UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

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

FAA Order No. 2011-9

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

Served: June 13, 2011

DECISION AND ORDER[2]

The Federal Aviation Administration ("FAA") brought a civil penalty action against Green Aviation Management Company, LLC, d/b/a Green Air ("Green Air") for allegedly violating several federal aviation regulations.[3] The FAA sought a $33,000 civil penalty. Later, the FAA withdrew its complaint and the ALJ dismissed the case with prejudice in accordance with the requirement of 14 C.F.R. § 13.215. Green Air then applied for attorney's fees under 5 U.S.C. § 504 of the Equal Access to Justice Act ("EAJA"). Administrative Law Judge ("ALJ") Isaac D. Benkin denied Green Air's

[1] Generally, materials filed in the FAA Hearing Docket (except for materials filed in security cases) are also available for viewing at *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*. 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).

application on the ground that the agency's position was substantially justified.[4] This decision holds that as a threshold matter, Green Air was not a "prevailing party" within the meaning of the EAJA, and therefore Green Air was not eligible for an award of attorney's fees. Thus, it is not necessary to reach the issue of whether the FAA was substantially justified in its prosecution of the case. The ALJ's denial of Green Air's application for fees is affirmed.[5]

I. Facts

Green Air is an on-demand aircraft charter company that holds an air carrier certificate 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's return trip on January 2, 2006, was from Nassau, Bahamas, to Wilmington, North Carolina, and from there to Morristown, New Jersey.

The FAA certificated the aircraft, a Challenger CL-600, to transport not more than nine passengers, and Green Air's operations specifications authorized use of the aircraft with not more than nine passengers. The aircraft had two pilot seats and a jump seat in addition to nine passenger seats. During the flights, the aircraft had on board Captain Daly, who was the pilot-in-command, Captain DeSantis, who was the second-in-command, nine passengers, and a person whose role and status were the subject of dispute – *i.e.*, Erin Daly, the daughter of Captain Daly. The FAA asserted that Ms. Daly

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

[5] Green requests that the Administrator order further proceedings if necessary for resolution of the case. (Applicant's Response to Order for Further Briefing at 1.) The request is denied. No such further proceedings are necessary.

was either an impermissible extra passenger or an unqualified flight attendant.[6]

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 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 accurately to describe the number of passengers and total weight of the loaded aircraft.
- 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.
- As a result of carrying more than the authorized number of passengers, operating without the accurate 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, is subject to a civil penalty of no more than $11,000 for each violation.

[6] The applicable regulations do not require a trained flight attendant to be on board.

- Under the facts and circumstances of the case, a civil penalty of $33,000 is 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 is subject to a civil penalty.

Green Air asserted the following 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 Part 135 did not require her to be trained.
- Ms. Daly 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.[7]
- The load manifests for the flights accurately described the number of passengers and total weight of the loaded aircraft.

On May 31, 2007, the FAA and Green Air agreed that, in exchange for the FAA

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[7] 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 ....

withdrawing its complaint, Green Air would submit an affidavit to the FAA stating that: Ms. Daly was an employee of the company, no company records of her employment presently existed, other than pay check stubs, and no IRS or state tax records existed at the time 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 motion styled, "Motion to Dismiss," on June 1, 2007. Green Air argued in this motion that there were no genuine issues of material fact, and it attached affidavits and other evidentiary items. Thus, it was actually a motion for decision under 14 C.F.R. § 13.218(f)(5).[8]

Specifically, Green Air argued in the June 1, 2007, "Motion to Dismiss" that Ms. Daly was a cabin aide employee of Green Air, not a passenger omitted from the manifest. Green Air attached as exhibits the following:

- Two affidavits of Captain James Daly attesting that: (1) Ms. Daly was a cabin aide whose responsibilities were not safety-related but instead were to serve food and drink; and (2) Ms. Daly's weight was included in 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 to "Erin Daly," one dated December 7, 2005, (almost a month before the flights), in the amount of $200.00, stating that it was for "2 days," another dated February 6, 2006, in the amount of $2,450.00, stating that it was for "Wages," and the final one dated April 24, 2006, in the amount of $3,150.00, stating that it was for

[8] 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.

"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 filed by the pilots 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 cabin aides were not required to receive safety training because they were not required crewmembers.[9]

- 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 to the "Motion to Dismiss" 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 19, 2007, Green Air filed another motion for summary disposition. This motion was entitled "Motion for Decision," and in it, Green Air asserted incorrectly that the FAA had failed to file a response to its "Motion to Dismiss." Green Air asked the ALJ to dismiss the FAA's complaint with prejudice due to the alleged failure to file a

[9] 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.*

response.

