UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

In the Matter of: GREEN AVIATION MANAGEMENT CO., LLC

FAA Order No. 2010-4

Docket No. CP07EA0003 (EAJA)
FDMS No. FAA-2007-26989[1]

Served: June 14, 2010

ORDER FOR FURTHER BRIEFING[2]

For the reasons set forth more fully below, the parties are directed to submit additional briefs on the issues described in this order. These briefs shall be submitted in accordance with this order and limited to the specific issues set forth herein.

On October 1, 2007, the FAA withdrew its complaint alleging that Green Aviation Management Company, LLC, d/b/a Green Air (Green Air), had violated 14 C.F.R. §§ 119.5(l), 135.343, and 91.13(a). Subsequently, Administrative Law Judge (ALJ) Isaac D. Benkin granted Green Air's motion to dismiss the proceedings with prejudice.

Green Air applied for attorney fees under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504, which permits awards of attorneys fees and expenses to a prevailing party in an adversary adjudication unless the government's position was substantially

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[1] Materials filed in the FAA Hearing Docket (except for materials filed in security cases) are also available for viewing at the following Internet address: *www.regulations.gov*.

[2] The Administrator's civil penalty decisions, along with indexes of the decisions, the rules of practice, and other information, are available on the Internet at the following address: *www.faa.gov/about/office_org/headquarters_offices/agc/pol_adjudication/AGC400/Civil_Penalty*. In addition, Thomson Reuters/West Publishing publishes Federal Aviation Decisions. Finally, the decisions are available through LEXIS (TRANS library) and WestLaw (FTRAN-FAA database). For additional information, see the Web site.

justified.[3] The ALJ held that Green Air was a prevailing party, but denied Green Air's application on the ground that the agency was substantially justified in going forward with the case. Green Air appealed the ALJ's finding that the FAA was substantially justified.

The threshold issue in this matter is whether Green Air is a prevailing party. In 2001, in Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources, 532 U.S. 598 (2001), the Supreme Court clarified the standard that should be applied in determining whether an applicant is a "prevailing party." In Buckhannon, the Court held that the term "prevailing party" does not include a party that has failed to secure a judicially sanctioned change in the legal relationship of the parties even if the litigation brought about the desired alteration in the defendant's conduct. The ALJ, in the instant case, did not consider whether the FAA's withdrawal of the complaint made Green Air a prevailing party under the test set forth by the Supreme Court in Buckhannon.

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[3] The EAJA provides as follows:

> An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust.

5 U.S.C. § 504(a)(1). Similarly, the FAA's implementing regulations provide that:

> A prevailing applicant may receive an award for attorney fees and other expenses incurred in connection with a proceeding, or in a significant and discrete substantive portion of the proceeding, unless the position of the agency over which the applicant has prevailed was substantially justified.

14 C.F.R. § 14.04(a).

Under 14 C.F.R. § 13.233(j)(1), the Administrator may, on his own initiative, raise any issue that is required for the proper disposition of the proceedings. The Administrator finds that the issue of whether Green Air is the prevailing party under the Buckhannon standard is a preliminary issue that must be resolved for the proper disposition of the proceedings. As explained below, this order provides the parties with an opportunity to brief this threshold issue as required under 14 C.F.R. § 13.233(j)(1).[4]

In addition, in the event that Green Air is a prevailing party under the Buckhannon standard, this order provides the parties with an opportunity to address certain issues related to the question of whether the FAA's position in the underlying litigation was substantially justified.

A. Prevailing Party.

In Buckhannon, the Supreme Court held that to be a prevailing party, a party must show that it has been awarded some relief by the court, such as an enforceable judgment on the merits or a court-ordered consent decree, bringing about a material change in the legal relationship of the parties. Buckhannon, 532 U.S. at 604-605. Courts have held that the Buckhannon standard broadly applies to other federal fee shifting statutes using prevailing party terminology, such as the EAJA. Arononov v. Napolitano, 562 F.3d 84, 88-89 (1st Cir. 2009); Ma v. Chertoff, 547 F.3d 342, 344 (2d Cir. 2008). Further, the Buckhannon standard has been applied by courts to administrative cases involving prevailing defendants. Mr. L. v. Sloan, 449 F.3d 405 (2d Cir. 2006).[5] The National

[4] This is a purely legal question, and, consequently, the Administrator is not obligated under the Rules of Practice to remand the case to the ALJ for further consideration. 14 C.F.R. § 13.233(j)(1).

[5] Mr. L was a case arising out of a dispute between a parent of a student and the local school board regarding the student's school placement under the Individuals with Disabilities Education

Transportation Safety Board has held that the Buckhannon standard applies to NTSB cases arising from suspensions of certificates by the FAA. Applications of Turner and Coonan, NTSB Order No. EA-5467 at 5 (2009).

The Administrator has not ruled on the issue of whether a respondent is a prevailing party after the voluntary withdrawal of the complaint by the FAA since 1991. In KDS Aviation Corp., FAA Order No. 1991-52 (October 28, 1991), the Administrator held that the EAJA applicant was a prevailing party when the FAA withdrew the notice of proposed civil penalty action (NPCP) and the complaint, and the ALJ dismissed the case. The Administrator noted that the FAA's rules implementing the EAJA, "obviously contemplate 'voluntary dismissal' as a basis for an EAJA claim."[6] KDS Aviation Corp. FAA Order 1991-52 at 5. In light of Buckhannon's requirement for a judicially sanctioned order causing a material alteration in the legal relationship of the parties, such as a decision on the merits or a consent decree, it appears that the principles announced in KDS Aviation Corp. should be reconsidered.

