UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

In the Matter of: WESTERN AIR EXPRESS, INC.
FAA Order No. 2011-7

Docket No. CP09SW0003
FDMS No. FAA-2009-0280[1]

Served: June 13, 2011

DECISION AND ORDER[2]

Western Air Express, Inc. ("Western") appealed from the initial decision issued by Administrative Law Judge Isaac D. Benkin (the "ALJ"), denying Western's application for agent fees and expenses under the Equal Access to Justice Act ("the EAJA"), 5 U.S.C. § 504.[3] The EAJA provides that an agency that conducts an adversary adjudication shall reimburse the prevailing party for fees and other expenses incurred in connection with that adjudication, including reasonable attorney or agent fees, unless the government's position was substantially justified or special circumstances make an award unjust. 5 U.S.C. §§ 504(a)(1), (b)(1)(A). The ALJ held that Western was not entitled to reimbursement of agent fees and expenses under the EAJA because Western was neither a party to an adversary adjudication nor a prevailing party. He held further that the EAJA

[1] Generally, materials filed in the FAA Hearing Docket (except for materials filed in security cases) are also available for viewing at *http://www.regulations.gov*. 14 C.F.R. § 13.210(e)(1).

[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*. See 14 C.F.R. § 13.210(e)(2). In addition, Thomson/West 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] A copy of the ALJ's decision denying Western's EAJA application is attached and will be referred to in this decision and order as "EAJA Initial Decision."

does not authorize reimbursement for the services of a corporate employee, such as Western's representative, who is not an attorney. In its appeal, Western challenges each of the ALJ's legal determinations.

Western's appeal is denied. This decision affirms the ALJ's rejection of Western's claim that an adversary adjudication began when Western received the notice and final notice proposing to assess a civil penalty. Further, this decision holds that Western was not a prevailing party, as that term is used in the EAJA, because neither the ALJ's dismissal of Western's late-filed request for hearing nor the Administrator's dismissal of Western's appeal as moot constituted administratively ordered relief.

I. History of the Underlying Civil Penalty Action

On May 28, 2008, the FAA issued a Notice of Proposed Civil Penalty ("NPCP"), proposing to assess a $33,000 civil penalty against Western for alleged violations of 14 C.F.R. § 119.5(l).[4] On July 23, 2008, the FAA sent a Final Notice of Proposed Civil Penalty ("FNPCP") to Western because Western had not replied to the NPCP.[5]

On August 11, 2008, an FAA inspector delivered "courtesy copies" of the NPCP and FNPCP to James Nyerges, Western's Chief Pilot, Director of Maintenance, and Director of Operations.

[4] 14 C.F.R. § 119.5(l) provides that "[n]o person may operate an aircraft under this part, part 121 of this chapter, or part 135 of this chapter in violation of an air carrier operating certificate, operating certificate, or appropriate operations specifications issued under this part."

[5] Under 14 C.F.R. §§ 13.16(f)(2)((iii) and (iv), a person has no more than 30 days after receiving the NPCP to, among other options, request an informal conference with an agency attorney or a formal hearing before an ALJ.

On August 18, 2008, Western sent a request for an informal conference to the agency attorney by facsimile. The next day, the agency attorney denied the request, and issued an order assessing a $33,000 civil penalty ("OACP").[6]

On September 4, 2008, Western sent a request for hearing to the Hearing Docket. In response, rather than file a complaint, the FAA filed a motion to dismiss Western's request for hearing under 14 C.F.R. § 13.208(d). In the motion, the FAA argued that Western's September 4, 2008, request for hearing was late-filed. The agency attorney explained that while Western had 15 days from the receipt of the FNPCP to request a hearing under 14 C.F.R. §§ 13.16(d)(2) and 13.16(g)(2)(ii),[7] it did not submit the request until 43 days after the FNPCP was mailed originally and 24 days after the FAA inspector hand-delivered a "courtesy copy." (Motion to Dismiss at 4.)

