UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

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

FAA Order No. 2012-9

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

Served: October 11, 2012

DECISION AND ORDER[2]

The Federal Aviation Administration ("FAA") brought a civil penalty action against Green Aviation Management Company, LLC, doing business as ("d/b/a") Green Air ("Green Air"), for allegedly violating several regulations.[3] The FAA ultimately withdrew its complaint, leading the Administrative Law Judge ("ALJ") to dismiss the case with prejudice. Green Air then applied to recover its attorney fees under the Equal Access to Justice Act ("EAJA"), 5 U.S.C. § 504, which authorizes shifting of fees to the prevailing party. The ALJ denied Green Air's application for attorney fees on the ground

[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*. For additional information, see *http://dms.dot.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.

[3] Specifically, the FAA alleged that Green Air violated the following regulations: (1) 14 C.F.R. § 119.5(l) (no person may operate an aircraft under Part 135 in violation of appropriate operations specifications); (2) 14 C.F.R. § 135.343 (no certificate holder may use a person as a crewmember unless that crewmember has completed the appropriate training); and (3) 14 C.F.R. § 91.13(a) (no person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another).

that the FAA's case had been substantially justified and Green Air appealed to the Administrator.[4]

The Administrator held that Green Air could not recover its attorney fees because it was not the prevailing party, as that term was interpreted by the U.S. Supreme Court in *Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep't of Health & Human Res.*, 532 U.S. 598 (2001). *Green Aviation Management Co., LLC*, FAA Order No. 2011-9 at 15 (June 13, 2011). The Administrator held that Green Air was not the prevailing party because 14 C.F.R. § 13.215[5] *required* the ALJ to dismiss the case, and, therefore, there was insufficient judicial *imprimatur* on the dismissal.

Green Air then filed a petition for review of the Administrator's decision with the U.S. Court of Appeals for the D.C. Circuit. The court held that Green Air was indeed a prevailing party because the ALJ's order dismissing the case had *res judicata* effect and ended the proceedings. *Green Aviation Management Co., LLC, v. FAA*, 676 F.3d 200, 205 (D.C. Cir. 2012). The court remanded the case to the Administrator to determine whether the filing of the complaint was substantially justified. *Id*.

The Administrator finds that the FAA was substantially justified on the allegation that Green Air operated the flights in a careless manner in violation of 14 C.F.R. § 91.13(a) because the weight and balance calculations on the load manifest were inaccurate. The Administrator finds further that the FAA's allegation that Green Air operated flights with either 10 passengers contrary to its operations specifications in violation of 14 C.F.R. § 119.5(l), or with an untrained crewmember in violation of

[4] A copy of the ALJ's order denying fees and expenses is attached.

[5] 14 C.F.R. § 13.215 provides: "If an agency attorney withdraws the complaint …, the administrative law judge shall dismiss the proceedings under this subpart with prejudice.

14 C.F.R. § 135.343, was not substantially justified. This case is remanded to the ALJ for further proceedings to determine the appropriate amount of fees to which Green Air is entitled.

I. Facts

Green Air is an on-demand aircraft charter company that holds an air carrier certificate permitting it to operate under 14 C.F.R. Part 135. It operated a charter flight from Morristown, New Jersey, to Nassau, Bahamas, on December 30, 2005. The aircraft returned on January 2, 2006, from Nassau, Bahamas, to Wilmington, North Carolina, and from there to Morristown, New Jersey.

The aircraft, a Challenger CL-600, was authorized to transport nine or fewer passengers. The aircraft had two pilot seats, a jump seat, and nine passenger seats. The following individuals were on board the flights: Captain Daly, the pilot-in-command, Captain DeSantis, the second-in-command, and nine passengers. In addition, Captain Daly's daughter, Erin Daley, was on board, but her status was unclear. The FAA alleged that Erin Daly was either an impermissible extra passenger or an unqualified flight attendant. Green Air contended that Ms. Daly was a non-required crewmember – *i.e.*, cabin aide – and, as such, was not required to take FAA-approved training.

Green Air's quote for the charter flight included an "attendant" for $1,600. The trip log prepared by Green Air's customer service representative listed Ms. Daly as "FA." When Captain Daly transmitted a report to the U.S. Customs and Border Patrol the day before the flight, the report listed Ms. Daly as "crew." Finally, the customs inspector in the Bahamas reported that there were nine passengers and three crewmembers on board.