On June 28, 2007, the ALJ denied both of Green Air's motions for summary disposition, 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, there remained a disputed issue of material fact – specifically, what was Ms. Daly's exact status during the flights in question. The ALJ therefore scheduled a hearing and the parties pursued discovery.

On August 3, 2007, Green Air requested reconsideration of the ALJ's denial of its June 1, 2007, motion for summary disposition. Attached to Green Air's motion for reconsideration were the following exhibits:

- An affidavit from Elaine Hunt, Green Air's customer service representative, in which she averred 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 for Green Air's customer, listing $1,600 for an "attendant."
- 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 its contract employee and

served as a cabin aide crewmember.

In its FAA's reply to Green Air's reconsideration request, the FAA attached a newer affidavit from Ms. Hunt, stating that her first declaration was incomplete and that Ms. Daly was expected to be trained to perform safety duties, not merely to serve food and drinks. The FAA argued that Ms. Daly's exact status remained an issue because on the IRS Form 1099 submitted by Green Air, the compensation for Ms. Daly was labeled "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's affidavit of Ms. Hunt supported the FAA's position and that in this affidavit, Ms. Hunt repudiated in part the earlier affidavit submitted by Green Air. 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 there remained disputed material issues of fact that precluded 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 one of the captains, 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, by her own admission, Ms. Hunt did not know Ms. Daly's status during the flights, and as a result, she would have no relevant or material testimony to offer at a hearing at which the central issue would concern Ms. Daly's status on the flights.

Less than 2 weeks after Green Air filed this motion and about 2 weeks before the October 1, 2007, scheduled hearing date, the FAA withdrew the complaint. Subsequently, Green Air moved to dismiss, and the ALJ dismissed the case with prejudice under 14 C.F.R. § 13.215.

III. Attorney's Fee Action

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

On January 16, 2008, the ALJ issued a decision denying the application for attorney's fees and expenses. The ALJ stated that the existence of questions of fact concerning Ms. Daly's role aboard the flights and her employment relationship to Green Air satisfied the EAJA's requirement that the agency action have a reasonable basis in law and fact. He further held that the legal inquiry and factual dispute were closely intertwined and satisfied the EAJA's requirement for a nexus between the two.

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 factual disputes regarding Ms. Daly's role, training,

and employment status, combined with the factual dispute regarding computation of weight and balance, established that the FAA had substantial justification for its action. The ALJ rejected Green Air's argument that the dismissal compelled the conclusion that no substantial justification existed for the original complaint; he stated that the EAJA does not entitle an applicant to an award in any case where the agency drops its charges. The question remained whether the agency had substantial justification for going forward, and the ALJ found that it did. Green Air filed an appeal.

After considering the briefs on appeal, the Administrator directed the parties to file additional briefs that addressed certain critical issues, including whether Green Air was a prevailing party in the underlying case. *Green Aviation Management Co., LLC*, FAA Order No. 2010-4 (June 14, 2010). Both parties filed additional briefs.

IV. Discussion

The American rule is that parties must bear their own attorney's fees unless a statute or contract explicitly authorizes fee-shifting. *Hardt v. Reliance Standard Life Ins. Co.*, 130 S.Ct. 2149, 2156 (2010). "Numerous" federal statutes authorize the award of attorney's fees to the "prevailing party." *Buckhannon Board and Care Home, Inc. v. West Virginia Dept of Health and Human Services*, 532 U.S. 598, 602 (2001). The EAJA is one such statute that authorizes the shifting of fees to the "prevailing party." *See* 5 U.S.C. § 504 and 28 U.S.C. § 2412. The EAJA provides that prevailing parties in certain adversarial proceedings may recover attorney's fees from the United States. The relevant portion of 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) (emphasis added).[10] Establishing "prevailing party" status is a threshold requirement for parties seeking fees. *Hensley v. Eckerhart,* 461 U.S. 424, 433 (1983).

The leading case regarding "prevailing party" status under fee-shifting statutes is the U.S. Supreme Court's decision in *Buckhannon.* In this case, Buckhannon, the operator of assisted living facilities, sued the West Virginia Department of Health and Human Services ("West Virginia HHS"), arguing that a new state requirement violated the Fair Housing Amendments Act ("FHAA") and the Americans with Disabilities Act ("ADA"). West Virginia eliminated the requirement, and the West Virginia HHS moved to dismiss the case as moot. The district court granted the motion. Buckhannon then sought attorney's fees from the West Virginia HHS under the FHAA and the ADA. Both statutes permit a court to grant attorney's fees to a "prevailing party."