Western responded to the motion to dismiss, arguing that it did not receive the copies of the NPCP or FNPCP that the agency attorney had sent by certified or by regular mail[8] and that the local post office is unreliable. (Answer to Complainant's Motion to Dismiss Respondent's Request for a Hearing as Untimely Filed, dated September 24,

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[6] A person has no more than 15 days after receipt of the FNPCP to request a formal hearing and does not have the right by regulation to an informal conference under 14 C.F.R. § 13.16(g)(2). The agency has stated, however, that an agency attorney has the discretion and authority to hold an informal conference even after issuing an FNPCP. 55 Fed. Reg. 27548, 27559 (July 3, 1990). The agency may issue an Order Assessing Civil Penalty if the person does not request a hearing within 15 days after receipt of the FNPCP. Under 14 C.F.R. § 13.16(d)(2), an agency attorney may issue an "order assessing civil penalty … if a person charged with a violation does not request a hearing under paragraph (g)(2)(ii) of this section within 15 days after receipt of a final notice of proposed civil penalty."

[7] See n. 6 *supra*.

[8] The certificates of service attached to the NPCP and FNPCP show that the agency sent these documents to Western by certified, return receipt mail, as well as by regular mail. The certified mail envelopes were returned to the agency attorney stamped "UNCLAIMED." According to the agency attorney, the NPCP and FNPCP sent by regular mail were not returned.

2008.) Western explained that it had filed its request for hearing within fewer than 30 days after the FAA inspector delivered the NPCP, and therefore, its request for hearing was timely filed under 14 C.F.R. § 13.16(f)(2).[9]

The ALJ rejected Western's argument that it had filed the request for hearing in a timely fashion. The ALJ explained that Western was not entitled to ignore the FNPCP, which "plainly and unmistakably advised" Western that it had 15 days from the date of receipt to request a hearing. The ALJ wrote:

> Even if we accept the contention that the 15-day period for filing a request for hearing did not begin to run until August 11 (the date on which the FAA inspector hand-delivered the notices to Mr. Nyerges), the Respondent's request for a hearing was still out of time. The 15-day period expired on August 26, 15 days after the date of hand-delivery.

(Initial Decision at 3.)[10]

Western filed a notice of appeal from the ALJ's order dismissing the request for hearing, and subsequently perfected that appeal by filing an appeal brief. On February 17, 2009, the FAA withdrew the NPCP, FNPCP and OACP, and filed a motion requesting that the Administrator dismiss Western's appeal as moot. The Administrator dismissed Western's appeal as moot on March 12, 2009, by FAA Order No. 2009-5.

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[9] See n. 5, *supra*.

[10] The ALJ rejected Western's contention that both certified letters "went astray" and, instead, found that Western had neglected to pick up the certified letters even though notices had been placed in its mail box about that certified mail from the FAA. He wrote:

> A program of regulation, such as that administered by the Federal Aviation Administration, cannot be carried out in the public interest if parties subject to the regulations could avoid their responsibilities simply by refusing to accept mail from the regulatory agency. It is plain to me that that is what Respondent sought to do.

(Initial Decision at 3-4.)

II. History of the EAJA Action

On April 1, 2009, Western applied for an award under the EAJA of fees and expenses that it incurred in connection with this civil penalty action. Western sought reimbursement for fees paid to Mr. Nyerges, its non-attorney agent and representative, for work starting on August 11, 2008, the date on which the FAA inspector delivered the NPCP and FNPCP. Western argued in its application that it was the prevailing party because the FAA withdrew the NPCP, FNPCP and OACP and the Administrator subsequently dismissed Western's appeal from the ALJ's order. (Application at ¶¶ -1-8.)

In its answer to the application, the FAA argued that Western was not entitled to an award because Western was not a prevailing party in an adversary adjudication and that the EAJA does not permit reimbursement of fees paid to an employee.

Western subsequently filed its reply. It argued that Kim Hall, Western's president, was Western's only employee and the corporation's "true alter ego and principal," and that Mr. Nyerges, an independent consultant, was its agent. (Reply at 5-6.)

The ALJ issued his initial decision denying Western's application for fees and expenses on June 19, 2009, finding that (1) there was no adversary adjudication; (2) Western was not a prevailing party; and (3) the EAJA does not permit reimbursement of the time spent by a corporate employee. (EAJA Initial Decision at 2-3.)