II. FAA's Civil Penalty Action Against Green Air

On February 6, 2007, the FAA filed a complaint against Green Air alleging the following:

- On each flight, Green Air carried 10 passengers in violation of its operations specifications.
- The load manifests, which indicated nine passengers rather than 10, failed to state the number of passengers and total weight of the loaded aircraft accurately.
- Green Air used the 10th passenger (Ms. Daly, Captain Daly's daughter) as a flight attendant even though Green Air did not have an approved flight attendant training program and Ms. Daly was not adequately trained.
- By carrying more than the authorized number of passengers, operating without the correct total weight of the loaded aircraft, and using a flight attendant who was not appropriately trained, Green Air operated the aircraft in a careless or reckless manner so as to endanger the lives and property of others.
- Green Air violated: (1) 14 C.F.R. § 119.5(l) (no person may operate an aircraft under Part 135 in violation of appropriate operations specifications); (2) 14 C.F.R. § 135.343 (no certificate holder may use a person as a crewmember unless that crewmember has completed the appropriate training); and (3) 14 C.F.R. § 91.13(a) (no person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another).
- Under 49 U.S.C. § 46301(a)(5), Green Air, if a small business, was subject to a civil penalty of no more than $11,000 for each violation.
- Under the facts and circumstances of the case, a civil penalty of $33,000 was appropriate.

In its answer to the complaint, dated February 9, 2007, Green Air denied that:

- it carried 10 passengers in violation of its operations specifications;
- the load manifest was inaccurate;
- it used Ms. Daly as a flight attendant;
- it operated the aircraft in a careless or reckless manner; and

- it was subject to a civil penalty.

Green Air also presented the following affirmative defenses:

- It was not required to establish or maintain an approved flight attendant training program under Part 135 because it operated aircraft with fewer than 19 seats.

- Ms. Daly was not a flight attendant during the flights and therefore was not required to be trained under Part 135.

- Ms. Daily was a non-required crewmember (*i.e.*, cabin aide, customer service representative).

- The jump seat occupied by Ms. Daly was placarded for "crew use only" – as such, the jump seat was not a passenger seat.

- Ms. Daly was an employee of Green Air and as such was authorized to occupy the jump seat under 14 C.F.R. § 135.85.[6]

- The load manifests for the flights accurately stated the number of passengers and total weight of the loaded aircraft.

On May 31, 2007, Green Air agreed that in exchange for the FAA withdrawing its complaint, Green Air would submit an affidavit to the FAA stating that: (1) Ms. Daly was an employee of the company; (2) no company records of her employment other than pay check stubs presently existed; and (3) no IRS or state tax records existed concerning her employment. Green Air also agreed not to file an EAJA application. Green Air, however, did not submit the affidavit, and the case went forward.

Green Air filed a document entitled "Motion to Dismiss" on June 1, 2007, arguing that there were no genuine issues of material fact. As a result, it was actually a motion

[6] Section 135.85 provides:

> The following persons may be carried aboard an aircraft without complying with the passenger-carrying requirements of this part:
> (a) A crewmember or other employee of the certificate holder ….

for decision under 14 C.F.R. § 13.218(f)(5).[7] Green Air argued that Ms. Daly was a cabin aide employee of Green Air, not an unmanifested passenger. Green Air attached the following exhibits to this motion:

- Two affidavits of Captain James Daly attesting that: (1) Ms. Daly was a cabin aide, not a required crewmember; (2) Ms. Daly had no safety-related duties on the flights, and was only responsible for serving food and drinks to the passengers and crew; and (3) Captain Daly had included Ms. Daly's weight in the total weight of the loaded aircraft on the load manifests.

- An affidavit of Ms. Daly attesting that she was a non-required crewmember in a non-safety position, that her duties included serving food and drink, and that Green Air paid her.

- Three check stubs, all indicating that checks had been made out to "Erin Daly":

  - one dated December 7, 2005 (almost a month before the flights), in the amount of $200, stating that it was for "2 days";

  - one dated February 6, 2006, in the amount of $2,450, stating that it was for "Wages";

  - one dated April 24, 2006, in the amount of $3,150.00, stating that it was for "Flight Attendent (sic)."

  The payer was not indicated on any of the stubs.

- A memorandum from the U.S. Department of Homeland Security, Customs and Border Protection ("CBP") indicating that, according to the General Declaration that the pilots filed with CPB, there were three crew and nine passengers on the January 2, 2006, flight.

- NTSB Safety Recommendation A-06-66 through -69 at 7 (November 8, 2006), stating that the cabin aides involved in an

[7] Section 13.218(f)(5) provides as follows:

> The administrative law judge shall grant a party's motion for decision if the pleadings, depositions, answers to interrogatories, admissions, matters that the administrative law judge has officially noticed, or evidence introduced during the hearing show that there is no genuine issue of material fact and that the party making the motion is entitled to a decision as a matter of law."

unrelated accident were not required to receive safety training because they were not required crewmembers.[8]

- A letter of interpretation dated March 19, 1986, from John H. Cassady, Assistant Chief Counsel, Regulations and Enforcement Division, Office of the Chief Counsel, FAA, to James W. Johnson, Air Line Pilots Association (ALPA), stating that "persons other than 'flight crewmembers' may be 'crewmembers' if they are assigned duty during flight time."

