UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

In the Matter of:	FAA Order No. 96-15
VALLEY AIR SERVICES, INC.	Served: May 3, 1996
	Docket No. CP94NE0095 94EAJANE0017

ORDER DENYING RECONSIDERATION

The Federal Aviation Administration (FAA) has petitioned for reconsideration of FAA Order No. 95-27 (December 19, 1995). In Order No. 95-27, the Administrator affirmed the law judge's award to Valley Air, under the Equal Access to Justice Act (EAJA), of attorney fees and other expenses.[1] For the reasons that follow, the FAA's petition for reconsideration is denied.

In its petition for reconsideration, the FAA argues that Order No. 95-27 improperly equated the FAA's failure to prevail with a lack of substantial justification. According to the FAA, Order No. 95-27 applied the same standard to both the EAJA determination and the underlying case, although different standards apply.

The FAA is correct in stating that an agency may have been substantially justified even if it lost its case. Natchez Coca-Cola Bottling Co., Inc. v. NLRB, 750 F.2d 1350, 1354 (1985) and Cornella v. Schweiker, 728 F.2d 978, 981 (8th Cir. 1984),

[1] The Administrator reduced the law judge's award of $16,510.21 by $1,511.62, due to several errors in the law judge's calculation of fees and expenses. The resulting award was $14,998.59.

both citing H.R. Rep. No. 1418, 96th Cong.2d Sess. 11 *reprinted in* 1980 U.S. Code Cong. & Ad. News 4953, 4990. To prevail in the underlying case, the FAA needed to prove its case by a preponderance of the reliable, probative, and substantial evidence. 14 C.F.R. § 13.223. This it failed to do. However, the FAA could still have avoided an award of attorney fees under the EAJA if it had proven that the positions it took in the case against Valley Air were substantially justified.

Order No. 95-27 does not stand for the proposition that because the FAA lost on the merits, it must pay Valley Air's attorney fees. Rather, in Order No. 95-27, the Administrator found that *not only* had the FAA lost, but that it had *also* failed to provide even enough evidence to show that its positions were substantially justified.

In some cases, the record may be so deficient that even though it contains some slight support for the agency's case, substantial justification cannot be found. Fulton v. Heckler, 784 F.2d 348, 349 (10th Cir. 1986). The government must show that it did not persist in pressing a tenuous factual or legal position, even if its position was not wholly without foundation. Gavette v. Office of Personnel Management, 785 F.2d 1568, 1579 (Fed. Cir. 1986).

In Order No. 95-27, the Administrator evaluated the strength of the FAA's case, as reflected in the evidence or lack thereof in the record. Because the FAA's case against Valley Air could fairly be characterized as "weak and tenuous,"[2] the Administrator held that the FAA lacked substantial justification.

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[2] In enacting the EAJA, Congress specifically intended "to caution agencies to carefully evaluate their case before proceeding, and not to pursue those that are weak and tenuous." H.R. Rep. No. 96-1418, 96th Cong. 1st Sess. 6, 14 (1979), *reprinted in* 1980 U.S. Code Cong. & Ad. News 4953, 4990.

The FAA bore the burden of proving each element of the violations it had alleged. FAA counsel refers to the approach taken in Order No. 95-27 as "the somewhat clinical approach of dissecting each regulation as to the proof it required" (Petition at 15). Be that as it may, before initiating a civil penalty action, agency employees must carefully examine the elements of an alleged violation to ensure that there is a reasonable basis for alleging each and every element of every violation included in the complaint. The record of this case fails to show that the FAA performed the careful evaluation that the EAJA requires.

Sections 135.5 and 135.421(a)

As explained in Order No. 95-27, two of the four regulations at issue only applied if the spinners were part of the propeller.[3] The law judge held that the spinners were not part of the propeller, and the FAA did not appeal from that finding. The only evidence the FAA offered at the hearing to prove that the spinners were part of the propeller was the testimony of the inspector and the regional specialist to that effect. Each witness based his statement that the spinners were part of the propeller solely on the fact that another FAA employee, Martin Buckman, had told him so. Neither FAA witness was able to provide any explanation, based upon his own experience and knowledge, as to why spinners should be considered to be part of the propeller. For example, neither witness made

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[3] One regulation is 14 C.F.R. § 135.5, which prohibits an operator from operating an aircraft in violation of its operations specifications. The FAA alleged that Valley Air had violated the particular operations specification that provided that the propeller and its component parts must be maintained in airworthy condition.