Western filed a notice of appeal from the ALJ's EAJA initial decision and perfected that appeal by filing an appeal brief. The FAA filed a reply brief.

III. Discussion

A. Adversary Adjudication

Under the EAJA, an agency that conducts an adversary adjudication shall award to a prevailing party fees and other expenses incurred by that party in certain circumstances. 5 U.S.C. § 504(a)(1). Contrary to Western's assertion, an adversary adjudication did not begin with its receipt of the NPCP and FNPCP.

The EAJA defines the term "adversary adjudication" as "an adjudication under [5 U.S.C.] section 554 … in which the position of the United States is represented by counsel or otherwise …." 5 U.S.C. § 504(b)(1)(C). Section 554 of Title 5 applies only to adjudications[11] "required by statute to be determined on the record after opportunity for an agency hearing …," with six exceptions not pertinent in this case. 5 U.S.C. § 554. The FAA's regulations implementing the EAJA cover "adjudications under 5 U.S.C. § 554 in which the position of the FAA is represented by an attorney … who enters an appearance and participates in the proceeding." 14 C.F.R. § 14.02. The FAA's EAJA regulations provide further that regarding FAA civil penalty proceedings, "fees may be awarded only for work performed after the issuance of a complaint." 14 C.F.R. § 14.05(e).

Western argues that "it is clear that the essential characteristic of an adversary adjudication is the opportunity for an agency hearing" and that "[t]he point at which this opportunity [for a hearing] arises … is the point at which a proceeding can first be considered an adversary adjudication." (Appeal Brief at 5.) In response, the FAA argues that an adversary adjudication does not begin until a complaint is filed.

[11] The term "adjudication" is defined broadly in the Administrative Procedure Act, 5 U.S.C. § 551(7), as the "agency process for the formulation of an order," and the term "order" is defined at 5 U.S.C. § 551(6) as "the whole or a part of a final disposition, … of an agency in a matter other than rule making but including licensing."

Although a civil penalty action is initiated by the sending of a NPCP by an agency attorney, 14 C.F.R. § 13.16(f), an adversary adjudication, as that term is used in the EAJA, does not begin with the issuance of a NPCP. In the NPCP and the FNPCP, the agency attorney states that based upon an investigation, it appears that a person has violated a statute and/or regulations and it proposes to assess a civil penalty. An administrative law judge is not involved during these informal proceedings.[12] The FAA is not required to file either the NPCP or the FNPCP in the Hearing Docket. See 14 C.F.R. §§ 13.16 (f) and (g). In contrast, when a complaint is filed in the Hearing Docket, a formal proceeding before an ALJ begins with the agency attorney representing the FAA's position that violations have occurred and that a civil penalty is appropriate. The parties in an adversary adjudication seek resolution of their dispute by an adjudicative official, such as an ALJ.

In *Ernest Wilson*, FAA Order No. 1990-17 (April 9, 1990), the Administrator held that an applicant is not entitled to fees incurred in connection with a NPCP and informal

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[12] The FAA explained the rationale for this informal process in the preamble to the final rule setting forth revised initiation procedures and new procedural rules in FAA civil penalty actions after Congress authorized the FAA to assess some civil penalties. The FAA wrote:

> Based on the FAA's experience in certificate action, the FAA believes that a hearing on the allegations contained in a notice, *which is merely a proposal*, is premature. The notice is issued after the FAA has completed an investigation of the allegations. However, the individual may or may not have taken part in the investigatory process…. Therefore, the rule provides an opportunity for *informal proceedings* in which an individual may submit information or discuss the matter with an agency attorney. These informal proceedings enable an individual to submit information including mitigating factors or extenuating circumstances that may affect the FAA's decision to continue to prosecute a civil penalty action. The FAA views the informal proceedings as an opportunity to narrow the differences between the parties with the intention of settling a civil penalty action. Even if the parties cannot agree to settle the matter, the informal proceedings serve to focus any remaining unresolved issues.

53 Fed. Reg. 34646, 34648 (September 7, 1988) (emphasis added.)

conference with an agency attorney. In that case, the agency issued a NPCP and subsequently withdrew it after an informal conference. Wilson submitted an EAJA application. The Administrator rejected the application, holding that legal expenses incurred prior to the filing of the order of civil penalty as the complaint[13] are not incurred in connection with an adversary adjudication, and hence, were not reimbursable under the EAJA.