The FAA filed a response on June 16, 2007, asserting that material facts remained in dispute, including whether Ms. Daly was an employee, whether she served as a non-required crewmember, whether she occupied the jump seat, and whether the load manifests included her weight. The FAA argued that if Ms. Daly were working on the flights, it might have been as a flight attendant without proper training. Further, the FAA asserted, there was nothing to show that she was not simply flying with her father to the Bahamas for New Year's Eve, and the ALJ needed to make credibility determinations at a hearing.

On June 28, 2007, the ALJ denied Green Air's motion for decision, ruling that the materials submitted by Green Air did not establish facts that would entitle Green Air to prevail. For example, the ALJ stated, the receipts showed that on three occasions, Ms. Daly was paid for something, but they did not demonstrate that she was a *bona fide* employee of Green Air. According to the ALJ, a disputed issue of material fact remained regarding Ms. Daly's status during the flights in question. The ALJ, therefore, scheduled a hearing, and the parties pursued discovery.

On August 3, 2007, Green Air filed a motion for reconsideration of the ALJ's order denying its motion for decision. Green Air attached the following exhibits to its

[8] The NTSB recommended, however, that "any cabin personnel on … Part 135 flights who could be perceived by passengers as equivalent to qualified flight attendants receive basic FAA-approved safety training." (*Id.*)

motion for reconsideration:

- An affidavit from Elaine Hunt, Green Air's customer service representative, stating that Ms. Daly was assigned the duties of a cabin or flight aide to serve food and drinks to the passengers and flight crew and that she was not an unmanifested passenger.

- An affidavit from Captain Charles DeSantis attesting that Ms. Daly was a cabin attendant serving food and drink.

- An estimate of flight charges, including $1,600 for an "attendant," for Green Air's customer.

- Green Air's flight schedule or "trip sheet," listing Ms. Daly as crew.

- A CBP Electronic Advance Passenger Information System Report listing Ms. Daly as crew.

- A copy of a 2005 IRS Form 1099 listing Green Air as the payer and Ms. Daly as the recipient of "non-employee compensation" in the amount of $2,100.

Green Air argued that the evidence showed that Ms. Daly was a contract employee of Green Air and served as a cabin aide crewmember.

The FAA attached to its reply to the motion for reconsideration a newer affidavit from Ms. Hunt, stating that her first declaration was incomplete. In this declaration, Ms. Hunt stated that Ms. Daly was to perform safety duties and that she did not merely serve food and drinks. The FAA argued in its reply that Ms. Daly's status remained an issue because according to the IRS Form 1099, Ms. Daly had received "non-employee compensation."

On August 21, 2007, the ALJ issued an order denying Green Air's motion for reconsideration. The ALJ noted that the FAA had submitted its own affidavit of Ms. Hunt supporting the FAA's position and repudiating in part Green Air's earlier affidavit. The ALJ stated that it was "difficult to imagine a case less suitable for

disposition by summary judgment." Order Denying Motion for Reconsideration at 1. He held that disputed material issues of fact remained, precluding him from granting the relief Green Air sought.

On September 18, 2007, Green Air moved to preclude Ms. Hunt's testimony at the hearing. Attached to its motion was an e-mail dated August 24, 2007, from Ms. Hunt to Captain DeSantis stating:

> I said I have no idea if she [Ms. Daly] is a FA, CA or a stripper for that matter. And I do't (sic) care as that has nothing to do with me. I don't hire, train or otherwise.
>
> I never said she is a [Part] 135 FA. I said as far as I am concerned she was on board to serve food and if there is an in flight issue she would assist. What did you think that she would just sit there and watch?
>
> … And just because I assume she was there for safety, maybe she was not. That was my take on it. But in the company I am no one. Not privy to training, paychecks, or otherwise.
>
> I'm not taking any blame for anything to do with this. I did not fly the flight, i (sic) did not assign crew nor did I pick the cabin attendant.

Motion to Preclude, Attachment 1 at 1. Green Air contended that Ms. Hunt would have no relevant or material testimony to offer because, by her own admission, she did not know Ms. Daly's status during the flights.

Subsequently, the FAA withdrew its complaint. Green Air moved to dismiss, and the ALJ dismissed the case with prejudice.