The *Buckhannon* majority held that the term "prevailing party" does not include "a party that has failed to secure a judgment on the merits or a court-ordered consent decree," even if the party has "achieved the desired result because the lawsuit brought about a voluntary change in the defendant's conduct." *Id.* at 600. The Court explained that to be a "prevailing party," there must be a judicially sanctioned material alteration of the legal relationship of the parties and the court must have awarded some relief to the

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[10] The FAA's regulations implementing the EAJA 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). Although Section 14.04(a) uses the term "prevailing applicant," rather than "prevailing party," the regulation should be interpreted to conform to the statute that it implements.

party seeking fees. *Id.* at 604, 605. The Court noted 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.

According to the Court, a prevailing party includes: (1) one who has been awarded some enforceable judicial relief on the merits of his or her claim; and (2) one who has received relief through a settlement agreement enforced through a consent decree. In contrast, the Court stated, private settlements do not involve the judicial approval and oversight involved in consent decrees. *Id.* at 604, n.7. Private settlements, the Court explained, are often unenforceable unless the order of dismissal incorporates the settlement terms. *Id.* The Court rejected the "catalyst theory," under which an award of fees would be permitted based upon a voluntary change in conduct by the defendant where there is no judicially sanctioned change in the parties' legal relationship. *Id.* at 609.

The Court in *Buckhannon* stated that given the clear meaning of "prevailing party" in the fee-shifting statutes, it was not necessary to determine which way policy arguments cut. *Id.* For example, the Court declined to address policy arguments like the following – if the catalyst theory was not upheld, litigation could be protracted because parties would be less likely to move to dismiss if they believed they would have to pay attorney's fees for doing so. The Court concluded by affirming the lower court's decision that Buckhannon was not a prevailing party.

The U.S. Court of Appeals for the District of Columbia Circuit has set forth the following three-part test, based on *Buckhannon,* for determining whether a party is a "prevailing party":

(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 v. NTSB, 608 F.3d 12, 15 (citing *District of Columbia v. Strauss*, 590 F.3d 898, 901 (D.C. Cir. 2010), and *Thomas v. National Science Foundation*, 330 F.3d 486, 493 (D.C. Cir. 2003)).

The Supreme Court in *Buckhannon* explained that "prevailing party" is a term of art, and that the Court interprets consistently the numerous federal fee-shifting statutes that use that terminology. *Buckhannon*, 532 U.S. at 602, 603, n.4. Following the Supreme Court's lead, the Federal circuit courts have applied the *Buckhannon* prevailing-party criteria to other fee-shifting statutes that use the term "prevailing party," including the statute at issue in this case, the EAJA – 5 U.S.C. § 504 and 28 U.S.C. § 2412.[11]

Several circuit courts have held that the types of relief cited by the Supreme Court in *Buckhannon – i.e.*, judgments on the merits and consent decrees – are only *examples* of the types of orders that would confer prevailing party status, assuming that sufficient judicial *imprimatur* exists. *See, e.g., Walker v. Calumet City*, 565 F.3d 1031, 1034 (7th Cir. 2009); *Citizens for Better Forestry v. U.S. Dep't of Agriculture*, 567 F.3d 1128, 1132 (9th Cir. 2009).

In the instant case, the FAA moved for a voluntary dismissal of its complaint. The ALJ dismissed the case with prejudice, as he was *required* to do by the FAA's rules

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[11] A case applying *Buckhannon* to 5 U.S.C. § 504 is *Turner v. NTSB*, 608 F.3d 12 (D.C. Cir. 2010). Cases applying *Buckhannon* to 28 U.S.C. § 2412 include: *Ma v. Chertoff*, 547 F.3d 342 (2nd Cir. 2008); *Biodiversity Conservation Alliance v. Stem*, 519 F.3d 1226 (10th Cir. 2008); *Carbonell v. Immigration and Naturalization Service*, 429 F.3d 894 (9th Cir. 2005); and *Thomas v. National Science Foundation*, 330 F.3d 486 (D.C. Cir. 2003).

of practice – specifically, 14 C.F.R. § 13.215. Section 13.215 provides as follows:

> **§ 13.215 Withdrawal of complaint or request for hearing**
>
> At any time before or during a hearing, an agency attorney may withdraw a complaint or a party may withdraw a request for a hearing without the consent of the administrative law judge. If an agency attorney withdraws the complaint or a party withdraws the request for a hearing and the answer, the administrative law judge ***shall*** dismiss the proceedings under this subpart with prejudice.

(Emphasis added.)