Accordingly, contrary to Western's argument, the issuance and receipt of the NPCP and the FNPCP in this case did not mark the beginning of an adversary adjudication although in these documents, the FAA offered Western the *option* to request a formal hearing governed by 14 C.F.R. Part 13, subpart G. In this case, Western forfeited that option by failing to request a hearing in a timely fashion.[14]

B. Prevailing Party Status

Ordinarily, in the United States, each party is responsible for its own attorney's fees and costs, and therefore, the winner is not able to obtain reimbursement of its litigation expenses from the loser. However, numerous statutes permit a court to award

[13] The original procedural rules required that after receiving a request for hearing, the agency attorney would issue an order of civil penalty and file it as the complaint in the Hearing Docket. 14 C.F.R. §§ 13.16(h) and 13.208 (published at 53 Fed. Reg. 34646, 34655, 34657 (September 7, 1988). Subsequently, the FAA received objections that the issuance of an order of civil penalty prior to a hearing "creates an apparent presumption of guilt before any hearing has been held." 55 Fed. Reg. 7980, 7981 (March 6, 1990). In response, the FAA proposed to amend the rules so that if an agency attorney received a request for hearing, the agency attorney would file a complaint but would not issue an order of civil penalty, and these changes were adopted in a final rule. 55 Fed. Reg. 15110, 15112, 15129, 15130 (April 20, 1990). Also in that final rule, the FAA conformed the EAJA procedural rule, 14 C.F.R. § 14.05(e), changing it from "[f]ees may be awarded only for work performed after the issuance of an *Order of Civil Penalty*" (54 Fed. Reg. 46196, 46201 (November 1, 1989)) to "[f]ees may be awarded only for work performed after the issuance of a *complaint*." 55 Fed. Reg. at 15125 and 15131 (emphasis added).

[14] The issue of whether an adversary adjudication begins when an agency attorney files a motion to dismiss a late-filed request for hearing, instead of a complaint, is not decided herein because it was not raised or briefed by either party.

attorney's fees and expenses to the prevailing party in certain circumstances. *Buckhannon Bd. and Care Home, Inc. v. West Virginia Dept. of Health and Human Resources,* 532 U.S. 598, 602 (2001). The EAJA is one of those fee-shifting statutes. The EAJA is also a waiver by the Federal government of its sovereign immunity, and consequently, it "must be construed strictly in favor of the government." *Aronov v. Napolitano*, 562 F.3d 84, 88 (1st Cir. 2009).

Buckhannon is the leading case regarding who is a prevailing party under fee-shifting statutes. That case arose after the West Virginia Department of Health and Human Resources (West Virginia HHS) issued cease and desist orders requiring the closure of the assisted living facilities operated by Buckhannon because, contrary to West Virginia law, some of the residents of those facilities were incapable of escaping in the event of an emergency. Buckhannon filed a lawsuit, arguing that the West Virginia "self-preservation" requirement violated the Fair Housing Amendments Act (FHAA) and the Americans with Disabilities Act (ADA) and seeking declaratory and injunctive relief. While the case was pending, the West Virginia legislature eliminated the "self-preservation" requirement, and the district court granted the West Virginia HHS's motion to dismiss Buckhannon's lawsuit as moot.

Subsequently, Buckhannon sought reimbursement of its attorney's fees and expenses under the FHAA's and ADA's fee-shifting provisions. The Supreme Court held that the term "prevailing party" is a term of art, and that it applies to a party which has been awarded some material relief by a court on the merits of at least some of its claims. *Buckhannon*, 532 U.S. at 603. The Court explained that "enforceable judgments on the merits and court-ordered consent decrees create the 'material alteration of the legal

relationship of the parties' necessary to permit an award of attorney fees." *Id*. at 604. The Court rejected the "catalyst theory," under which a plaintiff is the "prevailing party" if it achieved what it sought in the lawsuit simply because the defendant voluntarily changed its conduct when faced with a lawsuit. The Court stated that "a defendant's voluntary change in conduct, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial *imprimatur* on the change." *Id.* at 605. Based upon this reasoning, the Supreme Court affirmed the judgment of the court of appeals that Buckhannon was not the prevailing party.