III. Attorney Fee Action

Green Air filed an application under EAJA arguing that the FAA was not substantially justified in filing the complaint. Green Air contended that it should be awarded its attorney fees and expenses, which were in excess of $27,400.

On January 16, 2008, the ALJ issued a decision denying the application for attorney fees and expenses. The ALJ stated that the questions of fact concerning

Ms. Daly's role aboard the flights and her employment relationship to Green Air satisfied EAJA's requirement that the agency action have a reasonable basis in law and fact. The ALJ further held that EAJA's requirement for a nexus between the legal inquiry and factual dispute was satisfied.

Regarding the weight-and-balance computation, the ALJ said that it was unclear during the investigatory and adjudicatory phases whether Ms. Daly's weight was included. There was no documentary evidence listing Ms. Daly as crew for purposes of the computation.

The ALJ concluded that the FAA had substantial justification for its action due to the factual disputes regarding Ms. Daly's role, training, and employment status, combined with the factual dispute regarding the computation of weight and balance. The ALJ rejected Green Air's argument that the dismissal compelled the conclusion that substantial justification did not exist for the original complaint. In the ALJ's view, the question remained whether the agency had substantial justification for going forward, and he found that it did. Green Air filed an appeal with the Administrator.

On appeal, the Administrator held that Green Air was not a prevailing party, as interpreted by *Buckhannon*, 532 U.S. 598, because 14 C.F.R. § 13.215 *required* the ALJ to dismiss the case, and therefore there was insufficient judicial *imprimatur* on the dismissal and Green Air was not eligible for an award of fees. Green then filed a petition for review of the Administrator's decision with the U.S. Court of Appeals for the D.C. Circuit. The court held that Green Air was indeed a prevailing party under *Buckhannon* because the ALJ's order dismissing the case had *res judicata* effect and ended the proceedings. *Green Aviation Management Co., LLC, v. FAA*, 676 F.3d 200, 205 (D.C.

Cir. 2012). The court remanded the case to the Administrator to determine whether the filing of the complaint was substantially justified. *Id.*

IV. Analysis

A. EAJA

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).

Whether an agency's position is substantially justified is "determined on the basis of the administrative record, as a whole, which is made in the adversary adjudication for which fees and other expenses are sought." 5 U.S.C. § 504(a)(1); *see also* 14 C.F.R. § 14.04(a) (to the same effect). Agency counsel has the burden of proving that an award should not be made. 14 C.F.R. § 14.04(a).

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). The agency's implementing regulations use the language endorsed by *Underwood*, providing that agency counsel "may avoid an award by showing that the agency's position was *reasonable in law and fact*." 14 C.F.R.

§ 14.04(a) (emphasis added). There must also be a "reasonable connection between the facts alleged and the legal theory advanced." *Pacific Sky Supply*, FAA Order No. 1995-18 (August 4, 1995) (citing *United States v. One Parcel of Real Property*, 960 F.2d 200, 208 (1st Cir. 1992) and other cases).

In the instant case, the question is whether the FAA had reasonable bases in fact and law for its positions that: (1) Green Air flew with Ms. Daly as either an unqualified attendant or an impermissible tenth passenger; and (2) the load manifest failed to include her weight.

B. The FAA's Position that Green Air Flew with Either an Unqualified Flight Attendant or an Impermissible Tenth Passenger Was Not Substantially Justified

The FAA's position that Ms. Daly was a passenger was not substantially justified in view of the substantial evidence indicating that she had some role as a crewmember. The FAA explained in a response to discovery that it based its allegation that Ms. Daly was a passenger on the fact that she was Captain Daly's daughter, that the flights had been to and from the Bahamas, and that she had not attended an approved flight attendant training program.[9] These facts were insufficient to constitute substantial justification for the allegation that Ms. Daly was not a crewmember.

A crewmember is defined as "a person assigned to perform duty in an aircraft during flight time." 14 C.F.R. § 1.1. The issue was whether Ms. Daly had been assigned some duty during flight, and the FAA had no evidence to indicate that she had not been assigned some duty during flight.[10] As described above, the evidence indicated that Ms.

[9] FAA's Response to Interrogatory No. 6.

[10] Green Air had argued that Ms. Daly was authorized to sit in the jump seat under 14 C.F.R. § 135.85(a) because she was a "contract employee." (*See* note 6 *supra*.) That

Daly was a crewmember of some sort.