The other regulation is 14 C.F.R. § 135.421(a), which required Valley Air to comply with the manufacturer's recommended maintenance programs, or a program approved by the Administrator, for each aircraft engine, propeller, rotor, and each item of emergency equipment. The FAA did not even attempt to argue that the spinners fell into one of the other categories listed in Section 135.421(a)--the engine, rotor, or items of emergency equipment.

any attempt to show how the spinners fell within the definition of propeller contained in 14 C.F.R. § 1.1.[4]

Inspector Edwards, who initiated the case, testified that he himself had questioned at one point whether the spinners were part of the propeller, and that is why he had eventually contacted Mr. Buckman.[5] In response to the law judge's inquiry, FAA counsel indicated at the hearing that there was no reason why Mr. Buckman, whose name had appeared on the agency's witness list, could not be present to testify. On cross-examination, the FAA regional specialist, Mr. Inglis,

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[4] 14 C.F.R. § 1.1 provides as follows:

> *Propeller* means a device for propelling an aircraft that has blades on an engine-driven shaft and that when rotated, produces by its action on the air, a thrust approximately perpendicular to its plane of rotation. It includes *control components normally supplied by its manufacturer*, but does not include main and auxiliary rotors or rotating airfoils of engines (emphasis added).

Arguably, by stating that a propeller includes "control components normally supplied by its manufacturer," Section 1.1's definition of propeller indicates that the spinners in this case were not part of the propeller. The record of this case indicates that the spinners in this case were not control components and were not supplied by the propeller's manufacturer, Hartzell.

Although the inspector initially thought that the spinners were manufactured by Hartzell, the inspector knew by the time the FAA issued the complaint that the spinner was manufactured by Piper, the manufacturer of the aircraft, rather than by the manufacturer of the propeller.

Note that this decision should not be construed to hold that spinners, in this case or in any other, are part of the propeller, or that they are not. Rather, the intent here is to show that the FAA should have realized that whether the spinners were part of the propeller was an issue in this case.

[5] Inspector Edwards testified as follows:

> Q: Is [a spinner] part of a propeller?
> A: That was why--that was one of the reasons why I contacted Mr. Inglis. And he essentially referred me to Mr. Buckman to clear that up, because *I wasn't sure myself whether it was technically part of the propeller.*

(Tr. 57-58; emphasis added.)

testified that the spinner was part of the airframe, although he had previously testified that the spinner was part of the propeller.

In its petition for reconsideration, the agency argues that it did not realize before the hearing that there was any issue about whether the spinners were part of the propeller. Nor could it know, the agency says, that the law judge would ultimately find the FAA's expert witnesses, the inspector and the regional specialist, lacking in credibility. According to the FAA, even though its witnesses relied on hearsay for their opinion that the spinners were part of the propeller, this should not "tip the scales against the agency," because hearsay is admissible even though it may not carry as much weight as other testimony.

These arguments do not withstand scrutiny. If FAA counsel was surprised at the hearing by the issue of whether spinners were part of the propeller, it was incumbent upon counsel to bring the element of surprise to the law judge's attention and to request an opportunity to present whatever evidence the agency may have had. The FAA did not request an opportunity to obtain Mr. Buckman's testimony once it became apparent that it was needed--*e.g.*, by requesting a continuance or permission to supplement the record with Mr. Buckman's deposition testimony.[6]

Furthermore, the agency's claim that it had no way of knowing, prior to the hearing, about the propeller issue appears to be disingenuous. After all, the FAA witnesses had themselves discussed whether the spinners were part of the propeller well before the hearing. Thus, the agency was aware, and agency counsel should have been aware, that the proper classification of the spinners, which was critical to

[6] The FAA might also have introduced any documentary evidence upon which Mr. Buckman relied for his opinion that the spinners were part of the propeller.

the agency's case regarding two of the four alleged violations, was an issue that might arise at the hearing.