The courts have held that the *Buckhannon* standard for prevailing party status applies broadly to other federal fee-shifting statutes using the term "prevailing party." *E.g*. *Aronov*, 562 F.3d at 88-89. The courts have applied the *Buckhannon* standard when determining whether a party was a prevailing party under the portion of the EAJA, codified at 28 U.S.C. § 2412(d)(1)(A), permitting an award of attorneys fees and expenses incurred by a prevailing party other than the United States in a civil action brought by or against the United States.[15] *E.g*., *Ma v. Chertoff,* 547 F.3d 342 (2d Cir. 2008); *Biodiversity Conservation Alliance v. Stem*, 519 F.3d 1226 (10th Cir. 2008); *Carbonell v. Immigration and Naturalization Service*, 429 F.3d 894, 897-898 (9th Cir. 2005); *Thomas v. National Science Foundation*, 330 F.3d 486 (D.C. Cir. 2003). Likewise, *Buckhannon* was applied in a recent case involving the similar EAJA provision codified at 5 U.S.C. § 504 – the EAJA provision involved in this case - permitting an

[15] "Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses … incurred by that party in any civil action … brought by or against the United States … unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." 28 U.S.C. § 2412(d)(1)(A).

adjudicative officer to award attorney's fees and expenses incurred in connection with an agency adversary adjudication. *Turner v. NTSB*, 608 F.3d 12 (D.C. Cir. 2010.)

The *Buckhannon* standard has been "distilled" by the United States Court of Appeals for the District of Columbia Circuit as follows:

(1) there must be a court-ordered change in the legal relationship of the parties;

(2) the judgment must be in favor of the party seeking fees; and

(3) judicial relief must accompany the judicial pronouncement.

Turner, 608 F.3d at 15 (citing *District of Columbia v. Strauss*, 590 F.3d 898, 901 (D.C. Cir. 2010); *Thomas*, 330 F.3d at 493. The first and third steps "combine to require the movant to demonstrate the existence of some form of court-ordered judicial relief that results in a change in the legal relationship of the parties." *Poett v. United States*, 742 F.Supp. 2d 113, 116 (D.D.C. 2010).

Courts have applied *Buckhannon* in cases in which the party seeking fees was the defendant in the underlying litigation. For example, in *Mr. L. v. Sloan*, it was explained 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." 449 F.3d 405, 407 (2d Cir. 2006). The court explained, "[a]s applied to prevailing-defendant cases, *Buckhannon* requires only that the judgment or consent decree be entered in the defendant's favor, not that the defendant be accorded some 'relief' it had sought." *Id*. at 407, n.1.

Similarly, in *Turner v. NTSB,* a court applied *Buckhannon* to determine whether the respondents - two pilots whose airman certificates had been suspended by the FAA - were prevailing parties for EAJA purposes. In that case, the FAA withdrew the orders of

suspension which it had filed as the complaints,[16] and the National Transportation Safety Board (NTSB) ALJ dismissed the cases. On petition for review of the NTSB's decision rejecting the pilots' EAJA application, the court held that the pilots were not prevailing parties because the ALJ's order dismissing the case was without prejudice and, consequently, did not provide administrative relief. The court explained that "the order of the ALJ dismissing the cases was just an administrative housekeeping measure, not a form of relief, because the FAA did not need the ALJ's permission to withdraw a complaint" under the applicable NTSB procedural rule.[17] *Turner,* 608 F.3d at 16.

In light of the foregoing discussion, therefore, it is appropriate to apply *Buckhannon* when determining whether a respondent[18] in a FAA civil penalty action was a prevailing party. Likewise, *Buckhannon* should be applied to determine whether, as in this case, the recipient of a NPCP, FNPCP or an OACP, is a prevailing party in a FAA civil penalty action after the FAA withdraws these documents.