The FAA took the position that if Ms. Daly was not a passenger, then she must have been a flight attendant who had not completed an FAA-approved training program. This position was unreasonable because it ignored the possibility that she could have served in a crewmember position that did not require completion of an FAA-approved training program. Specifically, the FAA failed to consider the possibility that Ms. Daly may have served as a cabin aide (also called a "flight aide") crewmember. While the FAA sets forth specific training requirements for flight attendants, it does not have any training requirements for cabin aides. Further, there was no basis for the FAA automatically to assume that she was a flight attendant because certificate holders operating under Part 135 are not required to provide a flight attendant when operating aircraft with passenger seating configurations of 19 or fewer seats. 14 C.F.R. § 135.107. The Challenger aircraft involved in these flights had only 9 passenger seats.

Given the possibility, and for that matter, the likelihood that Ms. Daly was serving as a crewmember for whom FAA-approved training was not required and the absence of evidence that Ms. Daly was a passenger, the FAA was not substantially justified in pursuing the allegations that Ms. Daly was either an unauthorized tenth passenger in violation of 14 C.F.R. § 119.5(l) or served as a crewmember who had not completed the appropriate training in violation of 14 C.F.R. § 135.343.

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regulation is not germane. Section 135.85 specifies which individuals may travel aboard a Part 135 operation without changing that operation from an all-cargo to a passenger-carrying operation. (*See also* 14 C.F.R. § 119.3 for the definitions of "all-cargo operation" and "passenger-carrying operation.") There is no question that the flights in this case were passenger-carrying flights, and consequently that certain regulations imposing additional requirements on passenger-carrying flights (*e.g.*, Sections 135.117, 135.159 and 135.163) applied. Section 135.85(a) did not authorize Ms. Daly to sit in the jump seat, regardless of whether she was an employee or independent contractor.

C. The FAA's Position that the Load Manifest Failed to Include Ms. Daly's Weight Was Substantially Justified

It is undisputed that the failure to include Ms. Daly's weight on the load manifest would have violated the regulations. It is critical for the safety of a flight that the weight and balance on load manifests be complete. (Aircraft Weight and Balance Handbook, FAA-H-8083-1A at 1-1 (2007) (stating that a vital factor that leads to safe operation of aircraft is weight and balance control)). The failure to include total weight on load manifests is a violation of 14 C.F.R. § 91.13(a) (operating an aircraft in a careless or reckless manner so as to endanger the life or property of another). The FAA's position had a reasonable basis in law.

Ms. Daly's name was not listed with the rest of the crew on the load manifest. It was thus reasonable in fact for the FAA to take the position that Ms. Daly's weight was omitted. Further, according to a discovery response, an FAA inspector would have testified that Captain Daly "told him in person that Erin Daly was not included in the Load Manifest as either a passenger, or a crew member …." (FAA Answer to Interrogatory No. 3.)

Green Air's affirmative defense was that Ms. Daly must have been included in the Basic Operating Weight (BOW), given the definition of the BOW in the FAA Aircraft Weight and Balance Handbook, FAA-H-8083-1A (2007), Glossary at 2. The Handbook defines BOW to include required crew.[11] Green Air's position, however, is that Ms. Daly was *non*-required crew. Therefore, it is unclear that Ms. Daly's weight would have been included in the BOW. The FAA's position was reasonable in fact as well as in law.

[11] In the Handbook, BOW is defined as "[t]he empty weight of the aircraft plus the weight of the *required* crew, their baggage, and other standard items such as meals and potable water." (*Id.*; emphasis added.)

V. Conclusion

The FAA's position that Green Air flew with either an unqualified flight attendant or an impermissible tenth passenger was not substantially justified. However, its position that the load manifest failed to include Ms. Daly's weight was substantially justified. This case is remanded to the ALJ for the proper allocation of fees.[12]

[Original signed by Michael Huerta]

MICHAEL HUERTA
ACTING ADMINISTRATOR
Federal Aviation Administration

[12] Green may, within 30 days of this determination, file an appeal with an appropriate United States Court of Appeals. 5 U.S.C. § 504(c)(2); 14 C.F.R. § 14.29.

SERVED JANUARY 16, 2008

U.S. DEPARTMENT OF TRANSPORTATION
OFFICE OF HEARINGS
WASHINGTON, D.C.

IN THE MATTER OF THE APPLICATION OF

GREEN AVIATION MANAGEMENT CO., LLC

For fees and expenses under the
Equal Access to Justice Act

FAA Docket No. CP07EA0003
(Equal Access to Justice Act Proceeding)

DMS No. FAA-2007-26989

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION DENYING APPLICATION FOR FEES AND EXPENSES UNDER THE EQUAL ACCESS TO JUSTICE ACT

This proceeding arises from an application for attorney fees and expenses filed October 19, 2007, under the Equal Access to Justice Act, 5 U.S.C. § 504 ("EAJA"). The EAJA application was an outgrowth of a civil penalty action filed by the Federal Aviation Administration ("FAA") against Green Aviation Management Co., LLC ("Green Air" or "Applicant") in Docket No. 2006EA110010.