The ALJ's dismissal of the FAA's case *with prejudice* here met some of *Buckhannon*'s "prevailing party" criteria. The Supreme Court in *Buckhannon* indicated that obtaining a favorable decision on the merits could confer "prevailing party" status. Some lower courts have held that a dismissal with prejudice, as in the instant case, *is* a decision on the merits because it *precludes further litigation* – in other words, because *res judicata would apply. See, e.g., Michigan Surgery Inv., LLC v. Arman*, 627 F.3d 572, 576 (6th Cir. 2010) ("[b]ecause a dismissal with prejudice precludes further litigation," it effectively rejects the plaintiff's claim on the merits).[12] The ALJ's order of dismissal with prejudice effected a material alteration of Green Air's legal relationship with the FAA because if the FAA tried to bring the same claim in the future, Green Air could rely successfully on a *res judicata* defense. Further, enforceability is required for "prevailing party" status. In *Biodiversity Conservation Alliance v. Stem*, 519 F.3d 1226, 1230 (10th Cir. 2008), former Supreme Court Justice Sandra Day O'Connor wrote that "under *Buckhannon*, a court order must be enforceable to qualify that party for attorney's fees as

[12] In contrast, a dismissal without prejudice is *not* an adjudication on the merits, "as it leaves the parties in the same legal position as if no suit had ever been filed." *Cruz v. Louisiana ex rel. Dept. of Public Safety and Corrections*, 528 F.3d 375, 379 n. 15 (5th Cir. 2008) (quoting *Hilbun v. Goldberg*, 823 F.2d 881, 883 (5th Cir. 1987)).

a prevailing party." Here, the ALJ's dismissal with prejudice was enforceable by the courts under the doctrine of *res judicata.*

On the other hand, Green Air did not meet key criteria to be a "prevailing party." The *Buckhannon* Court explained that to be a "prevailing party," there must be a *judicially sanctioned* alteration of the legal relationship of the parties and *the court* must have awarded some relief to the party seeking fees. *Buckhannon,* 532 U.S. at 604, 605 (emphasis added). The *Buckhannon* court stated that judicial *imprimatur* is necessary. *Id.* at 605.

Here, while the agency attorney's voluntary decision to discontinue the civil penalty action gave Green Air what it wanted, the ALJ's order dismissing the case lacked the necessary judicial *imprimatur*, because under Section 13.215, the ALJ had entirely no choice or discretion but to dismiss the case with prejudice. *See, e.g., Highway Equipment Co. v. FECO, Ltd*, 469 F.3d 1027, 1034 (Fed. Cir. 2006), where the court emphasized that it was the judge's *exercise of discretion* that gave the dismissal with prejudice the necessary "judicial *imprimatur*" so that the order constituted a "judicially sanctioned change in the legal relationship of the parties" under *Buckhannon.*

In *Turner*, the court held that the NTSB ALJ's order dismissing the case was without prejudice and did not provide administrative relief. The court explained that the ALJ's order dismissing the case was simply an "administrative housekeeping measure" not conferring "prevailing party" status, because the FAA did not need the ALJ's permission to withdraw its complaint under the rule. *Turner,* 608 F.3d at 16.

Although *Turner* involved a dismissal *without* prejudice, *Turner* is instructive in this case because in both *Turner* and in this case, the FAA did not need the ALJ's

permission to withdraw the complaint under the applicable procedural rules. The ALJ's dismissal of the case against Green Air with prejudice did not reflect any substantive judicial *imprimatur* because Section 13.215 *required* the ALJ to dismiss the case with prejudice once the FAA withdrew its complaint. *See, e.g., Hutchinson ex rel. Julien v. Patrick*, --- F.3d ----, 2011 WL 540538, at *4 (1st Cir. 2011) (finding it necessary to determine whether the order contained the sort of judicial *involvement* and actions inherent in a court-ordered consent decree); *Bell v. Board of County Com'rs of Jefferson County*, 451 F.3d 1097, 1101 (10th Cir. 2006) (finding that because plaintiff entered into a private settlement *without any judicial involvement*, he was not a prevailing party); *Lum v. Mercedes Benz*, 246 FRD 544, 547 (N.D. Ohio 2007) (explaining that the focus after *Buckhannon* was on "*the nature and judicial involvement* in the outcome, rather than on the practical effects ...."; explaining that because the judge did not "determine or oversee" the dismissal, the defendant was not a "prevailing party") (emphasis added).

V. Conclusion

Green Air was not a "prevailing party" under the Supreme Court's key decision in *Buckhannon* because the FAA's voluntary change in conduct lacked the necessary judicial *imprimatur*. As a result, a fee award is not appropriate under 5 U.S.C. § 504(a)(1). For the reasons stated above, this decision denies Green Air's appeal.[13]

J. RANDOLPH BABBITT
ADMINISTRATOR
Federal Aviation Administration

[13] Within 30 days of this determination, Green 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).

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.]