Under *Buckhannon*, Western was not a prevailing party. First, the ALJ did not issue an order in Western's favor. On the contrary, the ALJ found that Western's request for hearing was late-filed and, consequently, Western was not entitled to a hearing. Second, the Administrator's order finding that the case was moot and dismissing Western's appeal was not a judicial pronouncement in Western's favor. Western

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[16] Under the NTSB's rules of practice, a certificate holder whose certificate is suspended by the FAA Administrator may file an appeal from the Administrator's order of suspension with the NTSB. 49 C.F.R. § 821.30(a). When the certificate holder files an appeal, the Administrator files the order of suspension as the complaint. 49 C.F.R. § 821.31(a).

[17] "Except in the case of … a complaint …, pleadings may be withdrawn only upon approval of the law judge or the Board." 49 C.F.R. § 821.12(b).

[18] The term "respondent" is defined in the FAA procedural rules as "a person, corporation or company named in a complaint." 14 C.F.R. § 13.202 ("*Respondent."*)

benefited from the agency attorney's unilateral withdrawal of the NPCP, FNPCP and OACP, but the Administrator's order in no way added to that benefit because it did not direct or require the FAA to take or refrain from any action. The Administrator's dismissal neither approved of the withdrawals nor protected Western against future enforcement action on the same allegations because the dismissal was not a decision on the merits regarding any alleged violations. Indeed, because a complaint was not filed, the agency attorney never presented any allegations of regulatory violations to the ALJ. The dismissal did not specify whether it was with or without prejudice, and as a result, it was without prejudice. *See Turner*, 608 F.3d at 15-16 (finding that the NTSB ALJ's dismissal of a complaint that was silent on the issue of prejudice constituted a dismissal without prejudice.) Hence, the Administrator's order dismissing the appeal as moot did not bring about a material change in the legal relationship between the FAA and Western. The Administrator's order dismissing Western's appeal was no more than a housekeeping matter, because under 14 C.F.R. § 13.16, the agency attorney did not need permission to withdraw the NPCP, FNPCP or the OACP. Thus, any relief that Western received lacked administrative *imprimatur*.

Western argues that the Administrator's decision in *KDS Aviation Corp.*, FAA Order No. 1991-52 (October 28, 1991) supports its argument that it is a prevailing party. In that case, the Administrator held that the EAJA applicant was a prevailing party when the FAA withdrew the NPCP and the complaint, and the ALJ dismissed the case. The Administrator pointed to 14 C.F.R. §14.20(c)(4) (now 14 C.F.R. § 14.20(c)(5)), which provided that a final disposition [30 days from which an EAJA application is due] includes 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. *Id.* at 5. The Administrator concluded from the inclusion of "voluntary dismissal" in the definition of "final disposition" that the agency's EAJA rules contemplated that the FAA's voluntary withdrawal of a complaint could serve as the basis for an EAJA claim. *Id*.

Western's reliance upon *KDS Aviation Corp*. is misplaced. *KDS Aviation Corp*. involved the withdrawal of a complaint, while in the case at bar, the agency attorney never filed a complaint. Also, as the Administrator noted in *Green Aviation Management Co*., "[i]n light of *Buckhannon's* requirement for a judicially sanctioned order causing a material alteration in the legal relationship of the parties … it appears that the principles announced in *KDS Aviation Corp*. should be reconsidered." FAA Order No. 2010-4 at 4 (June 14, 2010). Further, the court in *Cadkin v. Loose*, 569 F.3d 1142 (9th Cir. 2009) overturned the case on which the Administrator relied in *KDS Aviation Corp.*, *Corcoran v. Columbia Broadcasting System, Inc*., 121 F.2d 575 (9th Cir. 1941),[19] to the extent that it was contrary to *Buckhannon*.

The ALJ held that he was required to conclude that Western was not the prevailing party because the record contained no evidence regarding the reason behind the FAA's withdrawal of its allegations against Western. (EAJA Initial Decision at 3.) In *Buckhannon,* the Supreme Court rejected a definition of prevailing party that might require courts to analyze "a defendant's subjective motivations in changing its conduct." *Buckhannon*, 532 U.S. at 609. Accordingly, while affirming the ALJ's finding that

[19] In *Corcoran*, the court held that the defendants were prevailing parties after the plaintiff moved voluntarily for dismissal of its complaint and the judge issued an order dismissing the case without prejudice. *Corcoran*, 121 F.2d at 576.