For the reasons set forth below, I deny Green Air's application for an award of attorney's fees and costs incurred in the underlying proceeding.

Factual History

The underlying proceeding arose from a charter flight operated by Green Air. It departed White Plains, New York on December 30, 2005, flew to the Bahamas, and returned on January 2, 2006. During two flight legs,

the aircraft carried nine passengers. Also aboard were two pilots, Captains DeSantis and Daly, and Erin Daly, Captain Daly's daughter. The aircraft operated for the trip, a Challenger CL-600, was certificated to transport not more than nine passengers. Crew accommodations included two pilot seats and a jumpseat.

Green Air's quote for the charter flight, dated Dec. 15, 2005, included a line item for an "attendant" with a price of $1,600. The total amount quoted, including the cost of an attendant, was accepted by the client. The trip log prepared by Green Air's customer service representative listed Erin Daly as "FA." When Captain Daly transmitted an "Electronic Advance Passenger Information System" ("eAPIS") report to the U.S. Customs and Border Patrol on the day prior to the flight, Erin Daly was listed as "crew." Finally, when the aircraft arrived in the Bahamas, the customs inspector reported nine passengers and three crewmembers were on board.

Underlying Procedural History

The FAA filed actions before the National Transportation Safety Board ("NTSB") seeking suspension of the pilot certificates of Captains DeSantis and Daly[1] in addition to the civil penalty action against Green Air. The parallel charges rested on alternative theories, either that Erin Daly was an improperly trained flight attendant occupying the aircraft jumpseat or that she was an un-manifested tenth passenger on an aircraft certificated for only nine passengers. Additionally, the FAA asserted that Erin Daly's weight was not included in the weight-and-balance computation for the flight. The FAA's civil penalty complaint sought a $33,000 penalty. Green Air responded with a written demand for a hearing.

On May 31, 2007, the NTSB proceeding against Captains DeSantis and Daly was settled.[2] It was agreed that the charges would be dropped and no EAJA application would be made on behalf of the two pilots. Accordingly, the Administrator withdrew the action and the NTSB terminated the proceeding. During the settlement discussions concerning the pilots, it was agreed that the civil penalty case against Green Air would be dropped immediately upon submission of an affidavit concerning Erin

[1] NTSB Docket Nos. SE-117927 and 19278.
[2] The same counsel represented Captains DeSantis and Daly and Green Air.

Daly's employment status.[3] Similarly, Green Air agreed not to pursue an EAJA application.

However, the envisioned settlement of the civil penalty case did not hold. On June 1, 2007, Green Air moved to dismiss and, on June 6, Green Air wrote to FAA counsel requesting the proceeding be dropped since it arose from the same facts and circumstances as the settled charges against the two pilots. On June 16, the FAA indicated that it intended to continue the civil penalty case against Green Air and repeated its original charges from the Complaint. On June 28, 2007, I denied Green Air's motion for summary disposition, ruling that the unresolved factual issue of Erin Daly's employment status required a hearing to resolve. The same order scheduled the hearing for October 16, 2007. Thereafter, the parties exchanged interrogatories and pursued discovery.

On August 3, 2007, Green Air requested reconsideration of my disposition of its summary judgment motion. Attached to Green Air's motion were several exhibits, one of which was a copy of an IRS form 1099 listing "nonemployee" compensation for Erin Daly in the amount of $2,100.[4] The FAA reply to the reconsideration request pointed out that the issue of Erin Daly's employment status remained outstanding, since compensation was listed under the "nonemployee" category.

The underlying proceeding was finally resolved when the FAA withdrew its Complaint on October 1, 2007. Nothing in the record indicates the withdrawal took place pursuant to a settlement agreement. Thereafter, Green Air filed a timely application for award of fees under EAJA. The FAA filed a response opposing the application in its entirety.

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[3] Specifically the affidavit was to include first, that Erin Daly was an employee of Green Air, secondly, that Green Air presently had no records, other than pay stubs, evidencing her employment, and finally, that no IRS or state records presently existed to substantiate her employment.

[4] Line 7 of 2005 Form 1099, Exhibit 10 of Respondent's Motion for Reconsideration, filed August 3, 2007. The record does not show whether the 1099 existed two months earlier when counsel for Green Air represented that no federal or state tax forms existed as to Erin Daly's employment with Green Air. If it had existed, it presumably would have deepened the issue of employment status since it lists compensation as "nonemployee." In the circumstances, I make no ruling on the validity of the 1099, as it is immaterial in my view to the outcome of the pending application.