It seems a bit misleading for the FAA to argue that it presented *expert* testimony that the spinners were part of the propeller and that it had no way of predicting that the law judge would not credit this testimony. The FAA witnesses who testified that the spinners were part of the propeller had no independent basis for their opinions other than that someone else had told them so. Moreover, the FAA introduced nothing to substantiate its witnesses' opinions regarding the classification of the spinner, although it could possibly have obtained supporting documentary evidence or deposition testimony from Mr. Buckman. The weak and tenuous nature of the FAA's expert testimony on this critical factual issue should have been apparent to agency counsel.

The FAA also argues, citing Natchez Coca-Cola Bottling Co., Inc. v. NLRB, 750 F.2d 1350 (5th Cir. 1985) and Temp Tech Industries, Inc. v. NLRB, 756 F.2d 586, 590 (7th Cir. 1985), that where the outcome of an issue turns on credibility, the government is substantially justified in litigating the matter. As one court has cautioned, however: "[a]n agency cannot abdicate its responsibility to examine the likelihood of success of a proffered version of the facts by simply claiming that the ultimate decision turns on credibility, as this would bootstrap the agency's reasonableness to one party's subjective belief." United Brotherhood of Carpenters and Joiners of America, Local 2848 v. NLRB, 891 F.2d 1160, 1163 (5th Cir. 1990), citing Natchez Coca-Cola Bottling Co. v. NLRB, 750 F.2d 1350, 1353-54 (5th Cir. 1985).

In any event, the determination of whether the spinners were part of the propeller did not involve an assessment of the witnesses' credibility. This is not a case in which the FAA's witnesses were percipient witnesses. Instead, they were expert witnesses whose testimony needed to be evaluated on the basis of its logic, depth and persuasiveness. *See* the underlying civil penalty action, In the Matter of Valley Air Services, Inc., FAA Order No. 94-3, at 6 (March 10, 1994), noting that "[e]xpert testimony is not evaluated on the basis of credibility but on its logic, depth, and persuasiveness," and citing Administrator v. Carroll, NTSB Order No. EA-2952, 1989 NTSB LEXIS 100 (June 15, 1989). The testimony of the FAA witnesses in this case was so clearly lacking in logic, depth, and persuasiveness that it cannot be found that the FAA had a reasonable basis for its position that the spinner was part of the propeller.

The FAA also argues, citing NTSB case law,[7] that the government is substantially justified in proceeding with a case when the unrebutted testimony of its witnesses is sufficient to establish the allegations in the complaint. While it is true that hearsay is technically admissible,[8] the testimony of the FAA witnesses in this case, to the effect that "someone told me so," had too weak a foundation[9] to

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[7] Fuller & Clemence v. Administrator, NTSB Order No. EA-4058 (1994); Hill v. Administrator, NTSB Order No. EA-2232 (1985); and Loundagin v. Administrator, NTSB Order No. EA-2050 (1984).

The Administrator is not bound by decisions of the NTSB, although NTSB case law may be persuasive. In the Matter of South Aero, FAA Order No. 96-4 at 4, n.6 (February 13, 1996).

[8] 14 C.F.R. § 13.222(c).

[9] It is possible that the testimony at issue constituted double hearsay, which is even less reliable than hearsay. If Mr. Buckman based his purported opinion (*i.e.*, that the spinners were part of the propeller because they were on the aircraft when it was certificated) on hearsay, then the FAA's witnesses' testimony that Mr. Buckman told them that the spinners were part of the propeller would constitute double hearsay.

provide a reasonable basis for the complaint allegations regarding the propeller, particularly when their overall testimony was so strikingly weak and uncertain.[10] Consequently, agency counsel's argument that the hearsay evidence concerning Mr. Buckman's opinion constituted a reasonable basis for pursuing this matter must be rejected.