Western was not a prevailing party, the Administrator does not adopt this aspect of the ALJ's decision.[20]

IV. Conclusion

For the reasons discussed above, Western's appeal is denied.[21]

[Original signed by J. Randolph Babbitt]

J. RANDOLPH BABBITT
ADMINISTRATOR
Federal Aviation Administration

[20] In light of the Administrator's rejection of Western's adversary adjudication and prevailing party arguments, it is not necessary for the Administrator to decide Western's remaining argument regarding whether the EAJA permits an award for the services of an agent.

[21] Within 30 days of this determination, Western may file an appeal with an appropriate United States court of appeals. 5 U.S.C. § 504(c)(2); 14 C.F.R. 14.29. See 49 U.S.C. § 46110 and 14 C.F.R. §§ 13.235(a)-(c) (regarding petitions for review of orders issued by the Administrator.)

SERVED JUNE 19, 2009

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

IN THE MATTER OF

WESTERN AIR EXPRESS, INC.

For fees and expenses under the
Equal Access to Justice Act
EAJA-130023

FAA DOCKET NO. CP09SW0003

DMS NO. FAA-2009-0280

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

In a Notice of Proposed Civil Penalty issued on May 28, 2008, Western Air Express, Inc. (Western or Applicant) was charged by the Federal Aviation Administration (FAA) with operating an aircraft on 66 revenue flights with an engine that was beyond its overhaul requirements, in violation of § 119.5(l) of the Federal Aviation Regulations (FAR), 14 C.F.R § 119.5(l). On September 4, 2008, Western attempted to challenge this charge by requesting a formal hearing. The FAA moved to dismiss the request for a hearing as untimely and, in an order served on December 1, 2008, I granted the FAA's motion. Western Air Express, Inc., FAA Docket No. CP08SW0007, DMS No. FAA-2008-1050, Order Grant'g Mot. to Dismiss Req. for Hr'g at 4 (Dec. 1, 2008). Western appealed my order. While the appeal was pending, the FAA withdrew its claim against Western, and the Administrator dismissed the appeal as moot. Western Air Express, Inc., FAA Order No. 2009-5, Order Dismiss'g Appeal at 2 (Mar. 12, 2009) (Osmus, Act'g Adm'r).[1]

[1] This order, along with other materials relating to civil penalty cases, is available on the Internet at http://faa.gov/about/office_org/headquarters_offices/agc/pol_adjudication/AGC400/Civil_Penalty/.

On April 1, 2009, Western filed the instant application under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504 (2006), seeking to recover fees and expenses allegedly incurred in its effort to challenge the FAA's assessment. The FAA on May 1, 2009 filed an answer to the application, opposing it in its entirety.

The EAJA entitles a "prevailing party" (other than the United States) in an "adversary adjudication" conducted by the federal agency to recover fees and other expenses incurred by that party unless the "adjudicative officer" of the agency who conducted the adjudication 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), (b)(1)(D). To be eligible for an award, a for-profit corporation, such as Western, must had had a net worth of $7 million or less and 500 or fewer employees at the time the government initiated the adjudicative proceeding. 5 U.S.C. § 504(b)(1)(B)

I hold that, for several reasons, Western does not qualify for an award under the EAJA.

First. The Applicant was not a party to an "adversary adjudication." Under the FAA regulations that implement the EAJA, 14 C.F.R. Part 14 (2008), an applicant is entitled to reimbursement only of expenses incurred for "work performed after the issuance of a complaint." 14 C.F.R. § 14.05(e). In this case, no complaint was ever issued. In Ernest Wilson, Docket Nos. CP89SW0166 & EAJA90SW0001, FAA Order No. 90-0017, Decision and Order at 3 (Apr. 9, 1990) (Busey, Adm'r), the Administrator rejected an applicant's request for reimbursement of attorney's fees under the EAJA, observing that a "complaint . . . begins the adversary adjudication." Under the FAA's Rules of Practice, a complaint is filed only after the Respondent makes a timely request for a hearing. 14 C.F.R. § 13.16(g)(2)(ii). In this case, I ruled that such a request had not been made. Hence, no complaint was filed, and there never was an adversary adjudication to which the Applicant could be a party. The EAJA simply does not provide for relief on account of every squabble between a member of the aviation community and the FAA.