Standards:

The EAJA requires an agency conducting an adversary adjudication to award fees and other expenses to a prevailing party (other than the United States) unless the position of the agency was substantially justified or special circumstances make an award unjust. 5 U.S.C. § 504(a)(1). The FAA's regulations implementing the statute essentially mirror its language (*see* 14 C.F.R. § 14.04). The burden of proof to show that an award should not be made rests with the agency. 14 C.F.R. § 14.04(a).

Analysis:

Although the underlying proceedings did not conclude with a trial-type hearing, the entirety of the underlying proceedings constituted an "adversary adjudication" within the meaning of the EAJA and the regulations implementing that statute. The FAA had asserted that it was entitled to assess a civil penalty for violations of the Federal Aviation Regulations ("FAR"), Green Air disputed the FAA's charges and in the normal course of events, the issues in the case would have been resolved through a trial-type hearing under the adjudicative provisions of the Administrative Procedure Act. The FAA eventually withdrew its charges without a quid-pro-quo embodied in the settlement agreement. Agency rules implementing EAJA contemplate that a "voluntary dismissal" may serve as a basis for an EAJA claim. 14 C.F.R. § 14.20(c)(5). The FAA does not contest that its withdrawal of the charge established that Green Air was a "prevailing party." Thus, the critical question is whether the FAA's position was "substantially justified."

An action is substantially justified when it has a reasonable basis in law and fact. *Pierce v. Underwood*, 487 U.S. 552, 565 (1988); 14 CFR § 14.04(a). The charges must be justified to the degree that could satisfy a reasonable person. *Pierce v. Underwood*, at 565. The agency must show, first, a reasonable basis in truth for the facts alleged, second, a reasonable basis in law for the legal theory propounded and, finally, a reasonable connection between the facts and its legal theory. *Valley Air Services, Inc.*, FAA Order No. 95027 (December 19, 1995) at 6, *reconsideration denied,* FAA Order No. 96-15 (May 13, 1996); *Smith v. National Transportation Safety Board*, 992 F.2d 849, 852 (8th Cir. 1993).

EAJA also provides that a determination of "substantial justification" must be made "on the basis of the administrative record, as a whole, which is made in the adversary adjudication . . ." 5 U.S.C. § 504(a)(1). "Substantial justification" connotes an active, searching inquiry into the quality of evidence advanced and the overall reasonableness of the agency's position. *United Brotherhood of Carpenters and Joiners v. NLRB*, 891 F.2d 1160, 1163 (5th Cir. 1990).

The Complaint charged Green Air with three violations. First, Green Air was charged with violating its air carrier operating certificate (FAR § 119.5(l), 14 C.F.R. § 119.5), second it was charged with violating the requirement that no person may serve as a crewmember without training adequate and appropriate to the role (FAR § 135.343, 14 C.F.R. § 135.343), and, finally, it was charged with operating the aircraft in a careless and reckless manner so as to endanger the life and property of another (FAR § 91.13(a), 14 C.F.R. § 91.13). Specifically, the proceeding turned on the question of Erin Daly's role aboard the aircraft and whether her weight was included in the weight-and-balance computation.

Erin Daly's Role

It was clear that Green Air's client contracted for and paid for an "attendant." It was not clear whether they were getting someone who would simply serve drinks and attend to the passenger's comfort or whether they would have onboard a qualified flight attendant trained in safety procedures. Green Air's quotation refers to her as an "attendant;" the trip log refers to her as an "FA;" and the eAPIS filing refers to her as "crew." Clearly, it was anticipated that Erin Daly was acting in some capacity as a representative of Green Air. At the time of booking the trip, Green Air's customer service representative ("CSR"), who provided the quotation and created the trip log, informed Captain Daly that if Erin Daly was going on the trip, then she would be expected to perform safety-related duties and must be adequately trained in order to do so.

Numerous FAA regulations require that a "flight attendant" must be trained, knowledgeable, and competent in safety procedures concerning the passengers and the aircraft. (*See* 14 CFR §§ 135.295, 135.117, 135.122,

135.128.) Green Air was unable to provide records of flight attendant training to the FAA during the investigation. Additionally, Green Air's answer to the FAA's Complaint admitted that it did not establish and maintain an approved flight attendant training program. However, because the CL-600 was certificated for fewer than nineteen passengers, Green Air was not required to provide a qualified flight attendant. *See* 14 C.F.R. § 135.107. Thus, if Erin Daly served only as a non-required "attendant" or "cabin aide," there was no requirement for her to have had any kind of safety training at all. Because the aircraft was certificated for less than nineteen passengers, the issue of required flight attendant training became moot. Green Air asserted this point in its motion to dismiss filed on June 1, 2007. (Nevertheless, Captain Daly, in later affidavits, attested that he had provided Erin Daly with basic familiarization with safety procedures.)