The FAA further argues that even though it did not appeal the law judge's finding that the spinners were not part of the propeller, it was nevertheless substantially justified in filing an appeal because the basis for the law judge's decision was that the welds were not a major repair, a finding that the FAA believed to be erroneous. However, the agency should have realized that by failing to appeal the law judge's finding that the spinners were not part of the propeller, its appeal was fatally flawed: if the spinners were not part of the propeller, violations of Sections 135.5 and 135.421(a) could not possibly be found, regardless of the Administrator's decision regarding whether the welds constituted major or minor repairs.

Moreover, the regulation that requires that a major repair be made in accordance with technical data furnished by the Administrator, 14 C.F.R. § 135.437(b), was not even alleged in the complaint, and nowhere in the record did the FAA specifically connect Section 135.437(b) to the regulations alleged in the

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[10] As the law judge pointed out, due to the hearsay nature of this testimony, it could not be determined whether the FAA witnesses understood correctly what Mr. Buckman told them, whether Mr. Buckman was qualified to render an opinion on the subject, and whether Mr. Buckman had a reasonable basis for concluding that spinners are part of the propeller. Moreover, the FAA witnesses were unusually weak and uncertain overall. *See, e.g.*, the regional specialist's confused testimony on cross-examination regarding whether the spinner was part of the airframe. First he testified that it was part of the airframe, and then he reversed himself. (Tr. 120-122.)

complaint to have been violated.[11] Thus, the FAA appears to have appealed the case based on an alleged violation that was not even included in its complaint. As a result, the agency's claim of substantial justification for filing the appeal lacks persuasiveness.

Section 135.413(a)

The complaint alleged a violation of Section 135.413(a) "in that Respondent, as a certificate holder primarily responsible for the airworthiness of its aircraft, did not have defects repaired between required maintenance under Part 43 of the Federal Aviation Regulations." The particular provision of Part 43 that the FAA claimed Valley Air failed to follow was Section 43.13(a). Section 43.13(a) requires persons performing maintenance on an aircraft to use the methods, techniques, and practices prescribed by its manufacturer, or other methods, techniques, and practices acceptable to the Administrator. At the hearing, Valley Air argued that by following Advisory Circular 43.13-1A in welding the spinners, it had used "other methods, techniques, and practices acceptable to the Administrator" within the meaning of Section 43.13(a). Advisory Circular 43.13-1A is entitled "Acceptable Methods, Techniques, and Practices: Aircraft Inspection and Repair." The FAA countered that unless the manufacturer recommends that its part be welded, the data for accomplishing the weld in the Advisory Circular do not apply.

In its petition for reconsideration, the FAA argues that any criticism of the FAA's failure to introduce the Advisory Circular at the hearing would be unfair because the Advisory Circular was part of Valley Air's affirmative defense, and therefore, if it needed to be introduced, it was Valley Air's obligation to introduce it.

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[11] FAA Order No. 95-27 at 13, n.11.

While that may be true, as explained in Order No. 95-27, the FAA failed to present *any* evidence--whether a portion of the Advisory Circular itself, or some other type of evidence--to rebut Valley Air's affirmative defense concerning the Advisory Circular. Consequently, the FAA lacked reasonable justification for arguing that Valley Air had not used acceptable methods to repair the cracked spinners.[12]

The FAA argues that at the time the hearing commenced, it had no way of knowing that Valley Air would defend the appropriateness of the welds on the ground that the welds were performed in accordance with the Advisory Circular. (Petition at 15.) The record does not support the FAA's claim of lack of knowledge. From the outset, Valley Air's Director of Maintenance defended the welds by stating that they were accomplished in accordance with Advisory Circular 43.13-1A. (*See* Respondent's Exhibits B and E, letters from Kenneth Minck to Inspector Edwards.) Moreover, in its answer to the complaint, Valley Air raised the following affirmative defense: "The repairs performed on the subject spinners *were made in accordance with FAA issued and approved documents*, and replacement of the spinners were (sic) not required by any published criteria, either by the government or the manufacturer." (Valley Air's Answer to the Complaint, p. 2; emphasis added.) In addition, in Valley Air's motion for summary judgment, which was filed before the hearing, Valley Air contended that the welds were properly done in accordance with the Advisory Circular. (Motion for Summary Judgment, Items 9, 10.)