Second. The Applicant was not the "prevailing party." Although Western might qualify as a "party" under the definition found in the EAJA, 5 U.S.C. § 504(b)(1)(B)), the courts have held that an applicant cannot be regarded as a "prevailing party" unless it has succeeded on the merits of the

case. Hanrahan v. Hampton, 446 U.S. 754, 758 (1980) (Fees may be awarded only when "a party has prevailed on the merits of at least some of his claims."). In Buckhannon v. West Virginia Department of Health and Human Resources, 532 U.S. 598, 605 (2001), the Court held that a party was entitled to fee-shifting relief under the Americans with Disabilities Act and the Fair Housing Amendments Act only if that party obtained a "judicial *imprimatur*" that changed its relationship to the opposing party. Last year, the Second Circuit ruled that the Buckhannon definition of the term "prevailing party" applies to fee applications under the EAJA. Ma v. Chertoff, 547 F.3d 342, 344 (2d Cir. 2008). The Applicant's papers assume that it was the "prevailing party" for EAJA purposes because the FAA's claim against it was withdrawn. That is an unwarranted assumption. The question it must answer is: Why was the claim withdrawn? The record of the underlying proceeding, on which a decision under the EAJA must be based, 14 C.F.R. § 14.04(a), is silent on this point. Absent such proof, I am required to conclude that the Applicant does not qualify as a prevailing party.

Third. The bulk of the funds Western has requested relate to the time expended by its majority shareholder and sole employee, James Nyerges. So far as the record shows, no one except Mr. Nyerges spoke for Western in the underlying proceeding. Mr. Nyerges says in his application, that Western has a net worth of zero and only one employee: himself; all of the assets used by Western belong to him personally. In these circumstances, Mr. Nyerges is, in substance, seeking reimbursement for the time and effort he expended as an employee of the Applicant. It is well-established that a pro se litigant is not permitted to recover attorney's fees under the EAJA for his efforts on behalf of himself. See SEC v. Price Waterhouse, 41 F.3d 805, 808 (2d Cir. 1994); Matter of Whittle, 5 N.T.S.B. 727, 728 (1985). In substance, Mr. Nyerges was conducting a pro se defense on behalf of a corporation of which he is the alter ego. The amounts for which he now seeks "reimbursement" are largely his own valuation of time he spent as a corporate employee. They are not the type of fees to attorneys and agents and similar litigation expenses for which Congress authorized reimbursement under the EAJA.

For the foregoing reasons, subject to review by the Administrator, as provided in 14 C.F.R. § 14.28, the Application is denied.

IT IS SO ORDERED.

Isaac D. Benkin
Administrative Law Judge

[Note: Either party may seek review of this decision within 30 days after it is issued. 14 C.F.R. § 14.28(a). The Notice of Appeal must be filed not later than 10 days after service of this decision (plus five additional days, if this decision is served by mail). 14 C.F.R. §§ 13.233(a), 13.211(e). The appeal must be perfected with a written brief or memorandum not later than 30 days after service of this decision (plus five additional days, if this decision is served by mail). *See* 14 C.F.R. §§ 13.233(c), 13.211(e), 14.28(a). The Notice of Appeal and brief or memorandum must be either (a) mailed to the Federal Aviation Administration, 800 Independence Avenue, S.W., Washington, D.C. 20591; Attention: Hearing Docket Clerk, AGC-430, Wilbur Wright Building—Suite 2W1000; or (b) delivered personally or via expedited courier service to the Federal Aviation Administration, 600 Independence Ave., S.W., Wilbur Wright Building—Suite 2W1000, Washington, D.C. 20591, Attention: Hearing Docket Clerk, AGC-430. 14 C.F.R. §§ 13.233(a), 13.210(a)(2), (1). A copy of the Notice of Appeal and brief should also be served on each party. 14 C.F.R. § 13.233(a). However, if neither party timely submits an application for review and the Administrator does not decide to review it on his or her own motion, this decision shall become final 30 days after it is issued.]