The FAA argued that because Green Air provided an attendant onboard, it was required to establish and conduct a flight attendant training program. Since Erin Daly did not receive any training, the FAA argued that she was not a flight attendant, and thus, must have been an un-manifested tenth passenger. The FAA's argument failed to allow for the possibility of a middle ground, that of a non-required attendant, i.e., a cabin aide or cabin attendant.

However, when Green Air asserted Erin Daly required no training because she served only as a non-required attendant, the FAA's inquiry turned to the question of her employment status. Evidence of employment status was the key issue discussed in the settlement negotiations that resolved the actions against the pilots. Although this issue was discussed and agreed-upon in the settlement of June 1, 2007, Green Air was unable to produce any records of Erin Daly's employment until it provided a Form 1099 listing $2,100 paid to her as "nonemployee" compensation in August of 2007. The Form 1099 and three hand-written payment slips, at least, provided some evidence to suggest that she was not simply an un-manifested tenth passenger. Without evidence of some employment relationship, there was nothing of record to preclude the possibility that an additional passenger, just by agreeing to serve drinks and sit in the jump-seat, could don the disguise of a non-required attendant and easily circumvent the nine-passenger limitation applicable to the CL-600.

The existence of these fact questions concerning Erin Daly's role aboard the flights and her employment relationship to Green Air satisfies the EAJA's requirement that the agency action have a reasonable basis in law and fact. Even though Green Air was not required to provide a qualified flight attendant, if Ms. Daly had acted as a flight attendant, then she would have been required to receive adequate training. If she served as a non-required attendant, then it would be reasonable to expect to see evidence of an employment relationship. In order to support Green Air's assertion that Erin Daly was not an un-manifested tenth passenger, it was reasonable for the FAA to ask for proof of an employment relationship. Green Air was unable, until eight months after the Complaint was filed, to provide any form of evidence of employment, albeit "nonemployee" employment. Green Air's various references to Erin Daly as "crew," "attendant," and "flight attendant" point to Green Air's own internal confusion as to her role and its compliance with training requirements. The legal inquiry and factual dispute are closely intertwined and satisfy the EAJA's requirement for a nexus between the two.

Weight and Balance Computation

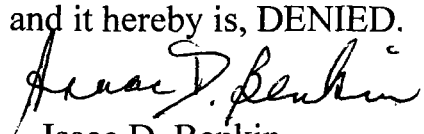
Also unclear during the investigatory phase and adjudicatory phase was whether Erin Daly's weight was included in the weight-and-balance computation. Although Captain Daly's affidavit denied it, the FAA investigator reported that Captain Daly did not include her weight in the computation. Copies of the weight and balance sheets in the record list the names of the two pilots and include data for the nine passengers. Green Air asserted in various filings that Erin Daly's weight was included in the computation under the category of "crew." While this may in fact be the case, there is no documentary evidence that lists Erin Daly as crew for purposes of the computation.

Conclusion:

The factual disputes as to Erin Daly's role, training, and employment status, combined with the factual dispute as to computation of weight and balance establish that the FAA had substantial justification for its action. It is not clear why the FAA voluntarily dropped the charges. Green Air argues that the dismissal compels the conclusion that no substantial justification existed for the original complaint. The EAJA does not, however, entitle an

applicant to an award in any case where the agency drops its charges. The question remains whether the agency had substantial justification for going forward. In this case, I find that it did.

In consideration of the foregoing, I find and determine that, subject to appeal to the Administrator as provided in section 14.28 of the regulations of the Federal Aviation Administration implementing the Equal Access to Justice Act of 1980, as amended, 14 C.F.R. § 14.28, the application of Green Aviation Management Co. must be, and it hereby is, DENIED.



Isaac D. Benkin
Administrative Law Judge

[**Note**—This decision may be appealed to the Administrator within 30 days after it is issued. The Notice of Appeal and Appeal Brief must be sent to the Federal Aviation Administration, 800 Independence Avenue, S.W., Washington, D.C. 20591, Attn: Appellate Docket Clerk. A copy of the notice and brief should also be served on counsel for the FAA.]

FAA Docket No. 2006EA110010
(Equal Access to Justice Act)

SERVICE LIST

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[5] Service was by U.S. Mail. For service in person or by expedited courier, use the following address: Federal Aviation Administration , 600 Independence Avenue, S.W., Wilbur Wright Building – Suite 2W1000, Washington, D.C. 20591; Attention: Hearing Docket Clerk, AGC-430.