(IDEA). The school board requested the due process hearing before the hearing officer. After the parties agreed to a placement sought by the parent, the hearing officer dismissed the case without prejudice. The parties could not agree upon settlement language, and consequently, the ALJ did not incorporate the settlement details in the order of dismissal. Subsequently, the parent sought attorney fees under the IDEA. The Second Circuit Court held that "the rule of Buckhannon applies at the first step of the analysis, regardless of whether the party seeking fees is a plaintiff or defendant." *Id*, at 407. Nonetheless, the court held that the defendant parent was not a prevailing party because the settlement "was purely private and therefore does not constitute an administratively sanctioned change in the legal relationship of the parties that is judicially enforceable." *Id*., at 408.

[6] The Administrator referred to 14 C.F.R. § 14.20(c)(4) [currently 14 C.F.R. § 14.20(c)(5)] which includes the "issuance of a final order or any other final resolution of a proceeding, such as a settlement or voluntary dismissal, which is not subject to a petition for reconsideration" as triggering the 30-day time frame for filing an EAJA application.

The ALJ did not consider whether Green Air was a prevailing party under a Buckhannon analysis, but instead apparently relied upon the reasoning in KDS Aviation Corp., and the parties have not addressed this issue on appeal.

In light of the foregoing, the Administrator requests briefs from the parties that address the following:

- Did the ALJ's dismissal of the proceedings with prejudice in this case after the FAA withdrew its complaint result in a material alteration of the legal relationship of the parties as required under Buckhannon?
- If there was a material alteration, did the dismissal with prejudice have the "judicial imprimatur" required under Buckhannon? The parties should discuss whether a dismissal of the complaint *with prejudice* constitutes the judicial sanction required by Buckhannon, or whether the judge (or ALJ in administrative cases) must have more involvement in the outcome, such as in a consent decree.
- In answering this question, the parties should consider whether it makes any difference in this case that the ALJ was *required* to dismiss the case with prejudice under 14 C.F.R. § 13.215?[7]

B. Substantial Justification

The Supreme Court has held that the phrase "substantially justified" in EAJA means "justified in substance or in the main," "justified to a degree that could satisfy a reasonable person," or having a "reasonable basis both in law and fact." Pierce v. Underwood, 487 U.S. 552, 565 (1988).

[7] Section 13.215 provides, "[i]f an agency attorney withdraws the complaint …, the administrative law judge shall dismiss the proceedings under this subpart with prejudice."

In this case, the FAA alleged that on flights that occurred on December 30, 2005, and January 2, 2006, Green Air carried 10 passengers in violation of its operations specifications, under which it was only permitted to fly nine passengers in its Challenger CL-600.[8] Further, the FAA alleged that Green Air used the 10th passenger, the pilot's daughter, Erin Daly, as a flight attendant although Green Air did not have an approved flight attendant training program, and Ms. Daly was not trained adequately. Green Air denied that it carried 10 passengers on these flights and that it used Ms. Daly as a flight attendant, arguing instead that Ms. Daly was a non-required[9] crewmember (*i.e.*, cabin aide) who was authorized to sit in the jump seat. According to Green Air, Ms. Daly was not a flight attendant because she was not assigned to perform any safety duties, but instead was only responsible for serving food and drinks to the passengers and pilots.

Green Air's defense was based upon 14 C.F.R. § 135.85(a), which provides that a carrier operating under Part 135 may carry "a crewmember *or other employee* of the certificate holder" "without complying with the passenger-carrying requirements of this part." "Crewmember" is defined in the regulations as "a person assigned to perform duty in an aircraft during flight time." 14 C.F.R. § 1.1 ("crewmember").

The parties are asked to brief the following issue:

- Must a "crewmember" under Section 135.85 be an "employee" of the certificate holder? If so, how is "employee" defined in this context? Do the

[8] The December 30, 2005, charter flight was from Morristown, New Jersey, to Nassau, Bahamas. The return trip went from Nassau, Bahamas, to Wilmington, North Carolina, to Morristown, New Jersey.

[9] Section 135.107 provides that "[n]o certificate holder may operate an aircraft that has a passenger seating configuration, excluding any pilot seat, of more than 19 unless there is a flight attendant crewmember on board the aircraft." 14 C.F.R. § 135.107.

regulations permit a certificate holder to transport crewmembers who are independent contractors or employed by independent contractors?

C. Briefing Schedule

The parties are directed to file[10] their briefs on the above issues no later than 30 days after the issuance of this order. The parties may file reply briefs no later than 20 days after the service of the opening briefs. The parties are required to serve each other with the opening and any reply briefs.

J. RANDOLPH BABBITT
ADMINISTRATOR
Federal Aviation Administration

[10] When filing their briefs, the parties should use the appropriate address for the Hearing Docket set forth in 14 C.F.R. § 13.210(a).