an administrative law judge that has not been appealed to the FAA decisionmaker is not precedent in any other civil penalty action.

14 C.F.R. § 13.233(j)(2).

decisions when the parties have reached a voluntary settlement. It is possible that vacating the law judges' initial decisions when the parties have reached a voluntary settlement during the appeal stage would encourage settlements. However, such a policy would encourage parties to settle *after* the conclusion of the hearing stage of the proceedings. Thus, the judicial economies achieved by a settlement would be less than if the parties, knowing that vacatur was not a likely result, decided to settle prior to the issuance of an initial decision.⁹ While exceptional circumstances may exist that outweigh the public interest in preserving the law judges' initial decisions for guidance, none have been argued or demonstrated in this case. Furthermore, the Administrator should not assume that since the parties are settling there must be a flaw in the law judge's initial decision, and as a result, the public interest would be served by vacatur.

Accordingly, the parties' cross-appeals are dismissed, and the joint motion requesting that the Administrator vacate the initial decision is denied.


JANE F. GARVEY, ADMINISTRATOR
Federal Aviation Administration

Issued this 19th day of December, 2000.

⁹ The Rules of Practice favor settlements before or during a hearing. *See* 14 C.F.R. § 13.215 which provides:

At any time before or during a hearing, an agency attorney may withdraw a complaint or a party may withdraw a request for a hearing without the consent of the administrative law judge. If an agency attorney withdraws the complaint or a party withdraws the request for a hearing and the answer, the administrative law judge shall dismiss the proceedings under this subpart with prejudice.

Failure of the law judge to dismiss the proceedings in accordance with 14 C.F.R. § 13.215 constitutes grounds for an interlocutory appeal of right. 14 C.F.R. § 13.219(c).