Thus, although the FAA knew from the beginning that one of Valley Air's defenses was that it had complied with the regulation by following Advisory

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[12] This decision indicates only that the FAA failed to provide evidence showing the reasonable basis of its claim that the Advisory Circular did not apply--not that the claim was necessarily incorrect.

Circular 43.13-1A in accomplishing the welds, the FAA failed to introduce into the record any evidence to support its claim that the Advisory Circular did not apply. Even where an agency's case against a respondent, unrebutted and standing alone, would be enough to show substantial justification, it may not be enough if the agency fails to take into account the respondent's rebuttal case. Alphin v. NTSB, 839 F.2d 817, 822 (D.C. Cir. 1988). Here, without *some* evidence to rebut Valley Air's affirmative defense, the FAA was not substantially justified in proceeding.

Section 135.25(a)(2)

The FAA alleged that Valley Air violated Section 135.25(a)(2) by operating an aircraft in Part 135 revenue service when it was not in airworthy condition. As noted in Order No. 95-27, the Federal Aviation Act sets forth a two-pronged test for airworthiness: first, the aircraft must conform to its type certificate, and second, the aircraft must be in condition for safe operation. 49 U.S.C. § 44704(c). The FAA did not attempt to prove that the aircraft failed to meet the second prong of the test--*i.e.*, that it was unsafe. Rather, the FAA argued that Valley Air's aircraft failed to meet the first prong of the test--the requirement that the aircraft conform to its type certificate. To support this claim, the FAA presented the testimony of the inspector, who testified that he reviewed the type certificate for the aircraft at issue, and that in his opinion, the aircraft with weld-repaired spinners did not conform to its type certificate. The FAA did not appeal from the law judge's finding that it had failed to prove a violation of Section 135.25(a)(2).

In finding a lack of substantial justification for this allegation, the law judge noted that although the FAA contended that the welded spinners altered the aircraft from its type design, it did not offer the type certificate data sheet into

evidence. The only evidence offered by the FAA to support the alleged violation was the inspector's testimony, which the law judge rejected. In Order No. 95-27, the Administrator affirmed the law judge's decision that the FAA's position regarding Section 135.25(a)(2) had not been substantially justified.

In its petition for reconsideration, the FAA argues that simply because the evidence was not convincing to the law judge does not mean that the FAA was not reasonable in relying upon it in choosing to proceed. The FAA contends that the inspector's testimony regarding the type certificate data sheet was unrebutted at the hearing, given that none of Valley Air's witnesses testified that the inspector's review of the type certificate data sheet was inaccurate.

To the extent that Order No. 95-27 can fairly be read to suggest that a mere failure to persuade the law judge will lead to a finding of lack of substantial justification, it was in error. Note, however, that this was not a case where the law judge simply credited one party's witnesses rather than the other's. As discussed in Order No. 95-27, the inspector's testimony was *particularly* or unusually weak and uncertain. Order No. 95-27, at 11, n.9. As a result, the FAA's failure to introduce into evidence the basis for the inspector's opinion testimony, *i.e.*, the type certificate data sheet, became a greater concern than it might otherwise have been.

Furthermore, contrary to the FAA's claim, Valley Air did rebut the inspector's testimony regarding the type certificate data sheet. Although it did not do so directly, it alleged from the very beginning of this case that the welds were proper repairs. (*See* Answer, p. 2.) Repairs would not be expected to appear on the type certificate data sheet. Given that the FAA has failed to show substantial

justification for its allegation that the welds constituted an improper repair,[13] the FAA's allegation of unairworthiness also lacked substantial justification.

Conclusion

For the reasons discussed above, Order No. 95-27's determination that the agency failed to show substantial justification will not be reversed. The FAA's petition for reconsideration is denied.

DAVID R. HINSON, ADMINISTRATOR
Federal Aviation Administration

Issued this 3rd day of May, 1996.

[13] *See* the discussion beginning on p. 9 above concerning the FAA's allegation that Valley Air violated Section 135.413(a) "in that Respondent, as a certificate holder primarily responsible for the airworthiness of its aircraft, did not have defects repaired between required maintenance under Part 43 of the Federal Aviation Regulations."